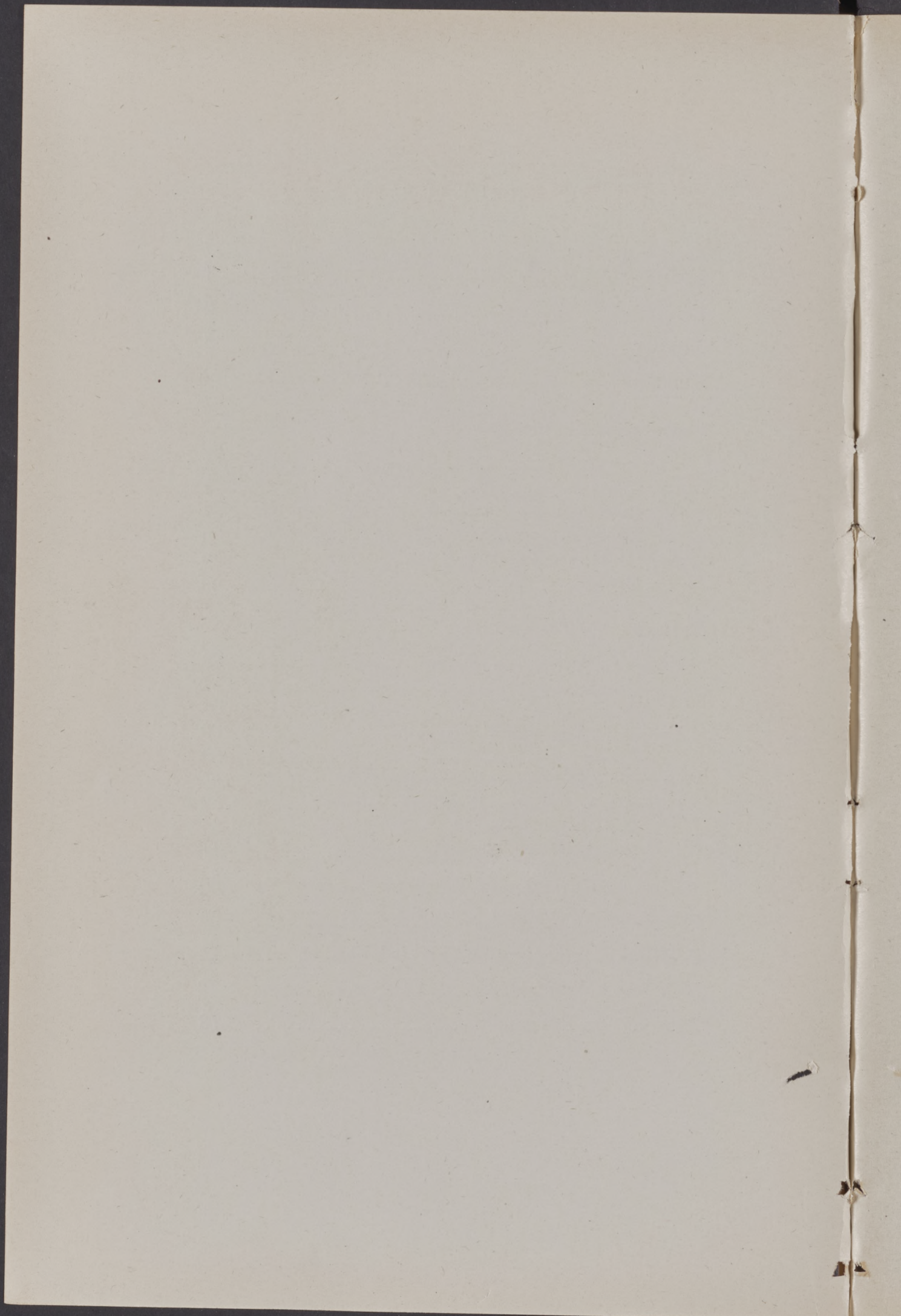


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COMPLAINT.

(Filed Dec. 29, 1921.)

NEW JERSEY SUPREME COURT.
BURLINGTON COUNTY.

10

CHARLES A. COLLINS,

Plaintiff,

v.

FRANK C. AMES, JR.,

*Defendant.*Action at Law.
Complaint.

20 Plaintiff, of the Township of Mt. Laurel, County
of Burlington, State of New Jersey, says:

FIRST COUNT.

30 1. On the 16th day of June, 1920, he entered into
and signed an agreement with the defendant, a copy
of which is hereto annexed and made a part hereof,
and which agreement obligated the said Frank C.
Ames, Jr., to sell, and the plaintiff to buy, a certain
premises situate in the Township of Delaware,
County of Camden, State of New Jersey, and more
particularly described in a certain deed from Flor-
ence R. Engle, et al., to Frank C. Ames, Jr., which
deed is of record in the office of the Register of Deeds
of Camden County, in Book 455 of Deeds, page 59.

2. At the time of said agreement, said property was encumbered by two certain mortgages, the first of which was held by the Burlington County Trust Company, to secure the sum of six thousand dollars (\$6,000.00) and which mortgage bore interest at the rate of 5½%, and was recorded in the office of the Register of Deeds of Camden County, in Book 166 of Mortgages, page 670; and the second of which was held by Florence R. Engle, et als., to secure the sum of nineteen hundred dollars (\$1900.00), on account of which the sum of one thousand dollars (\$1000.00) had been paid, which mortgage bore interest at the rate of 6%, and was recorded in the office of the Register of Deeds of Camden County, in Book 168 of Mortgages, page 5; and which mortgages, in accordance with the terms of said agreement, were to have been satisfied and cancelled of record by the defendant herein. 10

3. At the time of signing said agreement of purchase, the plaintiff paid to the defendant the sum of one hundred dollars (\$100.00), on account of the purchase price named in said agreement, and on the 25th day of March, 1921, plaintiff made final settlement with the defendant under said agreement, and then and there paid to the defendant, as and when required by said agreement, the further sum of \$16,855.68, which was the balance of the purchase price due under said agreement. 20

4. Although defendant agreed to pay off and satisfy said encumbrances, to wit: the mortgages aforesaid, defendant has, ever since that time, failed and refused so to do, and said mortgages remain of record and liens upon said premises, and no part thereof has been paid. 30

Plaintiff demands as damages the sum of \$6,900.00, the principal sum of said two mortgages, together with interest accrued and to accrue thereon at their respective rates per annum to the date of judgment herein.

SECOND COUNT.

1. Paragraph one of the first count is repeated
10 and made a part of this count.

2. Paragraph two of the first count is repeated
and made a part of this count.

3. Paragraph three of the first count is repeated
and made a part of this count.

4. On the said 25th day of March, 1921, the said
defendant did then and there execute to the said
20 plaintiff a general warranty deed covering premises
referred to in said agreement, and did then and
there promise and agree that the mortgages afore-
said would be paid off by him and immediately can-
called of record, and despite said promises and
warrants on the part of the said defendant, the said
mortgages still remain of record and liens on said
premises; and defendant has since that time failed
and refused to satisfy said mortgages, or to have
the same cancelled upon the record. No part there-
30 of has been paid.

Plaintiff demands as damages the sum of \$6,900.-
00, the principal due upon said two mortgages, to-
gether with interest accrued and to accrue there-
on at their respective rates per annum to date of
judgment.

BLEAKLY & STOCKWELL,
Attorneys for Plaintiff.

ARTICLES OF AGREEMENT made and entered into this Sixteenth day of June, in the year of our Lord one thousand nine hundred and twenty, between Frank C. AMES, JR., of the Township of Delaware, in the County of Camden and State of New Jersey, party of the first part, and CHARLES A. COLLINS, of the Township of Mount Laurel, in the County of Burlington, and State of New Jersey, party of the second part: 10

WITNESSETH, that the said party of the first part, in consideration of the sum of ONE HUNDRED DOLLARS, to him duly paid at and before the ensembling and delivery of these presents, the receipt whereof is hereby acknowledged, hereby agrees to sell unto the said party of the second part, his heirs and assigns, All that certain tract or parcel of land and premises situate in the Township of Delaware, in the County of Camden and State of New Jersey, containing about ninety-three acres, as particularly described in a certain deed from James Linton Engle and wife, and others, to Frank C. Ames, Jr., which said deed is of record in the office of the Register of Deeds of Camden County, at Camden, New Jersey, said tract being all of the property as described in said deed; for the sum of two hundred dollars per acre (the acreage of said farm to be determined either by the contents named in the aforesaid deed, or by a survey to be made at the option of the party of the second part). In case a survey is made, the parties hereto agree to bear the expense of said survey equally. 20 30

AND the said party of the second part hereto agrees to pay said purchase price to the said party of the first part hereto, as follows: One Hundred

Dollars is paid on the delivery of this agreement as above stated, and the balance of said purchase price is to be paid at the time of settlement, to wit: the twenty-fifth day of March, A. D. 1921.

AND it is further understood and agreed by and between the parties hereto, that the fire insurance policy or policies now covering the buildings on said premises, are included in the sale of the property and are to be transferred by the said party of the first
10 part to the said party of the second part free and clear of any charge or cost whatsoever, except the actual cost of transfer, if any.

AND it is further understood and agreed by and between the parties hereto, that settlement for said premises is to be made at the offices of Kaighn & Wolverton, Southeast corner Third and Market Streets, Camden, New Jersey, on the twenty-fifth day of March, 1921, at three o'clock in the after-
20 noon, at which time and place the said party of the first part, on receiving the payment at the time and in the manner above mentioned, shall at the proper cost and expense of the said party of the first part, execute, acknowledge and deliver to the said party of the second part, or to his heirs and assigns, a proper deed with covenants of general warranty, conveying and assuring to him the fee simple of said premises, free and clear of all liens and encumbrances whatsoever; the title to said premises to be good and marketable and such as will be insured
30 by the West Jersey Title and Guaranty Company.

And it is further understood and agreed by and between the parties hereto, that the said party of the second part shall have the right to go in, upon and on said premises at any time after the first day of September, 1920, to do any work upon said

farm which the said party of the second part may elect so to do, providing the same does not interfere with the said party of the first part; and that said party of the second part shall have full and complete possession of said farm, with the exception of the buildings, on the first day of January, 1921; and that full and complete possession of the farm and farm buildings is to be delivered by the said party of the first part to the said party of the second part, on the twenty-fifth day of March, 1921, 10 at the time of final settlement.

AND it is further understood and agreed by and between the parties hereto, that all taxes are to be adjusted as of the date of settlement.

AND it is further understood and agreed by and between the parties hereto, that the strawberry crop now growing on said farm is included in the sale of said farm, and that no crops whatsoever are to be reserved by the said party of the first part after the twenty-fifth day of March, 1921. 20

AND it is further understood and agreed by and between the parties hereto, that all manure now on the farm, or hereafter to be made on the farm, is included in the sale of the farm, and is not to be removed therefrom.

AND it is further understood and agreed by and between the parties hereto that all window screens and screen doors now on said premises, are not to be removed therefrom and are considered a part of said farm, and are included in the sale thereof, without any additional cost therefor. 30

AND it is further understood and agreed by and between the parties hereto, that the stipulations aforesaid are to apply to and bind the heirs, executors, administrators and assigns of the respective parties.

IN WITNESS WHEREOF, the said parties to these presents have hereunto set their hands and seals the day and year first above written.

FRANK C. AMES, JR. (Seal)

CHARLES A. COLLINS (Seal)

Signed, sealed and delivered in the presence of.

Joseph Kaighn.

10

ANSWER.

(Filed Jan. 15, 1922.)

NEW JERSEY SUPREME COURT.
BURLINGTON COUNTY.

20

CHARLES A. COLLINS,

Plaintiff,

v.

FRANK C. AMES, JR.,

Defendant.

Action at Law.
Answer.

30

The defendant, a resident of the County of Camden, State of New Jersey, by this answer:

1. Admits the allegations contained in paragraph 1 of the first count of the complaint.

2. Admits the existence of the mortgages referred to in paragraph 2 of the first count of the complaint, but denies that the defendant was under any obli-

gation in accordance with the terms of the agreement referred to in the 1st paragraph of the first count, to satisfy and cancel of record said mortgages.

3. Admits that at the time of the signing of the agreement to purchase, plaintiff paid defendant the sum of \$100 on account of the purchase price named in the agreement referred to in said complaint, but denies each and every of the other allegations of fact alleged in paragraph 3 of the first count of the complaint. 10

4. Denies the allegations contained in paragraph 4 of the first count of the complaint.

SECOND COUNT.

1. Makes the same reply to paragraph 1 of the second count as herein set forth in the answer to paragraph 1 of the first count. 20

2. Makes the same reply to paragraph 2 of the second count as herein set forth in answer to paragraph 2 of the first count.

3. Makes the same reply to paragraph 3 of the second count as herein set forth in answer to paragraph 3 of the first count.

4. Denies the allegations contained in paragraph 4 of the second count. 30

FIRST DEFENSE.

1. Joseph Kaighn, acting for the firm of Kaighn & Wolverton, was the agent and attorney of the plaintiff, at the time the settlement occurred be-

tween the plaintiff and defendant with reference to the lands and premises described in the contract of sale mentioned in paragraph 1 of the first count of the complaint.

2. At the time when defendant conveyed to plaintiff the lands and premises referred to in contract mentioned in paragraph 1 of the first count, and at the settlement therefor between the plaintiff and defendant, the plaintiff, through his said attorney, Joseph Kaighn, of the firm of Kaighn & Wolverton, retained from the purchase price of said farm, sufficient moneys to pay the principal and interest on the mortgages covering said premises referred to in paragraph 2 of the first count of the complaint, upon the understanding and agreement of the defendant that the said plaintiff, by his said attorney, out of the moneys thus retained, would pay off and satisfy said mortgages and interest.

3. Subsequently the said attorney of the said plaintiff remitted to the defendant the difference between the balance of the purchase price for said lands and premises and the amount due for principal and interest upon said mortgages, the said attorney of the said plaintiff then and there representing to the defendant that the said mortgages were paid off and cancelled of record.

30

SECOND DEFENSE.

1. To avoid repetition, paragraph 1 of the first defense is made the first paragraph of this defense.

2. To avoid repetition, paragraph 2 of the first defense is made the second paragraph of this defense.

3. In consideration of the agreement by the defendant that sufficient moneys be retained by the said plaintiff or his attorney to pay off and satisfy said mortgages and interest, the said plaintiff undertook and agreed with the defendant to pay off and discharge said mortgages and interest without any further obligation on the part of the said defendant so to do.

4. In order to avoid repetition, paragraph 3 of the first defense is made the fourth paragraph of this defense. 10

THIRD DEFENSE.

1. In order to avoid repetition, paragraph 1 of the first defense is made first paragraph of this defense.

2. In order to avoid repetition, paragraph 2 of the first defense is made second paragraph of this defense. 20

3. In order to avoid repetition, paragraph 3 of the first defense is made third paragraph of this defense.

4. If the said plaintiff or his said agent, Joseph Kaighn, did not properly apply the moneys constituting a part of the purchase price for the lands and premises set forth in the contract of purchase mentioned in paragraph 1 of the first count of the complaint, and did not pay off and discharge and cancel the said mortgages as the said plaintiff agreed to do, the loss by reason of such misapplication must necessarily be borne by the plaintiff, and is a matter for which the defendant is in no wise responsible. 30

LEWIS STARR,
Attorney of Defendant.

REPLY.

10

(Filed Jan. 18, 1922.)

NEW JERSEY SUPREME COURT.
BURLINGTON COUNTY.

	CHARLES A. COLLINS,	} Action at Law.
	<i>Plaintiff,</i>	
	v.	Reply.
20	FRANK C. AMES, JR.,	}
	<i>Defendant.</i>	

Plaintiff denies each and every allegation in the defendant's answer, excepting the admissions contained in paragraphs one, two and three.

BLEAKLY & STOCKWELL,
Attorneys for Plaintiff.

30

CHARLES A. COLLINS, sworn for the plaintiff.

Direct examination.

By Mr. Stockwell:

Q. Where do you live? A. Moorestown.

Q. What is your business? A. Farmer.

10 Q. Where is your farm? A. In Delaware Township, Camden County.

Q. Just over the Burlington County line? A. Yes.

Q. Is that the farm you bought from Mr. Ames, the defendant? A. All that I own are in that same township.

Q. I show you what purports to be an agreement between yourself and the defendant, Frank C. Ames, Jr., dated June 16, 1920. Is that signed by you? A. Yes, sir.

20 Q. Is that the signature of Mr. Ames? A. Yes, sir.

Q. Is that the agreement between you two with respect to the purchase by you of the farm formerly owned by Mr. Ames? A. Yes, sir.

(Agreement offered in evidence and marked Exhibit P1 for the plaintiff.)

Q. Did you make the initial payment of \$100.00 at the time this agreement was signed? A. I did.

30 Q. Did you make any subsequent payment on account of the purchase price before final settlement? A. I paid Mr. Ames \$1000.00 some time during the winter.

Q. I note according to the terms of this agreement, that final settlement was to be made at the office of Kaighn & Wolverson, on the 25th day of March, 1921. That is correct, is it not? A. Yes.

Q. Was final settlement made at that time? A. It was.

Q. Now, before the settlement was made, did you go into possession? A. No, except as by the terms of that agreement.

Q. Where was this settlement made? A. In Kaighn & Wolverton's office, 3rd and Market Streets, Camden.

Q. Before the settlement was made had any survey been made of the property? A. Yes. 10

Q. At your instance? A. Yes.

Q. Was the acreage difference definitely determined by that survey? A. Yes.

Q. Did you pay for the survey in the first place? A. No, according to that agreement—

Q. Did you pay it first? A. Yes.

Q. Then was any credit allowed to you after that for one-half of the survey? A. Yes.

Q. At the time of final settlement did you go to the office of Kaighn and Wolverton? A. I did. 20

Q. Did you go alone or was someone with you? A. Alone.

Q. Who else appeared there at the settlement? A. Mr. Ames.

Q. That is the defendant? A. Yes.

Q. Was there any other person there aside from Mr. Kaighn and yourself and Mr. Ames? A. Nobody, except the stenographers in the other office.

Q. Now, when you arrived in the office, was Mr. Ames already there? A. Yes. 30

Q. Or did he come in later? A. He was there when I went in the office.

Q. With whom? A. Mr. Kaighn.

Q. Did you go immediately into the inner office or did you wait to be called in? A. I got there exactly at three o'clock and the stenographer took

word in that I was there and in two or three minutes, in a short time, she told me to go in. Mr. Ames was in there when I went in.

Q. When you went in was the purchase of this particular property under discussion by the two?
A. I don't think it was.

Q. Was it or wasn't it? A. I don't know; I will put it that way.

10 Q. Did you have the cash with you that day to pay the balance of the purchase price, or did you pay by check? A. I took a blank check with me and made it out when I found out what was due Mr. Ames.

Q. A check on what bank? A. Moorestown Trust Co.

Q. Did you have the funds credited to your account to make good the check? A. I did.

Q. Did you have the check filled up when you went in there? A. I did not.

20 Q. Did you pay any cash over the table that day?
A. I did not.

Q. I think I understood you to say a statement was prepared and shown to you. Is that correct?
A. Yes.

Q. Did you prepare it? A. No.

Q. Was it prepared when you arrived? A. Apparently it was.

30 Q. I show you what purports to be a statement of settlement between Frank C. Ames, Jr., and Charles A. Collins, dated March 25th, 1921, and ask you if that is the original statement of settlement? A. It is.

Q. Did you sign that? A. Yes.

Q. Did Mr. Ames sign it? A. Yes.

(Statement offered in evidence and marked Exhibit P2 for the plaintiff.)

(Exhibit P2 for the plaintiff read to the jury by Mr. Stockwell.)

Q. On the receipt of this statement did you proceed to pay the balance of the money? A. I did.

Q. How did you do it? A. Wrote out the check payable to the order of Mr. Ames.

Q. That is the defendant here? A. Yes.

Q. The man selling you the property? A. Yes.

Q. Go ahead? A. I passed it over the table to 10 him.

Q. Did you sign the check? A. I did.

Q. I show you check dated March 25th, on Moores-town Trust Company, No. 1358, to Frank C. Ames, Jr., for \$16,855.68, signed by yourself. Is that the check? A. That is it.

(Check offered in evidence and marked Exhibit P3 for the plaintiff.)

20

(Exhibit P3 for the plaintiff read to the jury by Mr. Stockwell.)

Q. When you had written out this check and signed it, after examining the statement, I ask you whether the amount of the check is the amount called for in the statement, as being the balance due on the purchase price? A. It is.

Q. Was that the full amount due on the purchase price after deducting the two payments of \$100 and 30 \$1000 already made? A. It was.

Q. And after deducting the adjustment of \$41.27 for taxes and \$24.25 allowance for the survey, according to the statement handed to you, this signed statement? A. Yes.

Q. To whom did you hand the check after you had written it out? A. To Mr. Ames.

Q. Up to that point had you received into your possession any deed for this property? A. I had not.

Q. What was said by you or by Mr. Ames or by Mr. Kaighn then with reference to encumbrances on the property? A. Mr. Ames asked Mr. Kaighn, "What shall I do with the check?" Mr. Kaighn said, "Endorse that check to me and I will pay off the mortgages on the farm and send you a check for
10 the balance."

Q. Did you at the time you handed over the check, know that there were two mortgages on the property? A. I did.

Q. Had Mr. Ames told you so? A. Yes.

Q. So that you both knew at the time of the settlement there were these two mortgages on the property unsatisfied? A. Yes.

Q. When Mr. Kaighn said that to Mr. Ames, what did Mr. Ames do? A. Mr. Kaighn endorsed the
20 check. That is Mr. Kaighn's writing.

Q. Mr. Kaighn wrote on the back of it, "Pay to the order of Joseph Kaighn?" A. Yes; and Mr. Ames signed his name.

Q. Did you have it in your possession after you signed it and delivered it to Mr. Ames? A. I did not.

Q. Was there any suggestion there that day that you should assume and pay one of these mortgages or any part of them?

30 Mr. Starr: I object to the question because it is leading.

The Court: It will be permitted to stand. I see nothing particularly objectionable about it.

(Whereupon the defendant by his counsel prays

a bill of exceptions which is hereby allowed and sealed.)

Judge.

A. There was not.

Q. Did Mr. Ames during that interview tell you that you were to pay off the mortgages on the property? A. He did not tell me, no.

Q. On the contrary, what did he tell you? A. 10
Merely what I have stated.

Q. Go ahead. A. He asked Mr. Kaighn what he should do with the check, and Mr. Kaighn told him to make it payable to him and he would pay off the encumbrances and give him a check for the balance.

Q. Did you tell Mr. Kaighn to receive this money for you? A. No.

Q. Was any request made upon you by any one that day to pay off the mortgages, that you pay off the mortgages? A. No. 20

Q. Did you do any more that day than pay the money required by the agreement? A. That is all I did.

Q. How did you come to go to the office of Mr. Kaighn in the first instance in reference to this transaction? A. That started back from the time I was talking to Mr. Ames about the farm, away back in June.

Q. Tell me about it. A. I was in the market for a farm. I had been renting one but somebody had 30 bought it and I had the stock and didn't like to sell it and appear to be going backward. I mentioned that to one of my men, and he said——

Q. As a result of the conversation what did you do? A. I heard that Mr. Ames had a farm for sale and went over to see him.

Q. Who suggested that you go down to Mr. Kaighn? A. The day I made the bargain with Mr. Ames to buy the farm at \$200 an acre, clear and clean of expenses to me, I told him I thought we ought to have an agreement drawn up and I asked him if he had any suggestions as to a lawyer to do it, and he suggested Mr. Kaighn, and I said, "That is all right with me."

10 Q. Was anything more said about it before you actually went down to Mr. Kaighn's? A. Mr. Ames asked me about getting in touch with him and I told him—he didn't have a phone—and I said I had—I would call him up, and I called him up and made arrangements at a certain time to meet him with Mr. Ames in his office, and I told Mr. Ames about it the next day, that such arrangements had been made.

20 Q. Did you ever receive any bill from Mr. Kaighn or Kaighn and Wolverton for any services in connection with this settlement or drawing the agreement? A. I did not.

Q. Upon your understanding with Mr. Ames, were you to pay any legal expenses at all? A. I was not.

Q. Do you know whether or not Mr. Ames did pay a bill to Mr. Kaighn for representing in this matter? A. Mr. Ames did pay it.

Q. How do you know that? A. He told me so and I saw it on the statement.

30 Q. Who told you? A. Mr. Ames told me so himself.

Q. When? A. The day he came to me to tell me something must be wrong with the mortgages, about ten days after Mr. Kaighn's death. Mr. Ames asked me if I ever got a bill, and I told him, "No," and asked him if he got one, and he said, "Yes."

Q. Did he say whether or not he paid it?

A. No, I don't know. I took it for granted that he paid it. He didn't say actually he paid it.

Q. Did you apply to the Moorestown Trust Company for a loan on this property? A. I did.

Q. Through whom did you make the application?

A. My father.

Q. Is he in any way connected— A. A director.

Q. What is his name? A. Aaron L. Collins.

Q. Did he to your knowledge make the application? A. Yes. 10

Q. As a result of that was the loan granted? A. Yes.

Q. Who represented the Moorestown Trust Company at that time? Who was the lawyer for the Moorestown Trust Company? A. Mr. Kaighn.

Q. When did you in fact get your deed? A. I haven't gotten it yet.

Q. Was any deed turned over to you that day?

A. It was not.

Q. What was to be done with the deed and the mortgage to the Moorestown Trust Company and these other mortgages? A. To be recorded. 20

Q. Why was the deed left in possession of Kaighn?

A. The mortgage, the previous mortgages held by Mr. Kaighn had to be cancelled before the deed could be turned over to me.

Q. What else had to be done? A. The deed would have to be recorded and the mortgage recorded.

Q. You mean the Moorestown Trust Company mortgage? A. Yes. 30

Q. In other words, one transaction? A. Yes.

Q. Is it true that one of the mortgages—or were you threatened with foreclosure by the mortgagee in the mortgage from Ames to Harry R. Willitts, and which mortgage was held by people by the name of Engle? A. I was. I tried to get them to wait until this suit was settled, but they wouldn't wait.

Q. Did they put it off for some time? A. Yes; hoping it would be settled last term of court.

Q. And refused to wait longer? A. Yes.

Q. What did you do with reference to this Engle mortgage? A. I paid it off.

Q. The principal was nine hundred dollars? A. Yes.

Q. What amount of interest you paid at the time you paid the interest was how much? A. \$35.00, I
10 think.

Q. \$35.25? A. That's right.

Q. Before you paid the mortgage off were you compelled to pay any interest, and if so, how much? A. One year's interest, \$54.00.

Q. Is that all the payments you made on this mortgage? A. It was.

Q. \$935.25, and one installment of interest, \$54.00, before that? That's right.

Q. Bond and mortgage by Ames, dated October
20 9th, 1919, recorded in the office of the Register of Deeds of Camden County, in Book 168, page 5, etc. (Witness shown the bond and mortgage.) Are these the ones you paid off? A. Yes, sir.

(Bond and mortgage offered in evidence and marked Exhibit P4 and Exhibit P5 for the plaintiff.)

Q. By whom was the other mortgage held? A.
30 Burlington County Trust Company.

Q. Moorestown, New Jersey? A. Yes, sir.

Q. Have you paid that off? A. I have not.

Q. Have you paid any interest on it? A. I have not.

Mr. Stockwell: By stipulations between Judge Starr and myself all dividends filed by both parties

in this suit without prejudice to either side, dividends accrued on this claim, and by stipulation these dividends have been paid on account of this mortgage held by the Burlington County Trust Company.

Mr. Starr: Yes, sir.

Q. I show you deed, Frank C. Ames to Charles A. Collins, dated March 25th, 1921. Is that the deed for this farm? A. Yes. 10

(Deed offered in evidence and marked Exhibit P6 for the plaintiff.)

Mr. Stockwell: It is admitted that this deed was in the files of Kaighn and Wolverton, or Joseph Kaighn, until a few days ago, when Judge Starr and I inspected the file and this deed was withdrawn by me. 20

Mr. Starr: That is correct.

Q. After this settlement took place did you and Ames go out together or separately? A. Together.

Q. Did you leave the inner room together or separately? A. I went out first.

Q. Why did you do that? A. After we made settlement on the farm Mr. Ames and Mr. Kaighn started to talk about something else that I was not interested in, and I withdrew.

Q. Other business than this in which you were interested? A. Yes. 30

Q. Did Mr. Ames later tell you what it was? A. I don't think he did.

Q. How long did you wait before he came out to the outer office? A. A few minutes, about five minutes, I should say, something like that.

Q. But you both went out together? A. Yes.

Cross-examination by Mr. Starr:

Q. How old are you? A. Thirty-one.

Q. Where do you live now? A. Moorestown is my address.

Q. How long have you lived in Moorestown? A. Moorestown has always been my address.

Q. Always lived in Moorestown? A. Yes, sir.

10 Q. How long have you known Joseph Kaighn before his death? A. About five or ten years, perhaps.

Q. No longer than that? Haven't you known him as long as you knew anybody in Moorestown? A. No, sir.

Q. Did you ever have any business dealings with him before? A. Yes, sir.

Q. How many times? A. Twice, I think.

Q. What was the nature of the business dealings?

Mr. Stockwell: I object to this, if your Honor
20 please, as immaterial.

Mr. Starr: As to the question of agency the jury is entitled to have all the surrounding circumstances.

The Court: I will permit it, but it has very little weight.

(Question repeated.)

30 A. He was the attorney once, and partly the attorney another time, in the settlement of two farms I bought several years ago.

Q. In other words, you bought two farms and he represented you in the purchase of these farms? A. Originally in one of them, and in the other after we had some trouble about it.

Q. In one farm, he represented you in the purchase? A. He represented both men.

Q. He represented you? A. Both of us.

Q. And he made the searches for you and made the settlements for you. That is right, isn't it? A. Yes.

Q. What was the trouble with reference to the other farm? A. I really don't remember what it was now.

Q. He represented you in that transaction, did he? A. In a very small way. Some other lawyer sold the farm. 10

Q. Small or large, he represented you? A. Yes.

Q. How long has he been your lawyer? A. He never has been my lawyer except these two times.

Q. How long before this transaction were these occurrences? A. Seven or eight years, I think.

Q. How many farms do you own now? A. Three.

Q. Including Ames' farm? A. Yes, sir.

Q. Do you live on any of the farms, or live in Moorestown? A. Until about a week ago I lived with my father near Moorestown. 20

Q. Did you know Kaighn socially? A. No.

Q. The agreement introduced in evidence, the contract of sale, was that prepared by Kaighn? A. Yes, sir.

Q. Who gave him the information from which to prepare the contract? A. Mr. Ames and myself.

Q. At Kaighn's office? A. Yes, sir. Most of these things had been talked over before we went there. 30

Q. You went down together? A. No.

Q. Did you go to Kaighn's office first? A. No.

Q. How did he get the information, do you know? A. From Mr. Ames and myself the day the agreement was drawn.

Q. Wasn't the agreement prepared before you got down there? A. It was not.

Q. Drawn while you were there? A. Drawn while we were there.

Q. Sure of that? A. Yes, sir.

Q. You had talked with Kaighn prior to that time and made an appointment for you and Ames to go down there to sign it? A. Yes, sir. Merely that I made an appointment with him, that was all.

10 Q. Are you sure that Ames suggested Kaighn in the first instance? A. Yes, sir.

Q. You didn't suggest it? A. No, sir.

Q. How many times did you see Kaighn about this transaction before the settlement occurred? A. Once, that was the day we drew up the agreement.

Q. Talked with him on the phone, made an appointment, and then you went down with Ames to sign the agreement? A. Yes, sir.

20 Q. And didn't see him again until the date of settlement? A. I did not. Not in any business way. I might have met him on the street.

Q. Did you talk to him about this business, or call on the phone? A. I did not.

Q. Did you talk to Kaighn about this application for the mortgage you were making? A. The business was done through my father.

Q. Didn't have any conversation with him at all? A. I did not.

30 Q. Did Kaighn prepare the mortgage for you that you gave to the Trust Company? A. I don't know who prepared it. He represented the bank.

Q. Do you know whether he wrote it or not? A. I don't know.

Q. Is this the application you made at the bank for the mortgage? A. That is my signature, yes, sir.

Q. Is that the application for the mortgage? A. Yes, sir.

(Application marked D1 for identification.)

Q. And is this the receipt that you obtained from Hollingshead for making the survey? A. Yes, sir.

Q. Do you know how that got into the possession of Mr. Kaighn? A. I don't know; no, sir.

Q. Well, it is your receipt, is it not? A. Yes, sir; I probably took it down there with me that day to get my fifty per cent allowance.

Q. Did you leave that with Kaighn? A. I haven't 10
recollected whether I did or not. Apparently I did.

(Receipt marked D2 for identification.)

Q. I show you receipt signed by Ames for one thousand dollars, December 29th, 1920. How did that get into Kaighn's possession? A. I suppose I took it down with me that day. Mr. Kaighn didn't know anything about that one thousand dollars, as far as I know. 20

Q. I didn't ask that and desire that it be stricken out. How did it get into Kaighn's possession? A. I suppose I took it there that day.

(Receipt marked D3 for identification.)

Q. I show you tax receipt for 1920, Frank C. Ames, did you ever see that before? A. I suppose that was taken at the office that day to get the allowance of 1920 taxes off. 30

Q. Did you see it there? A. Yes, sir; I suppose I did.

(Receipt marked D4 for identification.)

Q. I show you paper dated March 25th, 1921,

signed "Joseph Kaighn." Did you ever see that before? A. No; I don't know anything about that.

Q. Never saw it before? A. No, sir.

Q. Wasn't that paper signed by Joseph Kaighn the day of the settlement in your presence? A. No, sir; I didn't see that.

Q. Never saw that receipt? A. No, sir.

Q. You said on your direct examination that that statement produced was made up before you got there. You are mistaken about that, aren't you? A. Did I say it was made up before?

Q. I understood so. You said it was apparently made up before you got there. Is that a fact or not?

A. He handed that over to me after I got into the office, into the room.

Q. It wasn't prepared after you got there? A. I don't think it was.

Q. If that is so, how did Kaighn get the amount of the surveyor's bill, if you brought the bill down that day, and half that bill is included in the statement? A. I really don't remember about that.

Q. Is it possible that you furnished that surveyor's bill to Mr. Kaighn before that day? A. I don't think so.

Q. If you didn't do that, the statement was made up after you got there? A. Possibly.

Q. Isn't that your recollection now? A. I don't remember when that statement was made up. It was handed to me after I got in the office.

30 Q. And when you paid the sixteen thousand odd dollars, all you had to show for it was a deed executed by Ames, which you left in Kaighn's possession to record. Is that a fact? A. Yes, sir.

Q. And you had nothing to show for it? A. No, sir.

Q. Did you have a receipt for the sixteen thousand dollars? A. Returned check.

Q. But you didn't have a receipt that day. No receipt was given you? A. I don't remember that any receipt was given to me.

Q. This settlement occurred right around the table in Kaighn's office, didn't it? A. Yes, sir.

Q. Nobody there but you and Kaighn and Ames? A. Yes, sir.

Q. Now, isn't it a fact that you handed that check to Kaighn or put it on the table? A. I passed it over to Mr. Ames. 10

Q. Did you hand it to Mr. Ames or put it on the table? A. On the table in front of Mr. Ames.

Q. He never had it in his hands until he endorsed it. You gave the impression a while ago that you handed it to him. A. I put it in front of Ames.

Q. And then Kaighn asked Ames to endorse the check to him? A. Mr. Ames asked Mr. Kaighn, "What shall I do with the check?"

Q. Why did he do that? A. Because the check was his. 20

Q. It wasn't his until these mortgages were paid off? A. It was his when I paid it to him.

Q. You were willing to give him the money and leave the deed in Kaighn's office without seeing that these two mortgages were paid off? A. That was part of the agreement.

Q. Answer the question.

(Question repeated.)

A. By previous agreement the mortgages were to be paid off. 30

Q. That day you parted with your money, didn't you, by this check, and all you had to show for it was a deed left in Joe Kaighn's possession? A. I had faith in Mr. Ames.

Q. Didn't you have faith in Mr. Kaighn? A. Yes, sir.

Q. You had confidence in Kaighn that when he had your deed and had the money he would pay off these mortgages? A. It was up to Mr. Ames.

Q. Whether it was up to Ames or not, you had confidence that when Kaighn had your deed and money he would pay off these mortgages? A. Kaighn didn't have my money.

10 Q. Your check then? A. Didn't have my check.

Q. The check endorsed by Ames. The check hadn't been paid. You could stop payment on the check? A. Yes.

Q. You controlled that situation, didn't you? A. I suppose I could, yes.

Q. At any time before that check was presented to the bank you could stop payment on it. Now, having that knowledge you permitted the check to go to Kaighn, and Kaighn retained your deed, and
20 you trusted him to pay these mortgages. Now, isn't that a fact? A. I trusted Mr. Ames and Kaighn together.

Q. You did trust Kaighn personally at least? A. You may put it that way.

Q. You had perfect confidence in Mr. Kaighn, isn't that a fact? A. Yes.

Q. At that time Mr. Kaighn had a first class reputation as an honest lawyer in this community, didn't he? A. I trusted him the same as I would trust you
30 or any other lawyer.

Q. Now, if you hadn't had confidence in Mr. Kaighn, you would have had somebody else there representing you and seeing that you got a clear title to the property, and that these mortgages were paid off. Now, isn't that a fact? A. It wasn't only Mr. Kaighn, it was Mr. Ames. Mr. Kaighn didn't have any money, I gave it to Mr. Ames.

Q. You say Mr. Ames didn't have your money. You don't mean that. A. I didn't say he didn't have it. I said Kaighn didn't have it.

Q. He had your check, hadn't he? A. Mr. Ames had it.

Q. At the time you left Kaighn had it? A. After Mr. Ames got it, what did I care?

Q. Do you mean to say you had no responsibility? A. I paid Mr. Ames the money.

Q. You had no responsibility after that. Is that the way you look at it? A. I had no responsibility, I had nothing to do with what Mr. Ames did with it. 10

Q. Didn't you know your check was endorsed and turned into Mr. Kaighn's possession? A. Yes.

Q. Saw Mr. Kaighn had the check endorsed? A. Yes.

Q. And that check was good? A. Yes.

Q. And Kaighn had your deed. Isn't that a fact? A. Yes.

Q. And you trusted him to put your deed on record. Isn't that a fact? A. Yes. 20

Q. And you trusted him to pay these mortgages. Isn't that a fact? A. Yes.

Q. Don't you know you could have refused to have gone on with the settlement until the mortgages were paid and settled before you paid the money? A. I do now. I didn't think anything about it then.

Q. Was that because you trusted Mr. Kaighn? A. I trusted Mr. Ames.

Q. Mr. Ames didn't have your money. Mr. Kaighn had it. A. Mr. Ames had it so far as I am concerned. 30

Q. Right there in your presence this check was turned over to Mr. Kaighn, wasn't it? A. Yes.

Q. And do you mean to tell this jury Mr. Ames had your money? A. He got it so far as I am concerned.

Q. Well, now, you expected to pay Kaighn for any services in this matter? A. I did not. That was part of the agreement. It was not to cost me anything but two hundred dollars an acre. Mr. Ames was to pay all expenses.

Q. What about making the searches? A. Mr. Ames was to pay that. It wasn't to cost me anything but two hundred dollars an acre.

10 Q. Is there anything in the agreement to indicate that? A. I haven't got it.

Q. Who made the examination of the title for you? A. Nobody.

Q. You took this—— A. Mr. Kaighn ran the searches, but Mr. Ames paid for it.

Q. It was for your benefit? A. It was for Mr. Ames' benefit. He was supposed to turn me over the farm clear of all encumbrances.

20 Q. Were you willing to take Mr. Kaighn's examination? A. Yes.

Q. You knew he was going to make the examination? A. I didn't know who was going to make it.

Q. Would you have been willing to make the settlement with anybody making the examination?

Mr. Stockwell: Objected to.

The Court: I will permit it. It has very little bearing.

30 (Question repeated.)

A. Any lawyer; yes, sir.

Q. Any lawyer at all, regardless of who it was?

A. Yes, sir.

Q. You didn't have any title insurance, did you?

A. No.

Q. Did you furnish the blue prints or the survey made by the surveyor, so that Kaighn could draw the deed? A. No, sir.

Q. How did he get it, do you know? A. I don't know anything about it.

Q. You don't know how the surveyor connected with Kaighn? A. No.

Q. Is this a copy of the mortgage which you gave to the Moorestown Trust Company for ten thousand dollars? A. It is.

10

(Mortgage marked D5 for identification.)

Q. Did you ever pay any of the expenses either to the trust company or Mr. Kaighn for preparing the mortgages and recording them? A. I haven't paid a cent to anybody except to Mr. Ames.

Q. You never went back after your deed. Did you leave that in Mr. Kaighn's possession? A. Yes, sir.

20

Q. You left all these other papers, the receipt, and the surveyor's bill, in Kaighn's possession? A. Yes.

Q. When did you get in possession of the place? A. 25th of March, 1921.

Q. Same day you got your deed? A. Well, I done some work on there before that.

Q. You had no actual possession of the property prior to the 25th of March? A. No.

Q. Did Ames move out of the property when you moved in, or did he move out before? A. He moved out before.

30

Q. When the agreement of sale was drawn, didn't you pay for that? A. No, sir.

Q. Sure of that? A. Yes, sir.

Re-direct examination by Mr. Stockwell:

Q. Mr. Collins, just tell us about the telephone conversation with Mr. Kaighn. What did you say to Mr. Kaighn when you called him on the phone making the appointment? A. I told Mr. Kaighn that Mr. Ames and I had made arrangements, that I had bought Mr. Ames' farm, and that Mr. Ames had suggested his name as a lawyer to draw up the arrangement, or the agreement, and that I was calling up because he had no phone, and I made the arrangements with him what day would suit him, and I told him I would tell Mr. Ames and if it suited Mr. Ames we would be down at that time.

10

Q. Did you tell Mr. Ames? A. Yes.

Q. Was that all you said over the phone? A. Yes.

Q. The only conversation prior to going down there? A. Yes. Just to make the arrangements—to set the hour and day.

20

Q. Why did you make this check of \$16,855.68 payable to the order of Frank C. Ames, Jr.? A. Because he was the man I was buying the property from.

Q. Judge Starr has questioned you quite searchingly to find out why you gave this check to Mr. Ames after you made it out to his order. Did you give it to him, or didn't you? A. I passed it over the table to Mr. Ames.

Q. Did you shove it over? A. I passed it over, like that, right in front of him.

30

Q. Did you have anything to do with your check from the time you passed it over the table to Mr. Ames? A. I did not.

Q. Was any request made by any one to you with reference to the endorsement of that check, or what should be done with the check? A. There was not.

Q. Did you have anything to do with Mr. Ames making the endorsement on there payable to Mr. Kaighn? A. I did not.

Q. Did you care to whom he had endorsed it after you had given him the check? A. I did not.

Re-cross examination by Mr. Starr:

Q. You don't mean that, Mr. Collins, do you? A. 10
I didn't care.

Q. Weren't you interested to know whether these prior mortgages were paid? A. I was taking it for granted.

Q. Then the check was handed over endorsed to Mr. Kaighn? A. I didn't care.

Q. It was as a fact turned over to him? A. Yes.

Re-direct examination by Mr. Stockwell:

Q. While you were in the office Mr. Ames passed the check over to Mr. Kaighn? A. Yes. 20

Q. After he had endorsed it on the back to the order of Mr. Kaighn? A. Yes, sir.

Q. That is correct? A. Yes.

Q. Nobody objected to that? A. No, sir.

Q. Did Mr. Kaighn die shortly after this agreement was signed? A. About six weeks, I think; some time early in May, I think.

Q. As a matter of fact did you think you had the deed, but didn't have it, until recently? A. I knew I didn't have it. 30

Re-cross examination by Mr. Starr:

Q. Had any other lawyer represented you in the purchase of any of the farms you have except Mr.

Kaighn? A. Mr. Stevenson was the man who sold one of the farms.

Q. Mr. Stevenson and Mr. Kaighn — A. No; Mr. Stevenson sold the farm, and I got Mr. Kaighn into it afterwards on account of a little disagreement.

Q. In the other matter Mr. Kaighn represented both you and the seller? A. Yes, sir.

Q. In any real estate transaction you have had,
10 did you have anybody else except Mr. Kaighn to represent you? A. I don't think I have.

Re-direct examination by Mr. Stockwell:

Q. Did you ever have any other real estate transaction? A. No, sir.

Q. So you never had Mr. Kaighn in any other real estate transaction? A. No.

20

ARMITT H. COATE, sworn for the plaintiff.

Direct examination by Mr. Stockwell:

Q. Do you live in Moorestown? A. Yes, sir.

Q. Are you an officer of the Burlington County Trust Company? A. Assistant trust officer.

Q. Have you at my request brought certain papers
30 here from the files of the trust company, to wit, bond and mortgage on the property now owned by Charles A. Collins in Delaware Township, Camden County, this State? A. Yes, sir.

Q. Bond and mortgage, Frank C. Ames, Jr., to Burlington County Trust Company, dated October 3, 1919, recorded in the office of the Register of Deeds of Camden County in Book 166, page 670, etc.,

to secure payment of the sum of \$6000, on premises in the Township of Delaware, County of Camden, beginning at a corner in the middle of the turnpike road from Marlton to Camden; is that the farm now owned by Mr. Charles A. Collins, the plaintiff here?
A. Yes, sir.

(Papers offered in writing and marked Exhibit P7, Exhibit P8 and Exhibit P9 for the plaintiff.)

10

Q. What is the amount now due on that mortgage?

A. The balance due on the mortgage for principal is \$3455.40.

Q. How much interest? A. Interest due from April 3d, 1922, to date of settlement.

Q. What rate? A. Six per cent.

Q. Did your company receive from the executor of Joseph Kaighn or other persons certain moneys in part liquidation of this mortgage? A. Yes, sir.

Q. What was the amount? A. The total amount of the checks? 20

Q. Yes, sir. A. Total amount of checks, \$2904.60.

Q. How did you apply that amount in liquidation of principal and interest? A. We first applied it on account of the interest due up to the date of receiving the check, amounting to \$360. The balance, of course, we applied on account of the principal, \$2544.60.

Q. So that the amount now due is — A. That reduced the amount of the mortgage to \$3455.40 principal. 30

Q. With interest from — A. From April 3d, 1922.

Cross-examination by Mr. Starr:

Q. What was the amount of credit on the principal? A. \$2544.60.

Mr. Stockwell: There is no dispute as to the fact of this mortgage, is there?

10 Mr. Starr: Not the slightest.

PLAINTIFF RESTS.

Mr. Starr: If your Honor please, I introduce in evidence Exhibits D1, D2, D3, D4 and D5, marked for identification. And Mr. Stockwell and myself have stipulated that Exhibits D1 to 4, inclusive,
20 were in the files of Joseph Kaighn, when we examined them the other day.

Mr. Stockwell: Yes, sir.

The Court: They will be admitted.

FRANK C. AMES, JR., sworn for the defendant.

30 Direct examination by Mr. Starr:

Q. What is your occupation and where do you live? A. Farming, living at Marlton.

Q. Where did you live at the time you made this contract with Collins? A. Lived on the farm that I sold to Collins.

Q. Where is that farm located? A. Located in Camden County.

Q. Tell the jury what happened between you and Collins when he first spoke to you about this farm.

A. Well, Collins had been at me to buy the farm. I had a lease on it before I thought of buying it.

Q. How long ago was that? A. About three years. And he was at me all the time to sell it to him. And he even went so far as to go down to —

Q. Only what occurred between you and Mr. Collins concerning the purchase. A. Collins came to me and asked what I would take for the farm, and I gave him the figures, two hundred dollars per acre. He suggested we go to Joe Kaighn and get an agreement wrote out. 10

Q. He says that you suggested it? A. Well, I didn't suggest it; he did. He made the suggestion, the day and hour and all, and it turned up that Joe Kaighn couldn't be there, and he came over and said that Joe Kaighn is in Atlantic City, and we will have to put it off. 20

Q. Did you suggest to him that you get Kaighn to draw the agreement? A. No, sir; I did not.

Q. Did you see Kaighn at all until you went to his office to sign the agreement? A. I did not.

Q. Did you furnish him any information as to what the agreement should cover, Kaighn? A. No, sir.

Q. What happened when you went down to Kaighn's office the first time to sign the agreement? A. The agreement was there and Collins was there ready to sign it, and I was half an hour late. There was a big rain storm or hail storm, and I stayed under the sheds, and I was half an hour late. And they were both there with the agreement ready to be signed. 30

Q. The agreement was prepared when you went in the office? A. It was.

Q. That is the agreement introduced into evidence? A. I haven't seen it, but the way it read it is the same thing.

Q. Was anything said about that Collins should pay any of the expenses? A. No, sir; we were to pay fifty-fifty, and Collins paid him five dollars the day of the agreement, and I paid five dollars out of
10 my pocket right there to Kaighn.

Q. When did you make the agreement that the expenses should be borne fifty-fifty? A. That day.

Q. The day the agreement was signed? A. Yes, sir.

Q. Did you ever make any agreement that Collins has testified that all the expenses of this transaction be imposed on you and he pay nothing? A. No, I never made any agreement to it.

Q. When was the first time after you signed the
20 agreement you went to Joe Kaighn's office? A. The day of the settlement.

Q. 25th of March, 1921? A. Yes, sir.

Q. Had you had any talk with Kaighn with reference to this transaction between the time the agreement of sale was executed and when you went there for settlement? A. No, sir.

Q. Had you had any talk with Collins about Kaighn during that time? A. With Collins?

Q. Yes. A. With Collins?

30 Q. Did you have any controversy about something on the farm? A. Yes.

Q. What was that? A. He had Italians come over to hoe the tomatoes, and we got down to where we couldn't hoe any more —

Q. What was said between you and Collins about this controversy and what did he say about Kaighn?

A. Well, he came —

Q. Between the time of making the contract and settlement? A. He wanted to fight from the first of the —

Q. Only what Collins said. What happened between you and Collins? Between the time of agreement and date of settlement. A. Do you mean in with Joe Kaighn's talk?

Q. At the time you had this talk with Collins, between the day the contract was signed and the date of settlement. A. I had a rail pile I bought and moved on the place, and Collins, when I asked him — 10

Q. What talk did you have with Collins? What did he say about Kaighn? A. That was about the rail pile. I told him not to take the rails, and he said, "If you want to know whose rails they are, go see Joe Kaighn about it." I says, "They are mine. I want you to leave them be."

Q. When was that conversation? A. That was 20
along, I should judge, in December.

Q. And he said go down and see Joe? A. Yes; to go see Joe Kaighn about it.

Q. Did you go? A. No.

Q. Did you have any other talk with Collins between the time the contract was made and the day of settlement about Kaighn? A. No; only he told me that—Charlie Collins told me, two or three days before the settlement, he said he didn't think it was possible for him to be there, but if he wasn't there 30
the money can be paid there and Kaighn would settle it.

Q. That was when? A. About the twenty-third of March.

Q. How did that conversation come about? A. He was there working in the barn. He just told me. He

didn't think that he would be there, and said if I went there the money will be there and Joe Kaighn will settle it.

Q. Did you recall any other talks with Collins about Kaighn between the time the contract was signed and the settlement took place; conversations in which Kaighn was mentioned? A. Not with Kaighn.

10 Q. With Collins about Kaighn? A. No; not that I remember.

Q. Now, on the day of settlement you went down to Kaighn's office? A. Yes, sir.

Q. Did you get there ahead of Collins? A. Collins was ahead of me.

Q. And where was he? A. There in his office. I don't know whether it is his office or not. A room on the Second Street side.

Q. Third and Market Streets, Camden? A. Yes, sir.

20 Q. Was Kaighn there too? A. Kaighn and Collins too.

Q. Both there before you got there? A. Yes, sir; I was a half hour late.

Q. I am speaking about the day of the settlement, not the day of the contract. A. They were both there before I was.

Q. Which day was the storm? A. The storm was the day of the agreement.

Q. Collins was there with Kaighn? A. Yes, sir.

30 Q. Just tell in your own way what happened after you got there. A. Collins drew up the check like he says he did, and he says I had the check. I have never had the check in my hands or the money either. Kaighn picked the check up, and drew that around to him, and then told me to endorse it. I said, "Don't this check belong to me?" He says,

“No, until Mr. Collins’ mortgage is lifted.” I says, “What have I got to show?” I said, “Collins got the farm, and you retain the check.” And that’s when he gave me that piece of paper that he retained the whole amount.

Q. Is this the paper, dated March 25th, 1921, signed “Joseph Kaighn”? A. Yes, sir.

Q. Did you get that paper the day of the settlement? A. Yes, sir.

Q. State whether or not Collins was there when this was handed to you. A. Certainly, I said, “Collins got the farm. You got the money. I got nothing.” And that’s what he gave me.

Q. Was this given in Collins’ presence? A. Yes, sir; we was all there.

Q. All three of you? A. Yes.

(Receipt offered in evidence and marked Exhibit D6 for the defendant.)

(Exhibit D6 for the defendant read to the jury by Mr. Starr.)

Q. Do you remember where Mr. Kaighn dictated that to his stenographer, was it in the office where you three men were, or did he go out of the office?

A. There wasn’t any stenographer in the room where we did the business. There was an open door where he went and gave it to her, and brought it back and gave it to me. He said, “You can’t have the money.” I says, “If I can’t have the money, I can’t pay off the mortgages.” He says, “Mr. Collins wants the mortgages paid off —”

Q. Was this paper read there? A. Certainly, it was.

Q. In the presence of Mr. Collins? A. Yes, sir.

Q. I am speaking of Exhibit D6, that was read in the presence of Mr. Collins? A. Yes, sir; we both heard that.

Q. Did you ever have your hands on this check except when you endorsed it to Kaighn? A. Never had it in my hand. Mr. Kaighn drew it over and told me I couldn't get my money until I had endorsed it and the mortgage was cancelled. Mr. Kaighn picked it right up and kept it.

10 Q. Was the deed executed there that day? A. I guess it was. He got possession of everything. I had to move.

Q. Was the deed executed there by you, the deed to Collins? A. I guess it was.

Q. Here is the Exhibit P2. Look at that and tell us when it was prepared, before or after you got to Kaighn's office, if you know? A. I never seen it prepared. I signed it and gave it to him.

Q. Kaighn prepared it? A. When I saw it, it was
20 all made up.

Q. Now, after the settlement was made and you received this blue paper, and Kaighn retained the check, what happened at Kaighn's office, anything, or did you go out? A. Why, I went out.

Q. Did you go out ahead of Mr. Collins or after him or with him? A. Mr. Collins walked down the stairs ahead of me, and I was right in back of him. He wasn't no more than down the stairs before I got there, I don't think.

30 Q. Did he take you part way down? A. Yes; we rode out as far as Haddonfield together.

Cross-examination by Mr. Stockwell:

Q. Mr. Ames, do you say that Mr. Kaighn represented you in any way in this transaction?

Mr. Starr: It seems to me, if your Honor please, that this calls for a conclusion.

The Court: It is cross-examination.

A. It was understood, I think, he was representing both of us.

Q. In what part of it was he representing you?

A. Well, Collins—we had to have somebody, and he wouldn't take my word what was against the farm. 10

Q. Please answer the question.

(Question repeated.)

A. I can't see where he ever helped me in representing me.

(Question again repeated.)

A. I don't know what part he was representing me. 20

Q. You don't know. A. No; I don't.

Q. Is that your answer? A. I don't know what he was representing me for. I thought we was going there to have everything fixed up straight.

Q. Is that your answer? A. Yes, sir.

Q. Had you read over this agreement of sale before you signed it? A. Yes, sir.

Q. You understood its terms, did you? A. Yes, sir.

Q. Did you know that by the terms of that agreement you were required to convey this property clear of all encumbrances upon the payment of the purchase price? A. I couldn't pay it when I didn't have it. 30

Q. Please answer the question. That is not an an-

swer. A. No; I didn't think I was to pay it over when I couldn't get the money to pay it with.

Mr. Stockwell: I ask that the question be read.

Mr. Starr: My objection is that the agreement speaks for itself as to what he was to do under the contract.

10 The Court: It is proper cross-examination. Let him answer the question.

(Question repeated.)

A. That's what I expected to do.

Q. That was to be done, was it, you understood that? A. Yes; I understood it.

Q. Did you insist upon cash that day? A. No; I didn't insist upon it.

20 Q. Won't you look at Exhibit P3, which is the check of March 25th, 1921, drawn to your order, will you state whether the amount of that check, to wit, \$16,855.68, was the amount due on the purchase price on the date of settlement? A. That's what was figured, isn't it?

Q. That is correct, is it not? A. Yes, sir.

Q. Is your name Frank C. Ames, Jr.? A. Yes, sir.

30 Q. Is that your signature on the back of the check? A. Yes, sir.

Q. You knew when you signed that you were endorsing it over to Joseph Kaighn, didn't you? A. He told me I couldn't get my money, on account of the mortgage —

Q. You know what it means to endorse a check? A. Yes.

Q. Farmers endorse checks as well as other men?
A. Yes, sir.

Q. And you have endorsed many? A. Yes.

Q. And you knew what it meant to endorse that to the order of Joseph Kaighn? A. Yes, sir.

Q. You knew the money represented by that check would go to Joseph Kaighn, didn't you, into his bank account? A. No; I didn't know it was going to his bank account.

Q. You know, unless he endorsed it to somebody else the money would go to Joseph Kaighn, didn't you? No doubt about that? A. There is no doubt about it, I guess. 10

Q. The amount of the purchase price due that day was \$16,855.68; that's correct? A. Yes, sir.

Q. And Mr. Collins made a check to your order for the balance due. That is correct, isn't it? A. Yes, sir.

Q. And that was strictly in accordance with the terms of the agreement? A. Yes, sir. 20

Q. And you endorsed that check over to Joseph Kaighn. That's correct, isn't it? A. Yes, sir.

Q. And you say you didn't have it in your possession. How did you sign your name, if you didn't have the check? A. I didn't have it in my hands.

Q. How did you endorse the check, if you didn't touch the check? A. Mr. Kaighn put it in front of me and gave me the pen and I endorsed it.

Q. Did you know what you were endorsing, when you signed your name to it? A. I knew it was a check. 30

Q. And you knew it represented the balance of the purchase price? A. Yes; after the credits off, I guess.

Q. Well, you say after the mortgages off. Are any mortgages deducted from that purchase price before that check was given? A. Which given?

(Question repeated.)

A. No; they were not.

Q. So, if the mortgages were going to be paid out of the purchase price, they would have to be paid after this check was given? Wouldn't they? A. Yes, sir.

Q. Is this your signature to the statement of March 25th, 1921? A. Yes, sir.

10 Q. Did you sign that in Mr. Kaighn's office? A. Yes.

Q. While you were there for settlement that day? A. Yes, sir.

Q. Do I understand you that it was up to Mr. Collins to pay off these mortgages? Is that your theory? A. I allowed so, because his attorney wouldn't let me have the money to pay it with.

Q. You have said a good many times his attorney. The fact is that you had the check and it was
20 endorsed by you? A. Yes, sir.

Q. And paid to another man, wasn't it? A. He retained it.

Q. You mean Kaighn retained it? A. Yes.

Q. He retained the money, too, didn't he, after he got the check? A. He retained the whole check. He wouldn't give me any of it.

Q. I will ask you again; when you came to that settlement did you expect Mr. Collins to pay off these mortgages, or were you to do it? A. Mr.
30 Kaighn was to do it.

Q. When you first arrived there it was up to Mr. Kaighn to pay the mortgages? A. I expected to take the money out and pay the mortgages, but they wouldn't do that way. They wanted it all in one. They wouldn't trust me with the money.

Q. Did you ever sell a piece of property before?

A. No, sir.

Q. Did you ever buy a piece? A. Yes.

Q. Ever have any transaction with Mr. Kaighn, except this one transaction? A. Did I ever before that?

Q. Yes. A. Yes; once.

Q. What was that? A. He sued me once.

Q. Did he get judgment? A. No.

Q. Aside from that one transaction, did you ever have any business dealings with him? A. After 10 that, or before?

Q. Either one. A. Yes; after that I did.

Q. How long after? A. Well, it was around the seventh of April, I should judge.

Q. Hadn't seen him in reference to that other transaction before the seventh of April? A. When I bought this other farm, we was to have a settlement, my father and I —

Q. There was another farm in which you were interested? A. Yes, sir; the one I was buying. 20

Q. From whom? A. My father.

Q. Where did you make settlement, you and your father? A. In Kaighn's office.

Q. The same Kaighn is it? A. Yes.

Q. What did you do with the money resulting from that farm? A. What farm?

Q. This other farm, not the Collins farm, but the other farm, did you pay the money to Kaighn there? A. Kaighn and Wolverton.

Q. Did you give your check to Kaighn and Wol- 30 verton then? A. Yes.

Q. And they were to pay for some mortgages out of the money you gave them? A. Yes.

Q. And they didn't do it, did they? A. No, sir.

Q. And you filed a claim against the Kaighn estate? A. A joint claim.

Q. You and your father? A. Yes, sir.

Q. And you said your father was wrong, and your father said you were wrong, the same game you have here? A. We never had any argument over it.

Q. Isn't it in the claim so stated? Is your name on that paper? A. Yes, sir.

Q. Is your father's name on it? A. Yes, sir.

10 Q. Is that the claim you and your father filed against the estate of Joseph Kaighn? A. Yes, sir.

(Claim offered in evidence and marked Exhibit P10 for the plaintiff.)

Q. Now, how long before the date of the agreement with Mr. Collins did you and your father take up this question of your purchase of the other farm from your father? A. I should judge two weeks.

20 Q. The two transactions running right along at the same time? A. Very near it.

Q. And you and your father going to Kaighn at the same time as to the Collins transaction? A. Only in the agreement, I supposed the mortgage had been paid before I bought the farm from pop.

Q. You found out it was not. As a matter of fact you gave your check to Joseph Kaighn? A. Kaighn and Wolverton.

Q. And trusted Joseph Kaighn to pay the money, and, by the way, it was Joseph Kaighn you were dealing with? A. At that time; yes.

30 Q. Now, on the very day of settlement with Mr. Collins, didn't you and Mr. Kaighn take up this question of the sale of your father's farm to you? A. On the day of what?

Q. On the day that you and Mr. Collins called at Mr. Kaighn's office to settle the Collins transaction,

did you not take up with Mr. Kaighn the other transaction with your father? A. No; we had the agreement wrote up when we had the other agreement wrote up.

Q. The same day? A. Practically the same day.

Q. Two weeks later? A. I am not sure.

Q. You say you had seen Mr. Kaighn about your father's transaction between the date of your signing the Collins agreement and the date of your settlement with Collins? A. Yes; we made our agreement with the other farm. 10

Q. Had your father had dealings with Mr. Kaighn before this? A. Yes, sir.

Q. Several transactions with him? A. I don't know just how many, but I know he had had some.

Q. He represented your family, didn't he? A. Only the time he sued me.

Q. You say he did not represent you then at the time of the Collins settlement, or at the time the Collins agreement was made? A. I expect he represented both of us. We both paid him. 20

Q. You are sure about the payment? A. Positively.

Q. You paid the bill for services, didn't you, on the settlement? A. The last one?

Q. I mean Kaighn's bill for services in connection with this entire transaction. Didn't you pay it? A. He took it off of me.

Q. Didn't you pay it? A. I guess I did; I could never get it. It was a case of have to. 30

Q. Didn't you pay it? A. I never got it. I guess I did. It wasn't thru any request of me he took the money.

Q. Did you protest against paying it? A. He told me Collins paid half, and I couldn't get away from what his charges are.

Mr. Stockwell: I move to strike it out.

(Question repeated.)

A. No; because it was agreed that we was to pay half.

Q. You say you paid only half? A. That's all.

Q. Did he tell you what the total was to be that day? A. The day of the settlement?

10 Q. Or any other time? A. No, he never told me.

Q. How do you know you paid only half then? A. I expected—that was our talking from the beginning, we was to pay fifty-fifty.

Q. Have you anything but talk to show you were to pay fifty per cent? A. I think the agreement says in the survey we were to pay fifty-fifty.

Q. It certainly does. Now, did you have anything else to settle fifty-fifty? A. If there was anything to show —

20 Q. Why didn't you have something? A. I expected he was going to be honest enough to be even with us.

Q. Is that the only reason? A. We paid half the agreement, and I expected we were going to pay it all on the same way, that was our understanding.

30 Q. Now, Mr. Ames, when this check for \$16,855.68 was shoved across the table you say you didn't get your hands on it, when it was shoved across the table under your nose, what did you expect was to become of the check, who was to get it? A. I expected I was going to have it, but he said I couldn't have.

Q. You expected to get the full amount. A. I expected to get the mortgage off.

Q. Your understanding was you were to pay the mortgages off when you got the check? A. There was no understanding about it.

Q. Didn't you just say that was your understanding? A. I hadn't a chance to get it, to understand it. That's what I would have done, but they wouldn't trust me with it. I asked why they wouldn't write the check out to pay the mortgage, but they stated when we had the agreement made out there was nineteen hundred dollars against the farm on the second mortgage, and they wouldn't take my word —

Q. Who wouldn't take your word? A. Charles 10
Collins and Kaighn.

Q. For what? A. That I paid off \$1000, and there was only nine hundred dollars left on the second mortgage. They had to look it up before they would give me my money.

Q. Who had to look it up? A. Kaighn.

Q. Did you tell Mr. Kaighn on that day the amount due on these mortgages? A. Yes, I told him.

Q. The mortgages were discussed there that day 20
at the settlement, were they not? A. They would not take my word.

(Question repeated.)

A. Yes, they were discussed.

Q. And it was stated there by somebody, by one of the three of you, that there were two mortgages against the property? A. Yes, sir.

Q. So you all understood that? A. Yes, sir.

30

Q. And that you had to take it out of the purchase price, that you had to pay them, you were not to get the full amount of the purchase price. A. I never wanted the money for the mortgages.

Q. You didn't want it? A. No, I expected Kaighn was going to pay them off, but he wouldn't take my word anything was paid.

Q. Was it your idea the amount of the mortgages were to be deducted from the settlement and Collins was to pay the mortgages off? A. Kaighn and Collins together.

Q. I am talking about Mr. Collins, the man who was buying the farm. Was that your idea? A. Either Kaighn or Collins; I couldn't pay it off.

Q. Kaighn didn't own the farm, did he? A. No.

Q. He wasn't buying the farm, was he? A. He
10 held the check so I couldn't cash it.

Q. Up to this time—I ask you something else. I ask you whether it was your idea when you came to that settlement that day with Mr. Collins, that you were to deduct the mortgages, amount of the mortgages, from the balance of the purchase price, and that Mr. Collins was then to pay them off? A. That day I expected they would make three checks, and give me what belonged to me and pay the mortgages off. I didn't want the mortgage money.

20 Q. You expected three checks. To whom were these checks to be drawn? A. One to James Engle, and the Burlington County Trust.

Q. Who was to draw that check? A. Charles Collins.

Q. What other checks were there to be? A. That is all except the expenses.

Q. One check to be drawn to the Engles, and one to the Burlington County Trust Company for their mortgages? A. Yes, sir.

30 Q. And the balance to you? A. That is what I expected.

Q. And that didn't happen, did it? A. No, sir.

Q. Instead of that, you got a check for the full amount? A. Yes.

Q. Did you read over this settlement statement before you signed it; March 25, 1921? A. I expect I did; I don't remember; I signed it.

Q. Did you see anything in that statement to the effect the mortgages were taken off from the balance of the purchase price, off the amount that is figured?

A. I don't see where it is taken off.

Q. On the contrary doesn't it show that the total amount due you on that settlement is \$16,855.68?

A. Was due me less the mortgages.

Q. Does it say that? A. No; but ——

Q. Does it say that? A. Don't say it there.

Q. I am asking you what it says. 10

Mr. Starr: It speaks for itself.

A. How was I to get ——

Q. Mr. Ames, you told us about going down to the office a little late. Did you get down late on the morning of the settlement, or the morning the agreement was signed? A. I was late on the morning of the agreement. I remember that. And I may have been ten minutes late on the settlement. 20

Q. You gave us quite a story about being late, and therefore the other fellow was there ahead of you. A. The day I referred to was the day of the agreement. The hail storm I told you about ——

Q. Mr. Ames, isn't it a fact that after the settlement had been concluded that day at Kaighn's office between you and Mr. Collins and Mr. Kaighn, Mr. Collins hurried out and you continued to talk with Mr. Kaighn about your father's transaction, in which settlement was then pending? A. I don't remember talking to him at all about my father's transaction that day. 30

Q. You are quite sure about that? A. Yes.

Q. Quite sure you didn't remain in the private office of Mr. Kaighn talking to him after Mr. Collins came out into the outer office? A. Not about the farm, no.

Q. About anything else? A. No.

Q. You don't recall that? A. No; the only thing I asked him that day, I asked him where the toilet was, that is the only thing.

Q. Where what was? A. The toilet. That's why I was detained a little back of Collins.

Q. Now, Mr. Ames, you and Mr. Collins did go out of the building together? A. No, Collins was out of the building as he said, two or three minutes
10 ahead.

Q. He said he went to the outer room ahead of you and you both went out together? A. No, Collins was down the steps before I was on them at all.

Q. Did you meet him at the bottom of the steps? A. Right at the door, very near on the pavement.

Q. You were considerably agitated when you left there, weren't you? A. I wasn't very much pleased. I didn't have any money or the farm either.

Q. Didn't you tell Mr. Collins when you met him
20 immediately after the settlement you thought you had made a mistake in endorsing that check over to Joseph Kaighn? A. I don't remember of it, no.

Q. Do you say you did not say that? A. I don't remember ever saying it, no.

Q. When did you finally get your check for the amount which you say was due you out of this transaction? A. From Kaighn?

Q. Yes. A. The 7th of April I think.

Q. Where did you get that? Where were you
30 at the time you received it? A. I was in Kaighn's office with my father.

Q. With your father? A. Yes, sir.

Q. In reference to your father's settlement? A. Yes, sir.

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

Q. Did you sign that on the date you have just mentioned, in April, when you and your father went

to the office of Joseph Kaighn? A. I must have signed it there; I don't remember it; that is my signature.

(Paper offered in evidence and marked Exhibit P10 for the plaintiff.)

Mr. Stockwell: It is admitted that this paper just marked is one of the papers taken from the files of Joseph Kaighn of Kaighn and Wolverton. 10

Mr. Starr: Yes.

Q. Isn't that a statement, Mr. Ames, between yourself and Mr. Kaighn as your attorney? A. I don't think so.

Q. Won't you please read it over, and then tell me what you think? A. I expect it was both of us like he told me it was.

(Exhibit P10 for the plaintiff read to the jury by Mr. Stockwell.) 20

Q. Now, Mr. Ames, will you kindly tell us why it was that you signed a statement like that, or Mr. Kaighn presented to you a statement like that, if in fact Mr. Kaighn was Mr. Collins' lawyer, upon the payment of that check to you of \$16,855.68? A. I expected the both of us paid the same amount, like he told me, we was going to go fifty-fifty with every- 30
thing.

Q. There is no question but what Mr. Kaighn was charging you with the amount of these two mortgages both principal and interest? A. He charged me that, yes.

Q. In that statement? A. According to that statement.

Q. Charged you with drawing deed, stamps on deed, cancelling mortgages, and attorney's fees? A. That is supposed to be half of it.

Q. He charges you with all of it? A. On that paper —

Q. Does it say one-half there? A. It don't say it.

Q. Why don't that paper say one-half? A. I didn't think it was going this way; I thought he was straight too.

10 Q. You thought he was straight too? A. As far as I knew.

Q. Your father had known him before you, hadn't he? A. I expect he had.

Q. Well known in Burlington County and around Marlton? A. Yes, sir.

Q. Very widely known in that vicinity, wasn't he? A. Yes, but he was not my lawyer.

20 Q. I am asking you whether he was widely known there. You thought he was honest? A. Yes, sir; I thought he was honest or I would never have went there.

Q. You thought he was honest, or you would never have trusted your money to him in your father's transaction? A. I thought he was honest, yes.

Q. Let's get back for a minute to the Engle mortgage. I thought you said Mr. Collins would not take your word about the amount due on the Engle mortgage. There was some dispute about the buildings before the settlement? A. Yes, sir.

30 Q. Between the agreement and the settlement? A. Yes, sir.

Q. You went to Mr. Collins, didn't you, and wanted another \$1000.00 on account? A. Mr. Collins came to me.

Q. Didn't you ask Mr. Collins, demand from him \$1000.00 more on account before the settlement? A. Yes; when he wanted to tear the barns down.

Q. Didn't you tell him you wanted it for the purpose of paying off the Engle mortgage? A. I said Mr. Engle would not be satisfied to tear two barns down out of three.

Q. Didn't you tell him you wanted it to pay off the Engle mortgage? A. I don't remember ever having told him that.

Q. You haven't paid part of either of these mortgages? A. I put the agreement against them.

Q. You did pay \$1000.00 on account of the Engle mortgage between the agreement and the settlement? A. Yes, sir, that is the way I did; the mortgage had to be paid off \$1000.00 every year. 10

Q. But you did pay \$1000.00 on account of it between the date of the agreement and the settlement? A. Yes, I had to do that.

Q. That was why Mr. Collins paid you the additional \$1000.00 before settlement? A. Mr. Collins didn't pay me the \$1000.00 until December, and that was in October. The reason he paid that, he wanted to tear down two barns out of three, and if Mr. Engle kicked I had no money to pay the second mortgage off with. 20

Q. I thought I understood you to say that you required him to pay \$1000.00 because the Engles would not be satisfied? A. I didn't tell him that —

Q. And that you did take the \$1000.00 and pay it on account of the mortgage? A. I said if Mr. Engle made a kick I had it to pay.

Q. Have you paid any part of any one of these mortgages now? A. Since the settlement? 30

Q. Yes. A. No, sir.

Q. Paid any interest on either one of them? A. No, sir.

Q. You refused to pay either one, or any interest on them, is that correct? A. Yes, sir.

60 *Frank C. Ames, Jr.—Re-direct—Frank C.
Ames, Sr.—Direct—Frank C.
Ames, Sr.—Cross*

Re-direct examination by Mr. Starr:

Q. What was said at the settlement in the presence of Collins and Kaighn about the Engle mortgage and the amount due on it? A. I told them I had to pay off \$1000.00 between the agreement and the settlement. They wouldn't take my word and said they
10 would have to look into it.

Q. Who said that? A. Kaighn; and that is how I thought he was keeping the check back on me.

Q. In the presence of Collins? A. Yes, sir, we were all sitting around the table in the room together.

FRANK C. AMES, SR., sworn for the defendant.

20 Direct examination by Mr. Starr:

Q. Mr. Ames, are you the father of this gentleman?
A. Yes, sir.

Q. Did you and your son have a real estate transaction with reference to the purchase of one of your farms by him? A. Yes, sir.

Q. Who did Mr. Kaighn represent in that transaction between you and him? A. I took my boy to
Mr. Kaighn. Mr. Kaighn is my lawyer.

30 Q. You took him there? A. I took him there.

Q. To do what? A. To have the agreement drawn up for that farm I sold to my son.

Cross-examination by Mr. Stockwell:

Q. Did you say Joseph Kaighn in the transaction represented you entirely? A. Yes, sir.

Q. Mr. Ames, won't you please tell me if either one of these signatures is yours? A. Yes, the upper one is mine.

Q. The upper one is yours? A. Yes.

Q. I want to read this to you, from this document, and ask you if it is true. "And these deponents," referring to yourself and son, "And these deponents further say that there is a dispute between the said Frank C. Ames, and Frank C. Ames, Jr., as to whether the said Joseph Kaighn or the firm of Kaighn and Wolverton, became indebted to the said Frank C. Ames or to the said Frank C. Ames, Jr., by reason of the said appropriation of the said sum of \$3538.50 by the said Joseph Kaighn or by the said Kaighn and Wolverton, and that the above claim is filed by these deponents jointly, pending settlement of the said dispute, and that it is understood and agreed between them, the said Frank C. Ames and Frank C. Ames, Jr., that the above claim is filed by them jointly pending said dispute, without prejudice to the rights of either of them in respect to the said dispute, and that the filing of the said claim and of this affidavit shall not under any circumstances, be taken to prejudice the rights of the said Frank C. Ames or of the said Frank C. Ames, Jr., in any dispute or litigation or proceedings which may hereafter be had between them respecting the said money so unlawfully retained by the said Joseph Kaighn, or by the said Kaighn and Wolverton, as aforesaid." Do you remember signing that? A. I do.

DEFENDANT RESTS.

CHARLES A. COLLINS, recalled.

Direct examination by Mr. Stockwell:

Q. After you left the rooms of Kaighn and Wolerton on the day of settlement in this transaction did you have a conversation with Ames, the defendant? A. I did.

10 Q. When was it? A. Before we got into the car, a little bit, and after we started. I took Mr. Ames out to Haddonfield with me. Of course we talked about various things on the way out.

Q. Will you kindly tell me what he said to you with reference to giving a check or taking a check?

A. Mr. Ames expressed some doubt to me—

Mr. Starr: I object to that.

20 A. (Continued) Mr. Ames asked me if I thought he had done a right thing by letting Mr. Kaighn have that check, turning that check over to Mr. Kaighn.

Q. What was his manner at that time? A. Well, he was feeling skeptical, he was thinking perhaps he hadn't done the right thing.

Q. What did you tell him? A. I told him I supposed it ought to be alright.

30 Q. Is it true that you were at the office of Joseph Kaighn on the date of settlement in advance of the arrival of Mr. Ames? A. It is not true; Mr. Ames was in the inner office when I went in there.

Q. Is it true that you suggested to Mr. Ames the employment of Kaighn? A. It is not.

Q. What, if any, information did you furnish to Mr. Kaighn for this settlement, did you furnish anything? A. I did not.

Q. Did you pay anything to Mr. Kaighn for the preparation of the original agreement? A. I don't remember that I did.

Q. That is your recollection now, is it? A. I don't remember that I did.

Q. Was there any arrangement at all, in writing or orally, to the effect you were to pay any part of the fees of Joseph Kaighn or Kaighn and Wolverton, in respect to this transaction? A. Nothing said; I was supposed to——

10

Q. Wait. A. It wasn't to cost me anything for the transaction whatever.

Q. Did you ever agree to pay one-half of the expenses? A. I did not.

Q. Did you ever pay any part of the expenses? A. Nothing.

Q. Was any bill ever sent to you? A. No, sir.

Q. Except one-half of the survey? A. Yes.

Q. And that was provided for in the agreement expressly, was it not? A. Yes, sir.

20

Q. Mr. Ames has referred to the conversation he said he had with you two or three days before the settlement, in which an item of rails was involved, you heard the conversation, what did you say about it? A. I remember it. It was not two or three days before. There was a conversation about some rails. It was in the winter time, but I don't remember what was said—it went in one ear and out the other.

Q. Did you say anything, or say that Kaighn represented you, or he was to go to Kaighn as your lawyer? A. I don't remember anything about that. I dropped it. I think he was moving the rails to the farm he bought from his father, and I questioned whether that was the right thing to do.

30

Q. Did you ever tell Mr. Ames you did not expect to be at the settlement at all? A. I don't remember that.

Q. You don't know whether you did or not? A. I did not.

Q. Did you ever tell him if you were not there Mr. Kaighn would look after it for you? A. I did not.

Q. Judge Starr produced a letter, in the form of a letter, dated March 25, 1921, addressed by Joseph Kaighn to Frank C. Ames, Jr., marked Exhibit D6. Mr. Ames, I understand it, says that was delivered
10 to Ames in your presence and read in your presence. Is that true? A. I certainly don't remember anything, ever seeing that paper before, don't remember it ever being dictated or anything.

Q. Did you ever hear anything said during that settlement like the language in that letter? A. I did not.

Cross-examination by Mr. Starr:

20 Q. With reference to that blue paper, you say you don't remember seeing it? A. No, sir.

Q. That is as far as you will go, isn't it? You won't say that that paper was not shown to you in your presence? A. I don't believe that paper—

Q. Will you say positively it was not? A. No, I won't go that far.

Q. Sure. Now, you started to qualify your answer with respect to the question that Mr. Stockwell put to you about the possibility of your not being at
30 the settlement and Kaighn would represent you; you said you didn't recollect? A. I never made any such statement.

Q. Was there any question about your being at the settlement, any doubt about it? A. Never in my own mind:

Q. Was there any conversation between you and

Ames about the fact you might not be there? A. No, sir.

Q. Of any kind? A. No, sir.

Q. What was the conversation about the rails?
A. I was telling Mr. Stockwell—as a matter of fact I think Mr. Ames was taking the rails—

Q. What was the conversation? A. I asked him if it was the right thing to do.

Q. Is that all? A. Yes, I dropped it, let him go ahead and take them. 10

Q. Was anything said about Kaighn? A. No, sir.

Q. Did Mr. Ames tell you why he thought he ought not to have permitted Kaighn to keep the check?
A. No, sir.

Q. He simply expressed some doubt to you as to whether it was the right thing to leave the check with Kaighn? A. Yes, sir.

Q. And you told him it was alright? A. I told him I supposed it was alright.

Q. Where was that conversation, just as you got 20
in the machine? A. I think so.

Q. Before you started to go home? A. Almost immediately when we started, when we came out.

Q. Immediately after you came out? A. That was practically the first thing we talked about.

Q. The first thing you talked about after you came out of Kaighn's office? A. Yes, I think so.

Q. Now, who made this survey? A. What do you mean, survey?

Q. Survey of the farm. A. Mr. Hollingshead. 30

Q. Now, did the description that he prepared from the survey get to Kaighn so that he incorporated it in the deed? A. I don't know.

Q. You don't know? A. Probably Mr. Hollingshead sent it, I don't know.

Q. Did you suggest that Hollingshead send it to Kaighn? A. I don't remember anything about it.

Q. How did Hollingshead know Kaighn was interested in the transaction? A. I don't know that.

Q. But you had all the dealings with Hollingshead about making the survey? A. Yes, sir.

Re-direct examination by Mr. Stockwell:

Q. You were to make the survey? A. At my option. If I chose the survey was made, we were to go fifty-fifty on the expenses.

BOTH SIDES REST.

Mr. Starr: I desire to make an application, your Honor, to direct a verdict for the defendant on the ground that it appears in the testimony that Kaighn, when he accepted the money, retained the money, to pay these mortgages was the agent of Collins; either the sole agent of Collins or the agent of Collins jointly with Ames; and under these conditions Collins would be charged with any taking of the funds by Kaighn. My motion is based upon the fact that there is no evidence which would justify the jury in finding that Kaighn in these circumstances was the exclusive agent of Ames.

30 Mr. Stockwell: On the contrary, I will move to direct a verdict on behalf of the plaintiff on the ground that not only is there no evidence whatever to sustain the statements which Judge Starr has just made, but the evidence does show conclusively that the defendant was obliged to cancel the mortgages upon this property. That was under his

written agreement, upon the payment of the purchase price. That he received that purchase price in the form of a check and by his own act he transferred that check to some other party and by so doing he incurred all risks. He had been paid in full, there was nothing further for Collins to do. As soon as Collins paid the price there was nothing for him to do. The amounts of the mortgages are not in dispute, the amount due on them is agreed upon. I see nothing whatever to go to the jury. 10

The Court: This case, members of the jury, is based upon a written agreement dated June 16, 1920.

Mr. Starr: There is no right of recovery with respect to the first count of the complaint, because the deed containing the covenants of general warranty supersedes any right which might be exercised by the plaintiff under the contract of sale. 20

CHARGE OF THE COURT.

Judge Wells: The testimony shows that on June 16th, 1920, there was an agreement made between Frank C. Ames, Jr., and Charles A. Collins, who are the defendant and plaintiff respectively in this case, and by that agreement Ames agreed to sell to
10 Collins a certain farm in the Township of Delaware and County of Camden, containing about ninety-three acres, for the sum of two hundred dollars per acre as determined by a survey to be made at the option of Collins. And Collins was to pay the purchase price, one hundred dollars on the delivery of the agreement, and the balance of the purchase price on the twenty-fifth day of March, 1921.

It was agreed that the settlement should be made at the office of Kaighn and Wolverton, in Camden,
20 on March 25th, 1921, and at that time and place, Ames, on the receipt of the payment for the farm, should, at his own cost and expense, execute, acknowledge and deliver to Collins a proper deed with covenants of general warranty, conveying and insuring to him the fee simple of said premises, free and clear of all liens and encumbrances whatsoever.

Now, it appears that there were two mortgages on this farm in question and that on the date of settlement they met at the office of Kaighn and Wolverton, and Mr. Collins paid the full purchase price
30 to Ames in the shape of a check, which was made payable to Frank C. Ames, Jr., for \$16855.68, signed by C. A. Collins, and drawn on the Moorestown Trust Company. The testimony shows that this check was endorsed on the back, "Pay to the order of Joseph Klaighn," was signed by Frank C. Ames, Jr., and turned over to Kaighn.

The question is whether Kaighn was the agent of Ames or Collins for the satisfaction of these mortgages. Ames does not claim that Kaighn was the exclusive agent of Collins in this transaction. There is a diversity of testimony as to that, much of which has very little bearing on the case. The testimony is that Collins has heretofore employed Kaighn, and that Ames has heretofore employed Kaighn. The real question is, who was Kaighn representing at this settlement? And the testimony of Ames himself is that he was representing both parties. That he paid part of the bill and Collins paid part of the bill for the services rendered, and as Ames himself says, "He was supposed to do all that was to be done to effect the settlement." 10

Under the circumstances it seems to the Court that inasmuch as the agreement required Ames to cancel these mortgages, in other words, to give a good, marketable title to this property in question, free from all encumbrances, that it was incumbent upon him to cancel these mortgages. It is undisputed that he signed and endorsed this check, and that it was placed in front of him and that Kaighn took it. 20

Now, if he were the agent of both parties, that is, Kaighn, in this transaction, then he would be the agent of Ames to do that which Ames was required to do under the agreement, namely, to give a clear title to the property in question. And I therefore see nothing for the jury to consider in this case, and direct that you shall find a verdict for the amount which it is agreed is due, if anything, namely, \$4600.26. 30

Mr. Starr: Will your Honor allow an exception; and may it appear upon the record that I do not

assent to what your Honor has said with respect to our claim. I suggested to your Honor that I thought the testimony showed that with respect to the paying of these mortgages, Kaighn was the exclusive agent of Collins. I do not waive our position with respect to that. At least he was the agent of both. We do not agree to anything in the matter.

Judge Wells: That may appear upon the record,
10 and an exception will be allowed.

(Whereupon the defendant, by his counsel, prays a bill of exceptions, which is hereby allowed and sealed.)

HAROLD B. WELLS,
Judge.

20

30

POSTEA AND JUDGMENT ON DIRECTED
VERDICT.

(Filed Nov. 24, 1922.)

NEW JERSEY SUPREME COURT.
BURLINGTON COUNTY.

10

CHARLES A. COLLINS,
 Plaintiff, }
 v. } Postea and Judgment
FRANK C. AMES, JR., } on Directed Verdict.
 Defendant. }

This action came regularly on for trial before the Honorable Harold B. Wells, sitting for the Circuit Court, to whom the same was duly referred, 20 with a jury, at Mt. Holly, on the 16th and 17th days of November, 1922, at the Burlington County Circuit, in the presence of counsel for the respective parties; and the parties having submitted their case and counsel having been heard thereon, the Court directed a verdict in favor of the plaintiff for (\$4600.26) forty-six hundred dollars and twenty-six cents, and the jury rendered a verdict accordingly.

Whereupon it is adjudged that the plaintiff recover of the defendant the sum of forty-six hundred 30 dollars and twenty-six cents (\$4600.26) and his costs to be taxed.

HAROLD B. WELLS,
Judge.

A true copy.
ENOCH L. JOHNSON,
Clerk.

RULE FOR JUDGMENT.

(Filed Nov. 24, 1922.)

NEW JERSEY SUPREME COURT.

10

CHARLES A. COLLINS,

Plaintiff,

v.

FRANK C. AMES, JR.,

Defendant.

Action at Law.

On Postea.

It is ordered that judgment be and hereby is entered in favor of plaintiff and against the defendant for the sum of four thousand six hundred dollars and twenty-six cents besides costs to be taxed *nisi*.

Entered November 24, 1922.

On motion of

BLEAKLY & STOCKWELL,

Attorneys.

\$4600.26

49.27

30 \$4649.53

A true copy.

ENOCH L. JOHNSON,

Clerk.

REASONS FOR REVERSAL.

(Filed Jan. 17, 1923.)

NEW JERSEY COURT OF ERRORS AND
APPEALS.

10

CHARLES A. COLLINS,
Plaintiff-Respondent, }
v. } Reasons for Re-
FRANK C. AMES, JR., } versal.
Defendant-Appellant. }

The appellant hereby assigns the following reasons for the reversal of the judgment of the Supreme Court, entered in the above entitled matter. 20

1. The learned trial Judge erroneously directed the jury to find a verdict in favor of the plaintiff for the full amount claimed by him.

2. The learned trial Judge erroneously refused to direct the jury to find a verdict in favor of the defendant.

LEWIS STARR, 30
Attorney of Appellant.

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JANUARY 1950

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New Jersey Court of Errors and Appeals

CHARLES A. COLLINS, <i>Plaintiff-Respondent,</i> v. FRANK C. AMES, JR., <i>Defendant-Appellant.</i>	}	On Appeal from the Supreme Court. Exhibits.	10
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SUPPLEMENT TO STATE OF CASE.

Exhibit P1, articles of agreement dated June 16, 1920, copy of which is attached to the complaint, C. 20 p. 5.

EXHIBIT P2.

Statement of settlement between Frank C. Ames, Jr. and Charles A. Collins in matter of purchase by Charles A. Collins of property situate in Township of Delaware, County of Camden, State of New Jersey. 30

Purchase price, 90.106 acres @ \$200	18,021.20
Credits:	
Paid on account	1100.00
Adjustment of taxes for year 1921 on basis of 1920 tax \$174.29,	

2 mo. 24 days	41.27	
one-half cost survey	24.25	
		<hr/>
Total credits	1165.52	
Balance due in settlement	16855.68	
		<hr/>
	18021.20	18,021.20

March 25, 1921

Above statement is examined and approved.

10 (Signed) Frank C. Ames, Jr.
Charles A. Collins.

P3.

No. 1358. Moorestown, N. J., 3/25/1921.

Moorestown Trust Company

Pay to the order of Frank C. Ames, Jr., \$16855.68

20

100

Sixteen Thousand Eight Hundred Fifty five 68/100
Dollars.

C. A. Collins

Endorsed:

Pay to the order of

Joseph Kaighn

Frank C. Ames, Jr.

Joseph Kaighn

30

Exhibit P4 & 5. Memo. of bond and mortgage, Frank C. Ames, Jr. to Florence R. Engle, et al., dated October 9, 1919, and recorded Book 160 page 5, to secure the sum of \$1900, the sum of \$1000 payable on account of principal at the expiration of one year from the date thereof and the balance within two years from the date thereof, covering 93 acres of

land, more or less, and the same premises covered by said Agreement, Exhibit P1.

Exhibit P6. Memo. of Deed, Frank C. Ames, Jr. (widower) to Charles A. Collins, dated March 25, 1921, recorded Book 484 of Deeds, Camden County, page 205 &c., covers same premises as in the agreement, P1.

Exhibit P7, 8 and 9 are bond, mortgage and assignment Ames to the Burlington County Trust Company.

10

P10.

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

Frank C. Ames and Frank C. Ames, Jr., of the Township of Delaware, County of Camden and State of New Jersey, being duly sworn according to law, 20 upon their respective oaths, say that there is due to them, or one of them, from the Estate of Joseph Kaighn, deceased, the sum of \$3538.50, together with interest thereon from April 7th, 1921, and that the particulars of their said claim against the estate of Joseph Kaighn, deceased, are as follows, viz:

That on April 7th, 1921, this deponent Frank C. Ames conveyed his farm in Delaware Township, Camden County, New Jersey, to this deponent, Frank C. Ames, Jr., for the sum of \$12,000.00; that 30 these deponents met at the office of Joseph Kaighn in the City of Camden on that day for settlement; that upon the settlement, it was determined that the amount due from this deponent, Frank C. Ames, Jr., was the sum of \$7868.79, for which amount this deponent, Frank C. Ames, Jr., drew his check to the order of Kaighn & Wolverton, and delivered the

same to the said Joseph Kaighn; that out of said sum of \$7868.79, this deponent, Frank C. Ames, received the sum of \$4330.29, leaving a balance of \$3538.50 which was to be applied by the said Joseph Kaighn or by the said Kaighn & Wolverton, to the payment of the principal and interest of a certain mortgage for \$3500.00 then held by Elma E. Lippincott upon the said farm; that the said sum of \$3538.50 was never applied by the said Joseph
10 Kaighn, or by the said Kaighn & Wolverton, to the payment of the said mortgage held by the said Elma E. Lippincott, but that the said sum of \$3538.50 was retained by the said Joseph Kaighn or by the said Kaighn & Wolverton, and never used for the purpose of the payment of the said mortgage.

And these deponents further say that there is due to them or one of them from the estate of Joseph Kaighn, deceased, the said sum of \$3538.50, together with interest from the seventh day of April, 1921, at
20 the rate of six per cent per annum.

And these deponents further say that there is a dispute between the said Frank C. Ames, and Frank C. Ames, Jr., as to whether the said Joseph Kaighn, or the firm of Kaighn & Wolverton, became indebted to the said Frank C. Ames or to the said Frank C. Ames, Jr., by reason of the said appropriation of the said sum of \$3538.50 by the said Joseph Kaighn or by the said Kaighn & Wolverton, and that the above claim is filed by these deponents
30 jointly, pending settlement of the said dispute, and that it is understood and agreed between them, the said Frank C. Ames and Frank C. Ames, Jr., that the above claim is filed by them jointly, pending said dispute, without prejudice to the rights of either of them in respect to the said dispute, and that the filing of the said claim and of this affidavit shall not under any circumstances, be taken to prejudice the

rights of the said Frank C. Ames or of the said Frank C. Ames, Jr., in any dispute or litigation or proceedings which may hereafter be had between them respecting the said money so unlawfully retained by the said Joseph Kaighn, or by the said Kaighn & Wolverton, as aforesaid.

And these deponents further say that in filing this claim, these deponents do not, by filing this claim, waive, or intend to waive any claim which they or either of them may have against Charles A. Wolverton, surviving member of the firm of Kaighn & Wolverton, or any other person who may be liable upon this claim, the right to claim said sum from the said Charles A. Wolverton, surviving partner as aforesaid, or any other person liable therefor, and to sue thereon should he or they be found liable for the same, being hereby expressly waived.

Frank C. Ames, Sr.

Frank C. Ames Jr.

Sworn and subscribed before me,
this 25th day of November, 1921

Willard F. Lippincott
Master in Chancery
of New Jersey.

20

P11.

Statement of settlement between Frank C. Ames, Jr. and Joseph Kaighn, Attorney; 30
Balance due in settlement with Charles A. Collins for sale of farm situate in Delaware Township, Camden County, N. J. (as per statement between Frank C. Ames, Jr. and Charles A. Collins), 16,855.68

	Principal of mortgage held by Burlington County Trust Company, 166-670	\$6,000.00	
	6 months' interest on said mortgage due Apr. 3, 1921	180.00	
	Principal of Mortgage held by Florence R. Engle, and others, originally \$1900 and since reduced to \$900, (168-5)	900.00	
10	6 months' interest on said mortgage due Apr. 9, 1921	27.00	
	Drawing Deed, Ames to Collins	7.50	
	Revenue stamp on said deed	11.50	
	Cancelling above 2 mortgages	.50	
	Attorneys fee for services	25.00	
	Total	7,151.50	
	Balance due Frank C. Ames, Jr.	9,704.18	
20		16,855.68	16,855.68
	Above statement examined and approved, April 1921.		
			Frank C. Ames, Jr.

DEFENDANT'S EXHIBITS.

EXHIBIT D1.

30 APPLICATION FOR LOAN OF \$10,000.

The undersigned hereby applies to the MOORESTOWN TRUST COMPANY, of Moorestown, N. J., for a loan of ten thousand dollars, for the period of one years, with interest at the rate of six per cent, per year, payable semi-annually, the repayment thereof to be secured by a mortgage on the follow-

ing described real estate, which shall be a first-lien thereon:

Location on the Marlton Pike, Delaware Township, Camden Co., N. J.

Size of Lot 90 acres. Size of Building House and large barn

Value of Land \$ and Value of Buildings \$18,000—

Annual Rent \$. Insured for \$. When Built

Present encumbrances 10

Last year's assessed valuation \$

Name of Owner Charles A. Collins (single)

Wife's name

P. O. Address Moorestown

The applicant agrees to furnish, at his own expense, full and complete searches, and title insurance policy to the amount of the mortgage, if required, and to pay the costs of examination as to the value of the property offered, and, also, to pay fee 20 for drawing execution of, and recording the mortgage.

Policy of fire insurance, in an acceptable Company, for \$ will be assigned as collateral security.

If the mortgage now covering the property is to be assigned, a declaration of "no set-off" will be furnished.

Should the application not be approved, by reason of defect in title or for any other cause, the applicant further agrees to pay all expenses incurred 30 prior to the discovery of such defect.

Charles A. Collins
Applicant.

Dated January 31st 1921.

REPORT ON ABOVE APPLICATION

We have examined the above described property and are of the opinion that the same, is worth at least 15250.00 dollars, and that it would bring that sum if offered for sale

The ground is worth \$11250.00
The Improvements are worth 4000.00

10 Total value \$15250.00
and we recommend that the loan be granted.
Dated January 31st 1921 N. J.

John C. Dudley
Ellis H. Rudderow
Aubrey S. Walton
Appraisers.

20

EXHIBIT D2.

Moorestown, N. J. 1/1 1921

Mr. Chas Collins

To S. Thornton Hollinshead, Dr.

To surveying calculating area and making
plans of the Ames farm

48 50

30

Received Paym't,
S. Thornton Hollinshead
Per
C. I. H.

EXHIBIT D3.

Hillman Farm	Brick Farm
CHARLES A. COLLINS	
Moorestown, N. J.....192	
12/29/20	

Received of Charles A. Collins One thousand dollars on account of purchase price of farm bought 10 from me.

F. C. Ames Jr.

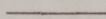
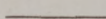


EXHIBIT D4.

20

Tax bill rendered in the name of Frank C. Ames, Jr., for taxes for 1920 on farm sold to Collins, showing taxes paid in full.



30

EXHIBIT D5.

Certified copy of a mortgage dated March 25, 1921, made by Charles A. Collins to the Moorestown Trust Company to secure \$10,000., covering property purchased from Ames.

EXHIBIT D6.

March 25, 1921.

To Frank C. Ames, Jr.:

This is to advise you that in the settlement made this day between yourself and Mr. Charles A. Collins, for the purchase by Mr. Collins of your farm, consisting of 90.106 acres of land, situate in the Township of Delaware in the County of Camden and State of New Jersey, that the balance due you in settlement amounts to \$16,865.68, which amount we are retaining until the two mortgages, one of \$6000.00 and another of \$1900.00, since reduced to about \$900.00, together with the interest thereon, are fully paid and satisfied, and cancelled of record, at which time the balance, less our expense in the matter, is to be turned over to you by us.

Joseph Kaighn

NEW JERSEY COURT OF ERRORS AND
APPEALS.

CHARLES A. COLLINS,
Plaintiff-Respondent,

v.

FRANK C. AMES,
Defendant-Appellant.

BRIEF OF PLAINTIFF-RESPONDENT.

FACTS.

Plaintiff, Collins, bought from defendant, Ames, a farm in Camden County and the arrangement between the parties was covered by written agreement dated June 16, 1920. A copy of this contract is attached to the complaint, found on pages 5 to 8 of the State of the Case. The agreement was drawn by Joseph Kaighn, attorney, and was signed by the parties in Kaighn's office in Camden.

Settlement under this agreement was to be had March 25, 1921, at the office of Kaighn & Wolverton in Camden:

“At which time and place the said party of the first part (Ames) on receiving the payment at the time and in the manner above mentioned, shall, at the proper cost and expense of said party of the first part, execute, acknowledge

and deliver to the said party of the second part, or to his heirs and assigns, a proper deed with covenants of general warranty, conveying and assuring to him the fee simple of said premises, free and clear of all liens and encumbrances whatsoever; the title to said premises to be good and marketable and such as will be insured by the West Jersey Title and Guaranty Company'' (Agreement, page 6, of Record).

On March 25th, the date mentioned in the agreement for settlement, plaintiff and defendant, being the vendee and vendor, went to the office of Joseph Kaighn (Kaighn & Wolverton) in Camden to make the settlement. Collins says Ames was in Kaighn's office when he arrived (p. 15, l. 30). Ames says that Collins arrived there first (p. 42, l. 12). A statement was then presented to Mr. Collins by Joseph Kaighn (Exhibit P2, p. 1 of Exhibits), showing the balance due by the purchaser to the owner to be the sum of \$16,855.68, and this settlement statement so produced was signed by the purchaser and seller in the following language:

''March 25, 1921 Above statement is examined and approved. Signed Frank C. Ames, Jr.

Charles A. Collins.''

(Page 16, line 22, *et seq.*, to line 15, page 17.)

The parties were around a table in Kaighn's office for the settlement. Upon receiving the statement (Ex. P2) Collins, the purchaser, produced a blank check on the Moorestown Trust Company, of Moorestown, N. J., and drew his check on said bank to the order of Frank C. Ames in the sum of \$16,855.68 (Ex. P3), signed the check and pushed it across the table or handed it to Mr. Ames. There-

upon Ames handed the check to Kaighn and Kaighn endorsed in his own hand on the back of the check the words:

“pay to the order of Joseph Kaighn”

then handed it to Mr. Ames and Ames signed the endorsement and handed the check to Kaighn. (See testimony of both Ames and Collins cited on subsequent pages of this brief.) Kaighn deposited the check in his own account, and the check was paid by the Moorestown Trust Company March 29, 1921, when finally presented in the usual course of banking practice (Check, Ex. P3, page 2 of Exhibits).

At the time of settlement and after payment of the check, a deed of general warranty was made and executed by defendant, Ames, and wife, to Charles A. Collins, dated March 25, 1921, and at the same time a mortgage was executed by Charles A. Collins (then a single man) to the Moorestown Trust Company in the sum of \$10,000. Kaighn was attorney for the Moorestown Trust Company (page 21, line 15) which made a loan to Collins on a first mortgage on this property to the amount of \$10,000. Kaighn made the searches on the property and at the settlement retained the deed and the mortgage to record them (p. 21, line 23).

Kaighn died May 2, 1921, either before the papers were received from the County Clerk on being recorded or shortly thereafter. The recorded deed was found in Kaighn's file after his death and delivered to Collins (page 23, line 12).

On March 25, 1921, being the date of settlement, there were encumbrances upon the property in the shape of two mortgages, one held by the Burlington County Trust Company in the sum of \$6,000 and accrued interest and the other held by one Engle in the sum of \$900.00 and interest. Defendant Ames did not remove these encumbrances and did not pay

the amounts due on those mortgages to the mortgagees. As to the smaller mortgage held by one Engle, plaintiff Collins was obliged to pay this off because of threats of foreclosure (bottom of 21 and 22).

Ames and Collins each filed a claim against the Kaighn Estate covering this loss, without prejudice to their rights in this suit and then stipulated that all dividends payable thereon from the Kaighn Estate should be turned over to the Burlington County Trust Company and be applied on the large mortgage on the property (page 22 bottom). This was done and at the time of the trial the testimony of the officer of the Burlington County Trust Company showed that the amount then due the mortgagee was \$3455.40 for principal and interest thereon, at 6% from April 3, 1922, and he further states that the total receipts from dividends upon the claims filed with the Kaighn Estate aggregated \$2904.60 (page 37). In other words, \$2544.60 was credited on the principal and \$360.00 to interest (pp. 37, 38).

The amount of the verdict directed by the trial Judge represents the moneys paid by Collins for principal and interest on the Engle mortgage and the amount due on the date of the trial upon the mortgage held by the Burlington County Trust Company, after deducting the credits from the Kaighn Estate.

ARGUMENT:

1.

If the essential facts were undisputed, it was for the Court to determine, as a question of law, whether Kaighn was the agent or attorney of Ames in taking and holding the money paid by Collins to Ames or whether he was the agent of Collins.

2 *Corpus Juris*, page 961:

“But whether or not there is any evidence tending to prove the existence of an agency is for the Court to determine, and if there is none, or if it is so slight that a finding thereon of the existence of the agency would not be sustained, the question should be disposed of by the Court alone, and should not be submitted to the jury; nor should the question be submitted to them where the facts relating to the existence of the agency are undisputed and are such that only one reasonable conclusion can be drawn therefrom.”

Belcher v. Manchester B. & L. Association, 74 N. J. L. 833 (E. & A.):

“When the facts are undisputed, the question whether the agent has the requisite authority to bind the principal in the receiving of moneys or the endorsing of checks is one for the Court to determine.

“The trial Judge directed a verdict for the plaintiff. It being already found that the facts touching the authority of the agent were not in

dispute, it is almost superfluous now to attempt to justify the direction.

“When the facts are not in dispute and the inferences from them are not in doubt, the question at issue is one of law for the Court and the direction of a verdict is not erroneous.”

Gulick and Holmes v. Grover, 33 N. J. L. page 473:

“When the facts are undisputed, the question whether an agent has the requisite authority to bind his principal, is a question of law for the Court, whether such authority is sought to be sustained by a previous authorization or by subsequent ratification.”

Ryle v. Manchester B. & L. Association, 74 N. J. L. 840 (E. & A.):

“When the facts are not in dispute, the question as to the authority of an alleged agent to act for the principal is one for the Court to determine.”

2.

The undisputed and admitted facts show conclusively that Kaighn was not the agent of or attorney for Collins, the plaintiff, in Kaighn's acceptance of the check given in settlement or in the retention thereof, or the collection of the money thereon. Such essential and admitted facts are as follows:

When Collins and Ames orally agreed on the terms of sale, they agreed to have Joseph Kaighn draw an agreement of sale. They both went to Kaighn's office, the agreement was drawn by Kaighn and they then and there executed it. Ames says (page 29) that Collins arrived at the office first, and

says that the agreement was all prepared when he arrived; Collins on the other hand says that this is not correct; that he was not there first and that the agreement was prepared after they both arrived (page 25, bottom, page 26, top). Ames says that he paid one-half of the charge of drawing the agreement and Collins the other half (p. 40). Collins says he has no recollection of paying any part for drawing the agreement and Ames was to pay all expenses; he was to get the farm net (p. 63, line 1).

On the date of the agreement or before \$500 was paid on account, and between the signing of the agreement and the date of settlement, an additional \$1,000 was paid on account, leaving due on the date of settlement the sum of \$16,855.68. On the date of settlement, Collins and Ames went to the office of Kaighn to make their settlement. Kaighn prepared a typewritten "statement of settlement," dated March 25, 1921, and handed it to the parties (Ex. P2). This showed the balance due from Collins to Ames to be \$16,855.68. The original of this "statement of settlement" was examined and approved by both Ames and Collins and each signed their approval on this statement in the following language:

"Above statement is examined and approved.

Signed Frank C. Ames, Jr.

Charles A. Collins."

After looking over this statement Collins took a blank check of the Moorestown Trust Company, which he had brought with him, and then in the presence of the parties filled out this blank check and made it payable to Frank C. Ames, Jr., in the sum of \$16,855.68, signed the check, dated it March 25, 1921, and passed it across the table to defendant Ames (Collins, p. 17, lines 1-15, and p. 29, lines 8 to 22); (Ames, p. 42, line 31).

Ames and Collins differ somewhat in their testimony as to what was said and what was done immediately following the passing of this check across to Ames.

Collins says (p. 18, l. 16):

“Mr. Ames asked Mr. Kaighn, ‘What shall I do with the check?’ and Mr. Kaighn said, ‘Endorse that check to me and I will pay off the mortgages on the farm and send you check for the balance.’

Q. When Mr. Kaighn said that to Mr. Ames, what did Mr. Ames do?

A. Mr. Kaighn endorsed the check, that is Mr. Kaighn’s writing.

Q. Mr. Kaighn wrote on the back of it ‘pay to the order of Joseph Kaighn’?

A. Yes, and Mr. Ames signed his name.

Q. Did you have it in your possession after you signed it and delivered it to Mr. Ames?

A. I did not.

Q. Was there any suggestion there that day that you should assume and pay one of these mortgages or any part of them?

A. There was not.

Q. Did Mr. Ames during that interview tell you that you were to pay off the mortgages on the property?

A. He did not tell me, no.

Q. On the contrary, what did he tell you?

A. Merely what I have stated.

Q. Go ahead.

A. He asked Mr. Kaighn what he should do with the check, and Mr. Kaighn told him to make it payable to him and he would pay off the encumbrances and give him a check for the balance.

Q. Did you tell Mr. Kaighn to receive this money for you?

A. No."

Mr. Ames' testimony is as follows:

Page 42, l. 31:

"Q. Just tell in your own way what happened after you got there.

A. Collins drew up the check like he says he did, and he says I had the check. I have never had the check in my hands or the money either. Kaighn picked the check up, and drew that around to him, and then told me to endorse it. I said, 'Don't this check belong to me?' He says, 'No, until Mr. Collins' mortgage is lifted.' I says, 'What have I got to show?' I said, 'Collins got the farm, and you retain the check.' And that's when he gave me that piece of paper that he retained the whole amount.

Q. Is this the paper, dated March 25, 1921, signed 'Joseph Kaighn'?

A. Yes, sir.

Q. Did you get that paper the day of the settlement?

A. Yes, sir.

Q. State whether or not Collins was there when this was handed to you.

A. Certainly, I said, 'Collins got the farm. You got the money. I got nothing.' And that's what he gave me.

Q. Was this given in Collins' presence?

A. Yes, sir; we was all there.

Q. All three of you?

A. Yes."

On cross-examination, Ames admits that the amount of the check was the correct balance due on

Counsel for appellant-defendant, on page 6 of his Brief, refers to a letter addressed to the defendant by Joseph Kaighn, dated March 25, 1921. In this the phrases "we are retaining", "our expenses", "is to be turned over to you by us", and the words "we", "our" and "us" refer to Kaighn & Wolverton, at whose offices, according to the agreement, settlement was to be made. This letter offered in evidence by the defendant is simply a letter copy taken from the files of Kaighn & Wolverton, and the original was undoubtedly on the letter head of Kaighn & Wolverton, as in practically all these transactions. The words "our expenses" in the next to the last line of this letter, furthermore, show this to be a fact. "Our expenses" are the expenses of Kaighn & Wolverton.

the date of settlement, ^{without} ~~after~~ deducting the mortgages (p. 46, l. 22); that he knew what it meant to endorse a check and knew what he was doing when he endorsed this over to Kaighn (bottom p. 46, top of p. 47).

Page 47:

“Q. The amount of the purchase price due that day was \$16,855.68, that’s correct?

A. Yes, sir.

Q. And Mr. Collins made a check to your order for the balance due. That is correct, isn’t it?

A. Yes, sir.

Q. And that was strictly in accordance with the terms of the agreement?

A. Yes, sir.

Q. And you endorsed that check over to Joseph Kaighn. That’s correct, isn’t it?

A. Yes, sir.

Q. And you say you didn’t have it in your possession. How did you sign your name, if you didn’t have the check?

A. I didn’t have it in my hands.

Q. How did you endorse the check, if you didn’t touch the check?

A. Mr. Kaighn put it in front of me and gave me the pen and I endorsed it.”

Therefore, on the admission of Ames himself, he received from Collins on the date of settlement, Collins’ check to Ames’ order for the precise amount due. At the time Ames knew that there were on the property mortgages (p. 53, line 18 and line 28), which he, Ames, was bound to pay off under the terms of his agreement with Collins (page 53, lines 28 to bottom). He endorsed the check to Kaighn; Kaighn embezzled the money.

Sometime after March 25, the date of settlement, Ames went to Kaighn's office with his father (56 and 57), and then and there made settlement with Joseph Kaighn for the moneys which had been put into Kaighn's hands by Ames on the date of settlement. At that time, Kaighn drew up for Ames a "statement of settlement between Frank C. Ames, Jr., and Joseph Kaighn, attorney" (Exhibit P11, p. 5 of Exhibits).

This charged Joseph Kaighn, attorney, with \$16,855.68, being:

"balance due in settlement with Charles A. Collins for sale of farm situate in Delaware Township, Camden County, as per statement between Frank C. Ames, Jr., and Charles A. Collins,"

then deducted the amounts of the two mortgages on the property and accrued interest, charged Ames \$7.50 for drawing deed, Ames to Collins, and "attorney's fee for services, \$25.00" leaving a "balance due Frank C. Ames, Jr., \$9704.18." The defendant, Ames, signed this statement and approved it in the following language:

"Above statement examined and approved
April 1921.

Frank C. Ames, Jr."

Defendant admits his signature to this paper (pp. 56, 57).

At that time, Kaighn gave Ames a check for the balance due on this statement between Frank C. Ames and Kaighn, attorney (Ex. P11) in the sum of \$9704.18, as shown by this statement (p. 56).

Collins, assuming that the mortgages were paid off by Ames in accordance with Ames' agreement, knew nothing to the contrary until after Kaighn's death.

There is no pretense or claim by Ames that Collins told Kaighn to take the check from Ames and hold it. Ames merely asserts that when Collins drew up the check to the order of Ames, the owner, for the balance due, Kaighn intervened and asked Ames to endorse the check to himself, Kaighn (p. 42). Ames admits that he expected Kaighn to pay the mortgages out of the proceeds of the check (Ames, p. 43, top, and Ex. D6—Collins says, p. 64, top, he never saw this paper and Ames says Collins did see it at the date of settlement, p. 43). Certainly nothing said at the settlement either by Collins or by Ames or by Kaighn even as interpreted by Ames, can be construed so as to make Kaighn the agent of Collins in the receipt of this money. Ames admits that a check was made to his order by Collins for the "precise amount due," "strictly in accordance with the terms of the agreement" (p. 47, lines 10 to 21). Upon the receipt of that check he became responsible for its disposition and the proof would necessarily have to be exceedingly clear in the face of the written agreement, the endorsed check and the two signed statements of settlement, to change the plain legal effect of those documents and establish, in spite of them, an agency between Collins and Kaighn after this check was given. Not only is this burden not borne, but there is no testimony whatever, positive or otherwise, from Ames or any other party or from the documents to show Kaighn as the agent of Collins in the receipt of this money. In other words, there was absolutely no testimony in support of Ames' defense that Kaighn was the attorney and agent of Collins in the receipt and disbursement of this money and not Ames' own agent and attorney, as shown by the documentary evidence. There was, therefore, nothing else for the Court to do than to

interpret the admitted facts and determine that Collins had paid the full purchase price and that the defendant had defaulted in his covenant to remove the encumbrances from this property.

A complete and conclusive answer to this defense of Ames is that any such theory is totally inconsistent with the undisputed documentary evidence and signed statements and with the facts admitted by Ames himself.

To say that Collins, knowing the balance due on this property, receiving a statement of settlement with reference thereto, should make a check to the seller for the amount due and *then immediately take back that check* through an alleged attorney, Kaighn, would merely convict him of doing a most foolish and unreasonable thing. If Mr. Collins had wanted to retain in his possession the money to pay the mortgages, he could easily have insisted upon it and given Ames a check for the balance. If, on the other hand, Collins had wanted Kaighn to act as his attorney to see to the removal of encumbrances before paying any money to Ames, he could, if Ames had consented, have made his check direct to Kaighn and permitted Kaighn to pay off the mortgages and then make settlement with Ames. *But this did not happen.* Collins acted for himself, made his check for the entire price direct to Ames, the owner, and looked to Ames to live up to his agreement to clear the title. If we are to accept the theory of the defendant (and we submit it is pure theory without proof to support it), then Collins never paid the purchase price at all on the date of settlement, but held all the money back (by Kaighn, his alleged attorney, taking the check back from Ames by endorsement of Ames) so that there would have been no settlement at all that day. This is in contradiction of the signed "statement of set-

tlement," would have been a violation of the terms of the written agreement between the parties, and is totally at variance with both the testimony of Collins and of Ames himself.

3.

Defendant asserts in his brief that Collins waived a performance of the agreement of Ames to convey clear of all encumbrances by giving check for the full amount of the purchase price to Ames on the date of settlement. We know of no principle of law under which anything said or done by Collins at or before the settlement could be construed as a waiver. There was a plain covenant in the agreement to convey clear of encumbrances; that agreement was broken the moment a conveyance was made with encumbrances on the property, and an action accrued to Collins.

There could be no waiver by Collins of the performance of this covenant and there is no pretense on the part of Ames in his testimony that Collins waived or intended to waive this covenant. On the other hand, Ames plainly asserts that he intended to pay the mortgages off out of the purchase price he was to get. We know of no authority to justify the assertion by counsel that so-called acquiescence by Collins in the endorsement of this check over to Kaighn, or in anything else done at the settlement, could deprive Collins of his right to enforce the covenant to convey clear of encumbrances.

4.

There is an attempt to show by circumstances antedating the date of settlement that Collins really

had Joseph Kaighn as his attorney. The plain facts are as follows:

Before the purchase of this farm Collins had had only two other transactions in which Kaighn was in any way involved; in one of said transactions, Kaighn had acted for both parties; in the other, he came in at the last to straighten out some difficulty another lawyer had had something to do with it (pp. 35, 36, 24, 25), and these other transactions were seven or eight years before the Collins transaction (p. 25, line 18).

Collins did not know Kaighn in a social way. He believed him to be honest, as everybody else believed him to be honest, and like many other people who knew Kaighn, would have trusted him (p. 30).

On the other hand, Ames, although very quick to assert originally that Kaighn did not represent him, but that Kaighn was Collins' attorney, finally admitted, on cross-examination that Kaighn did represent him in this very transaction.

Ames says, in cross-examination (p. 45):

“It was understood, I think, he was representing both of us.

Q. In what part of it was he representing you?

A. (After question had to be repeated to him several times under instructions of Court.) I don't know what part he was representing me.”

Page 51, lines 18 to 30:

“Q. You say he did not represent you then at the time of the Collins settlement, or at the time the Collins agreement was made?

A. I expect he represented both of us. We both paid him.

Q. You are sure about the payment?

A. Positively.

Q. You paid the bill for services, didn't you, on the settlement?

A. The last one?

Q. I mean Kaighn's bill for services in connection with this entire transaction. Didn't you pay it?

A. He took it off of me.

Q. Didn't you pay it?

A. I guess I did; I could never get it. It was a case of have to."

Furthermore, at the same time the Kaighn-Colins transaction was running along (Ames, pp. 50 and 51), Ames and his father had a deal on by which Ames, Jr., was buying from Ames, Sr., the latter's farm, and both Ames, Jr., and Ames, Sr., went to Kaighn's office in connection therewith (49). Defendant says that Kaighn was simply representing his father in this other transaction, but it develops (p. 49) that in the settlement at Kaighn's office the present defendant gave his check to Kaighn and Kaighn was to make the disbursements. Instead of doing it, Kaighn retained the money as in the present suit and Ames, Jr.; and Ames, Sr., filed their joint claim against the Kaighn Estate, setting forth that there was a dispute between the father and son as to who should bear the loss (see claim, Exhibit P , testimony pp. 49 and 50, and Ex. P10, page 3 of Exhibits).

Clearly, the father considered that Kaighn represented the present defendant. On the other hand, the son claimed that Kaighn represented the father and each was endeavoring to escape the loss by Kaighn taking the money. Kaighn had represented Ames' father for some time.

It will thus be seen that there is nothing in the testimony with reference to prior transactions be-

tween Collins and Kaighn to justify any presumption of agency in Kaighn for Collins in the transaction here involved. There is no evidence that Kaighn was any general attorney of Collins. In fact, the two small matters in which Kaighn had something to do for or in connection with Collins happened seven years before the Collins-Ames transaction.

Not only so, but under the authorities, no presumption of agency in Kaighn for Collins can be raised on the basis of any statements in the testimony.

2 Corpus Juris, 919, Section 647, under head of "Agency":

"Evidence 1. Presumptions and Burden of Proof-a. Presumptions (1) Facts of Agency (a) In General.

"Except where a known agent acts in a given transaction, in which case there is of course a presumption, in the absence of evidence to the contrary, that the relation of principal and agent exists as to such transaction and that he is acting therein on behalf of his principal, the law indulges in no presumption that an agency exists, but instead presumes that a person is acting for himself, and not as agent for another, as where he makes a contract in his own name. Agency is a fact to be proved as any other fact, and if any presumption of agency is indulged it must be indulged from the facts and circumstances of the case."

Sec. 648:

"(b) Arising from former agency. Unless there is proof either that the agency is a general continuing agency to endure until revoked, or that the agent fills some character from

which such a general agency may be presumed, the fact that there has been a separate former agency for a different or even a similar purpose does not raise a presumption of agency as to any subsequent transaction.”

5.

Defendant in his brief also asks that we should infer an agency in Kaighn for Collins because, forsooth, the deed, Ames to Collins, was left in Kaighn's possession to be recorded and the mortgage, Collins to the Moorestown Trust Company for \$10,000, was left in Kaighn's possession to be recorded. Kaighn represented the Moorestown Trust Company; the trust company was placing a mortgage of \$10,000 on the property for the benefit of Collins. Kaighn for the trust company was bound to see that the mortgage was recorded and that the deed was recorded at the same time. This shows nothing to even suggest an agency in Kaighn for Collins in the receipt of the endorsed check and the collection of the purchase price.

Counsel argues strenuously that Kaighn was protecting Collins' interest and was trying all the time to look after Collins and was, therefore, Collins' agent. While we fail to see any testimony of Collins or Ames justifying any such argument or any such inference, we do find counsel finally arriving at the only logical inference which could be drawn from his own argument, to wit:

“The real effect of the transaction was that Collins continued to be the owner of the funds while they were in Kaighn's possession ” (page 10 of brief).

In other words, we reach the absurd position that Collins and the other parties present went through all the motions and forms of a real settlement, that Collins made his check to the vendor for the full amount of the purchase price, that the vendor executed and delivered his deed for the property to Collins, the purchaser, but that then Collins immediately recalled the check by means of an alleged agent, Kaighn. In fact, the deed was immediately delivered, a new \$10,000 mortgage immediately created by the purchaser to a third party, and yet the defendant would have us believe that there was no settlement, that Collins was not the owner, and Collins was still the owner of the full purchase price. We say unreservedly that the arguments of counsel in support of his theory of agency is not based on any positive testimony or on any testimony of any kind from which any one could infer such an agency, but is pure speculation on his part.

To hold that Kaighn received the Collins check from the hands of and through the endorsement of Ames, the vendor, and that he received it as the agent of Collins, is to disregard and absolutely nullify the plain legal effect of the making of the check to the order of Ames, the delivery of it to Ames, and its endorsement (without a word from Collins) to Kaighn, and furthermore, such theory is contradictory of the "statement of settlement" produced at the final settlement and approved and signed by both parties, and also contradicts the plain reading of the "statement of settlement" between Frank C. Ames, Jr., and Joseph Kaighn, attorney (Exhibit P11), which was presented to Ames in the presence of Ames' father at Kaighn's office, at which time Kaighn made his check to the order of Ames for the balance in his hands, deducting charges for his professional services and disbursements.

We submit that there was no evidence to go to the jury in support of any agency in Kaighn for Collins and the only inference which could be drawn therefrom is that Kaighn received and held and disbursed this fund for Ames, who was bound to clear off the mortgages.

The direction of verdict should be sustained.

BLEAKLY, STOCKWELL & BURLING,
Counsel for Plaintiff-Respondent.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

CHARLES A. COLLINS,
Plaintiff-Respondent,

v.

FRANK C. AMES, JR.,
Defendant-Appellant.

ON APPEAL FROM SUPREME COURT.

BRIEF ON BEHALF OF ~~PLAINTIFF~~ *Defendant-Appellant.*
~~RESPONDENT.~~

STATEMENT OF THE CASE.

This appeal brings up the record of a judgment entered November 24, 1922, in favor of the plaintiff against the defendant for \$4,649.53. The case was tried before Judge Wells of the Burlington County Court of Common Pleas and a jury, pursuant to reference by Judge Donges of the Circuit Court. The jury was directed to return a verdict in favor of the plaintiff for the amount above stated. Upon such verdict the judgment was entered.

The action was based upon an alleged breach of the terms of an agreement, dated June 16, 1920,

made between the parties, for the sale and purchase of a farm in Camden County and particularly that portion which required a conveyance clear of encumbrances. The complaint contained a second count for breach of a covenant of general warranty contained in the deed made by the defendant to the plaintiff.

The real issue of fact is whether or not Joseph Kaighn, an attorney, now deceased, was the agent, exclusively, of either of the parties or the joint agent of both, at the time certain moneys were retained by him in the settlement between the plaintiff Collins and the defendant Ames, for the purpose of paying off existing mortgages.

The question is before this Court upon an exception taken by the defendant Ames, to the refusal of the learned trial Judge, to direct a verdict against the plaintiff and also to the direction of a verdict in favor of the plaintiff for the amount claimed (C. p. 73).

FACTS.

Prior to June 16, 1920, Ames owned a farm in Camden County, which was then subject to a lien of two mortgages, one for \$6,000 and the other for \$1,900 upon which latter, \$1,000 was subsequently paid.

For some time Collins had been anxious to acquire this farm and finally Ames agreed to sell the same to him for \$200 an acre.

Collins suggested they go to Joseph Kaighn, a member of the Bar, then in good standing, and have the agreement of sale prepared (C. p. 39, l. 14). Collins set the time and place, which was subsequently

changed because of Kaighn's unavoidable absence. Collins had another day set and furnished the information as to the details of the transaction to Kaighn, who prepared the agreement. On June 16, 1920, the parties met at Kaighn's office and the agreement was executed. All of the information with respect to the agreement, was furnished by Collins and the agreement was ready for execution by Ames when he arrived at Kaighn's office (C. p. 39, l. 21).

It was agreed between Collins and Ames, that the expense of preparing the agreement should be borne equally and Ames paid his share that day (C. p. 40, l. 5). Collins also paid \$5 to Kaighn, his share of the expense of preparing the agreement (C. p. 40, l. 7).

The agreement (C. p. 5), provides for the sale of the farm at \$200 an acre, the area thereof to be ascertained by a survey, the expense of which was to be paid by the parties equally. \$100 was paid on account, at the execution of the agreement, and it was thereby provided that settlement should be made March 25, 1921, at three o'clock in the afternoon at Kaighn's office, in Camden.

“At which time and place the said party of
“the first part (Ames) on receiving the pay-
“ment at the time and in the manner above
“mentioned, shall, at the proper cost and ex-
“pense of the said party of the second part
“(Collins) or to his heirs and assigns, a proper
“deed with covenants of general warranty,
“conveying and assuring to him the fee simple
“of said premises, free and clear of all liens
“and encumbrances whatsoever; the title to
“said premises to be good and marketable and
“such as will be insured by the West Jersey
“Title and Guaranty Company.”

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Partial possession of the premises was given to Collins shortly after September 1, 1920. Later the plaintiff Collins paid an additional \$1,000 on account of the consideration price.

Kaighn represented Collins in the transaction. This is shown by several occurrences which happened before the settlement.

Collins told Ames, two or three days before the time fixed for settlement, that he did not think it would be possible for him to be present, but if this be so, the money would be there and Kaighn would settle it (C. p. 41, l. 26).

A dispute arose between the parties in reference to the ownership of some rails and Collins made the following statement to Ames, "If you want to know whose rails they are, go and see Joe Kaighn about it" (C. p. 41, l. 18).

Kaighn made searches and examined the title for Collins. He also prepared the deed and had it ready for execution on March 25, 1921, at which time Collins and Ames appeared at Kaighn's office and in the presence of the latter, the deed was executed. A statement was prepared showing the balance of the consideration, with the adjustments, to be the sum of \$16,855.68, for which amount Collins drew a check on the Moorestown Trust Company to the order of Ames. The exact details of what then occurred, is shown by the following extracts of the testimony of Ames (C. p. 42, l. 34):

"Kaighn picked the check up, and drew that
"around to him, and then told me to endorse it.
"I said, 'Don't this check belong to me?' He
"says, 'No, until Mr. Collins' mortgage is
"lifted.' I says, 'What have I got to show?' I
"said, 'Collins got the farm, and you retain the
"check,' and that's when he gave me that piece
"of paper that he retained the whole amount.

“***** He said, ‘You can’t have the money.’
“I says, ‘If I can’t have the money, I can’t pay
“off the mortgages.’ He says, ‘Mr. Collins
“wants the mortgages paid off—’ ” (C. p. 43,
l. 29).

Then referring to the check,

“Never had it in my hand. Kaighn drew it
“over and told me I could not get my money
“until I had endorsed it and the mortgage was
“cancelled. Mr. Kaighn picked it right up and
“kept it” (C. p. 43, l. 7). “He told me I
“couldn’t get my money on account of the
“mortgage—” (C. p. 46, l. 31).

The following question was put to Ames on cross-examination:

“Do I understand you that it was up to Mr.
“Collins to pay off these mortgages? Is that
“your theory? A. I allowed so, because his
“attorney wouldn’t let me have the money to
“pay it with” (C. p. 48, l. 14).

Also the following:

“When you first arrived there it was up to
“Mr. Kaighn to pay the mortgages? A. I
“expected to take the money out and pay the
“mortgages, but they wouldn’t do that way.
“They wanted it all in one. They wouldn’t
“trust me with the money” (C. p. 48, l. 31).

Ames also testified,

“I asked why they would not write the check
“out to pay the mortgages but they stated when
“we had the agreement made out there was
“nineteen hundred dollars against the farm on
“the second mortgage, and they wouldn’t take

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“my word***** That I had paid off \$1,000 and
“that there was only \$900 left on the second
“mortgage. They had to look it up before they
“would give me the money. Q. Who had to
“look it up? A. Kaighn” (C. p. 53).

Also,

“That day I expected they would make three
“checks and give me what belonged to me and
“pay the mortgages off. I did not want the
“mortgage money” (C. p. 54, l. 16).

“Q. What was said at the settlement in the
“presence of Collins and Kaighn about the
“Engle mortgage and the amount due on it?
“A. I told them I had to pay off \$1,000 be-
“tween the agreement and the settlement. They
“wouldn't take my word and said they would
“have to look into it” (C. p. 60, d. 1).

In Collins' presence, Kaighn gave to Ames a re-
ceipt, of which the following is a copy:

“March 25, 1921.

“To Frank C. Ames, Jr.:

“This is to advise you that in the settlement
“made this day between yourself and Mr.
“Charles A. Collins, for the purchase by Mr.
“Collins of your farm, consisting of 90.106
“acres of land, situate in the Township of Del-
“aware in the County of Camden and State of
“New Jersey, that the balance due you in set-
“tlement amounts to \$16,865.68, which amount
“we are retaining until the two mortgages, one
“of \$6000.00 and another of \$1900.00, since re-
“duced to about \$900.00, together with the in-
“terest thereon, are fully paid and satisfied,
“and cancelled of record, at which time the bal-

“ance, less our expenses in the matter, is to be
“turned over to you by us.

“Joseph Kaighn.”

The check of Collins, endorsed by Ames, was retained by Kaighn and collected by him. About two weeks afterward, Ames received, from Kaighn, a statement, Exhibit , showing the payment of the mortgages, a deduction for Ames' share of the legal services and check for was sent by Kaighn to Ames for the balance. Kaighn did not pay either of the mortgages. Shortly thereafter, Kaighn's death occurred.

Kaighn had represented Collins in two prior transactions where the latter had purchased other real estate. These transactions, with the present one, covered all the purchases of real estate ever made by Collins. Kaighn had never before represented Ames in any transaction, although on one occasion he had sued Ames (C. p. 49, l. 4).

The deed to Collins was immediately placed upon record and he at once assumed entire possession of the farm.

Kaighn prepared a mortgage from Collins to the Moorestown Trust Company for \$10,000, the proceeds of which was used in part to pay Ames. Collins entrusted Kaighn with the deed and the latter was also charged with the responsibility of seeing that it was properly recorded. The papers which passed from Ames to Collins with the transfer, were found in Kaighn's possession.

The facts above stated, are not seriously in dispute, although there is some contradiction between the testimony of Collins and Ames on minor matters. Manifestly, however, upon this appeal, the evidence must be considered in a light most favorable to Ames, in view of the fact that the learned trial Judge took the case away from the jury.

ARGUMENT.

The learned trial Judge expressed the opinion that Kaighn was the agent of both Collins and Ames, but, in view of the fact that the agreement of sale required the property to be conveyed clear of all encumbrance, Kaighn became the exclusive agent of Ames to liquidate the said mortgages, when the money was left in his hands for that purpose (C. p. 69, l. 26).

FIRST.

We contend that the learned trial Judge was clearly wrong in reaching the conclusion, as a matter of law, Kaighn was the exclusive agent of Ames, and respectfully submit that the question of agency, at least, should have been left to the jury.

The agreement of sale fixed the time and place of settlement between the parties, and provided that Ames, on receiving payment, at the time and in the manner described, should, at his cost and expense, execute and deliver to Collins, a deed, with covenants of general warranty, conveying and assuring to him the fee simple of the premises, free and clear of all liens and encumbrances.

The agreement is silent as to the existence of prior mortgages. Of course, a literal interpretation of the language thus employed, would require Ames to remove the encumbrances prior to the delivery of the conveyance but the usual and sensible method of effectuating such an agreement would have been, to have the mortgagees present, so that the liens could be satisfied concurrently with the delivery of the deed and the payment of the purchase price.

Collins waived a literal compliance with the terms of the contract by accepting a deed, with the encumbrance unpaid, and giving a check, drawn to the order of Ames, who immediately turned it over to Kaighn. Collins, therefore, assumed the risk of taking a deed and parting with his money, without being assured that the mortgages would be satisfied, out of the moneys going into Kaighn's possession.

Kaighn undoubtedly was Collins' agent for the purpose of protecting the interests of the latter, to see that the premises thus conveyed, would be clear of encumbrance. Kaighn undertook, in this capacity, to see that Collins' money would be properly applied, for that purpose, and that is the reason why Collins refused to permit Ames to retain the money and pay the encumbrances himself.

It is nonsense to contend, that Ames ever came into possession of and had dominion over, the purchase price of the farm, paid by Collins. The mere fact that the check was drawn to Ames' order, is not conclusive upon this situation, because Kaighn, for the protection of Collins and acting for him, told Ames, in Collins' presence, that he could not have the money until the prior encumbrances were satisfied, and the receipt given by Kaighn to Ames, also in Collins' presence, shows conclusively that the money was being retained by Kaighn, as the agent of Collins, to guarantee to him, that the mortgages would be satisfied out of the moneys before any payment was made to Ames. This receipt states and advises him "That the balance due in settlement amounts to \$16,865.68, which amount we are retaining until the two mortgages, one of \$6000.00 and another of \$1900.00, since reduced to about \$900.00, together with interest thereon, are fully paid and satisfied and cancelled of record."

The question immediately arises, for whom and for what purpose was this amount retained? The answer is, that it was retained for the protection and benefit of Collins, and the money was retained by Kaighn for that purpose alone, which shows that Collins understood that Kaighn was acting for him in the retention of the funds, so that the balance only, would be paid to Ames, after the mortgages were satisfied.

Collins assented to this arrangement, which amounted to a waiver of his right, under the contract, not to be obliged to accept a deed or pay any money as consideration therefor, until the mortgages were cancelled of record.

In our judgment, this demonstrates conclusively, that Collins assented to the retention of the money, by Kaighn, to guarantee cancellation of the encumbrances. It shows also, that actually, the title to the purchase price never became vested in Ames. While there was a check drawn to his order, it was immediately endorsed over to Kaighn, with Collins' consent. The real effect of the transaction was, that Collins continued to be the owner of the funds, while they were in Kaighn's possession and Ames would not, under any circumstances, be entitled to receive the same, until the mortgages were cancelled of record, so that Collins, having accepted a deed, would become the owner of the real estate unencumbered. The check was given to Ames conditionally only.

This result is further exemplified, by the refusal of Kaighn, in Collins' presence, to divide the purchase price, and have Collins draw three checks, two to the mortgagees and the balance to Ames. When Kaighn insisted upon the condition, i. e., drawing of the check to Ames, he was undoubtedly acting for the protection and benefit of Collins, and constituted himself the latter's agent.

Every precaution that Kaighn took, and every condition imposed, was for the purpose of insuring to Collins, that no money would be turned over to Ames until the two mortgages were satisfied of record.

The situation was not the same as if Kaighn was a stranger to Collins. The former had represented the latter in every other real estate deal in which he was concerned. Undoubtedly, Collins had absolute confidence in the honesty and integrity of Kaighn.

Kaighn would not permit Ames to retain the money, after the delivery of the deed, for the purpose of satisfying the mortgages. Kaighn, in the exercise of this precaution, was undoubtedly acting as the attorney of Collins.

Ames surrendered his deed and gave up possession of the farm and had nothing to show for his money, except Kaighn's receipt, which was evidence of the fact, that the latter, for the protection of Collins, was to retain the money until the mortgages were satisfied.

Under the strict terms of the contract, Collins could have refused to part with the consideration until the conveyance was made to him, free and clear of all encumbrance. When Ames delivered the deed, he lost all control over his property. The natural result of this situation was, that when the proceeds of sale were retained by Kaighn, Collins had absolute control over the same and also was in possession of the farm under a deed delivered by Ames.

When Kaighn refused to accept the statement of Ames, that the \$1,900 Engle mortgage had been reduced to \$900 he was acting for Collins and for his protection. If Kaighn had acquiesced and accepted the word of Ames as to the amount due on this mortgage, there would have been no difficulty

about retaining, in Kaighn's hands, sufficient to pay both mortgages and to turn over to Ames, the day of settlement, the amount coming to him.

This is only one circumstance showing that Kaighn was acting primarily in behalf of Collins, for the purpose of insuring to the latter the satisfaction of the prior mortgages before Ames received any money whatever.

If Collins had refused to accept the deed and part with the purchase price until the prior mortgages were paid, the loss sustained by Kaighn's fraud would not have occurred, and Collins could not have been compelled, under the exact terms of the contract, to pay any money whatever, or accept the deed, until the mortgages were cancelled.

Therefore, it was the conduct of Collins, in assenting to the modification of the exact wording of the agreement, thereby permitting Kaighn to retain the money after having accepted the deed, which made it possible for the fraud to have been perpetrated.

Therefore, the rule must be invoked, that as between two innocent persons, the loss should be imposed upon the one who makes such loss possible.

In other words, where a loss is to be sustained by one or the other of two innocent parties to a transaction caused by the fraud of the third party, such loss must be sustained by that party to the transaction, whose conduct made it possible for the third party to perpetrate the fraud.

Ames was helpless. He did not get the money to pay off the mortgages. Collins could have refused to pay until this was done.

Collins' conduct, both before and after the original contract of sale was made, particularly during the period leading up to the settlement, demonstrated beyond a doubt, that he expected Kaighn to

look after his interest and to see that he was protected, for the reason that when there was some doubt if he could be present at the settlement, he said the check would be there and Kaighn would take care of it.

In these circumstances, therefore, it is impossible to reach the conclusion that the learned trial Judge was right in holding, that, as a matter of law, Kaighn was the exclusive agent of Ames for the proper distribution of the money which Collins refused to turn over to Ames and permitted Kaighn to retain.

We submit, that this was at least a jury question, and the latter should have been allowed to determine, from all the facts of the case, the question of Kaighn's agency as between the parties.

It may be argued, that the statement of settlement, which Ames signed, Exhibit D , conclusive evidence that Ames recognized Kaighn as his agent. It must be borne in mind, however, that this paper was prepared, and approved by Ames, some two weeks after the settlement occurred, when the money was retained by Kaighn for the purpose of satisfying the mortgages. Ames fully explained how this paper originated. The paper itself, cannot conclusively control, or establish the relation of agency, which existed, as a fact, two weeks prior thereto, when the settlement occurred.

While it may be a bit of evidence to be considered, in view of all of the circumstances, it cannot definitely and positively establish or control the relation existing between Ames and Kaighn, prior thereto. In any event, the paper was obtained by Kaighn by the rankest sort of fraud and deceit. It showed the payment of the mortgages, when in fact, they were not paid, but the money has been misappropriated by Kaighn.

There is nothing to show for whom Kaighn claimed he was acting as attorney, as appears by the statement at the top of the sheet. In view of the circumstances, it was a clever move on the part of Kaighn to do what he could to protect his friend Collins, after he had misappropriated the funds by which a loss would be imposed on either one or the other of the parties involved.

SECOND.

It is obvious also, that the learned trial Judge misconceived the scope and effect of the cause of action set forth in the first count of the complaint, and the materiality of the contract of sale with respect thereto.

The first count alleges an agreement, on the part of the defendant, to satisfy all encumbrances, and then sets out as a breach, that the defendant has never paid off and cancelled the same (C. p. 3, l. 31).

The obligation of Ames, according to the terms of the contract was, upon the receipt of the purchase price, to deliver to Collins a proper deed, assuring him the fee simple of the premises, clear of all encumbrances. The deed was delivered, but the purchase money was not paid to Ames, concurrently with such delivery. Independently of the terms of the contract, Ames never agreed to pay the encumbrances. Collins accepted the deed and in effect turned over the consideration, to Kaighn, for the purpose of paying the encumbrances.

The logical result is, that there is no proof in the case supporting the allegations of the complaint, that Ames agreed to pay the encumbrances and failed to do so. Furthermore, Collins waived the provision of the contract with respect to the deliv-

ery of a deed, assuring to him, the premises in fee simple, clear of encumbrances.

Therefore, Collins cannot now complain of any breach on the part of Ames, in view of the fact, that the situation, in which he now finds himself, was one brought about by his own conduct and of his creation.

Any implied agreement on the part of Ames to pay off the mortgages, was based upon the condition, that the funds would be placed in his hands for that purpose. This was never done.

So far as the second count in the complaint is concerned, based upon the breach of a covenant of general warranty, the right to recover thereon was expressly waived by the plaintiff at the trial. But even if this were not the fact, the learned trial Judge would not have been justified in directing a verdict for the plaintiff, under the second count, because under the allegations thereof, there was no basis for the reason upon which he assigned for his action, to wit; that Kaighn, being the agent of both Collins and Ames, he was the exclusive agent of the latter to pay off the encumbrances which Ames was obliged to do, under the terms of the contract, before the deed was delivered. No such obligation existed, with respect to the cause of action set forth in the second count of the complaint.

Therefore, it is perfectly manifest, that the ground upon which the plaintiff relied for the direction of a verdict, was not in accord with the allegations contained in the second count of the complaint, and for that reason, the learned trial Judge should have granted the motion of Ames to direct a verdict for the defendant.

THIRD.

We also think that the undisputed facts were sufficient to justify the learned trial Judge in directing a verdict for the defendant, and this claim is based almost entirely upon the facts above stated in support of the proposition that the learned trial Judge committed a manifest error in directing a verdict for the plaintiff.

We therefore respectfully insist, that upon a reversal, the Court below be directed to enter a verdict for the defendant.

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Attorney for Defendant-Appellant.

