NEW JERSEY

SUPREME COURT,

ESSEX CIRCUIT.

APRIL TERM 1868.

PHILIP W. CRATER, Plaintiff. *and* ABRAM M. BINNINGER, Defendant.	In Case.

BEFORE THE HON. DAVID A. DEPUE.

C. BORCHERLING & CORTLANDT PARKER,
For plaintiff.

A. W. CUTER & THEODORE RUNYON,
For defendants.

NEWARK, N. J.
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The Plaintiff's Counsel opened the case, and called and examined the following witnesses, viz:

PHILIP W. CRATER—who being sworn, says:

I live in Newark; I am teller in the Newark Banking Company; I know Mr. Binninger, the defendant; I have known him from twenty to twenty-five years; I first knew him in New York; he lived in New York then; he lives now there; I knew him first in the way of business; that business grew into intimacy and friendship; Binninger offered to sell me an interest in an oil territory; he came out to see me in the latter part of September, 1864; he saw me at the bank; he said to me that he had come out expressly from New York to see me on this particular business; that he had been purchasing a tract of oil land, containing about two and three-quarter acres, on which there were two wells already sunk; that these wells had been producing wells, and were abandoned by the owner on account of the low price of oil, which at that time was about twenty-five cents per barrel—crude oil; that he had bought this tract of land at a bar-

gain; that there was more money in it than what he proposed to make himself, and felt desirous of dividing it up amongst his particular friends; that he came expressly to make me this offer, although there were a number of others that would be willing to jump at it; he said he would give me the preference among them all, on account of his great interest in me; I asked him how much this land cost—that is, the interest—what he paid for the land—what the original cost was; he replied $28,000; that it would be necessary to raise in addition $4,000 for working capital—to buy an engine and other fix-
10 tures; he proposed to divide the property into eight shares, at the cost of $4,000 each; that Mr. Eames and a Mr. Luff, of the firm of Clapham & Co., of New York, were into the thing; also Professor Morse, of telegraphic notoriety, Ira O. Miller, of New York, a lawyer, a Mr. Sanger, who was his former partner, and a Mr. Pringle and others, who I don't recollect, whoever they may be; and the proposition was to make it what might be called—to use his own term—a chemical bank affair, which I understood to be profitable to the few; a kind of close corporation I suppose; he said I should take a few days to consider it and write him; after carefully considering
20 the matter a few days, and consulting a few of my best friends—one of them being my wife—I wrote him about the first of October that I would take the eight shares, that I knew nothing about it myself, but relied wholly on his honesty and integrity in the matter; I relied upon his honesty and integrity, and upon these representations, which was the reason I purchased; the matter of how much it cost most assuredly entered into the subject of my reliance; I relied implicitly upon what he told me; I had good reasons for that; he had never deceived me in all our dealings for twenty years,—in all that he told me; I know who drew and signed the receipt now produced—Bin-
30 ninger; I know his hand-writing; I received this receipt by mail, and I sent the money—$4,000—9th May, 1864; I sent him my check; I'll bet you it was paid; check was dated 9th May, 1864; I received the receipt produced back by mail.

Plaintiff's Counsel put in evidence the receipt, and read same.

And being further examined, witness says:

I afterwards paid more money to Binninger; the signature to receipt produced, dated May 18th, 1865, for $500 is Mr. Binninger's; the and-writing of the body of the receipt is of his book-keeper, Mr. Jones.

Plaintiff's Counsel put in evidence the receipt, and read same.

And being further examined, witness says:

The $4,000 was paid in November; I was called to New York by Binninger to attend a meeting, and the statement was there made—Binninger was there—that they had been running this thing at an expense, and found themselves in debt about $4,000; that in order to wipe that out, it was necessary to assess each of the stockholders $500 each; that the thing had been unproductive; I then made my check for $500 on that day, which that receipt will show; I saw Mr. Miller make his check for the same amount: I made that subsequent payment of $500 upon representation that the thing would be successful eventually; it was said they had every prospect of it, but had been unfortunate with some of the men there, as though they had not done their whole duty to develope the land. I learnt previous to paying this $500 that the land did not cost so much as $28,000, but not from Binninger; I learnt it from the title deeds themselves; I had no information before advancing the $500; I knew the gentlemen that Mr. Binninger named as interested in the enterprise by reputation; I so knew them favorably; I think I am not right in supposing that the receipt here produced, dated November 9th, 1864, for $4,000 was sent to me by mail. I think I said I sent Mr. Binninger my check, but I think Mr. Binninger came here and I gave him my check. I say that the first information conveyed to me as to other consideration than $28,000, was from the title deeds; the first and only time I saw the title deeds was on the 22d of February, 1866. I have never received any of this money back; I presume the enterprise is there; it was not successful, but a failure.

And being cross-examined, says:

After my payment of the $4,000 referred to in the receipt, an organization was talked of, but I think it never went into effect; Binninger was the organization; I was to have been treasurer; I don't know what constitutes a treasurer; I received the appointment at an informal meeting at Binninger's office, New York; I cannot tell when; with reference to the $500 payment, it might have been on the day of payment—before or after—I have no memorandum. Mr. Binninger, Mr. Sanger, Mr. Miller and Professor Morse were there, Mr.

Luff and I think Mr. Pringle; I am not positive; I think Mr. Eames was not there, but I am not positive.

And being interrogated by the Court, witness says:

I don't know that all were there; I am not positive.

And being further cross-examined, says:

I think a copy of the organization was submitted to the meeting of that day—not positive, but I think so; I am unable to state whether Mr. Morse was President. The name was The Oil Creek Island Petroleum Company. I am not aware that the wells had been worked during the Winter. I don't think anything was said of the company working through the winter; it was represented that it had been a hard Winter—that the snows had been deep—and I am not positive whether the engines had been brought on the ground. I presume there was a statement before the meeting, of expenses of working during the Winter; I don't know that there was. The assessment was to cover those expenses, but I don't know what the expenses were. I had nothing to act upon as treasurer. I did not subsequently act as treasurer for the company. Not that I know of was there a sale subsequently of a portion of the property. I believe there was a sale. I don't know only from hearsay. I cannot tell when that was. I did not consent to the sale as treasurer of the company.

And being interrogated by the Court, witness says:

As an individual member, I consented to the sale. I consented to anything Binninger thought best.

And being further cross-examined, says:

From conversation with Binninger, and from his letters, I think the sale was of one-quarter acre, taking in one well—well No. 1. The price I could not tell you; if I was to state from recollection, I should say it was $16,000; it included also engine tanks, pipes and everything appertaining to pumping off. I was never there. The signature to the paper now produced and shown to me is mine. I

am acquainted with Miller's signature, Charles W. Morse's and Mr. Sanger's.

Defendant's Counsel read written consent to sale of oil well No. 1 for $12,000, notes and $4,000 stock, and offered same in evidence.

And being further cross-examined, says:

I received no note given by this gentleman; the note was not handed by me to Mr. Miller, New York, to prosecute; I cannot swear positively where it is; I think it is in the hands of Mr. Miller; I think so because I understood so, I think from Mr. Binninger; I don't say I never had the note for the $12.000; I say this note was not for $12,000, but that $12,000 purchase was made into two notes —one of the notes purporting to belong to the company—the other note was given to a broker, who effected the sale. The note was for $12,000 less than the commissions, whatever they may be; from recollection, I think that was the amount of the note, $11,184.30, and the other one for the difference between that and $12,000. Mr. Binninger had that note in his possession a while, and as I understood from him, tried to sell it; it was a six months' note; he sent it to me, I being a bank man; he thought he would let me try my hand on it; I made an effort in New York to sell it; I found no purchasers at any price; I went to a number of note brokers and they said they did not know anything about the parties at all. I then left it at Mr. Binninger's office, with no directions at all, only that I could not sell it; I don't know what became of it; I have not seen it since; I have heard that it is in the hands of Mr. Miller for collection; I don't know that it is. The letter produced, dated June 21, 1865, is my letter to Mr. Miller, asking him to act as treasurer on the sale, &c. The letter produced, dated June 21, 1865, is my letter to Mr. Sanger. The letter produced, dated July 17, 1865, is my letter consenting to sale by the company to Mr. Binninger as trustee. I made the check for $500 payable to Mr. Binninger. I am very certain from recollection I made it payable to him; I do not think I made it payable to P. W. Sanger; I don't see why; I don't know who made the assessment up—the paper as to expenses represented to the meeting.

And being re-examined, says:

I think I made the check for $500 payable to Mr. Binninger; I don't know who received the money on it.

And being interrogated by the Court, says:

I never got the stock to represent interest in this concern.

And Plaintiff's Counsel also called

WHITING P. SANGER, who being sworn, says:

I live at East Orange; my business is lubricating oils; I am the person spoken of by Mr. Crater as having been associated with this enterprise with Mr. Binninger; the land was owned by Binninger and my wife. Binninger and my wife paid $11.000, I think, for the whole of that; there might have been another small payment made
10 in connection with one of the wells, but not to exceed $13,000.

And being interrogated by the Court, says:

$13,000 in all; we had a variety of enterprises.

And being further examined, says:

Mr. Binninger had an undivided half with my wife in the property. I knew from Binninger of the intent to make up a company in the land; that course was decided on by mutual consultation; that we should get up a company and endeavor to dispose of the property. We made a calculation of the expenditures we had been at on the land, and making a liberal calculation, it would bring the cost to
20 us not to exceed $18,000. We proposed to make an organization and sell the shares so that we should save to ourselves each one-eighth clear of costs, of the profits. With that view I disposed of two shares to particular friends for the sum of $3,000. It was to be sold at that rate so as to save us each one-eighth free of costs. I know of Binninger selling to Crater. I sold those two shares first; they were first sold at $3,000; Mr. Binninger afterward sold three shares to Crater; I heard of it when it was first proposed to Crater; I found all the money; I think every dollar; Mr. Binninger told me that he told Mr. Crater the original cost of the property was $28,-
30 000; it was some time after the transaction was completed that he told me that; I don't know how long after; not a very great while; he made the remark as touching Mr. Crater's wife, and speaking of

it said she would be very angry if she knew Phil had paid a profit on it. That is all Mr. Binninger had—he had only an undivided half in the land. The actual cost of the whole at a liberal estimate had was not to exceed $18,000; that included all the improvements we put on, as for instance, engine, derricks, pumps, bridge—all expenditures—which were paid back; five-eighths and a fraction were sold so that we paid back into our pockets for these expenditures. The company was given title to the engine and to these improvements; I forget how the title was made; we were bona fide half-owners; each half-owner; we were at that time connected in mercantile business. 10

And being interrogated by a juror, says:

It was not to exceed $13,000, the whole cost.

And being further examined, says:

The first understanding was that the shares were to be $3,000, and on that I sold one to Eames, and another to Luff, in the same business—particular friends; I reckoned that it cost us not to exceed $18,000, and one eighth each, without expenses it left us, by taking it at $24,000. I am acquainted with Binninger's hand-writing. The receipt produced to me describes the territory in question. We have received no returns from the enterprise. There was a sale made, 20 but the parties buying have refused to pay for it.

And being cross-examined, says:

At the time I and Binninger purchased the property they were two old wells—abandoned wells. I could not tell what party purchased, without referring to my books.

My impression is, we purchased in summer of 1864, or spring; it was the spring prior to the organization of the Company. We purchased of the Washington Iron Works, engine, machinery, necessary pumping gear, and put men on to make a road bridge across the marsh; we also made attempt to procure oil from one of the old 30 wells; at any rate there was work done; it was unsuccessful. I wont swear we did pump either of these wells, but at any rate we received no oil; we might have been preparing to pump. It seems to me it must have been in the winter when the organization was made

either December, 1864, or January, 1865. In speaking of the Company, the organization was never completed, we met together and elected certain officers; Mr. Miller being a lawyer by profession made a draft of by-laws of the Company and was to see that the parties to the organization were registered under the general law of the State of New York. I hold in my office the papers now. There was an election of officers; Morse was President, Prindle, Secretary, and Crater, Treasurer; Miller, Counsel; Binninger, Vice President. Prindle is dead. I was at the oil district several times between the time of the purchase and sale to the Company. I dont recollect what the phraseology of the deed was; the sale from myself and Binninger, was made to Abram M. Binninger, as Trustee for the benefit of the Company; I think it was; I perhaps had most to do with it. The agreement was made in the city of New York; I can give you the the details if you wish.

The basis of our valuation of the wells, was upon the supposed capacity of one of the wells; it was supposed to be a 30 barrel well. $500 a barrel; the parties purchasing sent a party to test it, on sale of Well No. 1. The arrangement with regard to payment was arranged through a broker; he was to receive certain commissions for bringing the parties together; they paid us no money, we took their paper for the amount, in two notes: the smaller note being the amount of brokerage, was also paid in paper, and we were to receive $4,000 of the stock of the Company. The Gentlemen composing this Company was the Favorita Company; they had possessed themselves of several unproductive Oil Companies, and wanted to vitatilize their Company: the Company was said to be in existence before the sale, but the notes where signed by each individual. That note was or is now in the hands of Ira O. Miller; I have receipt for it; it was put in his hands as Counsel for the Company, as being the only lawyer interested in the note; to get the money from the parties for the benefit of this Company. I think the note has never been sued on; five and a fraction shares were sold; those monies came into my hands: with the exception of the assessment—$500; every dollar, I think; Binninger was credited his proportion. Binninger was a large debtor to me. I found the money. We shared the the profits of the transaction with the Company. Bininger and I. Professor Morse paid $4,000. All paid $4,000, except Eames and Luff. Bininger made $4,000 sales. I sold at $3,000. I sold two shares at

$3,000. All these monies were received by me, and divided between me and Binninger; the money went to pay me what Bininger owed me. I appropriated his half to what he owed me, and then divided the profits. I think that that assessment was not made in winter; $500 I think was in the latter part of summer; that was expended under the supervision of Charles Morse, son of Professor Morse, towards improving the property to get oil out of the lands. The sales to Luff & Eames were cash sales paid for on the spot; Binninger's were cash sales too. Everything was paid except Prindles, who resisted on account of the Company never organizing, and it was never paid. I don't know of any property called the Jones' property. It never was Eames and Luff's interest in either property. I think I received Crater's when he brought the cheque in; at any rate I received the money; it was immediately handed over to me. On reflection I wish to alter some of my evidence; the sale of this well was predicated on $1500 a barrel instead of $500; we claimed the well to be a thirty barrel, and we charged $1500 a barrel, and on testing it it was found not to be more than ten barrels; they bought it as a ten barrel well. I knew Captain Jones, Judge Ross' son-in-law. There was a partial agreement made between this Mr. Jones respecting some property and Mr. Binninger and myself; Mr. Eames and Mr. Luff were not to be a party; that interest was not transferred over to this Company; there might possibly have been some conversation about taking some interest, but bought nothing at all till they bought this share. Jones' property was not bought. I have no recollection of any such thing as an interest to be taken if they bought.

And being RE-EXAMINED, says:

The actual condition of the well which was sold afterwards was worthless. The facts were as is the case with many of these properties; by letting it rest some time, some oil would work into the well, and then on pumping it would make representations of being some oil—and quite a quantity of oil. It is what they call technically "pump head of oil." Mr. Miller told me some considerable time ago that the note of the Favorita Company was not sued on. One of the gentlemen on the note, Charles Leinzman, is doing a respectable business in New Street. I think the majority of the parties on the note have disappeared. I think the note was made sometime in

the beginning of the summer of 1865. The date of the note is August 12th, 1865. The negotiation for sale extended over six weeks or two months. My wife supplied, I think, every dollar; there might have been a temporary use of $1,500 through Mr. Binninger. Mr. Binninger had a small interest in the business with which I was connected, and he brought the matter to my attention first. We went to the oil regions together; visited them and became occupied that way; and when we sold, we sold for the joint benefit of the concern. I received my portion of profit on the Crater sale. I did not know it till subsequently to the sale to Crater that Binninger had told Crater it was a $28,000 purchase. Some little time afterwards Binninger mentioned it to me, in connection with some little remark about Mr. Crater's wife.

And being RE-CROSS EXAMINED, says:

I was not there at the time of testing the well. I was quite earnest in the matter in selling, and honest, too, I should hope.

And being further RE-EXAMINED, says:

I was not out there in making the bargain. Mr. S. H. Stowell and a gentleman named Seater did their best to make a show. The parties who made the sale sent an expert out to test it. I said, go and see the well, and they did so.

And Plaintiff's Counsel re-called PHILIP W. CRATER, who says:

I was not told of the amount of money invested in this concern. If I had known it had not cost over $11,000, I would not have invested in the project.

And being interrogated by a Juror, says:

I say Binninger called at Newark for the $4,000. When I paid my last money I did not know the amount of the purchase money—whether $11,000 or $28,000.

And being CROSS-EXAMINED, says:

On August 12th, 1865, it was sold for $16,000.

And Plaintiff's Counsel also called C. Borcherling, Jr., who being sworn, says:

I know Ira O. Miller—that is, I have seen him once or twice. I have been informed he is at Albany. I have made diligent enquiry in order to produce him at this trial. His office is at the corner of Broad and Fulton Streets. I have seen the deeds to Binninger and Sanger, in question. I made abstracts from the deeds. There were two deeds produced to me by Mr. Miller. The first one was a deed from Jeremiah Campbell and Priscilla, his wife, and Rexford Pierce to A. M. Binninger and Sanger, dated Jan. 9th, 1865, filed January 16th, 1865, as appeared on the record, for all that fifteen-sixteenths, &c., containing one acre and ninety-six perches—consideration, $12,-000. The other deed was from John Watson and Mary, his wife, to A. M. Binninger and L. C. Sanger, dated December 6th, 1864, recorded February 11th, 1865, No. C of deeds—consideration, $8,00, for about three-fourths of an acre, be the same more or less. The deed given by these parties to Binninger, as Trustee, I never saw.

The plaintiff rests.

Defendant, by his counsel, T. Runyon, Esq., moved the Court to non-suit the plaintiff on the ground that plaintiff should have shewn three things, viz:

I. Falsity. II. Scienter. III. Damage. And had failed.

The Court refused the motion, ruling that it need only appear that a representation was made of the material matter—that such representation was false, and that the plaintiff relying on that representation embarked in that enterprise and from those circumstances damage has resulted. That there was evidence that representation was made as to the original cost of the property, and that representation of price was material—that such representations were false—and that the plaintiff was entitled to recover nominal damages if nothing more.

Defendants counsel excepted to the ruling of the Court.

The Defendant, by his counsel, A. W. Cutler, Esq., opened the defence, and called and examined the following witnesses:

ABRAM M. BINNINGER, who being sworn, says:

I reside in the city of New York. I have been there forty odd years—between forty and fifty. I have been in active business there and am still in business. I could not say how long I have been acquainted with Mr. Crater—somewhere about twenty years. I was one of the owners of oil territory in Pennsylvania; Mr. Sanger was the other owner. I was in the oil region with Mr. Sanger at the time of purchase and selected the property; I think it was in 1864. At the time of the purchase it was property much admired by all men 10 who knew much about oil lands; its reputatian was very high; it was on Watson Flats, and the property was offered to us, and we considered it would be a good purchase, and we bought it; it was considered a good property; there had been two wells on it, and they had been abandoned, and we worked one afterwards. There was two and three-quarter acres of it. After we became the owners we called the gentlemen together—the association. We had engines and went to work upon it. Before we sold we bought an engine, and made a bridge; we bought an engine and tools, and we put men on there to bore the well—sink it deeper—where we could get oil; 20 that was the theory among the oil gentlemen; we subsequently worked it a little while ourselves and then sold it—we sold it to the organization; I forget their names. We sold it to Mr. Heinzman and the company—the association; it was an association formed to buy oil property and we sold it to them.

And being interrogated by the Court, says:

The deed stood in my name and Sanger's. I think in the first place it was conveyed to me as Trustee—I would not be very positive.

And being further examined, says:

30 The members of this Association for whom I was Trustee were Professor Morse, Mr. Miller, Mr. Crater, Mr. Sanger, Mr. Eames and three or four others—one Mr. Luff; and Mrs. Lawrence, my wife's sister; we had not sold our interest before we sold to Mr. Crater. Mr. Prindle bought at the rate of $4,000—for an eighth. My sister-in-law paid the same price; I mean Mrs. Lawrence. Professor Morse paid $4,000. These agreements I believe were all made be-

fore Crater's. I came to Newark to see Mr. Crater. We had I believe one share left, and I think I made a proposition to Mr. Sanger that I would go out and see a friend of mine—a clever fellow and a nice man whom I had known many years—Sanger said very well; and I came and saw Mr. Crater at the Bank in Newark. I told him what my errand was, and that Association was got up to buy the piece of property we owned, and that we had put it in for $28,000 and wanted him to come in and take a share of it at $4,000 one-eighth share. I told him I thought it was a good thing and always had thought so; he said he would give me an answer in three or four days, and he did so, and said he would take it. He paid for his share just as these others.

And being interrogated by a Juror, says:

I told Mr. Crater that we put it in for $28,000—$4,000 a share—and $4,000 improvements made it $32,000.

And being further EXAMINED, says:

I would not say whether we kept working all through the winter—I know when we got the engine there we worked for some months. The meeting of Stockholders was held in New York—in May. At the time the $500 assessment was made, I do not think all the Stockholders were there—most of them were there. I recollect Crater, Miller, Sanger, and Mr. Morse. Professor Morse was President of the Company. The assessment of $4,000 was for labor that had been expended and for engine and tools. This meeting was in May, 1865. Subsequently to that there was a sale made. I was Trustee for the Stockholders. The paper now produced is the direction to the Trustee; it is the consent of the Stockholders for me to sell the property as Trustee. The signatures to this consent are the signatures of the respective gentlemen, I think; the body of the writing is Mr. Miller's, the Counsel of the Company. I believe the sale made to this Company was on the 12th of August 1865; I would not be positive it was sold the same day. I received the letter now produced on July 17th, 1865, from Mr. Crater; it is backed in my handwriting as received. I was in possession of the note referred to for $11,184; I gave it to Mr. Carter because as he was Treasurer I thought he was the proper party to have the note; the

paper writing now produced is a copy of the note I gave Mr Crater; the note is dated the 12th of August, 1865; the original I gave to Mr. Crater; I don't know what became of it afterwards; Mr. Miller told me he held the note, and got an order for me to go on and collect it.

The $4,000 I received from Crater I paid to Mr. Sanger—all of it—every cent of it. Sanger did not complain that I had told Crater charged too much for the share. We had talked about the price—what to put the shares at; and property had gone up so in the estimation of the public, we concluded $4,000 low enough. I cannot say but what we might have taken $3,000, if sold right off. Mr. Sanger received one-half of the benefits.

And being interrogated by a Juror, says:

Sanger took all the profits; I was not acting as agent; when the property was bought Sanger paid all the money for the property, and charged me for it; if he paid $1,000 he charged me one-half; and if he received money he credited me half. I never had such conversation with Mr. Sanger as that referred to by him in his evidence to the effect that the property cost $28,000, and that Phil's wife would be angry if she knew he had paid profit on it, or anything like it; I never told Mr. Sanger so in the world. Mrs. Lawrence is my wife's sister; she owned one-sixteenth; she paid $1;000; she paid at the rate of $4,000.

We had understanding with Captain Jones for property, and he considered it bought, so far as contract made verbally, and we considered it so too, but for some reason the property was given up.

And being Cross-examined, says:

Mrs. Lawrence had one-sixteenth in this concern; she paid at the rate of $4,000; she paid for one-sixteenth; she paid $1,000. I am sure of that; I sold to her; it was after I sold to Crater; I sold to Mr. Miller for $4,000; a one-eighth share; I did not sell to Mr. Luff; nor to Eames; to Prindle I did for $2,000; he took a one-sixteenth; Mr. Sanger and I took the balance that was left and divided it among ourselves. I don't know how much we had; I think we held five-eighths of the property; originally, after we had sold, I think we held five-eighths; after we had sold to Prindle and others, and so it

remained, and Sanger and me took it. I think Mr. Stowell was the gentleman who originally contracted for the purchase; could not tell whether I was out there when it was bought; I was out there when the business was done; we were to pay between $11,000 and $13,000; we put a bridge on the property; it was a small matter; not very expensive; it might have cost $200 or $300—a little more, I cannot say. Labor was high at that time. We bought an engine, but not out there. After the Association was formed they instructed me and Mr. Sanger to buy an engine; there was only one engine; all I know about was the one engine, and that is what the $4,000 10
was raised for. The engine Mr. Sanger referred to I know nothing about. $4,000 was raised for working. I could not say whether that was the $4,000, for which the $500 assessment was made—Yes, it was for that. Mr. Crater paid his portion; Miller his. The assessment was made; that is what that $4,000 was for. The receipt produced May 3d, 1865 is my handwriting, my signature. I accounted to Mr. Sanger for it; Sanger got it because he was there along with me; that was charged in the book along with other things, I suppose. I and Sanger's wife were in business together in Broad street and Broadway; he was never known in business himself; he 20
was in with me for several years; that was a special matter; I had other partners in the firm of Binninger & Co.; they had nothing to do with this; this was an outside thing. I don't know that I did tell Mr. Crater why $28,000 was named; I don't know how to apply your question; the $28,000 was named because we had made up our mind to put the property in for that; we wanted to make a profit; we had been at some little trouble and expense; because there was some little money going out there. I do not think Crater asked what the property cost. I recollect something being said about Chemical bank. I think I made use—to Crater—of about these 30
words: that from reputation of that oil—tract oil—the stock would be equal to something like Chemical Bank—it would be good; it was so reputed—everybody thought so—I know I did. Very likely I did tell Crater I wanted to give him a chance in this thing because he was an old friend of mine; I spoke encouragingly of it I spoke strongly of its merits—you can judge of the strength of the expression—it was no stronger than my feelings were at the time. I I don't remember that I did offer it to anybody else—I might have done; I know there was more applications for shares than we had

shares; I think it is very likely I did tell Mr. Crater why the oil wells had been abandoned in giving description of the property; I think it is likely I did tell him there had been two wells and they had been abandoned when oil was low, and that we were getting oil again and doing well, and that oil was going up again; I did not do it to deceive him,—I told him honestly, not to deceive him or any other man.

I am in my 68th year. I paid one-half of the purchase money out of my own pocket; Mr. Sanger paid it out and Mr. Sanger received
10 it. I lost the money that I paid out.

And being RE-EXAMINED, says:

I sold Professor Morse one-eighth for $4,000. Sold one-sixteenth for $2,000 to Mr. Prindle; my sister-in-law's part was at the rate of $4,000; she got one-fourth of what Professor Morse got; she had a one-thirty-second part of the whole thing, or one-fourth of one share; she only got one-half as much as Mr. Prindle; sold Morse one-eighth; Eames one-eighth; Luff one eighth; Crater one-eighth; Prindle one-sixteenth; and my sister-in-law one thirty-second; we had remaining two-eighths and a fraction.

20 And being interrogated by the Court, witness says:

Before Crater went in we had the deed.

And being RE-CROSS-EXAMINED, says:

Sometimes we take receipt; we did generally. I don't think we paid the money there; we bought it for cash and paid for it before. I don't remember we did have deed; Mr. Stowell will be able to tell you. Mrs. Lawrence paid one-eighth of $4,000 share; she paid $125 for assessment; I paid it for her; the original $1,000 she paid —she sent a draft. Afterwards the assessment was made, and she was not prepared, and I paid it for her.

30 And being interrogated by the Court, says:

The property cost us I suppose $18,000. We paid Campbell at the first start of it $11,000 to $12,000; by the deed of Campbell's we got fifteenth-sixteenths of the property; I could not tell you where we got the other one-sixteenth.

And being further RE-EXAMINED, says:
At the time of the assessment Mrs. Lawrence was at Troy.

And being further RE-CROSS-EXAMINED, says:
When we sold the property to her she was in Troy; her husband made application for it. I don't know that I can tell you the items of cost of $18,000; Mr. Stowell will be able to tell you.

And Defendant's Counsel re-called W. P. SANGER, who says:
The agreement was made with the parties selling to deposit the money for the purchase in the hands of Canfield Snedeker & Co.; I think that a portion of money was paid down at once into their hands. They were to pass on the title before the parties selling received their money. As far as we were concerned the purchase was a cash one for a large portion. I think that the agreement was made and left in their hands; we making payment—as you understand putting the money out of our hands. The agreement was made prior to these sales; we were virtually *bona fide* owners of the property when the deed was made. That fifteenth-sixteenths comes this way; there was at one time a division of landed property under seal, and some person holding a minor interest to a Mr. Parker, and Parker in selling his farm to what was called the Northern Light Petroleum Company this small interest went to them, and they consented to let that interest merge.

And being interrogated by the Court, says:
We never got title to the one-sixteenth.

And being further EXAMINED, says:
That one-sixteenth might have been released but I don't know that it was. I went on to Philadelphia; there was a shade come on the title, and went on and had the title perfected; it was a dispute on the boundary lines; from being very poor farm lands it came to be worth considerable—and the boundary lines had been slack.
At the time of the sale it was a fair price; I might say it was cheaper than some sold. I do not consider the price was exorbitant.

And being interrogated by a Juror, says:

I stated that Binninger told me that he represented to Crater that the property cost $28,000—that was the property included in the two deeds. We hired an engine of Mr. Souter; this engine was bought of the Washington Iron Works, and we put the engine in as a portion of the $28,000 worth of property—the deed was held in trust.

And being interrogated by the Court, says:

Without reference to the books I cannot tell what was paid Campbell; we did not buy directly of Campbell; it was a man who come along. I understood the middle man made $1,000. I think the principal purchase was in the neighborhood of $11,000, and the purchase of Watson was in the neighborhood of $1,000—$800; It was under $13,000 the whole. I suppose that it would be proper to reckon a portion of the expenses connected with our visits; there was considerable personal expense, and disagreeable traveling and disagreable work about it; there was very little practical knowledge in those days.

And being further EXAMINED, says:

I knew Suter. I think he was allowed a bill of about $1,000; I think it was for boring or something—it was for well work. I know Lock, Hemberton & Co.; they brought in a machine shop bill which was paid; we paid Mr. Stowell a salary, acting as agent; I have an impression it was a salary of $1200 a year, connected with sales of merchandize; there were no other permanent expenses.

And being cross-examined, says:

The boring bill of Suter, I think, was all executed after the Company formed; there may have been work for some $1000, and that was paid after the Company virtually ceased; it was paid by note, endorsed by Binninger and myself and discounted here; I suppose Mr. Crater found the money; Mr. Stowell, acting as our general agent, was attending to many pieces of property.

And being further interrogated, by the Court, says:

I think I could give it precisely; the exact cost; I think the deeds call for the exact amount; I will make affidavit that the whole is not as much as $13,000.

And being re-examined, says:

My calculation was that it was not quite; reckoning engine, labor and the things put on to work it ourselves; I thought it had stood us a trifle under $18,000; the original $4000 in the Treasury was absorbed by improvements; we provided for no working capital.

And being further interrogated by the Court, says:

The $18,000 included the cost of the land, engine and machinery that had already been bought; $4000 was raised afterwards, to defray expenses.

And being further re-examined, says:

The money raised as portion of capital when sold shares, I put in my pocket; I charged them no interest; the Company went to work and raised money to test the property more thoroughly; we, of course, were supposed to pay a portion of that; we found a difficulty to dispose of the whole six shares; a little less than six shares were sold; Mrs. Lawrence had one thirty-second of the property.

And being re-cross-examined, says:

The working capital was only necessary expenditures; after you get the well completed and start to pump it, it may be a day; may be twenty-four hours before you get your oil.

And being further interrogated, by the Court, says:

We were in hopes that the wells would produce very quickly; that assessment was unexpected; $28,000 included the cost of the land and what was on the land beside.

And being interrogated by a Juror, says:

I received a portion of $4,000 from sales made; as regards the date of the deed, I don't know.

And being further re-cross-examined, says:

In October, I received sales of Eames and Luff, each of them, $2,000 down, and they paid the balance January 16th, being $1,000 each; of Crater $4,000, Morse $4,000, Prindle $2,000, making $14,000 I had in hand before the deed was dated.

And being further re-examined, says:

10 We made the payment right down, before we sold the shares; delay in the deed was made; on examination of the title, there was no flaw in the title.

And defendant's counsel also called Samuel H. Stowell, who being sworn, says:

I reside at Titusville: for one and a half years I have resided there; I have been acquainted with the oil territory since spring of 1864; I knew the Oil Creek Island Petroleum Company's property; I have been at it many a time; I had been at it when they originally made the contract for 1864.

And being interrogated by the Court, says:

I am acquainted with the market value of the property generally in that neighborhood.

And being further examined, says:

The two and three-fourths acres would not be considered high at $28,000 or $30,000, compared with other properties being sold at that time in this vicinity.

And here the testimony in the case closed.

Whereupon the Hon. David A. Depue, the presiding Justice, charged the Jury as follows:

JUDGE'S CHARGE.

The plaintiff brings his action for the recovery of damages alleged to have been sustained by him, by reason of certain false and fraudulent representations alleged to have been made to him by the defendant, as the inducement to influence him to purchase an interest in the property in question.

To the maintenance of the action the plaintiff must prove:

1. That the defendant made representation to him of the previous existence of a material fact upon which the plaintiff had right to rely and upon which he did rely. 10

2. That that representation was false.

3. That it was fraudulent—of which the competent evidence is that the representation was untrue, to the knowledge of the defendant when made.

The mere expression of an opinion, however erroneous, or a promise to be performed in the future, will not constitute a representation whereon to form an action.

It must be the assertion of some *fact* in regard to the precise condition of the subject matter in relation to which it is made.

It must be of a *material* fact, upon which a reasonable man might be expected, and by which, in point of fact, the plaintiff was induced to act. 20

All these essentials to the maintenance of this action, viz:

That the representation was of an existing fact—that it was *material*, that it was false, and that it was fraudulent, the plaintiff must prove affirmatively, or his action fails.

But if proved to your satisfaction, you should have no hesitation in affording the plaintiff redress. The law permits great liberty in the prosecution of business, but it does not countenance or permit the overreaching of another by means that are denominated fraudulent. As the phrase is, the law permits a man to allow the person whom he deals with to cheat himself, but he must not actively assist him in cheating himself. He is not allowed to make any representation. If he does, he must tell the truth. 30

An expression of opinion as to the value of the property, or of the prospects of realizing a handsome profit out of the prosecution of the business, will not sustain this action.

And I may say that the only representation alleged to have been

made, which can sustain this action, is that in relation to the cost of the property and the quantity of land in the tract, and this case must hinge upon your finding of the fact in relation to the making of these representations. Everything else, as this case presents itself, is immaterial, so far as the gravamen of this action is concerned.

The representation as to the cost of this property is the one most relied on. A representation as to the original cost of property, the price of which is not regulated by every schedule of prices ruling in the market, and which is not inspected by the purchaser, is a material representation, upon which a party has a right to rely.

Your only inquiry, then, in this case, in determining the question whether your verdict should be for the plaintiff or defendant will be whether the defendant made to the plaintiff the representations as to the *original* cost of the property which the plaintiff testified to.

This is a question of credibility, for your consideration.

Mr. Crater says:

Mr. Sanger says:

If by that was understood and meant the cost as the original purchase by defendant and Mrs. Sanger, the plaintiff has proved a representation which will furnish a basis for a recovery.

Mr. B. says his representation, was &c.

That statement, you will perceive, has no reference to original cost, but the sum at which it was put in.

If you believe that this was the only representation made by Mr. B., it was true, and the plaintiff cannot recover.

If you find, from the evidence, that the representation above was that its *original* cost was $28,000, that representation was false; the property only cost $18,000, and the defendant knew it. From that, you may infer it was fraudulent.

That representation was a material representation. The plaintiff says he relied upon it. He had a right to rely upon it. If you so find, you will be warranted in finding a verdict for the plaintiff.

If you find for the plaintiff, the next question will be as to the measure of damages.

The plaintiff insists that the proper measure of damages is the entire loss sustained by him in this transaction, into which he was inveigled by the frand of the defendant.

That appears to have been the ruling of this court in the case of Littell vs. Manning. That case was affirmed in the Court of Errors,

and I shall adopt that statement of the rule, and charge you that in case you find for the plaintiff, you are to assess the damages at such sum as will include the whole loss of the plaintiff. But my charge to you is, you are to consider the proceeds of the disposition of a certain part of the property. I refer to the sale of the one well for $16,000.

If that sum had actually been realized, in cash, there could be no difficulty raised on this subject.

That it was not realized because of subsequent mismanagement on the part of the officers of the Company cannot affect the principle. 10

You will remember that this sale was made by the express consent and authority of the plaintiff, by his letter of 17th of July, 1865.

If the proceeds of that sale have not been realized, that had no connection with any circumstance attending the organization of the Company.

If eventually lost, its loss is due to the subsequent mismanagement of the officers of the Company. The damage resulting therefrom has no such connection with the fraud which is the gravamen of this action as to be said to have resulted therefrom. If for that plaintiff has any redress, he may have that in an action not against the defendant individually, but against the officers of the Company. 20

For the purposes of this suit, it must be taken that that sum ($16,000) has been realized out of this sale.

If you find for plaintiff, your verdict, as to amount of damages, will be on this basis:

Amount of original payment by plaintiff, 9th November, 1864,	$4,000 00
Subsequent amount, 3d May, 1865,	500 00
	$4,500 00
Deduct one-eighth of that sale—the amount of that sale,	$2,000 00
	$2,500 00

30

For that sum, with proper calculation of interest, if you find for plaintiff, your verdict will be.

This charge, as to the question of damages, is made with liberty on the part of either side to apply to the Supreme Court to enter judgment for such sum as from this rule of damages they ascertain may be lawful.

And thereupon the Defendant's Counsel requested the Court to charge the Jury that there were no damages shewn in the cause, and that there could be none, because the measure of damages in this case would be the difference between the price at which the plaintiff purchased his share and the actual cost of the share to the Defendant, deducting the amount realized by the Plaintiff from lands sold to Leinzman and others, which amount being shown to be more than that difference, there could be no damages.

Which request the Court then and there refused to comply with, and thereupon and therefore said Defendant, by his Counsel, prayed an exception, which was then and there allowed.

And thereupon said Defendant's Counsel requested the Court to charge the jury that if any damages were given in this case they should be only nominal, for the reason that it was shown in the cause that the share purchased by Plaintiff was, at the time of sale thereof by Defendant to Plaintiff, worth as much as Plaintiff paid for it.

Which request the Court then and there refused to comply with, and thereupon and therefore said Defendant, by his Counsel, prayed an exception, which was then and there allowed accordingly.

And thereupon said Defendant, by his Counsel, prayed exception to so much of the charge of the Court as related to the subject of Plaintiff's damages, which exception was then and there allowed accordingly.

Court of Errors and Appeals.

ABRAM M. BINNINGER, *ats.* PHILIP W. CRATER.	In Case. *Error from Supreme Court.*

ASSIGNMENT OF ERRORS.

Afterwards, that is to say, on the third Tuesday of November, in the year Eighteen Hundred and Sixty-eight, before the Court of Errors and Appeals of New Jersey, at Trenton, comes said defendant, by Augustus W. Cuter, his attorney and says that in the record and proceedings aforesaid, there is a manifest error in this, to wit: 10

1. That by the record aforesaid it appears that the judgment aforesaid was given against said Abram M. Binninger, whereas by law said judgment should have been given in favor of said Abram M. Binninger.

2. Because although when the Plaintiff rested his case, said Defendant's Counsel moved the Court to non-suit the Plaintiff, yet the Judge before whom this cause was tried refused said motion, whereas he ought to have granted the same, and to have non-suited said Plaintiff.

3. Because the Judge before whom this cause was tried charged 20 the Jury, on the trial of the cause, that the proper measure of damages in the cause, if they should find for the Plaintiff, would be the entire loss sustained by the Plaintiff in the transaction.

4. Because the Judge aforesaid refused, on said trial, to charge the Jury that there were no damages shown to have been sustained by the Plaintiff, although, at the time of charging said Jury, said Defendant's Counsel requested him so to charge.

5. Because the said Judge refused to charge said Jury, on said trial, that the measure of damages in the cause was the difference between the price at which the Plaintiff purchased his share and the 30

actual cost of that share to the Defendant, deducting the amount realized by the Plaintiff from the land sold to Leinzman and others, although said Judge was, at the time of charging said Jury, requested by said Defendant's Counsel so to charge.

6. Because said Judge refused, on said trial, to charge that the damages of Plaintiff in said cause were, at most, merely nominal—his share having been shown, in the cause, to have been worth as much as he gave for it, though said Judge was requested by said Defendant's Counsel, at the time of charging said Jury, so to charge.

7. Because said judgment is in other respects erroneous and contrary to law.

And the said Plaintiff in error prays that the judgment aforesaid, for the errors aforesaid and for other errors in the said record and proceedings, may be reversed, annulled, and altogether holden for nought, and that he may be restored to all things which he has lost by occasion of said judgment, &c.

A. W. Cutler,
Att'y for Abram M. Binninger, Defendant.

EXHIBITS.

Consent of Sale.

We hereby consent to the sale of oil well, No. 1, on the island near Titusville, Penna., and the engine tank, and tools, to Charles N. Crane, Charles Leinzman, Lucien A. Peycalley, John O. Hoyt, Henry Hulme, and Charles B. Hall, for notes $12000, and petroleum stock $4000, by Abram M. Binninger, as trustee, as per deed and agreement, dated this day.

New York, August 12, 1865.

L. C. Sanger,
per W. P. Sanger, Att'y.
Ira O. Miller.
E. E. Prindle.
P. W. Crater, Newark, N. J.
Charles W. Morse.
Sam'l F. B. Morse.

Indorsed. Left the note of $11,184.30 with the treasurer, P. W. Crater, Newark, August 14, 1865.

Note dated August 12, 1865.

Copy of Note.

New York, Aug. 12, 1865.

Six months after date, for value received, we jointly and severally promise to pay to the order of Charles A. Crane, the sum of eleven thousand one hundred and eighty-four thirty hundredths dollars.

Charles A. Crane.
Chas. Leinzman.
L. A. Peycallar.
Lewis G. Hansen.
H. Hulme.
J. O. Hoyte.

Newark, N. J., July 17, 1865.

I hereby give my consent to have the property now

known as the Oil Creek Island Petroleum Company, and at present held by A. M. Binninger and Mrs. W. P. Sanger, to be deeded by them to Mr. A. M. Binninger, as trustee; and I also give my approval of the sale of well No. 1, on said property, and that the said trustee give deed for the same.

P. W. CRATER.

Newark, N. J., June 21, 1865.

Ira O. Miller, esq., att'y, &c.

Dear Sir: I have just learned from Mr. Sanger that Mr. Binninger and yourself propose visiting our oil property, in Pennsylvania; in doing so it is my desire to have you act for me in the capacity of treasurer of our company, as regards the sale of well No. 1, selling and receiving pay for oil on hand, and anything that may seem proper to do in any matter connected with our oil interest, and clearing up needed matters generally, fully ratifying and confirming all you may do on the premises on my behalf.

Respectfully yours,

P. W. CRATER,

Treasurer of Oil Creek Island Petroleum Co.

Newark, N. J., June 21, 1865.

Friend Sanger: Yours of the 20th inst. is received this morning, and the contents noted.

It will be impossible for me to attend a meeting this P. M., at the hour named (two o'clock). However, I don't know that I could be of any advantage to you, if I could make it convenient to attend, having full confidence in all connected with us in our lucrative enterprise.

I enclose power of attorney, duly executed, for Mr. Binninger, and consent to Mr. Miller to act for me as treasurer, and shall be fully satisfied as far as I am concerned personally, with whatever Mr. Binninger and Mr. Miller may see proper to do in the matter.

Respectfully yours,

P. W. CRATER.

If anything new or strange turns up, please advise me.