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WITNESS FOR PLAINTIFF.

WITNESS FOR DEFENDANT.

Notice of Appeal.

(Filed March 20, 1927)

New Jersey Supreme Court

ESSEX COUNTY.

HENRY S. PUDER, Plaintiff, *vs.* DAYTON E. SMITH, Defendant.	Action at Law Notice of Appeal to the Court of Errors & Appeals.

To KESSLER & KESSLER, Attorneys of Plaintiff:

Sirs:

PLEASE TAKE NOTICE that the defendant in the above entitled cause appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey, from the whole of the judgment entered in this cause.

PERKINS & DREWEN,
Attorneys for and of Counsel With Defendant.

Grounds of Appeal.

(Filed March 20, 1927)

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

HENRY S. PUDER,
Plaintiff,

vs.

DAYTON E. SMITH,
Defendant.

} at Law. Action

To KESSLER & KESSLER, Esqs., Attorneys of Plaintiff:

Sirs:

PLEASE TAKE NOTICE that the defendant's appeal in the above entitled cause is on the following grounds, to wit:

1. Because the trial court erred in denying defendant's motion for a non-suit made at the close of the plaintiff's case.

2. Because the trial court did not permit counsel for the defendant to ask of the witness, King A. Harvie, the question, "Did you know of any sales yourself at that price at that time?"

3. Because the trial court erred in denying the defendant's motion for a direction of a verdict, made at the close of the whole case.

4. Because the trial court erred in denying the defendant's sixth request to charge.

5. Because the trial court erred in denying the defendant's ninth request to charge.

Yours,

PERKINS & DREWEN,
Attorneys of Defendant.

Summons.

NEW JERSEY SUPREME COURT,

THE STATE OF NEW JERSEY TO DAYTON E. SMITH: YOU ARE SUMMONED to answer the complaint of HENRY S. PUDER in an action at law in the Supreme Court, AND TAKE NOTICE, that unless you file your answer to said Complaint with the Clerk of the Supreme Court at Trenton, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

[L. S.]

WITNESS, WILLIAM S. GUMMERE, Chief Justice of the Supreme Court, at Trenton, this 14th day of April, Nineteen Hundred and Twenty-six.

EDWARD J. KELLEHER,
Clerk.

KESSLER & KESSLER,
Attorneys for Plaintiff.

Complaint.

(Filed May 1, 1926.)

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

HENRY S. PUDER,
Plaintiff,
vs.
DAYTON E. SMITH,
Defendant.

Action at Law.

Complaint.

COUNT I.

The plaintiff, residing in the City of Newark, County of Essex and State of New Jersey, complains of the Defendant, Dayton E. Smith:

1. That the defendant represented to the plaintiff that he was the holder and owner of certain shares of common stock of A. Silz, Inc., a corporation duly organized and existing under the laws of the State of New York, and further represented that he would not sell the said shares of stock owned by him which he was holding in the said company, but was in a position to procure a block of the shares of stock of the aforesaid stock for the plaintiff as a personal favor to him, the said plaintiff, and that the said shares of stock would be listed on the curb market in the City of New York within thirty days from the date of purchase of the said shares of stock by the plaintiff. Defendant further represented that he was an officer of the A. Silz, Inc., and that the shares

of stock of the said corporation were then of the full value of One Hundred Dollars ($100) per share as shown by the books of the said corporation, and that the necessary instruments were duly executed between the brokers and the A. Silz, Inc., and that the said shares of stock would be listed on the curb market on said date, and that by reason of said listing of the shares of stock on the curb market there would be a ready market and plaintiff would be able to quickly dispose of same.

2. That the plaintiff relied upon the said representations and believed them to be true, and did not know them to be false or untrue.

3. That the said representations were material and that the defendant knew that the plaintiff believed and relied upon the said representations as true.

4. That thereafter the defendant represented to the plaintiff that he had procured a block of Three Hundred (300) shares of stock of A. Silz, Inc., for the plaintiff from the Bankers of A. Silz, Inc., and the plaintiff relying and believing the aforesaid representations to be true paid to the defendant the sum of Forty-five Hundred Dollars ($4,500) for the aforesaid shares of stock of the A. Silz, Inc.

5. That the defendant knew (or should have known) that the representations made by him to the plaintiff were false and untrue and were made for the purpose of inducing the plaintiff to purchase the aforesaid shares of stock of A. Silz, Inc., which shares of stock so purchased by the plaintiff were the property of the defendant and

not procured from Bankers of the A. Silz, Inc., and that these representations were made by the defendant for the purpose of disposing of the stock held by him.

6. That the plaintiff recently learned that the representations aforesaid were false and untrue and made with intent to defraud the plaintiff and that the said stock has never been listed on the curb market in the City of New York nor was there any instruments duly executed between the stock brokers and A. Silz, Inc., for the purpose of listing said shares of stock on the curb market, and that the said shares of stock transferred to the plaintiff were not procured from the bankers of A. Silz, Inc., but sold to the plaintiff from the defendant's own stock which the defendant held, and that the full value of the shares of stock was not One Hundred Dollars ($100) according to the books of the aforesaid corporation as represented.

7. That the plaintiff was unable to sell the said shares of stock as represented and that he had offered to return the said shares of stock to the defendant for the consideration paid, but the defendant has failed, refused and neglected to accept the return of the said shares of stock or to return the consideration paid for them.

8. Plaintiff further alleges that since the time he purchased the aforesaid shares of stock from the defendant and until the present time the said shares of stock has had no market and that he has offered the said shares of stock for sale and was unable to receive any consideration therefor, and that the said shares of stock are valueless and unmarketable.

9. That the plaintiff has been damaged because of the false and fraudulent representations made by the defendant and demands the sum of Forty-five Hundred Dollars ($4,500) together with lawful interest from October 2, 1924, as damages.

COUNT II.

The plaintiff, Henry S. Puder, reiterates each and every allegation set out in Count I and restates and reaffirms all the statements therein contained as if said statements and allegations were set out in length in Count II and further says:

1. By virtue of the fraudulent representations made by the defendant, Dayton E. Smith, as set out in Count I, the plaintiff has elected to rescind the contract of purchase of the common stock of A. Silz, Inc., and has offered to return to the defendant the said stock;

2. That the said defendant has refused to accept said stock;

3. That the said plaintiff has demanded the return of the sum of Four Thousand Five Hundred ($4,500) Dollars paid to the defendant for said stock, but the defendant has failed, refused and neglected to do so.

The plaintiff demands the sum of Four Thousand Five Hundred ($4,500) Dollars, the sum paid for the shares of stock of the A. Silz, Inc., together with interest and costs.

KESSLER & KESSLER,
Attorneys for Plaintiff.

Answer to Complaint.

(Filed June 1, 1926.)

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

HENRY S. PUDER, Plaintiff, *vs.* DAYTON E. SMITH, Defendant.	Action at Law. Answer.

The defendant, DAYTON E. SMITH, who resides at Ridgefield Park, in the County of Bergen and State of New Jersey, answering the amended complaint of the plaintiff, filed in this action, says:

ANSWER TO THE FIRST COUNT.

(1) He denies the allegations of paragraph one.

(2) He denies the allegations of paragraph two.

(3) He denies the allegations of paragraph three.

(4) Answering paragraph four, he admits that the plaintiff paid to him the sum of $4,500, for three hundred shares of the capital stock of A. Silz, Inc. He denies each and every of the other allegations of paragraph four.

(5) He denies the allegations of paragraph five.

(6) He denies the allegations of paragraph six.

Answer to Complaint.

(7) He denies the allegations of paragraph seven.

(8) He denies the allegations of paragraph eight.

(9) He denies the allegations of paragraph nine.

ANSWER TO SECOND COUNT.

(1) He denies each and every of the allegations contained in the second count of the amended complaint.

PERKINS & DREWEN,
Attorneys for Defendant.

Reply.

(Filed June 5, 1926.)

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

HENRY S. PUDER, Plaintiff, *vs.* DAYTON E. SMITH, Defendant.	Action at Law. Reply.

The Plaintiff joins issue with the Defendant.

KESSLER & KESSLER,
Attorneys of Plaintiff.

Postea.

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

HENRY S. PUDER, Plaintiff, *vs.* DAYTON E. SMITH, Defendant.	Action at Law. Postea.

The above case was tried before Honorable William A. Smith, to whom the same was referred for trial with a jury at the Essex Circuit Court on March 14, 1927.

The jury rendered a general verdict against the defendant and in favor of the plaintiff for $4,500 plus interest from October 2, 1924, which amount is hereby fixed by the court at $5,150.

Dated, March 15, 1927.

WM. A. SMITH,
Judge.

Judgment.

(Entered March 16, 1927.)

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

HENRY S. PUDER, Plaintiff, *vs.* DAYTON E. SMITH, Defendant.	Action at Law.

KESSLER & KESSLER,
Attorneys of Plaintiff.

Judgment entered this sixteenth day of March, A. D. Nineteen hundred and twenty-seven, in favor of the plaintiff and against the defendant for the sum of Fifty-one Hundred and Fifty Dollars, damages, and Forty-nine Dollars and Fifty Cents, costs.

$5,150.00	
49.50	
$5,199.50	

WM. S. GUMMERE,
C. J.

Testimony.

NEW JERSEY SUPREME COURT,

ESSEX CIRCUIT.

Monday, March 14, 1927.

HENRY S. PUDER,
vs.
DAYTON E. SMITH,
} Action at Law.

Before

Hon. WILLIAM A. SMITH, J., and a jury.

For the plaintiff appear KESSLER & KESSLER (by Samuel I. Kessler).

For the defendant appear PERKINS & DREWEN (by John Drewen).

Mr. Drewen: We have asked our adversary to consent that the case go over to Thursday and it be peremptory. I would like to say that Mr. O'Connell of the New York Bar himself has been in personal communication with the defendant. The charge against him is fraud; he wants to defend it, naturally. He is on his way here now to defend. In order, however, that Mr. Kessler may not be delayed any more than he has been, we have offered to go to trial Thursday with or without the defendant.

The Court: I have passed on that. Mr. Kessler wishes to go on.

(A jury is called and sworn.)

Mr. Kessler: May it please your Honor, in preparing this case for trial, we observe a typographical error. The shares of stock of the said corporation are shown as of the full value of $100, and it was intended to be $30. We ask leave to amend it to $30.

The Court: Any objection?

Mr. Drewen: No, your Honor.

Mr. Kessler opens for the plaintiff.

Mr. Drewen opens for the defendant.

HENRY S. PUDER, plaintiff, sworn in his own behalf.

Direct examination by Mr. Kessler:

Q. Mr. Puder, you are the plaintiff in this case? A. Yes, sir.

Q. And you knew or still know Mr. Dayton E. Smith, the defendant in this case? A. Yes, sir.

Q. Were you on intimate social terms with him?

Objected to as leading.

Objection sustained.

Q. On what social terms were you with him, if any?

Objected to as incompetent, irrelevant and immaterial.

Objection overruled.

Witness: I met him in connection with the House of A. Silz in the early part of 1924. We became very intimate. I took him out to various golf clubs; we were playing golf; we had dinners together——

Mr. Drewen: I object to that and ask that it be stricken out.

The Court: Strike it out.

Q. On October 2, 1924, or immediately prior thereto, did you meet Mr. Smith and have a conversation relating to the stock of A. Silz? A. Yes.

Q. Tell us about it. A. I had invited Mr. Smith and his wife and a brother-in-law and sister-in-law to have dinner with me at the Newark Athletic Club, and I had entertained them for dinner. We had spent a very pleasant evening together. During the course of the evening there were several things I had done for him—he tried to be very friendly with me——

Mr. Drewen: I object to all this.

The Court: Confine yourself to the transaction.

Witness: He told me in a spirit of friendship that he wanted me to make some money and I could get a quick turnover. He had some stock which he said he could not sell. He said he had signed certain papers with brokers to list this stock with the curb; that he could get for me from the bankers three hundred shares at the underwriting price of $30 a share; that I could get a quick turnover at $30 a share.

Q. Did he say when it would be listed? A. Within thirty days; that the papers had been signed; it was simply a matter of formality in listing the stock.

Q. As a result of that conversation what did you say to him? A. I said, "Relying absolutely on your judgment; that you consider this stock valuable and won't sell; that the stock will be listed within thirty days, I will be very glad on this basis to get that stock."

Q. Did you tell him to buy 300 shares? A. He

told me he could get 300 from the bankers. Several days later he called me up and said he was in a position to get the stock. I said, "If that is the arrangement, I will buy the stock." As a result of that conversation I sent him a check for $4,500.

Q. Is this the check (handing paper to witness)? A. Yes, sir.

Q. That is made payable to whom? A. Dayton Smith.

Q. Do you know how it was cleared? A. Endorsed by Dayton Smith and put in his personal bank.

Q. And the check has been paid? A. Yes, sir.

Mr. Kessler: I offer it in evidence.

Mr. Drewen: No objection.

(The check is received in evidence and marked Ex. P-1.)

Q. After you sent this check and it was cleared at the bank, did you receive anything from Mr. Smith? A. I received three certificates .

Q. I show you three certificates of the stock of the House of A. Silz. Are those the certificates you received? A. Yes, sir.

Mr. Kessler: I offer the three certificates in evidence.

(The three certificates are received in evidence and marked as one Exhibit P-2.)

Q. Mr. Puder, you or your firm had been the auditors for this company? A. Some time prior.

Q. For how long a period were you auditor? A. Several years.

Q. When was your last connection with them?

A. Reorganization had taken place by a new group of bankers and we were out of the picture.

Q. How long before the stock was purchased? A. About six months.

Q. After the reorganization by the bankers you were no longer auditor? A. No, sir.

Q. Who was Mr. Smith? A. He became an officer of the company and was employed by the company. He had no identity with the company prior to the reorganization.

Q. At the time you were auditor he had no connection with the company? A. No, sir.

Q. Did he ever tell you whom he represented as an officer of the company? A. He represented the bankers on the board.

Q. Something was said here on opening that your father-in-law, Mr. Cohen, was an officer of the company, was he? A. Some time before that.

Q. How long before that? A. About six or nine months.

Q. That was before the reorganization? A. Yes, sir.

Q. That was before you purchased that stock or even knew Mr. Smith? A. Right.

Q. Some time subsequent to October 2d, did you have some conversation with Mr. Smith as to why the stock was not listed? A. Yes.

Q. About when did you have the first conversation with him as to that? A. About sixty days after the purchase of the stock.

Q. Was that over the telephone or in person? A. I had called him several times on the telephone. Inasmuch as the time of the arrangement had passed I was wondering why it had not been placed on the market.

Q. Did you make any investigation after that? A. Yes, sir.

Q. Where? A. To the House of A. Silz.

Q. With whom did you talk? A. I found at the time I got there that Mr. Smith was no longer connected with the House of A. Silz; that for some reason beyond my knowledge he was out of the firm.

Q. With whom did you talk? A. Mr. Harvie, a new officer of the company.

Q. Did you talk to him about the listing of the stock? A. Yes, sir.

Q. Did you talk to him about whose shares of stock they were?

Mr. Drewen: I object to the conversation.

Mr. Kessler: I am going only into the subject matter.

Q. Did you talk to him about whose stock it was? A. Yes.

Q. Did you talk to him about the book value of the stock? A. Yes.

Q. As a result of that, did you go to see Mr. Smith, the defendant? A. Yes, sir.

Q. Who went with you? A. I retained my present counsel to go with you.

Q. You mean I went with you? A. Yes, sir.

Q. Where did you meet him? A. Down at Old Broadway; we met him at his office.

Q. When you went to his office what did you say to him and what did he say to you? A. I asked him specifically why he had made certain representations; why he misrepresented the fact that the agreement had been signed with the brokers?

Q. What did he say in answer to that? A. He said, "I thought it was all set and ready to be closed."

Q. What did he say as to whose stock it was? A. I accused him of the fact that he had misrepresented to me——

Q. What did you say to him? A. "Why did you sell me your own stock when you told me you were trying to get stock from the bankers?"

Q. Did he say something about money——

Mr. Drewen: I object to that as most unfair.

Q. Did he say anything to you about the reason why he sold you his own stock? A. I don't remember; I can't remember that part of the details? I know he was very evasive.

Mr. Drewen: I ask that that be stricken out.

The Court: Strike it out.

Q. What did he say as to whose stock it was? A. He admitted he had sold his own stock.

Q. Did you say anything about the information you had received as to the book value of the stock? A. I accused him of the fact that he had misrepresented the book value to me——

Mr. Drewen: We object to that as calling for a conclusion.

Q. Just tell us what you did. Give us the words you used. A. As far as my knowledge can go back to the matter, he admitted to me——

Q. That is a conclusion. Tell us what he said. A. He told me that the value of the stock was $30 per share. When I accused him of the misrepresentation that the book value was less than that, he told me in good faith, "I thought it was worth $30 a share, but was not in a position to judge it."

By Mr. Drewen:

Q. Mr. Puder, you are a member of the firm of Puder & Puder, expert accountants, aren't you? A. Yes, sir.

The Court: Did he testify to any tender?
Mr. Kessler: Yes, sir, at the time.
The Court: I don't recall hearing it.

By Mr. Kessler:

Q. At the time that you and I went to see Mr. Smith, did you make a tender of the stock——

Mr. Drewen: I think it is leading.

By the Court:

Q. What did you do about the stock? A. At the time I was to New York with Mr. Kessler I had the stock with me. I told him I wanted to return the stock and wanted the money back.

By Mr. Kessler:

Q. Did you offer the stock to him? A. Yes, sir. But he refused to have anything to do with it.

Cross-examination by Mr. Drewen:

Q. How long had you been engaged in the work of auditing books for the House of A. Silz? A. Several years.

Q. You say this work terminated about six months before you had this transaction with Mr. Smith? A. January, 1923, was the last work we did.

Q. Your work finally terminated about six months before your first conversation with Mr. Smith? A. That's right.

Q. How long was your father-in-law treasurer of the House of A. Silz? A. I don't remember.

Q. Can you tell us for about how long? A. I should say for several years.

Q. And your father-in-law's position as treasurer terminated also about six months before your conversation with Mr. Smith? A. The termination was not at the same time as the reorganization when we were out.

Q. I didn't ask you that? A. I couldn't compare the time of his severance with our termination.

Q. About how long before you talked with Mr. Smith about this transaction was it your father-in-law was out as treasurer? A. I don't know; some time in the early part of 1924.

Q. At the time you talked with Mr. Smith, how many shares of stock had you purchased already, and how much did you already own in the House of A. Silz? A. I had some preferred stock.

Q. How much? A. Either ten or twenty shares of the old company.

Q. Mr. Smith did not sell you that, did he? A. No.

Q. When you got this 300 shares about which you testified this morning, you bought it for others besides yourself? A. I did not.

Q. Didn't you sell it after you got it? A. I did not.

Q. Isn't it a fact that you were asked by others to obtain a block of stock in the House of A. Silz by certain people you knew and as a result of that request—— A. I had committed myself to some of my friends that I was going to make a quick turnover and I had committed myself and when I found this had been misrepresented, I took it myself and wouldn't take advantage of the situation.

Q. When you learned what the real situation was, you didn't have any further negotiations? A. I called them off. I took the whole responsibility myself when I saw the element that entered into it.

Mr. Drewen: I ask that it be stricken out as not responsive.

The Court: Strike it out.

Q. How far had you gone with your friends in the matter of turning over this stock? A. With nothing more than a verbal arrangement, they were perfectly willing——

Q. You didn't transfer the stock to them. A. No, sir.

Q. They didn't pay anything for it? A. No, they didn't.

Q. And they said no more to you on the subject? A. Not after I declared them out of the deal.

Q. When did you declare them out? A. I don't remember.

Q. About how long after you had this conversation in October, 1924? A. I don't remember.

Q. Can you approximate it? A. I know it was after I paid the money.

Q. Was it one month or two months or six months? A. It is over two and a half years and I couldn't remember.

Q. During the time that your father-in-law was treasurer of the House of A. Silz you were on good terms with him, weren't you? A. I certainly was.

Q. Where did your father-in-law live, Mr. Puder, during the time he was treasurer of the company? A. In New York.

Q. You also lived in New York? A. I did not.

Q. Where did you live? A. In Newark.

Q. You had plenty of opportunity to discuss with your father-in-law the situation in the House of Silz, hadn't you? A. He wasn't acquainted with the situation in my conversation with Mr. Smith.

Q. I am speaking of the situation that prevailed prior to your father-in-law's getting out as treasurer. A. I don't think—in fact, the account was handled by our organization——

Q. I am referring to the facility you had for conversing with your father-in-law about the condition of the corporation during the time he was treasurer. You had that opportunity, didn't you? A. I don't know what extent of opportunity I had. He was a busy man, and so was I; and he lived in New York, and I lived in Newark.

Q. Did you or did you not have an opportunity to talk with him.

Objected to.

Objection sustained.

Q. Did you actually discuss with him the condition in the House of Silz? A. I don't remember.

Q. You don't remember whether you did or not? A. I must have talked to him; about what details I talked with him I don't recall. I may have had discussions with him about the account.

Q. Mr. Puder, I show you a letter purporting to be written by you and signed by you to Mr. Dayton E. Smith, dated March 10, 1925, and ask you if that is your signature to that letter. A. That is my brother's signature, although it was dictated by me.

By Mr. Kessler.

Q. You assume responsibility for the letter. A. I certainly do.

Mr. Drewen: I ask that it be marked for identification.

(The letter is marked Ex. D-1 for identification.)

By Mr. Drewen:

Q. I call your attention to the statement in the letter reading as follows: "I am being subjected to extreme pressure by my friends. I trust you will have this matter disposed of or have the parties from whom this stock was originally ordered reimburse my friends." A. I hadn't lost faith in Mr. Smith yet, although I was having misgivings about it.

Mr. Drewen: I ask that the "misgivings" be stricken out.

The Court: Strike it out.

Q. You had no relationships with your friends? They paid you no money? A. I said I committed my friends to this purchase with me, although I didn't hold them to their commitments.

Q. What did you mean when you said in this letter to Mr. Smith that you would have to reimburse your friends? What did you mean by that? A. I still tried to get Mr. Smith to clean up this deal. Perhaps, at that time, although I had committed my friends——

Q. Have you read the letter? A. Yes.

Q. Having read the letter, I ask you what you meant by the use of the word "reimburse" in the letter? A. It was my desire to impress upon Mr.

Smith the import of his representation to me which I had passed on to my friends.

Q. Do you understand the meaning of the word "reimburse"? A. I certainly do.

Q. Will you please define "reimburse" to me?

Mr. Kessler: I object to that. This is not a school.

Objection sustained.

Q. When you wrote this letter, your friends had not parted with any money that you knew of, had they? A. They had not.

Q. Mr. Puder, I show you a letter purporting to be signed by you, addressed to Mr. Dayton E. Smith, dated February 16, 1925, and ask you whether that is your letter. A. It is.

Mr. Drewen: I ask that it be marked or identification.

(The letter is marked Ex. D-2 for identification.)

Q. I show you a letter dated March 20, 1925, purporting to be signed by you, addressed to the defendant, Mr. Dayton E. Smith, and ask you whether that is your letter, signed Henry S. Puder. A. It is.

Mr. Drewen: I ask that it be marked for identification.

(The same is marked Ex. D-3 for identification.)

Q. Have you just now read the two letters I showed you, Exhibits D-2 and D-3 for identification? A. I have scanned them.

Q. Will you please read them?

(The witness reads the letters.)

A. I have read them.

Re-direct examination by Mr. Kessler:

Q. You have testified you had ten or twenty shares of preferred stock. Was it stock of this company or the old company? A. The old company.

Q. That was before the reorganization? A. Many years before.

Q. This was the stock of the reorganized company? A. Yes.

Q. It was a different name? A. I don't know, but it was a differently reorganized company. The condition of the new company I was in no position to say.

Re-cross-examination by Mr. Drewen:

Q. You don't mean to say it was in a different corporation? A. I understand it was a reorganized corporation; whether it was a new corporation or not I don't know.

Q. Isn't it a fact that you exchanged your shares of stock in the old company for the new stock? A. I was asked to change it.

Q. Did you do it? A. With further promises I did it.

Q. Have you sold it?

Objected to as immaterial.

(Question withdrawn.)

PLAINTIFF RESTS.

Motion for Non-Suit.

Defendant's counsel moves that plaintiff be nonsuited on the following grounds:

1. That there is no testimony that the plaintiff has sustained a loss.

2. That there is no testimony that the defendant made representations to the plaintiff which he knew to be false at the time he made them.

3. That there is no proof showing any relation between any loss that the plaintiff did sustain if he sustained any, and the false pretenses, even as alleged in the complaint, and as referred to in the plaintiff's testimony.

4. That the testimony so far establishes only that whatever representations were made, referred to promises or predictions as to what might or what would occur in the future.

The Court: As to the question of no proof of any loss, if there is a fraud, there may be a rescission, as to no representations, there is testimony here that he admitted that he knew the arrangements had not been made on the curb market; the plaintiff claims that he stated to him that the arrangements had been made which would be done in thirty days. I will deny the motion.

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

Exception noted as ground of appeal.

Mr. Drewen: I would like your Honor to hear me on a case or two covering these points.

The Court: I don't think that is necessary.

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

Exception noted as ground of appeal.

King A. Harvie—Direct.

King A. Harvie, sworn in behalf of the defendant.

Direct examination by Mr. Drewen:

Q. Mr. Harvie, are you connected with the firm of the House of A. Silz & Company? A. I am, as vice-president.

Q. Since when? A. March 17, 1924.

Q. How long has that company been in business? A. Are you referring to the reorganized name or the company?

Q. The company.

Mr. Kessler: Make it clear.

Mr. Drewen: This stock is in the same company; there are not two companies.

Q. Mr. Harvie, the house of A. Silz went through a reorganization, did it not? A. Yes.

Q. When did that occur? A. September, 1923.

Q. Did that reorganization result in the creation of a new company, or did the old company continue? A. The old company continued; the reorganization was a refinancing of the company.

Q. How long has the company been in business? A. Thirty-one years.

Q. Do you know the plaintiff, Mr. Puder? A. I do.

Q. Do you know the defendant, Mr. Smith? A. I do.

Q. Were you present in the month of October at a conversation between Mr. Puder and Mr. Smith? A. I was present at a conversation between Mr. Puder and Mr. Smith held in the office of the corporation late in 1924, but I don't recall what month it was.

Q. Can you tell us whether it was in the month

of October or prior, or later? Can you fix it to that extent? A. No, I cannot remember that.

Q. Do you know whether or not this conversation took place prior to the time Mr. Puder bought the stock that has been offered in evidence here? A. It did.

Q. Will you tell us what took place at the time of the reorganization that you have referred to? What was done?

Mr. Kessler: I object to that. That is not the best evidence.

The Court: The records would be the best evidence. Objection sustained.

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

Exception noted as ground of appeal.

Q. At the time of this conversation between Mr. Puder and Mr. Smith, was it in Mr. Smith's office in the company? A. Yes.

Q. Do you know from anything that Mr. Puder said at the time of that conversation why he came there to see Mr. Smith? A. It was, I believe, in connection with obtaining a line of credit with one of the New York banks.

Q. Who was to obtain the credit? A. Mr. Smith.

Q. And what part did Mr. Puder have in that?

Mr. Kessler: I object to that as immaterial to this issue, but if counsel thinks it is material, I won't object.

Witness: Mr. Puder thought he could be helpful to Mr. Smith in obtaining this line of credit.

Q. Did Mr. Puder and Mr. Smith in your presence have any conversation in regard to the purchase or the obtaining by Mr. Puder of a block of stock in the corporation? A. The purchase of common stock was discussed, but it was not particularly mentioned that it was for Mr. Puder.

Q. In other words, the reference to the purchase was not necessarily to the purchase by Mr. Puder.

Mr. Kessler: I object to that unless the conversation is given.

Q. What was stated by Mr. Smith and Mr. Puder with regard to the purchase and condition of the stock of the House of Silz, as you recall it? A. Mr. Smith stated that the preferred stock of the House would probably be listed on the Stock Exchange in Baltimore in the near future, as the prospectus which brought that issue out stated. He furthermore stated that it was his understanding that the common stock held by the old corporation was to be listed on the curb immediately following that preferred stock being listed.

Q. What did Mr. Puder say? A. I don't recall that Mr. Puder said anything at that moment.

Q. Is that the extent of the conversation at that time? A. No, Mr. Smith stated that he felt that the common stock was a good buy.

Q. Was anything said by Mr. Puder to Mr. Smith with regard to Mr. Puder's taking it on Smith's say-so? A. No.

Q. Have you stated whatever representations or statements were made by Smith concerning stock at that time? A. No, Mr. Smith stated that the common stock had no market value at that time as it had only been sold back and forth over the counter, but he knew of the sale of this stock for $15 and upward a share.

Q. Did you know of any sales yourself at that price at that time?

Objected to as immaterial.
Objection sustained.
Defendant's counsel prays an exception to this ruling of the court.
Exception noted as ground of appeal.

Q. Is the House of Silz still a going concern?

Objected to as immaterial.
Objection overruled.
Witness: It is.

Q. Was there a prospectus prepared concerning the issue of stock of which this 300 shares was a part?

Objected to as immaterial.
The Court: You must show it came to the notice of the plaintiff. I will allow it.
Plaintiff's counsel prays an exception to this ruling of the court.
Exception noted as ground of appeal.
Witness: Yes.

Q. By whom was that prospectus prepared and issued? A. Hambleton & Company.
Q. What is their business? A. They are an investment house.
Q. Do you know whether or not that prospectus was sent to all the stockholders in the company at that time?

Objected to as immaterial and improper.
Objection overruled.
Witness: It was not.

Q. Was there any discussion by Mr. Smith and Mr. Puder as to that prospectus at the time of the conversation?

Mr. Kessler: I object to that as immaterial as to an interested witness.
The Court: I will allow it.
Witness: Not to my knowledge.

Q. By the way, Mr. Harvie, do you know a Robert S. Campbell? A. I know the name and the connection.
Q. Do you know the name of Robert S. Campbell with regard to the stock of the House of Silz?

Objected to as immaterial.
Objection overruled.
Witness: The name is used in connection with the transfer of stock, and Robert S. Campbell is an employee of the Equitable Trust Company, the name being used as a dummy individual in order to simplify the transfer of stock.

Q. So that Robert S. Campbell is an employee of the bankers? A. Yes, sir.

Cross-examination by Mr. Kessler:

Q. Have you ever met Robert S. Campbell? A. No.
Q. Do you know whether there is such a person in existence? A. There is.
Q. How do you know? A. There has to be.
Q. How do you know there is one? A. Because when a bank appoints one to sign certificates, and he signs——
Q. Do you know whose stock this 300 shares was? A. Mr. Puder's.
Q. Before it was Mr. Puder's? A. No, sir.
Q. It may have been Mr. Smith's stock? A. Yes, sir.
Q. Campbell was a dummy name used? A. It

is the name all of our stock is issued under—preferred and common.

Q. He had no interest? A. No.

Re-direct examination by Mr. Drewen:

Q. He was simply a representative of the banking house?

Objected to as already covered.

Re-cross examination by Mr. Kessler:

Q. You don't know whether this conversation you related occurred prior to when Mr. Puder bought the stock or subsequent thereto? A. It was prior.

Q. How long prior? A. I can't answer that question.

Re-direct examination by Mr. Drewen:

Q. Where is Mr. Smith now? A. En route to New York.

Q. Where is he?

Mr. Kessler: I object to that. How does he know?

Objection sustained.

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

Exception noted as ground of appeal.

Mr. Kessler: A great deal has been said about the absence of Mr. Smith and about his being enroute from Oregon. I think the clerk ought to be permitted to take the stand and show that he knew for weeks that this case was coming on.

The Court: I will instruct the jury that they have got to decide it on the evidence produced in court.

Mr. Kessler: I think your Honor is justified in pointing out that the case has been at issue for two weeks.

Mr. Drewen: I offer in evidence the papers marked for identification.

The Court: They will be considered in evidence.

DEFENDANT RESTS.

Motion for Direction of a Verdict.

Mr. Drewen: I renew my motion at this time, making it a motion for the direction of a verdict.

The Court: On the same grounds?

Mr. Drewen: Yes, sir.

The Court: I will deny the motion.

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

Exception noted as ground of appeal.

Mr. Drewen sums up for the defendant.

Mr. Kessler sums up for the plaintiff.

Charge to Jury.

The Court charges the jury as follows:

SMITH, J.

Members of the jury: This action is brought by the plaintiff to recover the price which he paid for three hundred shares of stock in this company, on the ground that the defendant committed a fraud when he sold the stock to him. The sale was made

on October 2, 1924, and the charges of fraud are these: That the defendant stated that he owned stock himself but that he was going to keep it and would not sell it, but that he thought he could get some other stock for the plaintiff; that an arrangement had been made for the listing of this stock on the New York Curb Market within thirty days, I think the time was; and that these statements were false.

In order to give you what it is necessary for the plaintiff to prove to sustain his case I will read you the seventh request to charge on behalf of the defendant, so as to avoid the necessity of going over it. "Before the plaintiff can recover he must prove by the greater weight of the evidence: First. That the defendant made representations to him concerning the stock of A. Silz, Inc. Second. That such representations were made by defendant with intent that the plaintiff should act upon them. Third. That such representations related to past or existing facts. Fourth. That such representations when made were false. Fifth. That the defendant when he made the representations knew them to be false. Sixth. That the plaintiff relied on the representations, believing them to be true, and so relying did act upon them. Seventh. That having acted upon the representations the plaintiff sustained a loss. Eighth. That plaintiff's loss was proximately caused by the fact that the representations were not true."

The plaintiff here bases his claim on recission. That is, after he discovered the fraud he went to the defendant and offered him back the stock and asked for his money back. In order to recover in such an action he has to rescind promptly after the discovery of the fraud; if he does, he may then recover his money, and, upon the payment of the

plaintiff's claim, or judgment, if he gets one in this case, the defendant would become entitled to the stock. The plaintiff's damage in the case of recission is the amount he paid for the stock, and the interest. If you find for the plaintiff you should include the interest. The time of payment was October 2, 1924.

You are the judges of the facts in this case and it is for you to determine what the true facts are. The burden of proof is on the plaintiff. He must sustain every material allegation in his claim by the greater weight of the evidence.

I have been requested to charge certain requests for the defendant.

The first request I have covered.

The second I will charge: "To warrant a verdict for the plaintiff it must appear not only that the plaintiff has sustained a loss by reason of the defendant's fraudulent misrepresentations, but also that the loss and the fraud bear toward each other the relation of cause and effect. The fraud must be the proximate, and not the remote, cause of the loss or damage; and there can be no recovery unless the plaintiff has proved by the greater weight of the evidence that his loss was proximately caused by the defendant's fraud."

The third I will charge: "It is not enough for the plaintiff to prove that the defendant made certain representations to him which turned out to be untrue. The representations on which plaintiff relied must have related to past or existing facts. Mere unfulfilled promises or predictions, or erroneous conjectures as to future events are not sufficient to warrant a verdict against the defendant."

The fourth I will charge: "In order to find for the plaintiff it must be proved to you by the

greater weight of the evidence not only that defendant made false representations to plaintiff but also that plaintiff's loss, if there is a loss, was proximately caused by the fact that the things stated to him by defendant to be true were not true. The mere coincidence of false representations by defendant and loss to the plaintiff are not enough to support a verdict for plaintiff. There must be the relation of cause and effect."

The fifth I will charge: "Plaintiff must prove as part of his case that he has actually sustained a money loss. Even if the representations made to him were not true, yet if he has not actually sustained a loss as a proximate result of such representations, he cannot recover."

The sixth I will deny.

The seventh I have already charged.

The eighth I will charge: "Any loss that the plaintiff sustained must be proved to be a direct consequence of false representations by defendant."

The ninth I will deny.

Defendant's counsel prays an exception to the Court's refusal to charge the sixth and ninth requests of the defendant.

Exception noted as ground of appeal.

(At 3:40 P. M. the jury returns and requests that the testimony of the defendant's witness Harvie be read to them. The stenographer reads the entire testimony of this witness, whereupon the jury again retires.)

Defendant's Requests to Charge.

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

HENRY P. PUDER, Plaintiff, *vs.* DAYTON E. SMITH, Defendant.	At Law.

FIRST REQUEST:

The burden of proof in this case is upon the plaintiff. He must prove every material allegation of his complaint by the greater weight of the evidence.

SECOND REQUEST:

To warrant a verdict for the plaintiff it must appear, not only that the plaintiff has sustained a loss by reason of the defendant's fraudulent misrepresentations, but also that the loss and the fraud bear toward each other the relation of cause and effect. The fraud must be the proximate, and not the remote, cause of the loss or damage; and there can be no recovery unless the plaintiff has proved by the greater weight of the evidence that his loss was proximately caused by the defendant's fraud.

THIRD REQUEST:

It is not enough for the plaintiff to prove that the defendant made certain representations to him

which turned out to be untrue. The representations on which plaintiff relied must have related to past or existing facts. Mere unfulfilled promises or predictions, or erroneous conjectures as to future events are not sufficient to warrant a verdict against the defendant.

FOURTH REQUEST:

In order to find for the plaintiff it must be proved to you by the greater weight of the evidence not only that defendant made false representations to plaintiff but also that plaintiff's loss, if there is a loss, was proximately caused by the fact that the things stated to him by defendant to be true were not true. The mere coincidence of false representations by defendant and loss to the plaintiff are not enough to support a verdict for plaintiff. There must be the relation of cause and effect.

FIFTH REQUEST:

Plaintiff must prove as part of his case that he has actually sustained a money loss. Even if the representations made to him were not true, yet if he has not actually sustained a loss as a proximate result of such representations, he cannot recover.

SIXTH REQUEST:

If you find that the plaintiff at the time he purchased the stock had independent knowledge of the financial condition of A. Silz, Inc., and of the value of the stock, and that he did not actually rely for information as to these things on the statements of the defendant, the plaintiff cannot recover.

SEVENTH REQUEST:

Before the plaintiff can recover he must prove by the greater weight of the evidence.

First. That defendant made representations to him concerning the stock of A. Silz, Inc.

Second. That such representations were made by defendant with intent that the plaintiff should act upon them.

Third. That such representations related to past or existing facts.

Fourth. That such representations when made were false.

Fifth. That the defendant when he made the representations knew them to be false.

Sixth. That the plaintiff relied on the representations, believing them to be true, and so relying did act upon them.

Seventh. That having acted upon the representations the plaintiff sustained a loss.

Eighth. That plaintiff's loss was proximately caused by the fact that the representations were not true.

EIGHTH REQUEST:

Any loss that the plaintiff sustained must be proved to be a direct consequence of false representations by defendant.

Defendant's Requests to Charge.

NINTH REQUEST:

The mere fact that the stock was not listed on the exchange, or the fact the defendant sold to plaintiff stock other than his own, or the fact that the stock was not worth what the defendant at the time of the representations said it was worth, or the fact that plaintiff was not able quickly to dispose of the stock that defendant sold him, or all these facts taken together do not of themselves show that the plaintiff has sustained a loss.

PERKINS & DREWEN,
Atty's of Defendant.

New Jersey Court of Errors and Appeals

MAY TERM, A. D., 1927.

HENRY S. PUDER, Plaintiff-Respondent, *vs.* DAYTON E. SMITH, Defendant-Appellant.	Action at Law. ON APPEAL FROM THE NEW JERSEY SUPREME COURT. (Smith, C. C. J.)

BRIEF FOR THE DEFENDANT-APPELLANT.

Facts.

In this case the plaintiff seeks to recover back the purchase price of a block of the corporate stock of A. Silz & Company, purchased by him of the defendant. He claims to have rescinded his contract for the purchase of the stock on the ground of fraud and misrepresentation. The purchase price was $4,500.00, and for that sum with interest, judgment was entered in the Supreme Court on the verdict of a jury in the Essex Circuit.

The plaintiff is an expert accountant, a member of the firm of Puder and Puder (Case, page 19, line 5). Plaintiff's firm had been the auditors of the corporation, whose stock plaintiff purchased. Plaintiff had been engaged in the work of auditing the books of the corporation for several years (Case, page 19, line 31). Plaintiff's work of auditing the books of the corporation continued

until about six months before the plaintiff's first conversation with the defendant relative to the purchase (Case, page 19, line 38).

Plaintiff's father-in-law had been Treasurer of the corporation for several years (Case, page 20, lines 1-10). At the time the plaintiff spoke to the defendant about buying the stock, the plaintiff had already become the owner of some of the preferred stock of the corporation, which he still held —"either ten or twenty shares" (Case, page 20, lines 20-30). The defendant had nothing whatever to do with the sale to the plaintiff of the preferred stock, which the plaintiff so held (Case, page 20, line 27).

The plaintiff and defendant were intimates; they lived their club life and their social life very much in common (Case, page 19, lines 30-40), and the setting in which occurred the conversation between the defendant and the plaintiff and in which the defendant is alleged to have induced the plaintiff by false pretenses to purchase the stock, is described by the plaintiff as follows (Case, page 14, line 10, etc.):

> "Q. Tell us about it. A. I had invited Mr. Smith and his wife and a brother-in-law and sister-in-law to have dinner with me at the Newark Athletic Club, and I had entertained them for dinner. We had spent a very pleasant evening together. During the course of the evening there were several things I had done for him—he tried to be very friendly with me—"

Among the alleged false representations set forth in the complaint, is one to the effect that "the shares of stock of the said corporation were then of the full value of One Hundred ($100.) dollars per share as shown by the books of the said corporation" (Case, page 5, line 1, etc.).

At the trial, plaintiff's counsel amended this allegation by substituting the amount of Thirty ($30.) dollars for that of One Hundred ($100.) dollars (Case, page 13, line 1, etc.).

The defendant was not present in court at the trial. He was en route to New York (Case, page 12, lines 25-35; page 32, line 22).

The grounds for reversal urged in this brief are:

1. Denial of defendant's motion for nonsuit at the close of the plaintiff's case.

2. Denial of defendant's motion for direction of verdict made at the close of the whole case.

3. The Court's refusal to charge the defendant's 6th request to charge.

These will be argued in their order.

POINT I.

The Trial Court erred in denying the defendant's motion for nonsuit made at the close of the plaintiff's case.

Our motion for nonsuit appears in the printed case on page 26. The grounds stated to the Court for that motion are:

1. That there is no testimony that the plaintiff has sustained a loss.

2. That there is no testimony that the defendant made representations to the plaintiff which he knew to be false at the time he made them.

3. That there is no proof showing any relation between any loss that the plaintiff did

sustain if he sustained any, and the false pretenses, even as alleged in the complaint, and as referred to in the plaintiff's testimony.

4. That the testimony so far establishes only that whatever representations were made, referred to promises or predictions as to what might or what would occur in the future.

The plaintiff himself was the only witness called in his case. And the only testimony he gave bearing on representations made to him by the defendant concerning the stock purchase is the following. We here set it forth at length because there is very little of it (Case, page 14, line 20, *et seq.*):

"Witness: He told me in a spirit of friendship that he wanted me to make some money and I could get a quick turnover. He had some stock which he said he could not sell. He said he had signed certain papers with brokers to list this stock with the curb; that he could get for me from the brokers three hundred shares at the underwriting price of $30. a share; that I could get a quick turnover at $30. a share.

Q. Did he say when it would be listed? A. Within thirty days; that the papers had been signed; it was simply a matter of formality in listing the stock.

Q. As a result of that conversation what did you say to him? A. I said, 'Relying absolutely on your judgment; that you consider this stock valuable and won't sell; that the stock will be listed within thirty days, I will be glad on this basis to get that stock.'

Q. Did you tell him to buy 300 shares? A. He told me he could get 300 from the bankers. Several days later he called me up and said he was in a position to get the stock. I said, 'if that is the arrangement, I will buy the stock.' As a result of that conversation I sent him a check for $4,500."

Whatever there is in this case showing that the defendant made any representation whatever concerning the stock will have to be found in the testimony above quoted, *for it is nowhere else in the case.* And in the testimony quoted, the only reference to a representation concerning a *past or existing fact* is that to the effect that the defendant "had signed certain papers with brokers to list this stock with the curb", and that the defendant "had some stock which he said he could not sell".

All the rest of the testimony refers to mere promises or predictions.

Now, what is there in the plaintiff's case to negative these "pretenses"; to show that they were false, *and known to defendant to be false, when made by him to the plaintiff?* Only the following; there is nothing else (Case, pages 17-18):

"Q. When you went to his office what did you say to him and what did he say to you? A. I asked him specifically why he had made certain representations; why he misrepresented the fact that the agreement had been signed with the brokers.

Q. What did he say in answer to that? A. He said, 'I thought it was all set and ready to be closed.'

Q. What did he say as to whose stock it was? A. I accused him of the fact that he had misrepresented to me——

Q. What did you say to him? A. 'Why did you sell me your own stock when you told me you were trying to get stock from the bankers?'

Q. Did he say something about money——

Mr. Drewen: I object to that as most unfair.

Q. Did he say anything to you about the reason why he sold you his own stock? A. I don't remember; I can't remember that part of the details. I know he was very evasive.

Mr. Drewen: I ask that that be stricken out.

The Court: Strike it out.

Q. What did he say as to whose stock it was? A. He admitted he had sold his own stock.

Q. Did you say anything about the information you had received as to the book value of the stock? A. I accused him of the fact that he had misrepresented the book value to me——

Mr. Drewen: We object to that as calling for a conclusion.

Q. Just tell us what you did. Give us the words you used. A. As far as my knowledge can go back to the matter, he admitted to me——

Q. That is a conclusion. Tell us what he said. A. He told me that the value of the stock was $30 per share. When I accused him of the misrepresentation that the book value was less than that, he told me *in good faith,* 'I thought it was worth $30 a share, but was not in a position to judge it.' ''

The testimony that the defendant said "I thought it was all set and ready to be closed" surely is no proof whatever *that the papers for the listing of the stock had not actually been signed.* And the plaintiff's testimony that the defendant "*in good faith*" said "I thought it was worth Thirty ($30) dollars a share, but was not in a position to judge it", is no proof that the shares of the stock of the corporation were not "*then of the full value of $30 per share as shown by the books of the corporation*". The negatives required to contradict the truth of the alleged representations were never proved.

We respectfully submit to the Court that the plaintiff's manner of giving testimony should be observed. In spite of objections repeatedly made,

it was impossible to bring the plaintiff to give testimony free from unwaranted assumptions of fact and from conclusions of his own. There are many examples of his testimony like that in which he related that he said to the defendant:

> "Why did you sell me your own stock when you told me you were trying to get stock from the bankers?" (Case, page 18, lines 1-3).

And the only testimony whatever to the effect that the defendant *had* sold to the plaintiff the defendant's own stock rather than stock which the defendant had obtained from the bankers, is this:

> "He *admitted* he had sold his own stock" (Case, page 18, line 21).

The plaintiff seemed almost unable to answer any question with a real statement of fact. He was forever concluding and presuming. And, just prior to having testified that the defendant "admitted" to him that he (defendant) had sold his own stock, plaintiff had testified that *he did not remember and could not remember that part of the details* (Case, page 18, line 13).

When we made our motion for nonsuit on the grounds above stated, the trial court ruled against us for the reason, as the Court stated, that "There is testimony here that he (defendant) *admitted that he knew the arrangements had not been* made on the curb market" (Case, page 26, lines 27-30).

Notwithstanding the Court's statement, the simple fact is that there is no testimony whatever in the case that the defendant at any time admitted to the plaintiff or anyone else that he, the defendant, knew that arrangements had not been made for the placing of the stock on the curb.

Apart from other considerations, we have no way of telling what prejudice to the defendant was

carried into the jury box by the Court's inadvertance.

This Court held, in a similar transaction, in the case of *Lams* vs. *Fish,* 86 N. J. L. 321, that: "Before there can be recovery there must be proof that the stock was in fact worth less than the plaintiff paid for it." Just as was the fact in *Lams* vs. *Fish,* there is in the present case "an utter absence of proof as to the value of the stock". Whether it was worth more or less than the plaintiff paid for it is left unrevealed (*Lams* v. *Fish, supra,* page 324). The same case holds that *moral fraud* in a misrepresentation is an *essential element* in an action for deceit. As to the presence of moral fraud, there is nothing whatever in the plaintiff's case here to show that the defendant made any *representation which was in fact false, and which at the time he made it, he knew to be false.*

As to the necessity for proof of the actual value of the stock in a transaction like the present, the recent case of *Metz* v. *Schmeidler* (133 Atl. 298) is a holding by this Court the same as that of *Lams* v. *Fish, supra.* (See other cases cited in *Metz* v. *Schmeidler*).

This Court in the case of *DeBennedetto* v. *Fredman, et al.* (130 Atl. 539) again held that in a case like the present:

> "An essential element in the proof is to show the value of the shares of stock when the fraud was discovered".

This Court has held time and again in actions for deceit arising out of the purchase of stock that there must be "moral fraud in a misrepresentation", and that fraudulent intent is shown by the fact not only that the representations are false, *but that they are false to the defendant's knowledge, and were made with intent to deceive. Lams* v. *Fish, supra; Bingham* v. *Fish,* 86 N. J. L.

> "For the plaintiff to recover in an action for deceit, he must prove that the defendant made representation to him with intent that he should act thereon; that the representation was false; that the defendant when he made it, knew it to be false, and that the plaintiff believing the representation to be true acted on it to his injury".
>
> *Lembeck* v. *Gerken,* 86 N. J. L. 111.

> "To maintain an action on a case for deceit, the plaintiff must allege and with reasonable certainty be prepared to prove:
>
> 1. That the defendant made some representation to the plaintiff meaning that he should act upon it.
>
> 2. That such representation was false and that the defendant who made it knew it to be false.
>
> 3. That the plaintiff believing such representation to be true acted upon it and was thereby injured."
>
> *Byard* v. *Holmes,* 34 N. J. L. 296.

We have called attention to the fact that in the testimony referring to alleged representations by the defendant there are only these which concern past or existing facts, that is to say:

1. That the defendant stated that he "had signed certain papers with brokers to list this stock with the curb."

2. That the defendant stated "he had some stock which he said he could not sell."

And we called attention to the fact that all else in the testimony on this point refers only to promises or predictions as to the future.

> "An actionable representation must relate to past or existing facts and cannot consist of mere broken promises, unfulfilled predictions or erroneous conjectures as to future events. Predictions as to future events are usually regarded as non-actionable expressions of opinion upon which there is no right to rely".

26 Corpus Juris, 1087, Sec. 25, citing many cases, including *Lembeck* v. *Gerken,* 86 N. J. L., 111. *Norfolk Hosiery Co.* v. *Arnold,* 49 N. J. Eq. 390.

Justice Kalisch in *Lembeck* v. *Gerken, supra,* says at page 114:

> "There is no legal principle more firmly rooted in the law than that a representation, in order to form the basis of an action of deceit must be material to the subject matter of the contract and relate to some existent fact". Citing *Byard* v. *Holmes,* 24 N. J. L., 296.
>
> "If it merely affect the probability that it will be kept, that is, some assurance what shall thereafter be done, or as to any future event, it is not a representation, but a contract for the violation of which a remedy must be sought on the contract". Citing: *Dawe* vs. *Morris,* 149 Mass., 188; 4 L. R. A., 158.

Now, as to any *loss* to the plaintiff, it must be admitted that this case is altogether without any evidence of *loss* whatever. There was no effort to prove a loss. There is testimony in the case, adduced by the defendant, that the corporation whose stock was purchased is an old and seasoned business, that it has been in business thirty-one years (Case, page 27, line 29); that it is still a going concern (Case, page 30, line 10, etc.).

One of the grounds of our motion for nonsuit was that there was no proof of loss, but the Court decided our motion against us on a theory which

excluded any necessity for such proof. The Court said (Case, page 26, line 25):

> "As to the question of no proof of loss, if there is a fraud, there may be a rescission."

So we have it that the Trial Court's theory was that the plaintiff's case was one of rescission of the contract. But the difficulty here, and the point we now make, *is that nothing less in the way of fraud and its moral quality is required to justify a rescission of the contract than is required for the recovery of damages for loss resulting from the fraud.*

Rescission and recovery of the purchase price on the one hand, and affirmance and recovery of damages for loss on the other, are simply alternative remedies afforded by the law in cases of fraud and deceit. There is a choice of either of these two remedies, *but the ground upon which both forms of relief is based is precisely the same: fraud and deceit having the attributes defined by the cases hereinabove set forth.*

> "When a vendee discovers he has been induced to make a contract to purchase by fraudulent misrepresentation, he has a choice of remedies. He may rescind the contract, restore what he has received and recover back what he has paid; or he may affirm the contract and recover the damages he has sustained by the fraud.
>
> In case of such a choice of remedies the bringing of an action for deceit is a sufficient election of remedies."

Kvedar vs. *Shapiro,* 119 Atl. 104.

In a word, there being no proof of those facts which the law requires to constitute actionable fraud, our motion for non suit should have been

granted, regardless of the plaintiff's choice of remedy.

It remains only to add that in a case like the present the requirements of affirmative proof of plaintiff's charges is that such proof be clearer than in cases where no charge involving turpitude is made.

> "Clear proof is necessary to establish fraud."
>
> *Kelso* v. *Kelso,* 95 N. J. L., 544 (123 Atl. 250).

> "Business transactions are presumed to be honest."
>
> *Guerber Eng. Co.* vs. *Stafford,* 96 N. J. L. 280, (114 At. 747).

POINT II.

The Trial Court erred in denying defendant's motion for direction of a verdict made at the close of the whole case.

All that we put forth under Point I above is equally applicable here. Certainly the proof made on behalf of the defendant did not improve the plaintiff's position on the question of our motion. The close of the whole case left the record as free of the facts necessary for proof by the plaintiff as it was at the time of our previous motion.

Our motion for direction of a verdict appears in the printed case at page 33, line 18, etc., and was made on the same grounds as the motion for non suit (Case, page 33, line 20).

POINT III.

The Trial Court erred in refusing to charge the defendant's 6th request to charge.

The language of this request is as follows—(Case, page 28, line 32):

> "If you find that the plaintiff at the time he purchased the stock had independent knowledge of the financial condition of A. Silz, Inc., and of the value of the stock, and that he did not actually rely for information as to these things on the statements of the defendant, the plaintiff cannot recover."

The fullness of the plaintiff's opportunity as shown above, for a knowledge and understanding of the business of the company whose stock he purchased, made it, we submit, especially requisite for the Court to instruct the jury as we requested. It will be remembered that the one outstanding thing which the plaintiff says the defendant told him was that the stock was worth $30 per share (page 18, line 32). Indeed, the plaintiff had lately been the company's auditor. He, above all men, had opportunity to know just what the books showed, not only on their face, but by analysis. Plaintiff's father-in-law had been the company's Treasurer. With all this opportunity at the plaintiff's hand for the acquiring of immediate and authentic data as to the company's condition and the value of its stock, the defendant had the right to have the jury consider whether the plaintiff was led into his purchase solely by what the defendant told him—such as it was—or whether the

plaintiff "had independent knowledge of the financial condition of A. Silz, Inc., and of the value of the stock".

Judgment should be reversed and a new trial awarded.

Respectfully submitted,

PERKINS & DREWEN,
Counsel for Defendant-Appellant.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.
(1040)

New Jersey Court of Errors and Appeals

MAY TERM, A. D., 1927.

HENRY S. PUDER,
Plaintiff-Respondent,

vs.

DAYTON E. SMITH,
Defendant-Appellant.

Action at Law
On Appeal from
The New Jersey
Supreme Court.
(Smith, C. C. J.)

BRIEF FOR THE PLAINTIFF-RESPONDENT.

The facts in this case are fully set forth in the brief for the defendant-appellant, but specific attention of this Court is directed to the following facts:

The plaintiff was engaged by A. Silz & Company as an accountant to audit the books, not as a general auditor, but merely for the purposes of going over the accounts, and that this employment ceased more than six months before plaintiff purchased the stock in question, and in the interim, the corporation had undergone a financial reorganization at the hands of certain bankers (S. C., page 16, line 1). The plaintiff's father-in-law, who had been treasurer of the corporation had severed his connection with the corporation some six or nine months before the reorganization (S. C., page 16, line 20). The defendant did not become an officer of the corporation until after the reorganization had been effected, and he was not connected with the corporation at the time the plaintiff was employed as an auditor.

POINT I.

The Trial Court did not err in denying the defendant's motion for nonsuit.

The grounds set forth in the motion for nonsuit made at the trial are four in number, to wit:

> "1. That there is no testimony that the plaintiff has sustained a loss.
>
> 3. That there is no proof showing any relation between any loss that the plaintiff did sustain if he sustained any, and the false pretenses, even as alleged in the complaint, and as referred to in the plaintiff's testimony."

At the trial of this cause, the defendant elected to stand upon a rescission of the sale of this stock and proved the fraud and deceit plus a tender (S. C., page 19, line 20) of the return of the stock and a demand for the repayment of the purchase price, which are the necessary elements to sustain a recovery under a count for rescission.

It is deemed unnecessary to cite any cases to show that the plaintiff need not prove any loss or damage when he elects to rescind a contract (*Kvedar* vs. *Shapiro,* 119 Atl. 104).

> "2. That there is no testimony that the defendant made representations to the plaintiff which he knew to be false at the time he made them."

This is the main ground upon which the defendant-appellant relies for a reversal of the judgment in this case. All the testimony on this point is fully set forth in the brief for the defendant-appellant, but specific attention of this Court is directed to the following portions of the testimony given by the plaintiff:

> "Q. When you went to his office, what did you say to him and what did he say to you? A. I asked him specifically why he had made certain representations; why he misrepresented the fact that the agreement had been signed with the brokers?
>
> "Q. What did he say in answer to that? A. He said, 'I thought it was all set and ready to be closed' " (page 17, line 30).

And the further question and answer:

> "Q. What did he say as to whose stock it was? A. He admitted he had sold his own stock" (page 18, line 20).

This proof, we believe, sets forth such a situation as was in the contemplation of the Supreme Court in the case of *Cowley* v. *Smyth,* 46 New Jersey Law, page 380, on page 388.

> "In other cases of actionable frauds, the probative force and effect of the evidence to establish the fraudulent intent will depend upon the circumstances of the particular case. This question is presented in a complex form where the defendant has added to a representation—which turns out to be untrue, but was not false to his knowledge—an affirmation that he made the representation as of his own knowledge. In such cases the force and effect of the evidence will depend, in a great measure, upon the nature of the subject concerning which the representation was made. If it be with respect to a specific fact or facts susceptible of exact knowledge, and the subject matter be such as that the affirmation of knowledge is to be taken in its strict sense, and not merely as a strong expression of belief, the falsehood in such a representation lies in the defendant's affirmation that he had the requisite knowledge to vouch for the truth of his assertions, and that being untrue, the falsehood would be wilful and therefore fraudulent."

It is to be noted that the defendant not only represented that the papers had been signed, but that the defendant himself has signed the papers for the listing of the stock.

> "4. That the testimony so far establishes only that whatever representations were made, referred to promises or predictions as to what might or what would occur in the future."

As to this contention, the testimony set forth in the brief of the defendant-appellant in itself rebuts this argument, in that it shows that the representations were, among others, that the necessary papers for the listing of the stock on the market *had been signed* by the defendant, which in fact was false.

Certainly the defendant cannot contend that this representation relates to a promise or prediction as to what might occur in the future; it refers to a fact within the knowledge of the defendant, and, therefore, is sufficient to sustain this action.

POINT II.

The Trial Court did not err in denying defendant's motion for direction of a verdict.

The argument advanced under Point II is the same as that advanced under Point I of the defendant-appellant's brief and, therefore, the plaintiff urges this Court to consider the argument advanced under Point I of the plaintiff-respondent's brief as if the same were herein fully set forth.

POINT III.

The Trial Court did not err in refusing defendant's 6th request to charge.

It is respectfully submitted that the defendant's 6th request to charge was in effect fully charged by the Trial Court. The Trial Court charged as follows:

> "In order to give you what it is necessary for the plaintiff to prove to sustain his case, I will read you the seventh request to charge on behalf of the defendant, so as to avoid the necessity of going over it."
>
> * * * * * *
>
> "That the plaintiff relied on the representations, believing them to be true, and so relying did act upon them."

The effect of the 6th request to charge is that if plaintiff did not rely upon the representations of the defendant, then he cannot recover. This was fully charged by the Trial Court as above set forth, and is respectfully submitted that there is no error in the Court's refusal to charge this request.

Hintz v. *Roberts,* 98 N. J. L., page 768, at page 772.

POINT IV.

It is, therefore, respectfully submitted that the judgment entered in the Trial Court be affirmed.

KESSLER & KESSLER,
Attorneys for Plaintiff-Respondent.

SAMUEL I. KESSLER,
Of Counsel.