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day of December, 1926, without prejudice.

S. Rusling Leap,
Attorney of Defendant.

GROUNDS OF APPEAL.

(Filed December 17, 1926.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

JOSEPH RABINOWITZ, *Plaintiff-Appellant,* v. THEODORE E. DEBOW, *Defendant-Appellee.*	Action at Law. Grounds of Appeal.

The following are the grounds of appeal under the appeal in the foregoing cause:

1. Because at the conclusion of the case the Court directed a verdict for the defendant as to the second and third counts to which an exception was duly taken, allowed and noted on the record.

2. Because there was no evidence to warrant the Court in directing a verdict for the defendant on the second and third counts.

CARR & CARROLL,
Counsel for Joseph Rabinowitz,
Plaintiff-Appellant.

[ENDORSED]

Due and legal service of the within grounds of appeal is hereby acknowledged this 16th day of December, A. D. 1926.

S. Rusling Leap,
Counsel for Defendant-
Appellee.

COMPLAINT.

(Filed Aug. 5, 1925.)

Plaintiff, Joseph Rabinowitz, of Woodbine, County of Cape May, State of New Jersey, says that:

FIRST COUNT.

1. On February 19, A. D. 1923, defendant agreed in writing that within ninety days he would convey to plaintiff lots Nos. 18 and 19 of Block 41, Section A, Sea Isle City, New Jersey, together with the buildings and fixtures thereon, free and clear of all encumbrances and easements; and plaintiff in said writing agreed to pay $15,000 for the same, viz: $1,000 on executing the contract and the balance on the signing of the deed. A copy of said agreement is annexed hereto and forms a part hereof. Plaintiff paid $1,000 on executing the contract in accordance with its terms.

NOTICE OF APPEAL.

(Filed December 7, 1926.)

NEW JERSEY SUPREME COURT.

CAPE MAY COUNTY.

JOSEPH RABINOWITZ,
Plaintiff,
v.
THEODORE E. DEBOW,
Defendant.

Action at Law.
Notice of Appeal.

To S. Rusling Leap, Esquire, Attorney for Defendant:

Take notice that the plaintiff appeals to the Court of Errors and Appeals of New Jersey from so much of the judgment entered in this cause as adjudges that plaintiff is only entitled to recover $1170 being the amount due on the first count and that plaintiff was not entitled to recover on the second and third counts of the complaint.

CARR & CARROLL,
Attorneys of Plaintiff-Appellant.

[ENDORSED]

Service of the within notice of appeal is hereby acknowledged this 6th

2. Plaintiff and defendant agreed upon Saturday morning, May 19, 1923, as the time, and the office of the West Jersey Title & Guaranty Company, Camden, New Jersey, as the place for settlement. At said time and place the plaintiff attended with the balance of the consideration, but neither the defendant nor his representative appeared, nor was the deed from defendant to the plaintiff lodged with said title company.

3. On May 19, 1923, plaintiff was ready and willing, and offered to defendant, to pay the balance of said contract and duly to perform all the terms of said contract upon his part, upon the like performance by defendant.

4. Defendant refused then to deliver any deed of conveyance for said property and still refuses so to do.

Plaintiff demands the return of the $1,000 paid on account of said agreement.

Second Count.

1. The allegations of the first count are here repeated as of the second count.

2. On May 5, A. D. 1923, plaintiff entered into an agreement with H. S. Fox and Mori Brothers, all of the City of Vineland, County of Cumberland and State of New Jersey, for the sale of said property. Said H. S. Fox and Mori Brothers agreed to pay plaintiff $20,000 therefor.

3. On May 19, 1923, said H. S. Fox and Mori Brothers were ready, able and willing to pay for said property the sum of $20,000.

4. Defendant's refusal to deliver any deed of conveyance for said property has caused plaintiff a loss of $5,000.

Plaintiff demands, on the second count, $5,000 damages.

Wherefore the plaintiff demands $1,000 damages on the first count, and the sum of $5,000 damages on the second count.

CARR & CARROLL,
Attorneys for Plaintiff.

AGREEMENT, made the 19th day of February, A. D. 1923, BETWEEN Theodore E. De Bow of Sea Isle City, N. J., of the first part, and Joseph Rabinowitz of Woodbine N. J. of the second part, as follows, to wit: The said party of the first part agrees to sell and convey to the said party of the second part, who agrees to purchase all that certain land and buildings thereon situated including all furniture and fixtures and bowling alleys being lots number 18 and 19 of Block 41 Section A Sea Isle City N. J. on the terms and conditions following, to wit:—The said party of the second part agrees to pay for the said property the sum of Fifteen Thousand Dollars ($15,000.); One Thousand Dollars ($1,000.) on the signing of this agreement (which deposit shall be forfeited to the said party of the first part as liquidated damages in case of the default by the said party of the second part in the performance of the terms of this agreement) and the balance of the purchase money as follows, Fourteen Thousand ($14,000.00) dollars at the signing of the deed.

A policy of Fire Insurance for all to be transferred to said party of the second part upon payment of the premium, less the discount named in policy.

The premises are to be conveyed free and clear of all incumbrance and easements.

The gas fixtures, heaters, ranges, etc., annexed to the said building are all included in the sale, as also any water pipe laid on any street bounding said lot.

Possession is to be given at the signing of the deed.

Taxes, water rent, house rent and interest on incumbrance (if any) to be apportioned for the current term.

Gas bills, if any, to be paid by the seller.

The title is to be such as will be insured by any reputable title company.

And the said parties hereby bind themselves, their heirs, executors and administrators, for the faithful performance of the above agreement within 90 days from the date hereof, said time to be the essence of this agreement, unless extended by mutual consent in writing endorsed thereon, subject to lease on apartment known as the North side apartment made to August Wahm. Inventory of all personal property will be attached to and made a part of this agreement.

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

Theo. E. De Bow (L. S.)
Joseph Rabinowitz (L. S.)

Sealed and Delivered
in the presence of
M. M. Sofroney
M. E. Goodman

Received the day of the date of the within agreement the sum of one thousand dollars, on account of the purchase money named therein #101 on Franklin Natl Bank of Phila. Pa.

Theo. E. De Bow (seal)

Witness
M. M. Sofroney

[ENDORSED]

Due and legal service of the within Summons & Complaint is hereby acknowledged, this 3rd day of August, A. D. 1925.

Charles K. Landis
Attorney for Defendant.

ANSWER.

(Filed Aug. 12, 1925.)

Defendant, Theodore E. De Bow, of the City of Sea Isle City, Cape May County, New Jersey, says that:

FIRST DEFENSE TO FIRST COUNT.

1. He admits paragraph 1.

2. He denies paragraph 2 except he admits that neither he nor his representative appeared nor was the deed from him to the plaintiff lodged with said title company at the time and place mentioned in said paragraph.

3. He denies paragraph 3.

4. He denies paragraph 4.

SECOND DEFENSE TO FIRST COUNT.

1. Said contract stated in paragraph 1, has been duly rescinded by said parties.

2. On May 21, 1923, he paid to plaintiff the $1,000 demanded by said first count.

3. On May 21, 1923, at said City of Sea Isle City he handed $1,000 cash to Maurice M. Sofroney who acknowledged in writing the receipt of said $1,000 as plaintiff's agent on rescission of said contract, a copy of which written receipt is hereto annexed as Exhibit DA.

4. On May 21, 1923, at said City of Sea Isle City, said Maurice M. Sofroney was plaintiff's agent duly authorized to accept said $1,000.00 cash in acknowledgment of the rescission of said contract as stated in paragraph 3.

5. After May 21, 1923, plaintiff duly ratified the act of said Maurice M. Sofroney in accepting said $1,000.00 cash as plaintiff's agent on rescission of said contract as stated in paragraph 3.

6. Plaintiff, since May 21, 1923, until the commencement of this action at law, well knowing the facts stated in paragraph 3 of this defense, has not at any time denied to this defendant that said Maurice M. Sofroney was plaintiff's agent as aforesaid or that said contract was rescinded as aforesaid, nor notified this defendant of any demand as made by plaintiff in this action at law.

7. On May 21, 1923, Charles K. Landis, Jr., attorney for this defendant, wrote a letter of that date to Messrs. Carr & Carroll, attorneys for plaintiff, a copy of which letter is hereto annexed as Exhibit DB; to which letter, Exhibit DB Messrs. Carr & Carroll, attorneys for plaintiff, about June 12, 1923, replied by letter of that date, a copy of which is hereto annexed as Exhibit DC; about June 13, 1923, said Maurice M. Sofroney wrote a letter of that date to said Messrs. Carr & Carroll, attorneys for plaintiff, a copy of which is hereto annexed as Exhibit DD, to which letter, Exhibit DD, about July 14, 1923, said Messrs. Carr & Carroll, attorneys for plaintiff, replied by letter of that date, a copy of which is hereto annexed as Exhibit DE.

8. Said Messrs. Carr & Carroll were attorneys for plaintiff at the times mentioned in paragraph 7 of this defense.

First Defense to Second Count.

1. His first defense and second defense to first count is here repeated as of his first defense to second count.

2. He denies paragraph 2.

3. He denies paragraph 3.

4. He denies paragraph 4.

SECOND DEFENSE TO SECOND COUNT.

This defendant was not able to carry out the contract stated in paragraph 1 of the first count because of a defect in the title to said real estate and was not able to give possession of the premises in accordance with the terms of said agreement.

Charles K. Landis, Jr.,
Attorney for Defendant.

ANNEXED COPIES OF EXHIBITS MENTIONED AND REFERRED TO.

EXHIBIT DA.

Sea Isle City, N. J., May 21st, 1923.

$1000.—RECEIVED of Theo. E. De Bow One Thousand (1000) Dollars returned to Joseph Rabinowitz on rescission of contract between them dated February 19th, 1923 as to Lots 18 & 19 of Block 41 Section A, Sea Isle City, N. J.

Maurice M. Sofroney, agent
for Joseph Rabinowitz.

EXHIBIT DB.

May 21, 1923.

Messrs. Carr and Carroll,
Counsellors at Law,
S. W. Cor. 4th & Market Sts.,
Camden, N. J.
Gentlemen:—

Mr. Theo. E. DeBow has handed me your letter of May 19th inst. as to claim of Mr. Joseph Rabinowitz on contract of February 19, 1923 for purchase of lots at Sea Isle City, N. J., on which contract Mr. Rabinowitz made a first payment of $1000.—

Mr. DeBow today returned the $1000.—, in cash to Mr. Maurice M. Sofroney as agent for Mr. Rabinowitz and notified said agent of the rescission of the contract.

I will accept service of process as attorney for Mr. De Bow.

Yours truly,
Charles K. Landis, Jr.

EXHIBIT DC.

Law Offices
CARR AND CARROLL,
S. W. Cor. Fourth & Market Sts.,
Camden, New Jersey.

June 12, 1923.

Harvey F. Carr
Walter R. Carroll
Thomas B. Kenworthy.
Charles K. Landis, Jr., Esq.,
102 N. Landis Ave.,
Sea Isle City, N. J.
Dear Sir:

Referring to yours of the 21st inst., will you kindly make the following arrangement: Either have Mr. De Bow forward his check to our order as attorneys for Mr. Rabinowitz, or arrange with Mr. Sofroney to endorse the check over to us.

Yours truly,
Carr & Carroll.

HFC/B

EXHIBIT DD.

June 13, 1923.

Messrs. Carr & Carroll,
4th & Market Sts.,
Phila. Pa.
Gentlemen:

In complying with your request to Mr. Charles K. Landis Jr., relative to the return of one thousand dollars ($1000.—) deposit that Mr. Joseph Rabinowitz gave to Mr. Theo. E. DeBow of Sea Isle City. Mr. De Bow returned to me as agent $1000.— on May 19th. I tendered this money to Mr. Rabinowitz but he refused to accept it pending advise from his council. You will inclose find bill for expenses incurred by me as agent covering this transaction which amount I have deducted from the check or money that I have been holding.

You will inclose find check for eight hundred eighty-one dollars and fifty cents ($881.50) as per your request.

Yours very truly,
M. M. Sofroney.

MMS/W

EXHIBIT DE.

Law Offices
Carr and Carroll
S. W. Cor. Fourth & Market Sts.,
Camden, New Jersey.

Harvey F. Carr
Walter R. Carroll
Thomas B. Kenworthy.

July 14, 1923.

Mr. M. Sofroney,
Sea Isle City, N. J.
Dear Sir:

I am returning herewith your check to the order of Carr & Carroll Attorneys for Joseph Rabinowitz, amounting to $881.50, Mr. Rabinowitz declines to accept this, and insists that the full $1000. be returned to him. Any expense of title examination should be borne under the circumstances by Mr. De Bow. I am writing to Mr. De Bow's attorney in accordance with the above.

Harvey F. Carr

HFC/B

REPLY.

The plaintiff denies every allegation in the answer except those paragraphs admitting the allegations of the complaint except that he admits the accuracy of the exhibits attached thereto with the exception of Exhibit DA of which he has no knowledge or information sufficient to form a belief.

Carr & Carroll,
Attorneys for Plaintiff.

RULE AMENDING COMPLAINT.

(Filed December 16, 1925.)

It is on this eighth day of December, 1925, ordered that the complaint be and the same is hereby amended by adding thereto the following:

Third Count.

1. The allegations of the first count are here repeated as of the third count.

2. At the time of the defendant's breach of the said agreement as hereinabove set forth the fair market value of the lands and premises described in said agreement was the sum of $20,000, and upon defendant's refusal to convey, plaintiff became and is entitled to recover for the loss of his bargain.

Plaintiff demands on the third count $5000 damages.

Wherefore the plaintiff demands the sum of $1000 damages on the first count; the sum of $5000 on the second count, and the sum of $5000 on the third count.

On motion of

Carr & Carroll,
Attorneys for Plaintiff.

Let this rule be entered.

Theo. W. Schimpf,
C. C. J.

JUDGMENT.

NEW JERSEY SUPREME COURT.

STATEMENT.

JOSEPH RABINOWITZ,
v.
THEODORE E. DE BOW. } Action at Law.

Judgment entered Dec. 16, 1925.

	Damages		$1170.00
COSTS	Attorney	32.00	
	Disbursements	23.60	
			1225.60

EDWARD J. KELLEHER,
Clerk.

POSTEA.

(Filed December 16, 1925.)

This case was tried before Judge Theodore W. Schimpf with a jury, at the Cape May Circuit, on December 8, 1925.

The jury rendered a general verdict against the defendant and in favor of the plaintiff for eleven hundred and seventy ($1170) dollars on the first count and a verdict against the plaintiff and in favor of the defendant on the second and third counts, both verdicts by direction of the Court.

THEO. W. SCHIMPF,
Judge.

SUBSTITUTION OF ATTORNEY.

(Filed Aug. 13, 1926.)

It appearing to the Court that Charles K. Landis, Jr., Esquire, the attorney for the defendant in the above entitled cause, consents hereto.

It is, on this 13th day of August, 1926, on motion of S. Rusling Leap.

Ordered, that S. Rusling Leap be and he is hereby substituted as attorney for said defendant, in the place and stead of the said Charles K. Landis, Jr.

LUTHER A. CAMPBELL,
S. P. C.

I hereby consent to the entry of the foregoing order.

CHARLES K. LANDIS, JR.

I request that the above order be made.

(Signed) THEO. E. DE BOW.

NOTICE.

To Harvey Carr, Esquire, Attorney for Plaintiff, Camden, N. J.:

Take notice, that application will be made by the undersigned as attorney for Theodore E. DeBow, before the Honorable Luther A. Campbell, one of the Justices of our Supreme Court, at No. 1 Exchange Place, Jersey City, at 11.00 o'clock, Daylight Saving Time on the 13th day of August, 1926, for an order permitting the defendant to pay to the clerk of the Supreme Court, the damages in the amount of $1170.00, costs $55.60, and the interest on the sum of $1225.60 from the 16th day of December, 1925, which payment to be made shall be in full payment of the judgment, recorded in Volume 19 of judgments, page 203, in the office of the clerk of Supreme Court, and at the same time, application will be made for an order directing the clerk of our Supreme Court to cancel said judgment so recorded in Volume 19 of judgments, page 203.

S. Rusling Leap,
Attorney for Defendant.

Due and legal service of the within Notice hereby acknowledged this 2nd day of August, 1926.

Carr & Carroll,
Attorney for Plaintiff.

ORDER.

It appearing to the Court that judgment in the above entitled cause was entered on the 16th day of December, 1925, in favor of Joseph Rabinowitz, plaintiff, against Theodore E. DeBow, defendant, in the amount of $1170.00 damages, $55.60 costs, and that interest on said total judgment has accrued since the 16th day of December, 1925.

And it further appearing that the defendant has attempted to pay the amount of this judgment to the plaintiff, and that the plaintiff has refused to accept said amount, and it appearing to the Court that due notice of this application has been given the plaintiff or his attorneys, Carr & Carroll.

It is thereupon, on this 13th day of August, 1926.

Ordered, that the defendant, Theodore E. DeBow, be and he is hereby directed to pay to the clerk of the Supreme Court, the sum of $1170.00 damage, $55.60 costs and interest on said $1225.60 at the rate of six per cent per annum from the 16th day of December, 1925, to the date of said payment.

It is further ordered, that immediately upon receipt of this money, which shall be held by the clerk for the use of Joseph Rabinowitz, plaintiff, that the judgment against the defendant appearing of record in Volume 19 of judgments, page 203, in the office of the clerk of this Court, be, by the said clerk, cancelled of record, and that the judgment of nonsuit on the second and third counts be allowed to stand.

(Signed) Luther A. Campbell,
Justice Supreme Court.

Entered August 14, 1926.
On motion of
S. Rusling Leap,
Attorney.

A true copy.
Edward J. Kelleher,
Clerk.

RECEIPT.

Office of the Clerk of the Supreme Court.
Trenton, N. J., Aug. 18, 1926.

Rabinowitz,
v.
De Bow. } No. 956.

Received of S. Rusling Leap twelve hundred seventy-four and 56/100 dollars amount deposited in payment of judgment.
$1,274.56.

Edward J. Kelleher,
Clerk.

TESTIMONY.

CAPE MAY COUNTY SUPREME COURT.

JOSEPH RABINOWITZ,
Plaintiff,
v.
THEODORE E. DEBOW,
Defendant.

Action at Law.

APPEARANCES:
MESSRS. CARR AND CARROLL, for plaintiff.
CHARLES K. LANDIS, JR., ESQ., for defendant.

The above entitled case was tried December 8th, 1925, before HON. THEODORE W. SCHIMPF, Judge, and a jury.

A jury was impaneled, accepted and sworn.

Mr. Carr: We would like to make an amendment, if your Honor please, to the complaint, adding a third count. I have shown it to my adversary—a copy of the proposed amendment. I do not know whether he has any objection to it or not. Is there any objection, Mr. Landis?

Mr. Landis: Well, I cannot consent to it because it is too suddenly presented. I do not like to make up my mind so quickly. I do object to the expression in it that the defendant refused to convey the land to the plaintiff. I will object to it and leave it to your Honor to dispose of.

The Court: I will permit the amendment. The third count proposed is very similar to the second and I think states the same cause of action in a little more definite way.

Mr. Landis: I will take an exception.

The Court: Yes.

(Which exception was duly allowed and noted.)

(Mr. Carr opened the plaintiff's case to the jury.)

(Mr. Landis opened the defendant's case to the jury.)

Joseph Rabinowitz, the plaintiff, called as a witness in his own behalf, being duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Carr:

Q. Mr. Rabinowitz, where do you live?
A. Philadelphia.

Q. Did you live at Woodbine at one time?
A. Yes, sir.
Q. For a number of years?
A. Yes, sir.
Q. Were you engaged in business there?
A. Yes, sir.
Q. Do you know Mr. De Bow, the defendant in this suit?
A. Yes, sir.
Q. Do you remember coming down to Sea Isle City about the nineteenth of February, 1923, to look at some real estate?
A. Yes.
Q. Was there a sign upon that real estate?
A. Well, I couldn't say positively whether there was or was not, as I have not called at any particular day. I was familiar with the property before I purchased it, but I did call Mr. Sofroney.
Q. Who is he?
A. He was an agent, a real estate agent.
Q. Real estate agent there?
A. Yes, sir.
Q. Did you see him with reference to this property?
A. Yes, sir.
Q. Did he have it in charge for sale?
A. He did, sir.
Q. You talked to him generally about the matter, I suppose?
A. May I explain to you?
Q. No. Did you talk to him generally about the subject matter?
A. I did.
Q. Did you meet Mr. De Bow?
A. I did, sir.
Q. Did you enter into an agreement for the sale of certain lands in Sea Isle City?

A. Yes, sir.

Q. Generally speaking, what was that property?

A. The property was sold to me for $15,000.

Q. Now, just what sort of property was it?

A. It was a piece of property on the beach front, something like 88 feet by -100 or 120; I don't remember exactly the dimensions.

Q. Any buildings on it?

A. There were two old buildings on it.

Q. Did you enter into a written contract to purchase the land?

A. Yes, sir.

Q. Agreement dated the nineteenth day of February, 1923, between Theodore E. De Bow and Joseph Rabinowitz, signed by Theodore E. De Bow and Joseph Rabinowitz, and witnessed by M. Sefroney and Moe Goodman. Is that the agreement you entered into?

A. Yes, sir; this is the agreement.

Mr. Carr: The paper is offered in evidence as Exhibit P1.

(The paper offered is received in evidence and marked as an exhibit for the Plaintiff P1.)

Q. At the time of the making of this agreement, did you pay Mr. De Bow any money?

A. I paid him $1,000 by check.

Q. I show you check dated February nineteenth, 1923, to the order of Theodore E. De Bow, one thousand dollars, signed Joseph Rabinowitz, and bearing the bank's cancelled marked. Is that the check that you used?

A. Yes, sir.

Q. That was paid, was it?

A. Yes, sir.

Mr. Carr: I offer it in evidence.

(The paper offered is received in evidence and marked as an exhibit for the plaintiff P2.)

Q. Did you have any talk with Mr. De Bow after the signing of this agreement as to fixing the time and place of settlement?

A. When this agreement was signed by Mr. De Bow I asked Mr. Sefroney if it required his wife's signature, Mrs. De Bow. Mr. Sefroney said that "It is not necessary. Mr. De Bow and his wife is willing to deliver the property to you when the time comes for delivery."

Q. Did you have any talk about the time and place when settlement was to be made?

A. Immediately ——

Mr. Landis: I object. The agreement speaks for itself. It is a written contract, and it states no other times and place of settlement than that stated in the agreement, and it cannot be altered by parol.

The Court: The agreement is silent as to the place of settlement?

Mr. Carr: The agreement is silent as to the place of settlement.

The Court: I will permit the question.

Mr. Landis: I ask an exception.

(Which exception was duly allowed and noted.)

Q. Did you have any talk about the time and place when settlement was to be made?

A. Immediately when Mr. De Bow signed this agreement I had talked to Mr. Sefroney, who was the agent at that time for this property, for Mr. De Bow, I presume, and I questioned him "Why doesn't Mrs. De Bow sign?"

Q. Where were you to settle, I mean?

A. Immediately after signing this agreement I had requested Mr. Sefroney to get the necessary searches done for the property and I questioned, "Where would you like to have this settlement take place?

The Court: You are asked a very simple question. Did you have any conversation with Mr. De Bow about the time and place of settlement? Now, did you or didn't you?

The Witness: I had—I did not.

The Court: Well, why don't you tell us that?

The Witness: I had talked with Mr. Sefroney.

Q. What place was fixed as the place of settlement?

A. Camden.

Q. Where?

A. West Jersey Title Company.

Q. Now, shortly before the nineteenth of February, which was a Saturday, I believe, did you have any talk with either Mr. De Bow or Mr. Sefroney as to the time and hour and place of settlement?

A. On the eighteenth, the day previous, before the settlement was supposed to take place at the West Jersey Title Company, I called up Mr. Sefroney on the telephone.

Q. Yes.

A. And asked where they were going to—and asked whether they were going to be there at the settlement the next day, which I am ready to make settlement.

Q. Yes.

A. He answered me that he will be there with the necessary papers and Mr. De Bow will be there and settlement will be taken place at the West Jersey Title Company at Camden, New Jersey. That is on May nineteenth.

Q. Was any hour fixed for settlement?

A. Well, it happened to be on a Saturday; it should be at twelve o'clock; because it is business usually.

Q. Well, did you fix any hour or was it just Saturday morning?

A. Why, we told him over the telephone that settlement will take place between ten and twelve o'clock.

A Juror: May I ask what date that was, what day of the year?

The Witness: On May 19, 1923.

Q. Do you mean by that May 19, 1923—that was the date ——

A. Date of settlement.

Q. That was the date fixed for settlement, is that it?

A. Exactly.

Q. Now, on the date fixed for settlement, May 19, 1923, did you go to the West Jersey Title and Guarantee Company in Camden?

A. Yes, sir.

Q. Who went with you?

A. My son was with me, Ben.

Q. Who else went with you?

A. And Sefroney was there.

Q. In Camden?

A. In Camden, yes, sir.

Q. Did your counsel go with you, too?

A. No, sir; I called counsel afterward when Mr. De Bow did not appear.

Q. Did Mr. De Bow appear at the title company that morning?

A. No, sir.

Q. Was any word left at the title company for you as coming from Mr. De Bow?

A. No, sir.

Q. Did you have any money or check with you?

A. I had a certified check of $14,000 payable to Mr. De Bow.

Q. Did you have any message at all from Mr. De Bow explaining his absence?

A. No, sir.

Q. I mean on that morning?

A. Why, Mr. Sefroney had advised me that Mr. De Bow has told him he will not come to Camden to make settlement as his wife refuses to sign the deed.

Q. That is what Sefroney said?

A. That was what Sefroney told me.

Q. Now, did you go to Sea Isle City later in the day?

A. I did, sir.

Q. What time did you get down there?

A. I got down there I presume about three o'clock or half-past three in the afternoon.

Q. Who was with you?

A. My son, Ben.

Q. How did you go to Sea Isle City?

A. I believe by train.

Q. Did you take any money with you?

A. I did.

Q. What did you take with you?

A. $14,000 in cash.
Q. Did you go to Mr. Sefroney's office?
A. I did.
Q. Was he there?
A. No, sir.
Q. Where else did you go?
A. Then we went to Mr. De Bow's house.
Q. Yes.
A. And we didn't find him; so next I went to Mr. —Captain Moore's office and asked him what I can do in that matter, explaining the condition, and I also handed the $14,000 which I asked him to count it over and give me an affidavit to that effect, that I was in Sea Isle City to deliver this money to Mr. De Bow and get a deed in return, and that he was not there to be found.
Q. Did he count the money?
A. Yes, sir.
Q. Did Moore go with you to De Bow's house?
A. He did.
Q. When?
A. In the afternoon around four o'clock or half-past three; I am not sure.
Q. While you still had the $14,000 with you?
A. Yes, sir.
Q. Was anybody at home?
A. Nobody.
Q. No word for you there?
A. Nothing.
Q. Now, Mr. Rabinowitz, do you know Mr. H. S. Fox?
A. I do.
Q. And do you know Mori Brothers of Vineland?
A. I know one of the gentlemen, Mr. Mori.
Q. Did you have any communications with them for the sale of this property—did you have any negotiations with them for the sale of this property?

A. Yes, sir.

Q. Did they make you an offer to buy?

A. Yes, sir.

Q. At what figure?

A. $20,000.

Q. Do you know whether they are men of financial responsibility?

A. They are. They were in good standing and they are today.

Q. You were never able to make title to them, were you?

A. No, sir.

Q. Did you ever receive a deed from Mr. De Bow and his wife?

A. No, sir.

Q. Did Mr. De Bow ever tender you a deed?

A. No, sir.

Q. Did he ever offer to deliver a deed to you?

A. No, sir.

Q. Did he ever pay you back your thousand dollars?

A. No, sir.

The Court: When you paid the thousand dollars originally, whom did you give the money to?

The Witness: To Mr. De Bow.

Cross-examination.

By Mr. Landis:

Q. Where did that transaction occur, when you paid this thousand dollars?

A. In Sefroney's office.

Q. Do you remember distinctly that you handed the check to Mr. De Bow?

A. I handed the check to De Bow and it is made to the order of De Bow.

Q. I know it is made to the order of De Bow, but didn't you give the check to Mr. Sefroney?

A. Gave the check to Mr. De Bow. He was there.

Q. But didn't you first give it to Sefroney?

A. I have given it to Mr. De Bow.

Q. Did you send your son Friday night to see Mr. De Bow, the night before the day of settlement that you say it was agreed upon in Camden?

A. Yes, sir.

Q. You sent your son there?

A. Yes, sir.

Q. What did your son report?

A. He reported that he is going to be there the next day in Camden to make settlement.

Q. Who, De Bow?

A. Mr. De Bow.

Q. When you met Mrs. De Bow on the street, what did she tell you, on Saturday?

A. She didn't know where her husband was. She couldn't do nothing without him.

Q. Didn't she tell you he would be home at six o'clock?

A. I don't remember her telling me.

Q. You don't remember that?

A. No.

Mr. Landis: That is all.

Re-direct examination.

By Mr. Carr:

Q. Mr. Rabinowitz, did your son report to you anything with reference to how the deed would be signed when it was to be delivered the following Saturday?

A. The deed would be signed by Mr. De Bow and Mrs. De Bow.

Q. Did your son so report to you?

A. Yes, sir.

(Witness excused.)

JOHN L. MAHER, called as a witness on behalf of the plaintiff, being duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Carr:

Q. You live in Sea Isle City?

A. Yes, sir.

Q. What is your business?

A. Real estate and insurance.

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

A. About three years.

Q. Do you know this property involved in this suit?

A. Yes, sir.

Q. Were you in the office when the agreement was signed?

A. Yes, sir.

Q. You do know the property, however?

A. Yes, sir.

Q. Now, do you know what its value was as of May 19, 1923?

A. It was worth $20,000.

Q. Was that its fair market value?

A. Yes, sir.

Q. At that time?
A. Yes, sir.
Q. Did you negotiate the sale of this property to Fox and Mori Brothers?
A. Yes, sir.
Q. What price did they agree to pay?
A. $20,000 and a thousand dollars bonus for a mortgage.
Q. Are they responsible people?
A. Yes, sir.
Q. Did you deal with them before?
A. Yes, sir.

Mr. Carr: That is all.

Mr. Landis: No cross-examination.

(Witness excused.)

PLAINTIFF RESTS.

DEFENDANT'S CASE.

THEODORE E. DEBOW, the defendant, called as a witness in his own behalf, being duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Landis:

Q. Mr. De Bow, how did you come to first meet Mr. Rabinowitz?

Mr. Carr: Objected to as immaterial and irrelevant.

Q. In regard to selling this property?

The Court: I think the objection will have to be sustained. I do not think that it is relevant.

Q. Who approached you in regard to the sale of this property?

Mr. Carr: Same objection.

The Court: It will be sustained, because the question is irrelevant.

Q. How did you come to go to Mr. Sefroney's office?

Mr. Carr: Objected to as immaterial and irrelevant.

The Court: Well, Mr. Landis evidently thinks it is important. I will let it be answered.

Mr. Carr: I pray an exception.

(Which exception was duly allowed and noted.)

Q. How did you come to go to Mr. Sefroney's office?

A. Mr. Sefroney telephoned to me and said he had a client.

Mr. Carr: I object to what Mr. Sefroney said.

Q. Mr. De Bow, were you residing at Sea Isle City during the time of this contract, when the contract was made?

A. Yes, sir.

Q. Did you ever agree, as Mr. Rabinowitz says, to go to Camden for settlement?

Mr. Carr: I object to that. It calls for a conclusion, if your Honor please. He can say what was said.

The Court: It would be better if he would state the conversation he had, if he had any, with Mr. Rabinowitz about Camden.

Q. Did you have any conversation with Mr. Rabinowitz about going to Camden for settlement?

A. No, sir; none whatever.

Q. Were you present at the office when this conversation about going to Camden was had with Mr. Sefroney?

A. I didn't hear any conversation of that character.

Q. On Friday afternoon, the day before the Saturday when Mr. Rabinowitz says you were due to go to Camden, and his son—did his son come to your house?

A. Friday evening about seven o'clock.

Q. Who came with him?

A. Mr. Sefroney.

Q. Did he ask you then to go to Camden?

A. He did.

Q. What did you reply?

A. I told him I could not go.

Q. Did you say why you could not go?

A. Yes.

Q. Why couldn't you go?

A. I was engaged at the time on work, on route 14 on the bridge; and it was important and I could not go that day; that the notice was too short.

Q. When did you tell him you could settle?

A. I told him anytime he come down.

Q. Where?

A. To Sea Isle.

Q. Well, what time of the day did you tell him that you would be home?

A. I told him he would be home six o'clock that night, Saturday night.

Q. Well, were you home at six o'clock that night?

A. Yes, sir.

Q. Did Mr. Rabinowitz ever offer you this $14,000?

A. No, sir.

Q. You never saw it?

A. No, sir.

Q. Never had a chance to get it?

A. No, sir.

Q. Did you pay the thousand dollars to Mr. Sefroney?

Mr. Carr: I object to that. We are not bound until the agency is shown. I do not care whom it was paid to.

The Court: I think that is true. I would like to know how they justify a payment to Mr. Sefroney?

Mr. Landis: Well, we will prove Mr. Rabinowitz ratified the payment through his attorney, Mr. Carr.

Mr. Carr: If you examine the letters you will find there was no ratification.

The Court: I have already read the letters. They seem to me to be a very direct refusal to abide by any such payment. I have read the letters attached to the pleadings. I suppose they are the same.

Q. Well, I ask the question whether Mr. De Bow

paid the thousand dollars to Mr. Sefroney, the real estate agent, who was transacting this matter.

Mr. Carr: I object.

The Court: Objection sustained.

Mr. Landis: And I take an exception.

(Which exception was duly allowed and noted.)

Mr. Landis: I wish to recall this witness later.

Mr. Carr: I will defer my cross-examination until he has completed his direct examination of the witness.

(Witness withdrawn for the present.)

MAURICE M. SEFRONEY, called as a witness on behalf of the defendant, being duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Landis:

Q. Mr. Sefroney, have you heard Mr. Rabinowitz's testimony?

A. I have.

Q. Did Mr. Rabinowitz engage you as his agent?

Mr. Carr: I object to that, if your Honor please. That is a conclusion.

The Court: That is a conclusion. The objection will be sustained.

Q. Did you act as ——

Mr. Carr: I object.

The Court: The question is not quite completed; but do not answer these questions when there is an objection, Mr. Sefroney.

The Witness: Yes, sir.

Q. Was your answer "yes, sir," intended to be in assent to his Honor's statement?

The Court: I think it was in answer to my injunction.

The Witness: That is right.

Q. Were you present at the transaction ——
A. I was.
Q. —as Mr. Rabinowitz testified? Who wrote the agreement?
A. I wrote the agreement of sale.
Q. Was a check written and drawn and signed by Mr. Rabinowitz at that time?
A. Yes, sir.
Q. To whom did he hand the check?
A. He handed the check to me.
Q. Did the parties then sign this agreement?
A. After I seen the check was properly drawn I handed the agreement to the two parties to sign it.
Q. Then what did you do?

A. Then I handed the check to Mr. De Bow and gave them each an agreement.

Mr. Landis: I would like to show this Exhibit P1 to the witness.

Q. Is that one copy of the agreement? (Showing the witness Exhibit P1.)

A. Yes, sir.

The Court: Was there agency agreement in it, Mr. Carr?

Mr. Carr: No, sir, no agency agreement. A copy of it is attached to the pleadings, if your Honor please, too.

The Court: I see.

Q. How did you come to act in this transaction?

Mr. Carr: I object, if your Honor please. This calls for his reasons. I object to it as immaterial and irrelevant and calls for a conclusion.

The Court: Yes. I think the only things that you can examine this witness about are the conversations that he had with the parties. It is for the jury to conclude what was meant by that.

Q. Well, Mr. Sofroney, please state what your conversation was with Mr. Rabinowitz that brought about this transaction.

Mr. Carr: I object to the "that brought about this transaction."

Q. Well, what was the first conversation you had with Mr. Rabinowitz shortly before this transaction?

A. Mr. Rabinowitz came to my office ——

Mr. Carr: He asked you when.

Q. When?

A. Why, the day—I think it was the nineteenth of February that he said he would like to buy that particular property and I told him that I would find out. He waited at the office until I phoned Mr. De Bow. I went and had a talk with Mr. De Bow and he gave me the terms and particulars of the property and I went back to my office, met Mr. Rabinowitz, and we walked up to the property and we came back, talked about the terms and conditions and then he decided he would buy it, and I called Mr. De Bow on the phone and told him Mr. Rabinowitz had decided to buy it, whether he would come to my office so that we could arrange to draw up the necessary papers and pay him the money for it, which was done.

Q. You say "we would draw up the papers and pay him the money for it." Whom do you mean would draw up the papers and pay the money?

A. Why, the party who was buying the property, Mr. Rabinowitz.

Mr. Carr: I object to that. He is simply defining his own words. What he means is not important. It is what he says.

The Court: Yes, it is for the Court and jury to determine what he meant by what he said.

Mr. Carr: I ask that it be stricken out.

The Court: That will be stricken out.

Q. Who was to pay you your commission?

Mr. Carr: I object to that.

The Court: That calls for a conclusion.

Q. What was said by Mr. Rabinowitz to you about in what way you would serve or act and how you were to be paid for it?

A. What was said? Why, the property was offered for sale ——

Mr. Carr: No, what was said, Mr. Sofroney?

The Witness: That was said—that he could have the property for $16,000.

Q. Where was that conversation?
A. In my office.
Q. Between whom?
A. Between me and Mr. Rabinowitz.
Q. Was Mr. De Bow there?
A. No, sir.
Q. This was between you and Mr. Rabinowitz?
A. Yes, sir.
Q. First conversation?
A. When he asked about that property, and I gave him the impression that I had received from Mr. De Bow. The property was for sale to him at $16,000, and out of that I was to receive a commission ——

Mr. Carr: No, what was said—what was said?

The Witness: I don't quite understand what you mean.

The Court: Can't you tell the difference between what you know about a thing and what somebody said to you?

The Witness: That was the conversation that me and Mr. Rabinowitz had.

The Court: "I was to receive a commission;" that is not telling that Mr. Rabinowitz said that. Why can't you say what you said to Mr. Rabinowitz and what Rabinowitz said to you?

The Witness: Well, I said to him that the price is $16,000, and he said to me: "I will pay you the commission. You leave the price go in at $15,000 and the commission will be paid to you at the settlement. I will pay it." And we drew the agreement afterward for the $15,000.

Q. When you say "he" you mean Rabinowitz was to pay you the commission?

A. Yes, sir.

Q. What did he say with respect to engaging you as his agent to buy this property?

Mr. Carr: I object to that as absolutely leading and very suggestive.

The Court: It is leading, and, therefore, objectionable.

Q. Did Mr. De Bow pay you $1,000?

Mr. Carr: Objected to as irrelevant and immaterial. No agency has yet been established to receive the money and compromise a dispute.

The Court: Presently that is true. The objection will be sustained.

Q. Did you write a letter to Messrs. Carr and Carroll? I ask you if that is a copy of the letter you wrote to Messrs. Carr and Carroll?

A. I did, sir. This is the copy of the letter I wrote.

Q. Did you receive a letter in reply to your letter from Messrs. Carr and Carroll?

A. I did.

Q. Is that the answer?

A. Yes, sir.

Mr. Landis: I will offer the two letters in evidence.

Mr. Carr: Objected to as immaterial and irrelevant, if your Honor please. It is a self-serving declaration of Mr. Sofroney's, and the reply indicates that the proposed settlement of Mr. Sofroney was not accepted or ratified, and evidence cannot be made in this way.

Mr. Landis: Your Honor, he did not give the money to a messenger. He gave the money to a man of profession said to be the agent of Rabinowitz, who wrote a letter ——

The Court: And who up to this point in the case was not.

Mr. Landis: But he was declared to be in the letter, and the letter in reply does not make any denial or contradiction.

The Court: Mr. Landis, I cannot hear the suggestion that you can prove agency by a failure to deny under these circumstances. I overrule that as a proposition of law.

Mr. Landis: I will take an exception, if your Honor please.

(Which exception was duly allowed and noted.)

Q. Mr. Sofroney, were you with the son of Mr. Rabinowitz when they called at the house of De Bow on Friday evening?

A. I was.

Q. The day before the nineteenth of May?

A. Yes, sir; Friday night.

Q. 1923?

A. Yes, sir.

Q. What did you go there for?

A. We went to make arrangement for settlement.

Q. At Camden the next day—what settlement?

A. Mr. Rabinowitz's son stopped at my office and together we went down to see Mr. De Bow. When we got there we talked about the settlement. Mr. De Bow requested that we have the settlement at Sea Isle because he could not get away on account of his work. Mr. Rabinowitz's son requested the settlement to be made in Camden, and one wanted it in Camden and the other wanted it in Sea Isle, and when we left there there was practically this—disagreed; in other words, Mr. Rabinowitz said that he wanted to settle in Camden; Mr. De Bow said he would not be in Camden, but would be home in Sea Isle after six o'clock Saturday night, and we left there.

The Court: Then you went to Camden the next day?

The Witness: Mr. Rabinowitz called me on the phone that day and asked me to come to Camden.

The Court: Well, did you go to Camden the next day to make settlement?

The Witness: I went up; yes, sir.

Q. Well, why did you go?
A. Mr. Rabinowitz called me on the phone and asked me to come up.
Q. Did you attend the settlement?
A. No, sir.
Q. Why not?
A. Well, I didn't go to the West Jersey; I didn't meet him at the West Jersey.
Q. Where did you meet him?
A. I met him in the corridor of Carr and Carroll's office on Market Street, I think it is.
Q. Were you in Sea Isle City that Saturday afternoon?
A. I was.
Q. When Mr. Rabinowitz was in town there?
A. Yes, sir.
Q. Did you see Mr. Rabinowitz?
A. I did.
Q. He knew you were there?
A. Yes, sir; it was about a quarter after three I seen him.
Q. Where was this, at your office?
A. In my office.

Mr. Landis: That is all; cross-examine.

Cross-examination.

By Mr. Carr:

Q. I understand Mr. De Bow was willing to go on with this contract when you and Ben Rabinowitz talked to him on Friday night?

A. Yes, sir.

Q. And the only question between them was where the settlement was to take place?

A. Yes, sir.

Q. Was that all there was to do?

A. Yes, sir.

Q. And you—they agreed upon the place?

A. No, sir.

Q. Did you try to get them to agree upon a place?

A. I did.

Q. You went up the next day, did you, to Camden?

A. Yes, sir.

Q. Did you suggest that you could carry the deed up with you and since it was executed it would not be necessary for Mr. De Bow to go to Camden at the time of settlement?

A. I did not.

Q. You did not? That did not occur to you at all; did it?

A. It did, yes.

Q. And you did not suggest it?

A. No, sir.

Q. Why didn't you suggest it?

A. Because I didn't think it was necessary for him to trust me with the deed.

Q. You didn't think he would trust you with the deed?

A. No; the deed meant $14,000.

Q. Did you suggest to him that he might send it up by a more trustworthy messenger?

A. No, sir, I did not.

Q. Did you—that did not occur to you?

A. No, sir.

Q. You are an experienced real estate man; aren't you?

A. Yes, sir.

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

A. Eleven years.

Q. You know, as a matter of fact, that settlements of this kind are made at the title company as a rule; don't you?

A. Not on every occasion.

Q. You know that is the rule, however, don't you?

A. No, sir.

Q. You say it is not the rule to make it in the title company?

A. Not all the time.

Q. I ask you whether it is not the rule?

A. It is not.

Q. Most settlements are not made in the title company?

A. I do not say most of them are not, but it is not absolutely a rule.

Q. But most settlements are made in the title company office, aren't they?

A. On some occasions.

Q. Now, if you were going to make this settlement in Sea Isle City, who would pass on the question of the exceptions to the title and all that sort of thing?

A. Why, we have them generally removed when the settlement is not made in the trust company.

Q. But they were not removed in this case?

A. I believe they were.

Q. Well, do you know?

A. I don't know for sure.

Q. Well, you made a charge, didn't you, for getting the settlement certificate?

A. I paid for it.

Q. I say, you made a charge for doing it; didn't you?

A. I did.

Q. And you got one, didn't you?

A. Yes, sir.

Q. A whole lot of exceptions on it, aren't there? Isn't that the one you got?

A. Yes.

Q. How in the world did you expect to make settlement down in Sea Isle City with those exceptions on there?

A. Well, maybe he had it to my office there to remove them.

Q. Maybe? Who did?

A. Mr. De Bow.

Q. Did you ask him?

A. I know it. I seen them. He had affidavits.

Q. Don't you get the title company to strike these off at the time of settlement?

A. Yes.

Q. You had not made any provision about that in making the settlement at Sea Isle City; had you?

A. I don't know.

Q. Well, you had not, had you?

A. I don't know.

Q. Well, don't you know whether you had or not?

A. I don't know that.

Q. What provision did you make on the removing of these exceptions upon the assumption that you were going to have a settlement in Sea Isle City?

A. It was not my office to remove them.

Q. You did not care, eh?

A. I did care, but it was not my place to remove them. That was up to the seller.

Q. Don't you know that is part of the routine of any real estate settlement to remove the exceptions that can be removed?

A. I do.

Q. And don't you know that it was impracticable to make settlement at Sea Isle City until those exceptions were removed?

A. Not necessarily.

Q. Don't you know it was impracticable to do it?

A. No, sir.

Q. You don't know that?

A. No, sir.

Q. How long have you been a real estate man?

A. Eleven years.

Q. Would you, as a real estate man make a settlement at Sea Isle City with all those exceptions rather than go to the title company so they could be removed? Would you do that?

A. Under certain conditions I would.

Q. Is that your general rule?

A. Sometimes.

Q. Is it your rule?

A. Sometimes.

The Court: Mr. Sefroney, you are not answering Mr. Carr's question.

A. Well, I think so.

The Court: No, I do not think so. I hate to have to caution you about it, but this "sometimes, maybe," and "I don't know," and all that sort of thing are not definite answers to these questions, and these questions are definite questions and they are entitled to be definitely answered.

Q. Is that your general rule?

A. No.

Q. And why would you make an exception to that general rule in this case?

A. I would have—I had nothing to do—I was looking after Mr. Rabinowitz's efforts.

Q. Oh, you thought you were representing Mr. Rabinowitz?

A. I was.

Q. And you didn't care whether these exceptions were removed or not?

A. I did.

Q. And you were willing to make settlement down here, seventy miles away from the title company, without having them removed?

A. No.

Q. You were not willing?

A. I didn't say I was.

Q. Well, how could you do it except by going to the title company?

A. I didn't know that Mr. De Bow didn't have them removed. How could I know that until we come to the settlement?

Q. Weren't you the man who got this settlement certificate?

A. Yes, and I turned it over to Mr. Rabinowitz.

Q. You expected him to clear it up then?

A. No; I expected De Bow to clear it up.

Q. Did you say to De Bow "clear these exceptions up" ——

A. Yes, sir.

Q. Now, wait a minute. I haven't finished my question.

A. All right.

Q. Did you say to De Bow: "You must first remove these exceptions and when you do we will settle?"

A. Yes, sir.

Q. Did you? When did you say that?

A. When he got the report.

Q. When did you say that?

A. When I turned the title report over to Mr. De Bow.

Q. Did you say that on the Friday night when you were arranging, trying to arrange for a definite settlement?

A. We talked about that long before that night.

Q. Just a minute. Did you say that on that Friday night when you were arranging for a definite time of settlement?

A. We didn't talk about that that night.

Q. Did not at all?

A. No, sir.

Q. So that you had all these matters open which ordinarily would be decided and disposed of at a title company; isn't that so?

A. Yes, sir.

Q. And it never occurred to you to make your objection to a proposed settlement in Sea Isle City; did it?

A. No, sir.

Q. That is another deviation from your prudent practice as a prudent realtor; isn't it?

A. No, sir.

Q. And that is your usual practice, is it?

A. I didn't say it was.

Q. Well, it must be either your usual practice or a deviation from it. Now, which is it?

A. It is not either.

Q. Not either. Of course, you are expecting to get a commission; you wanted to see this sale go through, didn't you?

A. I certainly did.

Q. You never did anything after this time toward getting the deed; did you?

A. Well, Mr. Rabinowitz ——

Q. I asked you?

A. No; I did not.

Q. You never did a thing at all; did you?

A. No, sir.

Q. As a matter of fact, on the very same day you accepted a thousand dollars back and claimed to be the agent of Mr. Rabinowitz in taking it, so that the matter was at an end; didn't you?

A. I don't know whether it was the same day or not. I did take the thousand dollars. I don't know exactly what date it was.

Q. Wasn't it on the same day?

Mr. Landis: It was on the twenty-first.

A. I think it was on a Monday—I think.

Q. What time of day Monday was it that you took the thousand dollars back?

A. I couldn't exactly say.

Q. In the morning?

A. I don't recall it.

Q. Then haven't you any memory at all on this thing?

A. Well, this is two and a half years ago, my friend.

Q. Can you remember whether it was any time at all on Monday?

A. I said it was Monday.

Q. Twenty-four hours on Monday.

A. During the business day on Monday.

Q. In the afternoon or morning?

A. I cannot say positively.

Q. What do you think it was?

A. I think it was in the afternoon.

Q. Mr. De Bow wasn't too busy that day, was he, to stay off the bridge job and hand you the thousand dollars?

A. I don't know about that.

Q. He wanted to get this $14,000; didn't he?

A. He did; yes, sir.

Q. And the way he wanted to get it was by giving you back a thousand dollars on the next week-day after this thing and you told him—he said the deal was off; isn't that true?

A. No, sir.

Q. Didn't he say it was off?

A. Yes, he did, Monday.

Q. On Monday he said it was off?

A. Yes.

Q. And you agreed, as far as you could agree, that it was off; didn't you?

A. No; it was not my business.

Q. But so far as you could agree, you agreed and took his thousand dollars; didn't you?

A. Yes.

Q. And still you say that De Bow wanted to get his fourteen thousand?

A. He did.

Q. And you wanted to see it go through?

A. Certainly.

Q. And when did you change your mind from Saturday until Monday?

A. I did not change my mind at all.

Q. Well, your efforts to put it through ceased on Monday; didn't they?

A. There was no effort to make any settlement.

Q. You made no effort whatever?

A. No; I did not.

Q. On Saturday you made no effort to put it through?

A. I did.

Q. What did you do?
A. I went to Camden with Mr. Rabinowitz.
Q. Empty-handed?
A. No, sir.
Q. Did you take the deed with you?
A. No, sir.
Q. How was the settlement to be made without the deed?
A. The settlement was arranged to be in Sea Isle City on Saturday night.
Q. Is that so?
A. Mr. De Bow said he would settle.
Q. Now, you gave that message to Mr. Rabinowitz; didn't you?
A. Yes.
Q. And Mr. Rabinowitz had fourteen thousand dollars certified check that he showed you?
A. He didn't show it to me; he told me he had it.
Q. And you believed him?
A. Yes, sir; I did.
Q. Then why didn't you come down to Sea Isle City and make the settlement, if that had been agreed upon?
A. I can tell you why I didn't come with him if you want to know.
Q. Why didn't you stay with the man that had the $14,000 if you wanted it made?
A. Because he was not going to pay me.
Q. He was not going to pay you?
A. No.
Q. So you were through with him, weren't you?
A. I was through with him; yes, sir.
Q. You were through with the whole transaction then; weren't you?
A. No.
Q. Well, why didn't you stick to him, the man who

had the fourteen thousand dollars, and get the thing closed?

A. I knew we couldn't have it closed in Camden because I knew De Bow wasn't to be there.

Q. You said he was to go to Sea Isle City?

A. Yes, sir.

Q. You were going to Sea Isle City?

A. Yes, sir.

Q. He had fourteen thousand dollars in his pocket?

A. Yes, sir.

Q. You wanted the fourteen thousand dollars for your client; that is right, isn't it?

A. That is right.

Q. Then you walked away and didn't see him the rest of the day?

A. I did see him that day.

Q. Saw him to speak to?

A. Yes, sir.

Q. What did you say to him?

A. I seen him in his office.

Q. What did you say to him?

A. I said Mr. De Bow would be home at six o'clock.

Q. You didn't carelessly mention the fourteen thousand; did you?

A. I don't know what I mentioned. I said Mr. De Bow would be home at six o'clock and he better wait for him.

Q. How did you know so much about Mr. De Bow?

A. I was to his house Friday night with his son.

Q. And you were going by that?

A. Yes, sir; by his statement.

Q. And on Friday evening the matter was up in the air; nobody had agreed upon the time or place; isn't that true?

A. Yes; that is right.

Q. And you were assuming, the matter not having been agreed upon, that somehow Mr. Rabinowitz

would come down and settle Saturday afternoon after everything was closed and the title company was closed, and make the settlement at Sea Isle City; is that your story?

A. Yes, sir.

Q. And you left the man with the $14,000 get away from you; did you?

A. No, I didn't let him get away. He got away himself. He was holding tight to it.

Q. Well, didn't you say that when he said he would not pay any commission that you lost interest in the matter?

A. I left him in Camden; yes, sir; in your corridor.

Q. I say, didn't you say, when he told you he would pay you no commission that you lost interest in the matter?

A. I didn't say I lost interest.

Q. What did you say with reference to it?

A. I just spoke to Mr. Rabinowitz.

Q. No, what did you say on the stand?

A. I said I left him in Camden in the corridor in your hall.

Q. Didn't you say his saying he would not pay you the commission had something to do with that?

A. No, sir.

Q. Nothing at all?

A. No, sir; I didn't say that.

Q. But, at any rate, you were satisfied by sometime on Monday to call it off and to cease any further efforts on your part?

A. No.

Q. Weren't you?

A. No.

Q. Well, you took DeBow's money on Monday for the purpose of calling it all off; didn't you?

A. Yes, sir.

Q. And you were satisfied to do that without asking Rabinowitz a word about it?

A. Because Rabonowitz didn't make the settlement.

Q. You were satisfied to do that without asking Rabinowitz a word about it; weren't you? You were, weren't you?

A. Yes.

Q. So that by sometime on Monday you had reached the conclusion that so far as you were concerned, you had called the whole matter off; isn't that right?

A. Yes.

Q. Do you still say that you wanted to see it go through or that DeBow wanted to get the $14,000?

A. I absolutely did.

Q. And you couldn't get it away from the man that was carrying it around in his pocket and told you he had it; is that right?

A. Absolutely right.

Re-direct examination.

By Mr. Landis:

Q. The man that was carrying it around in his pocket, kept it there and went out of town?

A. Bet your life he did.

Q. Before DeBow came back?

A. He never made any attempt to give it to De Bow.

Q. Well, Mr. Sofroney, are you got this thousand dollars from De Bow, did you offer it to Mr. Rabinowitz?

Mr. Carr: I object. Whatever was done was done by letter——

Q. I am asking you was Mr. Rabinowitz at your office, did you offer him the thousand dollars?

A. No, sir, not that I can recall. I think there was some correspondence, Mr. Landis.

Q. No, some letters.

A. Yes, sir; I think it was letters.

Q. You haven't those letters?

A. No; I think there——

Mr. Carr: I object to what you think.

The Witness: Well, there was some correspondence; I don't remember it.

Mr. Landis: Before Sofroney leaves the stand, I wish to identify the two letters, one of June 13, 1923, sent by Mr. Sofroney to Messrs. Carr and Carroll and their reply to him of July 14th, 1923, which your Honor has refused to admit as evidence.

(The papers referred to are marked as exhibits for the defendant for identification respectively D1 and D2.)

Mr. Landis: I wish to offer in evidence the receipt given by Mr. Sofroney for the thousand dollars, cancelling the contract.

Mr. Carr: Objected to, if your Honor please. It purports to act as the agent of Mr. Rabinowitz.

The Court: Objection sustained.

Mr. Landis: May I show it to Mr. Sofroney for identification?

The Court: Yes.

The Court: And when you cancelled the agreement between Rabinowitz and Mr. DeBow, you did it on your own initiative; did you?

The Witness: Well, I presume I was agent for Mr. Rabinowitz.

The Court: Well, did you? Never mind about your presumption. Did you do it without any consultation with Mr. Rabinowitz?

The Witness: Yes, sir.

The Court: That is all.

(Witness excused.)

THEODORE E. DEBOW, recalled, having been previously sworn, was further examined and testified as follows:

Direct examination.

By Mr. Landis:

Q. Mr. De Bow, did Mr. Rabinowitz ever offer this $14,000 to you?

A. No, sir.

Q. Did you ever refuse to accept it?

A. No, sir.

Q. Well, how did it happen, as Mr. Carr asked, that you were not in Sea Isle City on Saturday, but you were there on Monday to pay this thousand dollars back? Now, how did that happen?

A. Well, Monday was a stormy day and I couldn't

Q. Is that the receipt you gave for one thousand dollars to Mr. DeBow?

A. Yes, sir.

Mr. Landis: I wish to have it marked for identification.

(The paper referred to is marked as an exhibit for identification for the defendant D3.)

Q. Mr. Sofroney, I show you the report of the West Jersey Title and Guarantee Company, application number 38478, about which Mr. Carr has been cross-examining you. Did you procure that from the title company?

A. I ordered it from the title company; yes, sir.

Q. For whom did you order it?

A. For Mr. Rabinowitz.

Q. Did he ask you to get it?

A. He did.

Q. Were you acting for him in the matter at the time?

Mr. Carr: I object to that.

The Court: Objection sustained.

Mr. Landis: All right; that is enough.

The Court: Mr. Sofroney, did you have a listing of this property in your office?

The Witness: No, sir.

The Court: Did you have a sign on the property?

The Witness: No, sir, there was no sign on it.

work. It stormed very hard and the work we were on we couldn't work that day.

Q. Where was this work? What sort of work was it?

Mr. Carr: I object to the kind of work.

Q. Was it out door work?

A. Yes, sir.

Q. Well, where was it? Was it far from Sea Isle City or near by?

A. It was over at Petersburg, building a bridge across Cedar Swamp Creek on route 14, State Highway.

Q. Did Mr. Rabinowitz ever notify you that he would be in Sea Isle City on Saturday with that money, as he was?

A. No, sir.

Q. You never knew he was coming to Sea Isle City on Saturday?

A. No, sir.

Q. But you told his son on the Friday evening before, you would be there any evening after six o'clock?

A. Yes, sir.

Mr. Landis: That is all.

Cross-examination.

By Mr. Carr:

Q. Mr. De Bow, did you want this deal to go through and were you eager to get out of it?

A. I wanted it to go through. I was sincere in the matter.

Q. You were sincere?

A. Yes, sir.

Q. On Friday evening you wanted it to go through and get your $14,000; isn't that right?

A. Yes, sir.

Q. And all you had to do to get that $14,000, was to execute a deed and send it to Camden, whether you were there or not; isn't that true?

A. Well, probably it is. I don't know whether it is or not.

Q. Well, you knew that you could act that way?

A. I knew I could send it, yes.

Q. You knew you didn't have to be personally present; didn't you?

A. Yes, sir; I knew that.

Q. Then, why was it that you didn't consent to a settlement at Camden at the title company where such settlements are usually held?

A. Well, I took it for granted from the bill of sale, as it didn't state, that I had to go to Camden, that I didn't have to go there.

Q. It didn't say that you had to go anywhere, did it?

A. No, sir; I presumed it would be at my home.

Q. Well, assuming that you wanted to get the $14,000, weren't you willing to sign a deed and have your wife sign it and send it to the title company at Camden?

A. Yes.

Q. You knew that the West Jersey Title Company was doing the work; didn't you?

A. I knew they were making the search.

Q. You knew they were making the search, didn't you?

A. Yes, sir.

Q. And all you had to do was to mail it to them there and you would have gotten your $14,000; isn't that true?

A. Yes; I presume it is.

Mr. Landis: I object to these questions, because they are irrelevant.

The Court: Well, it is cross-examination and it goes to his good faith.

Q. Had you executed, yourself and your wife, and acknowledged a deed in this case, ready for delivery?

A. I don't think it had been executed. We had the deed ready for execution at the settlement.

Q. Signed by you and your wife?

A. No; we didn't sign it. We had to—we had it ready to sign.

Q. You knew that this provided that settlement must be made by the nineteenth of May, 1923, on a Saturday; you knew that; didn't you?

A. Yes.

Q. You knew that the business day ended by twelve o'clock noon on that day; didn't you?

A. Yes.

Q. And up to twelve o'clock of that day you had not even executed the deed on your part; had you?

A. No.

Mr. Landis: I object to it as immaterial.

The Court: I think it is very material.

Mr. Landis: I ask an exception.

(Which exception was duly allowed and noted.)

Q. Were you familiar with the settlement certificate showing eighteen exceptions to the title?

A. I saw this a day or so before this evening that they called. That is all I know.

Q. You had seen it?

A. Yes.

Q. What steps had you taken, if any, toward removing those exceptions?

A. Well, I asked in regard to some of the exceptions and they said that they were——

Q. No, what steps had you taken with regard to clearing them up yourself?

A. Well, there were affidavits for some of the exceptions.

Q. Did you obtain the affidavit?

A. Yes, sir.

Q. Exception number six water bill—had you paid that before the time fixed for settlement?

A. Yes, sir.

Q. 8. Liens, defects and encumbrances, if any, in the title of "Miller C. Landis," etc. Had you cleared that up?

A. No, sir; I had not done anything with that.

Q. All right. You had not cleaned up exception number eight. Exception number 9, had you cleared that?

A. I don't know what it is.

Q. Take a look at it.

A. Well, all these exceptions——

Q. Just answer my question. Had you cleared up exception number nine?

A. It cannot be cleared up.

Q. Well, you have not cleared it; that is an answer.

A. It cannot be cleared up.

Mr. Landis: Is the answer, it cannot be cleared up?

The Witness: That is it.

Q. Now, look at the rest of these, 11, 12, 13, 14, 15, 16, 17 and 18 and tell me which of them you have cleared off, if any.

A. Starting with ten?

Q. Yes.

A. Well, ten cannot be cleared off; 11 and 12 were affidavits.

Q. Well, had you cleared them off at that time?

A. Yes, sir, by affidavits.

Q. Had you cleared them up, at that time?

A. Well, we took an affidavit to the effect that there was not——

Q. Had that been submitted to anybody and approved?

A. No, sir.

Q. The title company had not seen them?

A. No, sir.

Q. Had you cleared up the rest of them?

A. Number 13 we had not; that was a waiver.

Q. Well, you had not cleaned it up?

A. No.

Q. 14?

A. 14, was an affidavit for.

Q. Had you cleared it up?

A. No; I had not cleared any of it up.

Q. Had not cleared any of those exceptions off?

A. No, sir.

Q. So that you were not in a position to settle at any time on Saturday, having cleared off the exceptions; were you?

A. Yes, sir.

Q. You mean to say you were in a position to deliver a title free and clear of any encumbrances in accordance with the agreement, at any time on Saturday?

A. That would have been satisfactory to the West Jersey, yes, sir.

Q. You mean that on Saturday, however, practically all of these exceptions were outstanding?

A. Yes, sir.

Q. That is right, is it?

A. Yes, sir.

Q. And if you had made a deed on Saturday, the purchaser would have gotten the title subject to most of these exceptions; is that right?

A. But some that couldn't be removed.

Q. Most of them, wasn't it?

A. Well, I couldn't say most of them.

Q. Well, some of them?

A. Well, there are some of them that cannot be removed in Sea Isle, in any title——

Q. You talked a good bit about that. How about this $700 mortgage? Had that been paid off on that date?

A. No, sir.

Q. That was there without question, wasn't it?

A. Yes, sir.

Q. Had you made any arrangement with the mortgagee, to come in and produce his mortgage and have it cancelled?

A. He could not be found.

Q. Well, it had not been done; had it?

A. No, sir.

Q. So that he would have had to take title subject to that mortgage, at least?

A. No, sir.

Q. Why not?

A. Because I would have deposited that amount with interest with the West Jersey Company and they would have removed that exception.

Q. West Jersey?

A. Yes.

Q. Weren't you going to make settlement down here, at Sea Isle City, Saturday afternoon?

A. (No answer.)

Q. How could you——

A. I asked him—I asked him to come—well, go ahead.

Q. How could you on Saturday afternoon, you having fixed that time, as you say——

A. Yes.

Q. How could you have deposited the money on that day with the West Jersey Title Company?

A. I couldn't.

Q. You could not?

A. I could not.

Q. So that he would have had to take title subject to a number of defects in title if he made settlement here; wouldn't he?

A. Yes.

Q. And no provision was made by you toward relieving him from those conditions at that time; is that right?

A. No; other than affidavits.

Q. Only affidavits that nobody had to prove; is that right?

A. I suppose that would be it.

The Court: No notary had been arranged for to take acknowledgement for the deed or anything, I suppose—six o'clock Saturday night?

The Witness: No; we could have gone out and done that in the bank. It is customary to do it that way.

Q. You say up to Saturday at six o'clock, you wanted to get this $14,000?

A. I was ready to settle, yes, sir.

Q. You wanted to get it and were willing to go on Saturday?

A. Yes, sir.

Q. Now, sometime after that you changed your mind; didn't you?

A. Yes, I did.

Q. When did you change your mind?

A. Monday, when I got your letter.

Q. Then you made up your mind the following Monday, that you would not go on with it; isn't that right?

A. I made up my mind Mr. Rabinowitz didn't want to go on.

Q. On Monday you made up your mind you would not go on with it; isn't that right?

A. Yes.

Q. And then on Monday, without consulting Rabinowitz at all, you went and paid the money over to Sofroney with the idea of closing the whole thing; isn't that true?

A. That was my idea.

Q. So that by Monday, you decided you didn't want to go on; is that right?

A. Not under those conditions, I didn't.

Q. What were the conditions?

A. Threatened suit.

Q. Were you to be sued if you did go on?

A. No, but I was ready. He didn't come near me to go on.

Q. What?

A. Mr. Rabinowitz never came down to see me about the matter.

Q. No, he didn't—your wife reported he had been there on Saturday, didn't she?

A. She told me he was there, yes.

Q. She told you what his errand was; didn't she? He was down there to settle?

A. Yes.

Q. So that you knew he had come all the way

to Sea Isle City to give you fourteen thousand dollars; you knew that on Saturday evening; didn't you?

A. Yes, sir.

Q. You never called up Rabinowitz and said: "Let us settle on Monday or Tuesday, or any other time;" did you?

A. No.

Q. Well, on Monday you called the deal off, didn't you?

A. After I got your letter, I did, yes.

Q. What had the letter to do with it?

A. A good deal, I thought.

Q. Tell me what it had to do with that?

A. Well, I felt that a man wanted to sue me for his money back—I thought I would give it back to him. That is what he said in the letter; he was going to sue me for the thousand dollars. So I considered he didn't want to go on with that deal.

Q. Didn't think it was necessary to talk to him, did you?

A. No.

Q. You didn't think it necessary to tell the lawyer that you were willing to go on with it; did you?

A. I turned it over to my attorney.

Q. I ask you whether you told the lawyer that you were willing to go on with it?

A. Mr. Landis?

Q. No, the lawyer who wrote you the letter.

A. No; I didn't. I don't know what Mr. Landis answered.

Q. Well, you didn't answer?

A. No.

Q. You went out and hired a lawyer to fight right away; didn't you?

A. Yes, sir.

Q. And you hadn't any idea then of going on with this agreement, had you, from that time on?

A. I didn't think he wanted me to.

Q. And you hadn't any idea then of going on with this agreement, had you, from that time on? That is, from Monday on?

A. No; I hadn't any idea of it.

Q. But from Monday, you never intended to carry out this agreement; did you?

A. I cannot say no to that, because I would have if he had come to me.

Q. I say from Monday on, you had no idea or no desire to carry out this agreement; is that true?

A. No; I would not say that.

Q. Isn't the reason, because prices had gone up and you sold it to somebody else at a higher price?

A. Absolutely not.

Q. You did sell at a higher price; didn't you?

A. About three months ago, I did.

Q. At a much higher price?

A. Yes.

Q. How much did you get for it?

Mr. Landis: I object.

The Court: His answer states that he had a defective title and could not make title good. I suppose he is entitled to examine him to show that he did make title.

Q. Did you sell this property at an increased price, later?

A. Yes.

Q. And you made title?

A. Title is not perfected yet.

Q. Well, you made title that the other fellow took; isn't that right?

A. It has not been accepted yet.
Q. Has the consideration been paid?
A. He paid a binder on the property. The matter is in the hands of the trust company now.
Q. Title company?
A. Yes, sir.
Q. Settlement to be made at Sea Isle City, or at the title company's office?
A. The settlement I don't know; I don't have to appear in the settlement.
Q. Don't have to appear—didn't have to appear in this settlement; did you?
A. Well, I didn't know that.
Q. How did you find out since, that you didn't have to appear?
A. I have been told so.
Q. As a matter of fact, you now know that you did not have to appear on that Saturday?
A. Yes; I know it now; yes, sir.
Q. And you could have sent up a deed and the whole thing would have been closed on Saturday?
A. Absolutely. I know all that now.

Re-direct examination.

By Mr. Landis:

Q. Is this the letter to which you referred?
A. Yes, sir; that is the letter.

Mr. Landis: I offer that letter in evidence.

The Court: I think I will admit all of those letters, copies of which are attached to the pleadings. I think they have something to do with the issue in this case.

Mr. Carr: Your Honor will allow me an exception?

The Court: Yes.

(Which exception was duly allowed and noted.)

Mr. Landis: I offer this letter and the application.

(The application referred to is received in evidence and marked as an exhibit for the defendant D4.)

(The letter referred to is received in evidence and marked as an exhibit for the defendant D5.)

By Mr. Carr:

Q. In the sale you recently made, does exception number 8 appear in your title report?

A. Yes, sir.

Q. Have you been able to remove it?

A. No, sir.

Q. You cannot remove it?

A. No, sir.

Q. Did Mr. Rabinowitz or his attorney, ever tell you they would not accept title unless you were able to remove it?

Mr. Landis: I object to that. They naturally would not volunteer that unless they were asked.

Q. Did he ever offer to accept title if you did not remove the exception?

Mr. Landis: I object. It is leading and not relevant.

Mr. Carr: Well, that is all, Mr. DeBow.

(Witness excused.)

Mr. Landis: There are some copies of letters attached to the pleadings, and in the reply it is not clear to me whether the intention was to admit or deny those letters. It says they admit the accuracy of the letters.

Mr. Carr: We admit that they are correct copies of letters. What we intended to do was to challenge their admissibility, however, and their relevancy.

Mr. Landis: Well, you admit, as I understand it, that such letters were sent and received in reply?

Mr. Carr: I will if you will put in, as you properly should, the reply letter to you dated July 14, 1923. There is another letter. There is a reference to it in the Sofroney.

The Court: I will let in all the correspondence on both sides. I think it would be just as well if all the correspondence went in by consent.

Mr. Landis: I offer this letter in evidence.

(The paper offered is received in evidence and marked as an exhibit for the plaintiff P3.)

DEFENDANT RESTS.

PLAINTIFF'S REBUTTAL.

BEN RABINOWITZ, called as a witness in rebuttal on behalf of the plaintiff, being duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Carr:

Q. Where do you live?
A. Philadelphia.
Q. Are you a son of Joseph Rabinowitz, the plaintiff?
A. I am.
Q. Do you know Mr. Sofroney?
A. I do.
Q. Mr. De Bow?
A. Yes.
Q. Do you remember being present on Friday evening, the eighteenth of May, at the home of Mr. De Bow, at Sea Isle City?
A. Yes, sir.
Q. Who was with you?
A. Mr. Sofroney.
Q. What was said by you with reference to fixing a time and place of settlement?
A. I told Mr. De Bow in the presence of Mr. Sofroney, that my father was ready to settle at the title and trust company at Camden, anywhere between ten and twelve the following day; that he would be there with $14,000 cash and whether they would have everything ready. Mr. De Bow said he didn't think it was possible for him to be there, but he said Mr. Sofroney would be there with the deed signed by himself and his wife; that everything would be O. K., ready for settlement.

Q. Did you report that fact to your father?

A. I believe—yes, sir; called him up the same afternoon.

Q. When did you next see your father?

A. Why, I was there the next morning at the trust company, with my father.

Q. You were at the trust company?

A. Yes, sir.

Q. Did he have the money with him?

A. He had a certified check, but Mr. De Bow didn't show up, and he cashed it and got $14,000 in bills.

Q. Was there any word from Mr. De Bow?

A. None at all.

Q. Did you see Mr. Sofroney on that occasion?

A. I did, at the hall of your office.

Q. Was any appointment made with Mr. Sofroney or anybody at Sea Isle City for six o'clock that evening?

A. None whatsoever.

Q. Any talk of that kind?

A. None whatsoever.

Q. Did you come down with your father to Sea Isle City?

A. I did.

Q. What time did you come down?

A. About three in the afternoon.

Q. Did your father have the $14,000 with him?

A. He did.

Q. Where did you go in Sea Isle City?

A. To Mr. Sofroney's office.

Q. Was he there?

A. Not then. He was afterwards, about an hour or two hours; I don't just remember.

Q. What time did you first stop there?

A. Around three o'clock.

Q. Was that your first stop?

A. I believe so.

Q. And your father was with you, and anyone else?

A. Just myself.

Q. Now, after leaving Mr. Sofroney's office, where did you go and whom did you see?

A. We went to Mr. De Bow's home and there was not anyone home.

Q. No one home at all. Then where did you go next?

A. Captain Moore's office.

Q. Did you show him the fourteen thousand dollars?

A. He counted it. Captain Moore counted that. I believe he counted all the bills.

Q. Where did you go from Captain Moore's office?

A. I just think we stuck around town until we found Mr. Sofroney. When we did we went into his office, laid the cash on his desk.

Q. Was Mr. Moore there with you?

A. No, he was not.

Q. And what did Mr. Sofroney say?

A. He said he didn't know what was t he matter with De Bow. He said he couldn't tell him anything just then.

Q. Did Mr. Sofroney have any deed there?

A. I don't recollect seeing any.

Q. Did he offer any deed?

A. None at all.

Q. Did you go anywhere else after that?

A. We met Mrs. De Bow on the street after we left the office and we told her that we were ready for settlement and we had the money there, whether she wanted to count it or not, and she said she couldn't do anything without Mr. De Bow; he was not home; didn't know what time he would be home.

Q. What time did you finally leave Sea Isle City?
A. Oh, around five. I just don't remember just what the hour was.

Mr. Carr: Cross-examine.

Mr. Landis: No cross-examination.

(Witness excused.)

JOHN L. MAHER, recalled in rebuttal, having been previously sworn, was examined and testified as follows.

Direct examination.

By Mr. Carr:

Q. Captain, do you remember Mr. Rabinowitz and his son Ben, coming down to Sea Isle City that afternoon?
A. I do; yes, sir.
Q. Did they come to your office?
A. Yes, sir.
Q. Did they have any money with them?
A. They did. I counted it.
Q. How much?
A. $14,000.
Q. Now, did you and Mr. Rabinowitz go somewhere after that?
A. Yes, sir; Mr. Rabinowitz asked me if I would drive them around to Mr. De Bow's house.
Q. Did you drive them there?
A. I did.
Q. Was he at home?

A. No, sir.

Q. After that where did you go?

A. I told them that if Mr. De Bow was in town he would be probably at one or two shops, and in driving to them or one of them—I forget which—we met Mrs. De Bow on the street. Mr. Rabinowitz and his son got out, had some conversation with her. I don't know what it was. I stayed in the car.

Q. You didn't go back to Sofroney's after that?

A. I didn't go to Sofroney's at all; no, sir.

Mr. Carr: Cross-examine.

Mr. Landis: No cross-examination.

(Witness excused.)

JOSEPH RABINOWITZ, recalled, was examined further in rebuttal, and testified as follows:

Direct examination.

By Mr. Carr:

Q. Mr. Rabinowitz, did Mr. De Bow say to you that he would not come to Camden and that settlement would not be held in Camden on that Saturday morning?

A. Nobody said to me anything.

Q. Did your son report to you the result of his conversation with De Bow?

A. Yes, sir, over the telephone. He told me that Mr. De Bow is go—either he will come himself or he will deliver the deed to Mr. Sofroney, at the

West Jersey Title Company, on Friday before twelve o'clock.

Q. Now, on Saturday morning you saw Sofroney

A. On Saturday; beg pardon.

Q. On Saturday morning you saw Sofroney?

A. Yes, sir.

Q. Did you say to Sofroney that you would come down to Sea Isle City for the purpose of settlement?

A. I did, sir.

Q. Did you go down?

A. I did.

Q. Did you see Mr. Sofroney at Sea Isle City?

A. Late in the afternoon.

Q. Who was with you?

A. My son.

Q. Did you say anything to him or do anything in his presence?

A. Yes, sir; I told him I had since—I was at the West Jersey Title Company before twelve o'clock and he was not there—since I was at the West Jersey Title Company before twelve o'clock and he was not there, I had decided to cash the check and went to Sea Isle City to see whether I can find him in Sea Isle City, and offer him the money, which I tendered the money to Mr. Sofroney, showing I have the cash money to settle it.

Q. In Mr. Sofroney's office?

A. In Mr. Sofroney's office.

Q. Did he take it?

A. No, sir.

Q. Was any deed ever tendered to you?

A. No, sir.

Q. By anyone?

A. Beg pardon?

Q. Was any deed tendered to you by anyone?

A. Nothing was handed to me and nothing was tendered to me.

Cross-examination.

By Mr. Landis:

Q. Mr. Rabinowitz, how were you going to make this settlement?

A. How was I?

Q. Yes.

A. By offering the money and he is supposed to give me the deed for it.

Q. Well, you had arranged for settlement at the title company, hadn't you?

A. Well, if the title would be presented clear of every defect possible, I would have received the deed, accept the deed.

Q. You wanted these exceptions cleared off; did you not?

A. Of course. I wasn't sure whether they did clear them off or not.

Q. I show you D4, application number 38478. You wished those exceptions cleared off; didn't you?

A. Sure.

Re-direct examination.

By Mr. Carr:

Q. When you made this tender of $14,000, did you say anything at all about the exceptions?

A. I haven't said anything.

Q. Just made the tender?

A. Made the tender.

Q. So you had not discussed with anybody, the question of the exceptions?

A. No, sir.

(Witness excused.)

PLAINTIFF RESTS.

DEFENDANT'S MOTION FOR A DIRECTION OF VERDICT.

Mr. Landis: If the Court please, I wish to move for a directed verdict as to the second and third counts which asks for damages for the alleged loss of $5,000, and calls the attention of the Court to the sale of land Act: 2. Cumulative Supplement to the Compiled Statutes of New Jersey, 183-67. This cites Robinson against Miller, and the interpretation of this statute by that case is that in a case of this kind, the recovery is limited to the deposit money. As to the second and third counts, I move for a directed verdict.

Mr. Carr: If your Honor please, the statute in question changes the common law liability in a certain class of cases by enlarging the measure of damages. The statute is not restrictive. So the question arises what was the liability at common law under such a situation? This question first came up in an opinion by Beasley, Chief Justice, in the case of Lake or Drake against Baker. (Citing 70 New Jersey Law, Brown v. Honnis; Stein v. Francis, opinion by Vice Chancellor Leaming; 91 Equity, 205; 92 Equity, 109.)

The Court: I am inclined to think the motion should be granted as to the second and third counts, because I think the testimony as it now stands, cannot be disregarded by the jury. The defendant has testified that his title was defective and he could not make a good title, and the plaintiff has stated in his testimony, that he would not have taken the title if it had the slightest defect in it. I do not

know how a jury or anyone else is going to refute the statements of these two men themselves, one as to the knowledge of his title, and the other the knowledge of his own attitude toward that property. I will allow the direction of a verdict as to the second and third counts.

Mr. Carr: I ask for an exception, if your Honor please.

The Court: Yes.

(Exception was duly allowed and noted.)

Mr. Carr: !Now I move for a directed verdict on the first count. I do not know what is left. There was no payment back and no proof of agency. I think we are entitled to a verdict of a thousand dollars with interest from the nineteenth of February, 1923.

Mr. Landis: I do not think it is established at all, that Mr. Sofroney was the agent of Mr. De Bow.

Mr. Landis: Well, if that is not established, then a tender to Mr. Sofroney was not a tender to Mr. De Bow.

The Court: I do not think it is either, Mr. Landis.

The Court: I will direct a verdict on the first count. Have you figured the amount?

Mr. Carr: $1,170.

Mr. Landis: Well, what is the $170?

The Court: Interest.

Mr. Carr: Interest.

The Court: You will find a verdict, then, for the plaintiff for the sum of $1,170.

(The jury found as directed.)

The Court: On the second and third counts you will find a verdict for the defendant.

(The jury found as directed.)

EXHIBIT P1.

12/8/25

AGREEMENT, made the 19th day of February A. D. 1923 BETWEEN Theodore E. De Bow of Sea Isle City N. J. of the first part, and Joseph Rabinowitz of Woodbine N. J. of the second part, as follows, to wit: The said party of the first part agrees to sell and convey to the said party of the second part, who agrees to purchase all that certain land and buildings thereon situated including all furniture and fixtures and bowling alleys being lots number 18 and 19 of Block 41 Section A Sea Isle City N. J. on the terms and conditions following to wit:—The said party of the second part agrees to pay for the said property the sum of Fifteen Thousand Dollars ($15,000.00) Dollars, as follows: One Thousand Dollars ($1000.00) Dollars on the signing of this agreement (which deposit shall be forfeited to the said party of the first part as liquidated damages in case of the default by the said party of the second part in the performance of the terms of this agreement) and the balance of the purchase money as follows, Fourteen Thousand ($14,000.00) dollars at the signing of the deed.

A policy of Fire Insurance for $ all to be transferred to said party of the second part upon payment of the premium, less the discount named in policy.

The premises are to be conveyed free and clear of all incumbrance and easements

The gas fixtures, heaters, ranges, etc., annexed to the said building are all included in the sale, as also any water pipe laid on any street bounding said lot.

Possession is to be given at the signing of the deed.
Taxes, water rent, house rent and interest on incumbrance (if any) to be apportioned for the current term.
Gas bills, if any, to be paid by the seller.
The title is to be such as will be insured by any reptuable title company.
And the said parties hereby bind themselves, their heirs, executors and administrators, for the faithful performance of the above agreement within 90 days from the date hereof, said time to be the essence of this agreement, unless extended by mutual consent in writing endorsed hereon, subject to lease on apartment known as the North side apartment made to August Wahm. Inventory of all personal property will be attached to and made a part of this agreement.

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

Sealed and Delivered }
in the presence of }

Theo E. DeBow (Seal)
Joseph Rabinowitz (Seal)

M. M. Sofroney
Moe Goodman

Received the day of the date of the within agreement the sum of one thousand Dollars, on account of the purchase money named therein.

#101 on Franklin Natl Bank
of Phila Pa.
Theo E. DeBow (Seal)

WITNESS:
M. M. Sofroney

STATE OF NEW JERSEY, }
COUNTY OF } SS.

BE IT REMEMBERED, that on this day of , nineteen hundred and twenty-three, before me , personally appeared M. E. Goodman, of full age, and to me well known, and who, being duly sworn according to law, on his oath, doth say and prove that he saw Theodore E. De Bow and Joseph Rabinowitz, the parties named in the within agreement, to him personally known, sign, seal and deliver the said agreement as their voluntary act and deed; and that he, the said M. E. Goodman, subscribed his name to the same at the same time, as an attesting witness.

Moe E Goodman

Sworn and subscribed before me at Sea Isle City N J. the day and year aforesaid. on May 29-1923.

Charlotte M. Sofroney.
(Seal) Notary Public.

My commission expires Feby 23, 1928.

4521 1.50 c

No.....

AGREEMENT

91

Between Theo E DeBow

and

256

Joseph Rabinowitz

Deed to be made

Memorandum for Deed

Received in the clerk's office of Cape

May County, N. J. at Cape May C. H., on the 29th day of May 1923 at 3 o'clock P. M. and recorded in Book No. 375 of Deeds, pages 435

A. C. Hildreth
Clerk.

EXHIBIT P2.

12/8/25

FRANKLIN NATIONAL BANK 3-44

Philadelphia Feb. 19 1923 No. 101

Pay to the order of Theo E. DeBow $1000.00

one thousand XX Dollars

Joseph Rabinowitz

(Endorsed)

On account of part of money as per agreement of sale dated Feb- 19th 1923; Pay to order of First Nat. Bank Sea Isle City N. J.

Theo E DeBow

Pay to the order of any bank, banker or trust company

Prior Endorsements Guaranteed

FIRST NATIONAL BANK

55-544 Sea Isle City, N. J. 55-544

Received payment
Through the
Feb 27 1923
Clearing House
Corn Exchange Nat'l Bank, Phila.

(Perforated)
PAID
2 . 27 . 23
3 . 44

EXHIBIT P3.

12/8/25

July 14, 1923.

Charles K. Landis, Esq.,
102 N. Landis Ave.,
Sea Isle City, N. J.
Dear Sir:

Rabinowitz v. DeBow.

Referring to your letter of May 21st, 1923, Mr. Sofrony is not the agent of Mr. Rabinowitz for the purpose of settling this case. Mr. Sofrony has forwarded us his check for $881.50 making the following deductions: For title policy and report West Jersey Title & Guaranty Co. $68.50; for expenses incurred going to Philadelphia including carfare, telephone calls, etc., $50., total $118.50.

Will you please have Mr. DeBow forward us his check for $1000. The expenses incident to the title policy, and, perhaps, Mr. Sofrony's expenses should be borne by Mr. DeBow.

Awaiting your early reply, we are,

Yours truly,

HFC/B Carr & Carroll

EXHIBIT D1.

June 13, 1923.

Messrs. Carr & Carroll,
4th & Market Sts.,
Phila. Pa.
Gentlemen:

In complying with your request to Mr. Charles K. Landis Jr., relative to the return of one thousand dollars ($1000.—) deposit that Mr. Joseph Rabinowitz gave to Mr. Theo. E. DeBow of Sea Isle City. Mr. De Bow returned to me as agent $1000.— on May 19th. I tendered this money to Mr. Rabinowitz but he refused to accept it pending advise from his council. You will inclose find bill for expenses incurred by me as agent covering this transaction which amount I have deducted from the check or money that I have been holding.

You will inclose find check for eight hundred eighty-one dollars and fifty cents ($881.50) as per your request.

Yours very truly,
M. M. Sofroney.

MMS/W

EXHIBIT D2.

Law Offices
Carr and Carroll,
S. W. Cor. Fourth & Market Sts.
Camden, New Jersey.

Harvey F. Carr
Walter R. Carroll

Thomas B. Kenworthy

July 14, 1923,

Mr. M. Sofroney,
Sea Isle City, N. J.
Dear Sir:

I am returning herewith your check to the order of Carr & Carroll Attorneys for Joseph Rabinowitz, amounting to $881.50. Mr. Rabinowitz declines to accept this, and insists that the full $1000. be returned to him. Any expense of title examination should be borne under the circumstances by Mr. De Bow. I am writing to Mr. De Bow's attorney in accordance with the above.

Harvey F. Carr

HFC/B

EXHIBIT D3.

Sea Isle City, N. J., May 21st, 1923.

1000.— RECEIVED of Theo E. De Bow One Thousand (1000) Dollars returned to Joseph Rabinowitz on rescission of contract between them dated February 19th, 1923 as to Lots 18 & 19 of Block 41 Section A, Sea Isle City, N. J.

Maurice M Sofroney, agent for
Joseph Rabinowitz.

EXHIBIT D4.

WEST JERSEY TITLE AND GUARANTY COMPANY

S. E. Cor. Third and Market Streets, Camden
N. E. Cor. North Carolina and Atlantic Aves., Atlantic City

Camden, N. J. May 7, 1923.

Pursuant to application No. 38478 the "West Jersey Title and Guaranty Company" will, upon the surrender of this certificate, the payment of the premium and expenses, and the production and record of the papers, hereinafter called for, insure Joseph Rabinowitz as Owner of an estate in fee simple of premises—as per Schedule hereinafter written—to the amount of Two Thousand Dollars, against all liens or defects in title, except the following, which may now exist, and will be made exceptions in the policy unless removed, viz:

NOTE—No liability assumed after this date; if settlement is postponed search should be continued.

Where insurance is under a mortgage, the production and approval of the bond and mortgage will be required before issuing policy.

It will not be guaranteed that there are any buildings or improvements on the land intended to be insured.

This Company will not assume any responsibility for unpaid gas, electric lights, sewer or other corporation claims NOT LIENS; nor for the proper execution of papers until approved by it; nor will it perform the work required for the removal of any proper exception. Counsel should be employed where legal services are required. All papers should be submitted for approval BEFORE settlement day.

1. Tenure of present occupants.

2. Rights of way, not of record.

3. Any variation in location of lines, or dimensions, encroachments, objections or easements, which an accurate survey, showing all physical conditions, including ways, buildings, fences and windows, would disclose, or which are visible, or are known to the Insured.

4. Loss or damage by reason of mechanics' lien claims not filed or of record at this date.

5. Taxes, water rents and municipal claims for the year 1923. (Tax 1923, $308.20).

6. Liability of premises for municipal improvements, such as grading, curbing, guttering, paving, sidewalks, sewers, water pipe, etc., constructed or being constructed, but not assessed.

7. Collector reports under date of May 14, 1923:
Water bill, $1.80
Add interest and costs.

8. Estates, liens, defects and encumbrance, if any, in the title of Matilda T. Landis, as the same may affect insured premises, existing at the date of deed from said Matilda T. Landis to Henry Whelan, dated March 19, 1888, recorded in Book 80, page 145 &c.

9. Condition and restriction that the lands situate between Marine Place and low water mark of Atlantic Ocean, shall ever remain open and unonstructed, and free for public use.

Note—this condition or restriction appears in the deeds in our line of title, but insured premises lie altogether Northwest of the Northwest side of Marine Place.

10. Estate in fee and right of way of the West Jersey Railroad Company (now West Jersey and Seashore Railroad Company), being a strip of land 66 feet wide (33 feet on both sides of the centre line), extending along Ocean Avenue from the Northwest side of Marine Place Northwest to Ludlam Thoroughfare, as conveyed by Matilda T. Landis to Thomas Townsend, by deed recorded in Book 52, page 321, and by Thomas Townsend to West Jersey Railroad Company, recorded in Book 55, page 36.

11. Proof that there were no children born to or adopted by Susan L. Krouse after the making of her will, dated April 15, 1909, proved in Cape May County August 2, 1911, recorded in Book I, page 332 &c.

12. Proof that there were no children born to or adopted by John W. Krouse after the making of his will, dated July 8, 1915, proved in Cape May County October 26, 1915, recorded in Book L of Wills, page 75.

13. Inheritance Tax due the State of New Jersey under will of John W. Krouse, deceased.

Note—Receipt or waiver to be produced.

14. Federal Estate Tax, if any, payable upon the Estate of John W. Krouse, according to Act of Congress approved September 8, 1916, as amended.

Note—Upon production of satisfactory evidence that the Estate does not amount to $50,000. this exception will be removed.

15. Mortgage John H. Krouse
$700. Marion V., his wife
— to —
A. W. James
Covers premises in question.
Dated Aug. 16, 1916.
Recd. Aug. 16, 1916.
Book 141, page 147.
$700. expiration of 1 year, 6%.

Assigned by A. W. James to Victoria Realty and Mortgage Company, by Assignment dated August 16, 1916, recorded in Book 17, page 11.

16. Production and record of a Deed from Theodore E. DeBow and wife to Insured.

Note— Title of record to premises in question became vested in Theodore E. DeBow by Deed from Horace H. Fritz, sole Executor under last will and testament of John W. Krouse, dated Nov. 1, 1917, recorded in Book 327, page 101.

17. Conditions and restrictions as imposed by deeds of Matilda T. Landis and Henry Whelen, and as in Agreement between said Matilda T. Landis and Henry Whelen & al—dated August 13, 1881 and recorded in Book 50, page 505 &c.

18. Estate in dower of the widow of John W. Krouse, if he left any him surviving.

West Jersey Title and Guaranty Company
Wm. S. Casselman, Pres. L.

SCHEDULE.

Land and premises situate in the City of Sea Isle City, in the County of Cape May and State of New Jersey:—NO. 1— BEGINNING at a point in Northwest line of Marine Place, 44 feet from Southwest side of Ocean Avenue; thence along the Northwest side of Marine Place South 30 degrees West 44 feet in front or breadth, and extending thence Northwest between lines of that width parallel with Ocean Avenue and at right angles to Marine Place, 110 feet in length or depth.

BEING lot No. 18 in Block No. 4, on plan of Southwest Section of Sea Isle City, on file in the Clerk's Office of Cape May County.

NO. 2— BEGINNING at the Southwest corner of Marine Place and Ocean Avenue, and extending thence Southwest along the Northwest side of Marine Place 44 feet in front or breadth, and extending thence Northwest between lines of that width parallel with said Ocean Avenue and at right angles to Marine Place, 110 feet in length or depth.

BEING lot No. 19 in Block No. 4, on aforesaid plan.

West Jersey Title and Guaranty Company
Incorporated 1888
Capital, Surplus, Etc. over $450,000

Complete Plants of
Camden and Atlantic Counties

OFFICERS
Wm. S. Casselman
President
Hon. C. L. Cole
C. H. Laird, Jr.
Vice-Presidents
C. R. Lippincott
Treasurer
F. C. Robbins
Ass't Treasurer
W. E. Barto
Secretary
R. E. Fagan
2nd Ass't Treasurer

SETTLEMENT CERTIFICATE
Under Application No. 38478
for Joseph Rabinowitz
premises Sea Isle City,
N. J.

To be returned
To the Company when the Policy is issued.

WEST JERSEY
TITLE AND GUARANTY COMPANY.
S. E. Cor. Third and Market Sts., Camden.
N. E. Cor. N. Carolina and Atlantic Aves.,
Atlantic City.

DEFENDANT'S EXHIBITS,
RABINOWITZ VS DEBOW
EXHIBIT D-5
Law Offices
CARR AND CARROLL,
S. W. Cor. Fourth & Market Sts.
Camden, New Jersey.

May 19, 1923.

Harvey F. Carr
Walter R. Carroll
Thomas B. Kenworthy
Mr. Theodore DeBow,
Sea Isle City, N. J.

Dear Sir:

This is to advise you that Mr. Joseph Rabinowitz, of Woodbine, New Jersey, whom we represent, appeared at the office of the West Jersey Title & Guaranty Company, Camden, New Jersey, pursuant to an appointment made by M. Sofroney, your agent, prepared to make settlement and pay over the consideration named in a certain agreement dated February 19, 1923.

Mr. Sofroney delivered to Mr. Rabinowitz settlement certificate of the West Jersey Title & Guaranty Company issued under application number 38478, showing a number of liens and defects to title.

Mr. Sofroney also advised that you refused to sign the deed for this property. A deed for this property was prepared by Mr. Sofroney and delivered to you last night for signature of yourself and wife. Under the terms of the agreement of February 19, 1923 time is of the essence of the agreement. $1000 was paid you under this agreement. We are advised also that you are unable to give possession in accordance with the terms of this agreement. Mr. Rabinowitz had this property resold, subject to your delivering title to him, at an advance of $5000. Under these circumstances we are compelled to ask that you forward us your check for $6000. If you desire to contest this matter please advise us whether you have an attorney authorized to accept service of process on your behalf.

Very truly yours,
Carr & Carroll

HFC/B

NOTE: The above exhibit was inadvertently omitted from the printed state of the case.

NEW JERSEY COURT OF ERRORS AND APPEALS.

JOSEPH RABINOWITZ,
Plaintiff-Appellant,
v.
THEODORE E. DE BOW,
Defendant-Appellee.

ACTION AT LAW.

ON APPEAL.

DEFENDANT-APPELLEE'S BRIEF.

Generally speaking the plaintiff's statement of facts in his brief are correct with two or three exceptions.

The first point of difference, "That the premises will be conveyed free and clear of all encumbrances and easements" (S. C., 64, l. 31), is not limited by the provision that the title was to be such as will be insured by any reputable title company (S. C., 65, l. 7), but in fact merely is a statement as to how it shall be determined whether or not the title was free

and clear as above. Further discussion of this point is unnecessary as no evidence was introduced by the plaintiff to show that any title company would so insure defendant's title without exceptions.

The second arises by reason of the fact that the contract did not specify a place of settlement. (S. C., 5, l. 27.)

The plaintiff admitted (S. C., 6, l. 18) that he had no conversation with De Bow as to place of settlement.

The plaintiff testified (S. C., 6, l. 33) that he had arranged for settlement at Camden by calling Sefroney and, evidently as an additional safeguard, sent his son, Ben Rabinowitz, to call on Mr. De Bow, the defendant, on Friday evening, May 18. (S. C., 11, l. 8.)

The plaintiff claimed that De Bow agreed to meet them in Camden, or in event of his being unable to be present there, that Mauric Sefroney would be present with the executed deed. De Bow, however, denies this (S. C., 15, l. 24), and states that he told Ben that he could not go to Camden on the 19th of May, but in fact told Ben that he would settle at Sea Isle on Saturday evening, May 19th, at six o'clock (S. C., 16, l. 1) and that he was in fact at home at that time. De Bow is supported in this by Mr. Sefroney (S. C., 24, l. 30) who testified, "Mr. De Bow requested that we have the settlement at Sea Isle because he could not get away on account of his work." Mr. De Bow said he "would be home in Sea Isle after six o'clock Saturday night."

Sefroney denied (S. C., 26, l. 28) that it was suggested to De Bow that the deed be executed and carried by Sefroney to Camden.

Rabinowitz after finding that De Bow was not at Camden on May 19th went to Sea Isle City and dur-

ing the afternoon at about four o'clock went to De Bow's home. (S. C., 9, l. 22.) No testimony was offered to show that plaintiff did call on De Bow at six o'clock that evening as suggested by De Bow.

De Bow, however, testified (S. C., 48, l. 28) that Mr. Rabinowitz never came down to see me about the matter. De Bow testified (S. C., 15, l. 34) that he was working at a bridge *and that he could not* go to Camden as the time was too short.

The third point in plaintiff's statement of facts to which we take exception is that a title policy was *not* procured from the West Jersey Title and Guaranty Company, an inspection of D4, S. C., 70, l. 31, *et seq.*, will show this to be a settlement certificate showing eighteen exceptions.

The defendant also testified (S. C., 48, l. 5) that he was ready to settle up to the time of receiving a letter, Exhibit D5, S. C., 76, from Carr and Carroll, plaintiff's attorneys, which letter demanded the return of the deposit and also demanded damages in the amount of $5,000.00 suggesting suit if defendant did not meet their demands.

The above facts are not important except for the purpose of showing the attitude of the parties.

The trial Court in granting the defendant's motion for direction as to the second and third counts was faced with the following propositions: First, was De Bow (defendant) in a position on May 19th, 1923, to convey a title free and clear of all encumbrances and easements such as would have been insured by a reputable title company? Second, was Rabinowitz willing to accept the title subject to the exceptions which according to the defendant's uncontradicted testimony could not be removed?

In answer to the first question, the exception sheet or settlement certificate, Exhibit D4 (S. C., 70, l. 30),

shows eighteen exceptions. The defendant testified (S. C., 44, l. 11) that he had obtained affidavits to remove certain of the exceptions and had paid taxes and thereby put himself in a position to remove certain other exceptions. Beginning with (S. C., 44, l. 15) on through (S. C., 45, l. 3) that other exceptions could not be removed. De Bow's testimony remains uncontradicted that the settlement certificate, Exhibit D4 (S. C., 70, l. 30), contained exceptions that could not be removed and must necessarily remain as exceptions in any title policy. No testimony concerning title was offered by plaintiff. Further, no testimony was offered by the plaintiff to show the willingness of any title company to insure the title without exceptions in the policy. The Court therefore was correct in holding that the undisputed facts disclosed that the title was not free and clear of encumbrances and easements.

In answer to the second question: Was Rabinowitz willing to accept the title subject to the exceptions which De Bow testified could not be removed? Rabinowitz by his testimony and his actions clearly expressed his unwillingness so to do. Rabinowitz at (S. C., 60, l. 18) was asked:

> "You wanted these exceptions cleared off, did you not?
>
> A. Of course, I wasn't sure whether they did clear them off or not.
>
> Q. I show you D4, application number 38478. You wished those exceptions cleared off, didn't you?
>
> A. Sure."

Next we must consider the letter, D5, S. C., 76, written by plaintiff's attorneys on the same day that he attempted to make settlement in Camden and ap-

parently written prior to his trip to Sea Isle City on Saturday afternoon, March 19th, 1923. The second paragraph of the letter called attention to "a number of liens and defects to title" as shown by the settlement certificate. It next calls attention to the fact that time is the essence of the agreement and that a deposit of $1,000 was made by plaintiff. Then follows a statement "We are advised also that you are unable to give possession in accordance with the terms of this agreement" (which was raised by exception #1 on settlement certificate). And last, "*Under these circumstances* we are compelled to ask that you forward us your check for $6,000." "If you desire to contest this matter, please advise us whether you have an attorney authorized to accept service of process on your behalf."

This letter stands unexplained by the plaintiff and certainly amounts to an election on his part not to accept the title that the defendant had to give. After having authorized the writing of this letter, his later visit to Sea Isle City can only be considered in one way, that he had no further or other intention of accepting De Bow's title but in fact made his trip to Sea Isle for the purpose of making or attempting to make legal tender fearing that his tender in Camden was not sufficient considering the request of De Bow that settlement be made at Sea Isle.

If Rabinowitz actually wanted to settle, why did he not postpone his visit to De Bow's house until six o'clock in the evening of May 19th rather than go there at three-thirty or four P. M. (S. C., 9, l. 22)?

So far as De Bow is concerned his uncontradicted testimony (S. C., 48, l. 5) was that he was willing to settle until he received the letter, Exhibit D5. (S. C., 76.)

It is evident that after the writing of this letter, Rabinowitz would not have accepted title subject to the exceptions and even though he might have met De Bow that afternoon, there is no testimony on his part that he would have done other than as indicated by his attorneys' letter of the same date, and refused to accept the deed, first, by reason of the liens and defects in the title, second, by reason of the defendant's inability to give possession in accordance with the terms of the agreement. As to this point there is no testimony in the case.

The Court had no other alternative than to grant the defendant's motion for direction as to the second and third counts of the complaint, as the defendant said that his title was subject to encumbrances and easements which could not be removed, and the plaintiff recognizing this condition of title demanded his money back, and both by his testimony and the evidence of this letter D5, declared his unwillingness to accept the title subject to the exceptions shown in the settlement certificate.

The situation thus presented is covered by Chapter 159, Pamphlet Laws 1915, at page 316.

> "Whenever any person shall contract to sell real estate or any interest therein, and shall not be able to carry out such contract because of a defect in the title to such real estate or interest therein, the person with whom such contract was made, or his legal representatives or assigns, shall be entitled to recover from such vendor, in an action for the breach of such contract, not only the deposit money, with interest and costs, but also the reasonable expenses of examining the title and making survey, except where the contract shall provide otherwise; provided, this act shall not limit the recovery where

the purchaser may seek to recover for the deceit or fraud of the vendor."

It will be noted that in the complaint there is no allegation or charge of deceit or fraud on the part of the vendor. The plaintiff has no evidence to support his statement (d) on page 15 of his brief. To the contrary the evidence discloses that the breach complained of occurred on May 19, 1923, and that he had not resold the property until (S. C., 50, l. 19) "about three months ago" referring to the date of the trial which was December 8th, 1925 (S. C., XIV), and at that time title was in fact not perfected (S. C., 50, l. 34), so that the defendant held title for more than two and a half years after May 19, 1923.

In conclusion, the judgment should be affirmed.

Respectfully submitted,
S. RUSLING LEAP,
Attorney for Defendant-Appellee.

NEW JERSEY COURT OF ERRORS AND APPEALS.

JOSEPH RABINOWITZ,
Plaintiff-Appellant,
v.
THEODORE E. DEBOW,
Defendant-Appellee.

ACTION AT LAW.

ON APPEAL.

APPELLANT'S BRIEF.

This is an appeal from a judgment of the Supreme Court based upon a verdict of a jury at the Cape May County Circuit directed by the Court, denying the plaintiff's right to recover on a real estate contract the loss of his bargain, *i. e.* the difference between the market value of the property and the purchase price provided in the contract.

THE APPEAL CHALLENGES THE CORRECTNESS OF THE COURT'S ACTION IN DIRECTING SUCH VERDICT.

The Court's ruling (S. C. 62, l. 30, *et seq.*), which was challenged at the trial, and to which an exception was duly taken and noted on the record (S. C. 62, L. 9), is based upon facts which may briefly be stated as follows:

By a written contract (Ex. P1, S. C. 64), dated February 19, 1923, the plaintiff agreed to purchase, and the defendant to sell, certain property in Sea Isle City, for the sum of $15,000—$1000 of which, under the terms of the contract, was paid on the signing of the agreement (Ex. P1, S. C. 65, l. 29; Ex. P2, S. C. 67). The contract provided that the premises were to be conveyed free and clear of all encumbrance and easements (S. C. 64, l. 31). This is limited, however, by a later provision that the title was to be such as will be insured by any reputable title company (S. C. 65, l. 7). The contract further provided that settlement should be made within ninety days from February 19, 1923 (S. C. 65, l. 9, &c.). May 19, 1923, was, therefore, the last day for the making of settlement.

The sale was negotiated through the offices of one Maurice W. Sefroney, a real estate agent of Sea Isle City (3 S. C., l. 10, *et seq.*). His relationship to the parties is in dispute, defendant alleging that he was plaintiff's agent, and the plaintiff alleging Sefroney to be the agent of the defendant. It appears that on May 18, 1923, plaintiff advised Sefroney over the telephone that he was ready for settlement on the day following (Saturday, May

19th) (S. C. 6, l. 33), and that Sefroney replied that he would be at the West Jersey Title Company at Camden, New Jersey, with the necessary papers (S. C. 7, l. 6). It further appears that plaintiff's son, Ben Rabinowitz, went to Sea Isle City on Friday evening, May 18th, and arranged with defendant, DeBow, for settlement on May 19th, between 10 A. M. and 12 M., at the West Jersey Title Company in Camden (S. C. 11, l. 8, *et seq.;* S. C. 54, l. 28, *et seq.*), at which time defendant said he did not think it possible for him to be there, but that Sefroney would be there with the deed signed by himself and his wife (S. C. 12, l. 1), and that everything would be ready for settlement. Defendant denies there was any talk of going to Camden (S. C. 15, l. 11, *et seq.*).

On Saturday morning, May 19, 1923, plaintiff went to the West Jersey Title Company in Camden with a certified check for $14,000. Defendant put in no appearance. Sefroney was present and stated that DeBow told him he would not come to Camden to make settlement as his wife refused to sign the deed (S. C. 8, l. 20, *et seq.*). This is, of course, no evidence of the wife's unwillingness to sign, and there is nothing in the pleadings, and no other evidence of the wife's refusal. Plaintiff then journeyed to Sea Isle City, taking with him $14,000 in cash, going first to Sefroney's office (S. C. 25, l. 29, *et seq.*), and later to DeBow's home (S. C. 8, l. 35, *et seq.*). This is substantiated by testimony of Sefroney and one Maher (S. C. 57, l. 20, *et seq.*). DeBow was not at home. Late in the afternoon plaintiff met Mrs. DeBow on the street, and she told him that she didn't know where her husband was, and that "she couldn't do nothing without him" (S. C. 11, l. 22). Defendant admits that Ben Rabinowitz (plaintiff's son) came to his house Friday evening (May 18th) S. C. 15, l.

22, *et seq.*, and that he said he could settle any time plaintiff came down (S. C. 15, l. 37; S. C. 16, l. 1, *et seq.*), but further states that he said he wouldn't be home before six P. M., Saturday (May 19th).

A title policy was procured from the West Jersey Title and Guaranty Company, ordered by Sefroney (S. C. 39, l. 10, *et seq.*, Exhibit D4, S. C. 70, l. 31, *et seq.*). Since the title policy was taken through the West Jersey Title and Guaranty Company the inference is strong that settlement was to be made there. DeBow knew that the title company was making the search (S. C. 42, l. 30), and that settlement was to be made by May 19, 1923 (S. C. 43, l. 14), and had seen the settlement certificate a day or so prior to May 18th (S. C. 43, l. 31). Defendant states that up until six P. M., May 19th, 1923, he was ready to settle (S. C. 47, l. 30), and that sometime thereafter he changed his mind, and on Monday, May 21, 1923, paid over the $1000 deposit to Sefroney "with the idea of closing the whole thing" (S. C. 48, l. 14).

Defendant's pleadings state (Second Defense to Second Count, S. C. X) that his refusal to convey was due to a defect in his title, and it is true that certain encumbrances are shown on the title policy (Exhibit D4, p. 70). Defendant admits, however, that he made practically no effort to clear the title prior to the time of settlement (S. C. 44, *et seq.*); that no deed had been executed (S. C. 43, l. 6, *et seq.*); that no arrangement had been made for taking an acknowledgement in Sea Isle City (S. C. 47, l. 22, &c.), and that he made no effort after May 19, 1923, to effect a settlement (S. C. 49, l. 5), and the defendant further testified (S. C. 45, l. 29, *et seq.*) as follows:

"Q. Do you mean to say that you were in a position to deliver a title free and clear of any encumbrances in accordance with the agreement at any time on Saturday?

A. That would have been satisfactory to the West Jersey, yes, sir."

Since that time he has sold at a much higher price (S. C. 50, l. 20), and the inference to be drawn is that the title is marketable.

Rabinowitz testified that he made a tender of $14,000 in cash to Mr. Sefroney (S. C. 59, l. 18, &c.). There is no evidence that the plaintiff made any objection whatever to the exceptions or encumbrances noted on the title policy, and his tender was unconditional, he having had no discussion with anyone regarding the exceptions (S. C. 60, l. 28, *et seq.*). He states that he expected to make settlement by offering the money and receiving the deed, and that if the title were cleared of every defect, possible, he would have received the deed (S. C. 60, l. 5, *et seq.*). Of course, he wanted to have removed such exceptions as it was possible to have removed, and his testimony is indicative of nothing further than his desire to have all removable exceptions removed.

The testimony is undisputed that plaintiff had entered into negotiations with Mori Bros. of Vineland, men of financial responsibility, for the sale of the property in question to them for $20,000, and that he was unable to make title to them due to defendant's failure to give him a deed (S. C. 35, l. 35, *et seq.;* S. C. 10, ls. 1 to 16; S. C. 13, ls. 3-13).

The testimony stands undisputed that the fair market value of the property on May 19, 1923, was $20,000 (S. C. 12, testimony of John L. Maher).

It is, therefore, undisputed that the plaintiff has suffered a loss of $5000.

At the close of the whole case defendant moved for a directed verdict as to the second and third counts, relating to the above loss, on the ground that the Sales of Land Act (2 N. J. C. S., 183-67) limits the recovery in cases of this kind to the deposit money (S. C. 61). In granting the motion the Court says:

> "The Court: I am inclined to think the motion should be granted as to the second and third counts, because I think the testimony as it now stands, cannot be disregarded by the jury. The defendant has testified that his title was defective and he could not make a good title, and the plaintiff has stated in his testimony, *that he would not have taken the title if it had the slightest defect in it.* I do not know how a jury or anyone else is going to refute the statements of these two men themselves, one as to the knowledge of his title, and the other the knowledge of his own attitude toward that property. I will allow the direction of a verdict as to the second and third counts."
>
> (S. C. 61, l. 30, *et seq.* to l. 7, p. 62.)

The above charge is apparently based on two misconceptions of the evidence, and of the legal consequence thereof.

AS TO THE EVIDENCE:

A. That the defendant *could not* make a good title, whereas the defendant testified (S. C. 45, l. 29, *et seq.*) that he was in a position to have made

a title free and clear of encumbrances that would have been satisfactory to the West Jersey Title Company, and the defendant further testified (S. C. 50, l. 18, *et seq.*) that at a later date he had sold the same property to some one else at a much higher price, although he testified that the title "is not perfected *yet.*"

B. That "the plaintiff has stated in his testimony *that he would not have taken the title if it had the slightest defect in it.*" The plaintiff's testimony in this respect was as follows:

> "Well, if the title would be presented clear of every defect possible, I would have received the deed, accept the deed."
>
> (S. C. 60, l. 15, *et seq.*)

To our mind this meant that if the title would be presented clear of every defect possible to be removed he would have accepted the deed. His whole course of action was consonant with such an interpretation. Having the settlement certificate before him, he appeared at the office of the title company at Camden on the day of settlement with a certified check for $14,000, and, not finding the defendant at the appointed place, he had the check cashed and took the actual cash with him to Sea Isle City, and tendered the same to Sefroney, whom he considered to be the defendant's agent, and attempted to locate the defendant himself, but was unable to make a tender because the defendant absented himself from his home, and left no word as to his whereabouts.

On the question of tender, while there was a dispute as to whether or not the appointed place of settlement was the West Jersey Title and Guaranty Company, such dispute was for the jury and not for

the Court. If the testimony of the plaintiff appearing on S. C. 60, is susceptible of either of two constructions, or if reasonable minds might draw more than one inference therefrom, then, on well settled principle, its effect was for the jury and not for the Court. If the effect of this testimony is fairly arguable in this court it is strongly persuasive of the existence of such a difference of opinion as would necessarily take this case to the jury.

In connection with the above testimony the word "possible" is defined as follows:

> "*Possible.* Capable of being or becoming; potential. *Syn.* That is *possible* which may, given the proper conditions, exist or occur."
> Webster's Collegiate Dictionary.

As used, it certainly limited the scope of the noun "defect." In order to give the sentence the meaning attributed to it by the Court it would be necessary to excise the word "possible."

AS TO THE LEGAL CONSEQUENCE OF THE ABOVE EVIDENCE:

The defendant was not excused from tendering and conveying such title as was within his power to convey, even though there might have been some defects therein, and the plaintiff was entitled to have actually presented to him such a deed conveying such title, at which time the plaintiff was entitled to decide as to whether he would accept the same and make claim for compensation, or a deduction covering the money value of such defect, or to wholly reject the said title. This situation he was entitled to have presented to him actually, and not hypothetically, at a period long after the de-

fendant had definitely refused to go on with the agreement (see *Saldutti v. Flynn,* 72 N. J. Eq. 157, Ch. 1906). The defendant was not excused from making such title as he was able to convey, the vendee having an absolute right to waive such defect and accept the title subject to compensation for the defect.

> "Under a contract for the sale and conveyance of land with warranty deed, a substantial defect in the title to the land, affecting only a small portion thereof, and not depriving the vendee of the enjoyment of the residue in the manner contemplated by the contract, may be waived by the vendee as an objection to the title or to carrying out the contract.
>
> "Where a defect in the title to land contracted to be sold and conveyed with warranty deed is subject to a waiver by the vendee, and is in fact waived, the contract continued in force, subject to compensation for the defect."
>
> *Melick v. Cross,* 62 N. J. Eq. 545.
>
> "As to a purchaser's waiver of the defect in title, the authorities settle the rule that a vendee may, on being informed of a defect in title, and either expressly or by his acts, waive the defect as a reason for abandoning the contract without, however, giving up his right to abatement or compensation for the defect, or he may, in like manner, waive the defect, both as an objection to the contract and as a matter of compensation. Taking possession after a notice of defect has been considered a waiver, both of the defect and of the right to compensation."
>
> *Melick v. Cross,* 62 N. J. Eq. 545, 558.
>
> "A lease perpetually renewable, where the

> rent reserved is one peppercorn, a release of which may be procured by paying the cost of drawing the necessary papers, is not such a defect of title as will excuse the non-performance of a contract to purchase lands providing that the property was 'to be conveyed by warranty deed by a record marketable title free from all encumbrances.' ''
>
> *Meyer v. Reed,* 91 Eq. 237 (Ch. 1919).

Under the case of *Gerbert v. Trustees,* 59 N. J. L. 160, at 184 (E. & A. 1896), the seller is only excused from making title and exempted from liability for failure to do so, by a showing of his inability so to do, and he is not excused from offering or tendering such title as he can deliver or control, leaving it to the buyer to accept or reject.

> ''In distinguishing *Engel v. Fitch* he said: 'The vendor in that case was bound by his contract to do all that he could to complete the conveyance. *Whenever it is a matter of conveyancing and not a matter of title,* it is the duty of the vendor to do everything that he is enabled to do by force of his own interest, and also by force of the interest of others whom he can compel to concur in the conveyance.' ''
>
> *Gerbert v. Trustees, supra,* at p. 184.

A wilful failure to offer to convey such title as the seller has it in his power to convey is not protected by the rule in *Gerbert v. Trustees.* This rule is stated in that case as follows:

> ''In an action on contract for breach of covenant to convey real estate with warranty of title, where the vendor's title is defective, nominal damages only can be recovered.''

It seemed to be the view of the Court, and based entirely upon a misconception of the testimony, that in some way a state of mind on the part of the plaintiff unaccompanied by any overt act, and undisclosed until the date of the trial, which was eighteen months after time for performance, in some way exonerated the defendant from liability. It is not claimed that the defendant knew of this mental state, nor was in any way influenced by it. It is respectfully submitted that the plaintiff was entitled to have presented to him for decision under the terms of the contract, and within a time fixed therein, an actual situation rather than a hypothetical situation presented eighteen months later as to what the plaintiff would have done if the defendant had done some other act.

With relation to this settlement, the plaintiff was represented by counsel at the time of the intended settlement. There is every probability that upon an actual situation being presented to him he would have conferred with counsel and would have been advised as to his rights, and as to the character of defects or objections to title (if any) that could not have been removed from the settlement certificate, and would likewise have been advised that he had the right to accept such title as could be conveyed to him, and would have been entitled to compensation for any defects not capable of being removed.

At the time the contract was breached by the defendant there was an undoubted cause of action; at the time the suit was instituted this right of action existed. Under the ruling made by the learned trial Judge this right ceased to exist. What took it away? Usually an existing right of this character ceases to exist only by payment, release or estoppel. None of these elements appear in the case. We have

been unable to find any authority which sustains the view expressed by the learned trial court.

The learned trial Judge withdrew this case from the jury upon the theory that the defendant could not make a good title, and the plaintiff would not have taken such title if it had the slightest defect in it. The question of whether the defendant could have made a good title was obviously one of fact for the jury, the defendant having testified, p. 45, that he was in a position to deliver a title free and clear of any encumbrance in accordance with the agreement that would have been satisfactory to the West Jersey Title Company, and also that he had since sold the property at a much higher price, and that with reference to the title: "Title is not perfected *yet.*" From the word "yet" it is to be inferred that the title was capable of being perfected, and one reasonable inference would be simply that the deed had not yet been delivered. It was, therefore, a jury question as to whether or not the defendant was able to deliver such a title as the plaintiff would have accepted.

The defendant, under the rule in *Gerbert v. Trustees, ubi supra,* is not excused from making such title as it is within his power to make; and would not be protected against a verdict in favor of the plaintiff, except by a showing of his inability to convey.

The situation in the case *sub judice* is more nearly analogous to the facts of *Brown v. Honniss*, 70 N. J. L. 260, at 264 (E. & A. 1903), where the Court says:

> "Gerbert (referring to Gerbert v. Trustees) was unable to make this conveyance because Snyder had only a life estate in the property covered by the lease—an estate by curtesy—the title to the property being in his wife, deceased

at the time of making the lease. Here there was an absolute inability in the seller or his executor to convey by reason of total failure of title in them. In the case *sub judice,* there is no allegation of any disability in the seller to convey but a refusal to convey for a totally inadequate reason, and in such case the plaintiff is entitled to recover for the loss of his bargain. Engel v. Fitch, L. R., 8 Q. B. 659."

This case is followed by *Cohen v. Cyzam Realty Co.,* 3 N. J. Miscl. Rep. 1028 (not reported in the official reports) where the Court approved the charge of the trial Court:

"That the plaintiff, if the jury should find in his favor, was entitled to be reimbursed the amount of money which he had paid on account of the purchase price of the property, and also the loss of his bargain—that is, the difference between the market value of the property and the purchase price provided by the contract, if the jury should find that the market value was in excess of the purchase price. This instruction was in accordance with the rule laid down by the Court of Errors and Appeals in Brown v. Honniss, 70 N. J. L. 260, and the damages were assessed by the jury on the basis of this instruction."

Subordinate to the above are questions relating to tender. These involve disputed questions of fact, and, if material, come within the province of the jury and not within that of the Court. Ben Rabinowitz testified that an appointment was made for the purpose of settlement at the office of the West Jersey Title Company at Camden on May

19th, and that the defendant agreed to be present at that time and place. This is denied by the defendant. There was also a question of fact as to whether Sefroney was the agent of plaintiff or defendant. This, however, is wholly immaterial in view of the testimony relating to a definite appointment at the office of the title company in Camden for purpose of settlement. Under these circumstances an actual tender by the plaintiff is excused.

In the case of *Meyer v. Reed,* 91 N. J. L. 237 (Ch. 1920), the Court held that a vendor's conduct in refusing to answer the purchaser's request and meet him for the purpose of receiving the balance of the purchase money and delivering his deed, thus preventing the making of a tender, excused the purchaser from making a tender.

In conclusion, it is respectfully submitted that the Court should not have directed a verdict because:

(a) The question of whether DeBow could or could not have made a good title was a question of fact for the jury.

(b) DeBow was obliged to tender such title as he had, with the right on the part of Rabinowitz to have accepted such title with compensation, or wholly reject it.

(c) The plaintiff did not testify as stated in the Court's opinion "that he (Rabinowitz) would not have taken the title if it had the slightest defect in it," but did testify instead thereof as follows: "Well, if the title would be presented clear of every defect possible I would have received the deed, accept the deed."

(d) On the whole case it appeared that the defendant had a sufficiently good title to sell to another person at a largely increased price, and the defendant's whole conduct was consistent with the theory that he was evading the plaintiff and attempting to escape his legal obligation in order to sell the property at a higher price to a third party.

In conclusion, the judgment should be reversed, and a *venire facias de novo* issue.

Respectfully submitted,
CARR & CARROLL,
Attorneys for Plaintiff-Appellant.

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NOTICE OF APPEAL.

(Filed December 7, 1926.)

NEW JERSEY SUPREME COURT.

CAPE MAY COUNTY.

JOSEPH RABINOWITZ,
Plaintiff,
v.
THEODORE E. DEBOW,
Defendant.

Action at Law.
Notice of Appeal.

To S. Rusling Leap, Esquire, Attorney for Defendant:

Take notice that the plaintiff appeals to the Court of Errors and Appeals of New Jersey from so much of the judgment entered in this cause as adjudges that plaintiff is only entitled to recover $1170 being the amount due on the first count and that plaintiff was not entitled to recover on the second and third counts of the complaint.

CARR & CARROLL,
Attorneys of Plaintiff-Appellant.

[ENDORSED]

Service of the within notice of appeal is hereby acknowledged this 6th

day of December, 1926, without prejudice.

S. Rusling Leap,
Attorney of Defendant.

GROUNDS OF APPEAL.

(Filed December 17, 1926.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

JOSEPH RABINOWITZ,
Plaintiff-Appellant,
v.
THEODORE E. DEBOW,
Defendant-Appellee.

Action at Law.
Grounds of Appeal.

The following are the grounds of appeal under the appeal in the foregoing cause:

1. Because at the conclusion of the case the Court directed a verdict for the defendant as to the second and third counts to which an exception was duly taken, allowed and noted on the record.

2. Because there was no evidence to warrant the Court in directing a verdict for the defendant on the second and third counts.

CARR & CARROLL,
Counsel for Joseph Rabinowitz,
Plaintiff-Appellant.

[ENDORSED]

Due and legal service of the within grounds of appeal is hereby acknowledged this 16th day of December, A. D. 1926.

S. Rusling Leap,
Counsel for Defendant-
Appellee.

COMPLAINT.

(Filed Aug. 5, 1925.)

Plaintiff, Joseph Rabinowitz, of Woodbine, County of Cape May, State of New Jersey, says that:

FIRST COUNT.

1. On February 19, A. D. 1923, defendant agreed in writing that within ninety days he would convey to plaintiff lots Nos. 18 and 19 of Block 41, Section A, Sea Isle City, New Jersey, together with the buildings and fixtures thereon, free and clear of all encumbrances and easements; and plaintiff in said writing agreed to pay $15,000 for the same, viz: $1,000 on executing the contract and the balance on the signing of the deed. A copy of said agreement is annexed hereto and forms a part hereof. Plaintiff paid $1,000 on executing the contract in accordance with its terms.

2. Plaintiff and defendant agreed upon Saturday morning, May 19, 1923, as the time, and the office of the West Jersey Title & Guaranty Company, Camden, New Jersey, as the place for settlement. At said time and place the plaintiff attended with the balance of the consideration, but neither the defendant nor his representative appeared, nor was the deed from defendant to the plaintiff lodged with said title company.

3. On May 19, 1923, plaintiff was ready and willing, and offered to defendant, to pay the balance of said contract and duly to perform all the terms of said contract upon his part, upon the like performance by defendant.

4. Defendant refused then to deliver any deed of conveyance for said property and still refuses so to do.

Plaintiff demands the return of the $1,000 paid on account of said agreement.

SECOND COUNT.

1. The allegations of the first count are here repeated as of the second count.

2. On May 5, A. D. 1923, plaintiff entered into an agreement with H. S. Fox and Mori Brothers, all of the City of Vineland, County of Cumberland and State of New Jersey, for the sale of said property. Said H. S. Fox and Mori Brothers agreed to pay plaintiff $20,000 therefor.

3. On May 19, 1923, said H. S. Fox and Mori Brothers were ready, able and willing to pay for said property the sum of $20,000.

4. Defendant's refusal to deliver any deed of conveyance for said property has caused plaintiff a loss of $5,000.

Plaintiff demands, on the second count, $5,000 damages.

Wherefore the plaintiff demands $1,000 damages on the first count, and the sum of $5,000 damages on the second count.

CARR & CARROLL,
Attorneys for Plaintiff.

AGREEMENT, made the 19th day of February, A. D. 1923, BETWEEN Theodore E. De Bow of Sea Isle City, N. J., of the first part, and Joseph Rabinowitz of Woodbine N. J. of the second part, as follows, to wit: The said party of the first part agrees to sell and convey to the said party of the second part, who agrees to purchase all that certain land and buildings thereon situated including all furniture and fixtures and bowling alleys being lots number 18 and 19 of Block 41 Section A Sea Isle City N. J. on the terms and conditions following, to wit:—The said party of the second part agrees to pay for the said property the sum of Fifteen Thousand Dollars ($15,000.); One Thousand Dollars ($1,000.) on the signing of this agreement (which deposit shall be forfeited to the said party of the first part as liquidated damages in case of the default by the said party of the second part in the performance of the terms of this agreement) and the balance of the purchase money as follows, Fourteen Thousand ($14,000.00) dollars at the signing of the deed.

A policy of Fire Insurance for all to be transferred to said party of the second part upon payment of the premium, less the discount named in policy.

The premises are to be conveyed free and clear of all incumbrance and easements.

The gas fixtures, heaters, ranges, etc., annexed to the said building are all included in the sale, as also any water pipe laid on any street bounding said lot.

Possession is to be given at the signing of the deed.

Taxes, water rent, house rent and interest on incumbrance (if any) to be apportioned for the current term.

Gas bills, if any, to be paid by the seller.

The title is to be such as will be insured by any reputable title company.

And the said parties hereby bind themselves, their heirs, executors and administrators, for the faithful performance of the above agreement within 90 days from the date hereof, said time to be the essence of this agreement, unless extended by mutual consent in writing endorsed thereon, subject to lease on apartment known as the North side apartment made to August Wahm. Inventory of all personal property will be attached to and made a part of this agreement.

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

Theo. E. De Bow (L. S.)
Joseph Rabinowitz (L. S.)

Sealed and Delivered
in the presence of
M. M. Sofroney
M. E. Goodman

Received the day of the date of the within agreement the sum of one thousand dollars, on account of the purchase money named therein #101 on Franklin Natl Bank of Phila. Pa.

Theo. E. De Bow (seal)

Witness
M. M. Sofroney

[ENDORSED]

Due and legal service of the within Summons & Complaint is hereby acknowledged, this 3rd day of August, A. D. 1925.

Charles K. Landis
Attorney for Defendant.

ANSWER.

(Filed Aug. 12, 1925.)

Defendant, Theodore E. De Bow, of the City of Sea Isle City, Cape May County, New Jersey, says that:

FIRST DEFENSE TO FIRST COUNT.

1. He admits paragraph 1.

2. He denies paragraph 2 except he admits that neither he nor his representative appeared nor was the deed from him to the plaintiff lodged with said title company at the time and place mentioned in said paragraph.

3. He denies paragraph 3.

4. He denies paragraph 4.

SECOND DEFENSE TO FIRST COUNT.

1. Said contract stated in paragraph 1, has been duly rescinded by said parties.

2. On May 21, 1923, he paid to plaintiff the $1,000 demanded by said first count.

3. On May 21, 1923, at said City of Sea Isle City he handed $1,000 cash to Maurice M. Sofroney who acknowledged in writing the receipt of said $1,000 as plaintiff's agent on rescission of said contract, a copy of which written receipt is hereto annexed as Exhibit DA.

4. On May 21, 1923, at said City of Sea Isle City, said Maurice M. Sofroney was plaintiff's agent duly authorized to accept said $1,000.00 cash in acknowledgment of the rescission of said contract as stated in paragraph 3.

5. After May 21, 1923, plaintiff duly ratified the act of said Maurice M. Sofroney in accepting said $1,000.00 cash as plaintiff's agent on rescission of said contract as stated in paragraph 3.

6. Plaintiff, since May 21, 1923, until the commencement of this action at law, well knowing the facts stated in paragraph 3 of this defense, has not at any time denied to this defendant that said Maurice M. Sofroney was plaintiff's agent as aforesaid or that said contract was rescinded as aforesaid, nor notified this defendant of any demand as made by plaintiff in this action at law.

7. On May 21, 1923, Charles K. Landis, Jr., attorney for this defendant, wrote a letter of that date to Messrs. Carr & Carroll, attorneys for plaintiff, a copy of which letter is hereto annexed as Exhibit DB; to which letter, Exhibit DB Messrs. Carr & Carroll, attorneys for plaintiff, about June 12, 1923, replied by letter of that date, a copy of which is hereto annexed as Exhibit DC; about June 13, 1923, said Maurice M. Sofroney wrote a letter of that date to said Messrs. Carr & Carroll, attorneys for plaintiff, a copy of which is hereto annexed as Exhibit DD, to which letter, Exhibit DD, about July 14, 1923, said Messrs. Carr & Carroll, attorneys for plaintiff, replied by letter of that date, a copy of which is hereto annexed as Exhibit DE.

8. Said Messrs. Carr & Carroll were attorneys for plaintiff at the times mentioned in paragraph 7 of this defense.

First Defense to Second Count.

1. His first defense and second defense to first count is here repeated as of his first defense to second count.

2. He denies paragraph 2.

3. He denies paragraph 3.

4. He denies paragraph 4.

SECOND DEFENSE TO SECOND COUNT.

This defendant was not able to carry out the contract stated in paragraph 1 of the first count because of a defect in the title to said real estate and was not able to give possession of the premises in accordance with the terms of said agreement.

Charles K. Landis, Jr.,
Attorney for Defendant.

ANNEXED COPIES OF EXHIBITS MENTIONED AND REFERRED TO.

EXHIBIT DA.

Sea Isle City, N. J., May 21st, 1923.

$1000.—RECEIVED of Theo. E. De Bow One Thousand (1000) Dollars returned to Joseph Rabinowitz on rescission of contract between them dated February 19th, 1923 as to Lots 18 & 19 of Block 41 Section A, Sea Isle City, N. J.

Maurice M. Sofroney, agent
for Joseph Rabinowitz.

EXHIBIT DB.

May 21, 1923.

Messrs. Carr and Carroll,
Counsellors at Law,
S. W. Cor. 4th & Market Sts.,
Camden, N. J.
Gentlemen:—

Mr. Theo. E. DeBow has handed me your letter of May 19th inst. as to claim of Mr. Joseph Rabinowitz on contract of February 19, 1923 for purchase of lots at Sea Isle City, N. J., on which contract Mr. Rabinowitz made a first payment of $1000.—

Mr. DeBow today returned the $1000.—, in cash to Mr. Maurice M. Sofroney as agent for Mr. Rabinowitz and notified said agent of the rescission of the contract.

I will accept service of process as attorney for Mr. De Bow.

Yours truly,
Charles K. Landis, Jr.

EXHIBIT DC.

Law Offices
CARR AND CARROLL,
S. W. Cor. Fourth & Market Sts.,
Camden, New Jersey.

June 12, 1923.

Harvey F. Carr
Walter R. Carroll
Thomas B. Kenworthy.
Charles K. Landis, Jr., Esq.,
102 N. Landis Ave.,
Sea Isle City, N. J.
Dear Sir:

Referring to yours of the 21st inst., will you kindly make the following arrangement: Either have Mr. De Bow forward his check to our order as attorneys for Mr. Rabinowitz, or arrange with Mr. Sofroney to endorse the check over to us.

Yours truly,
Carr & Carroll.

HFC/B

EXHIBIT DD.

June 13, 1923.

Messrs. Carr & Carroll,
4th & Market Sts.,
Phila. Pa.
Gentlemen:

In complying with your request to Mr. Charles K. Landis Jr., relative to the return of one thousand dollars ($1000.—) deposit that Mr. Joseph Rabinowitz gave to Mr. Theo. E. DeBow of Sea Isle City. Mr. De Bow returned to me as agent $1000.— on May 19th. I tendered this money to Mr. Rabinowitz but he refused to accept it pending advise from his council. You will inclose find bill for expenses incurred by me as agent covering this transaction which amount I have deducted from the check or money that I have been holding.

You will inclose find check for eight hundred eighty-one dollars and fifty cents ($881.50) as per your request.

Yours very truly,
M. M. Sofroney.

MMS/W

EXHIBIT DE.

Law Offices
Carr and Carroll
S. W. Cor. Fourth & Market Sts.,
Camden, New Jersey.

Harvey F. Carr
Walter R. Carroll
Thomas B. Kenworthy.

July 14, 1923.

Mr. M. Sofroney,
Sea Isle City, N. J.
Dear Sir:

I am returning herewith your check to the order of Carr & Carroll Attorneys for Joseph Rabinowitz, amounting to $881.50, Mr. Rabinowitz declines to accept this, and insists that the full $1000. be returned to him. Any expense of title examination should be borne under the circumstances by Mr. De Bow. I am writing to Mr. De Bow's attorney in accordance with the above.

Harvey F. Carr

HFC/B

REPLY.

The plaintiff denies every allegation in the answer except those paragraphs admitting the allegations of the complaint except that he admits the accuracy of the exhibits attached thereto with the exception of Exhibit DA of which he has no knowledge or information sufficient to form a belief.

Carr & Carroll,
Attorneys for Plaintiff.

RULE AMENDING COMPLAINT.

(Filed December 16, 1925.)

It is on this eighth day of December, 1925, ordered that the complaint be and the same is hereby amended by adding thereto the following:

Third Count.

1. The allegations of the first count are here repeated as of the third count.

2. At the time of the defendant's breach of the said agreement as hereinabove set forth the fair market value of the lands and premises described in said agreement was the sum of $20,000, and upon defendant's refusal to convey, plaintiff became and is entitled to recover for the loss of his bargain.

Plaintiff demands on the third count $5000 damages.

Wherefore the plaintiff demands the sum of $1000 damages on the first count; the sum of $5000 on the second count, and the sum of $5000 on the third count.

On motion of

Carr & Carroll,
Attorneys for Plaintiff.

Let this rule be entered.

Theo. W. Schimpf,
C. C. J.

JUDGMENT.

NEW JERSEY SUPREME COURT.

STATEMENT.

JOSEPH RABINOWITZ,
v.
THEODORE E. DE BOW. } Action at Law.

Judgment entered Dec. 16, 1925.

	Damages.		$1170.00
COSTS	Attorney	32.00	
	Disbursements.	23.60	
			1225.60

EDWARD J. KELLEHER,
Clerk.

POSTEA.

(Filed December 16, 1925.)

This case was tried before Judge Theodore W. Schimpf with a jury, at the Cape May Circuit, on December 8, 1925.

The jury rendered a general verdict against the defendant and in favor of the plaintiff for eleven hundred and seventy ($1170) dollars on the first count and a verdict against the plaintiff and in favor of the defendant on the second and third counts, both verdicts by direction of the Court.

THEO. W. SCHIMPF,
Judge.

SUBSTITUTION OF ATTORNEY.

(Filed Aug. 13, 1926.)

It appearing to the Court that Charles K. Landis, Jr., Esquire, the attorney for the defendant in the above entitled cause, consents hereto.

It is, on this 13th day of August, 1926, on motion of S. Rusling Leap.

Ordered, that S. Rusling Leap be and he is hereby substituted as attorney for said defendant, in the place and stead of the said Charles K. Landis, Jr.

LUTHER A. CAMPBELL,
S. P. C.

I hereby consent to the entry of the foregoing order.

CHARLES K. LANDIS, JR.

I request that the above order be made.
(Signed) THEO. E. DE BOW.

NOTICE.

To Harvey Carr, Esquire, Attorney for Plaintiff, Camden, N. J.:

Take notice, that application will be made by the undersigned as attorney for Theodore E. DeBow, before the Honorable Luther A. Campbell, one of the Justices of our Supreme Court, at No. 1 Exchange Place, Jersey City, at 11.00 o'clock, Daylight Saving Time on the 13th day of August, 1926, for an order permitting the defendant to pay to the clerk of the Supreme Court, the damages in the amount of $1170.00, costs $55.60, and the interest on the sum of $1225.60 from the 16th day of December, 1925, which payment to be made shall be in full payment of the judgment, recorded in Volume 19 of judgments, page 203, in the office of the clerk of Supreme Court, and at the same time, application will be made for an order directing the clerk of our Supreme Court to cancel said judgment so recorded in Volume 19 of judgments, page 203.

S. Rusling Leap,
Attorney for Defendant.

Due and legal service of the within Notice hereby acknowledged this 2nd day of August, 1926.

Carr & Carroll,
Attorney for Plaintiff.

ORDER.

It appearing to the Court that judgment in the above entitled cause was entered on the 16th day of December, 1925, in favor of Joseph Rabinowitz, plaintiff, against Theodore E. DeBow, defendant, in the amount of $1170.00 damages, $55.60 costs, and that interest on said total judgment has accrued since the 16th day of December, 1925.

And it further appearing that the defendant has attempted to pay the amount of this judgment to the plaintiff, and that the plaintiff has refused to accept said amount, and it appearing to the Court that due notice of this application has been given the plaintiff or his attorneys, Carr & Carroll.

It is thereupon, on this 13th day of August, 1926.

Ordered, that the defendant, Theodore E. DeBow, be and he is hereby directed to pay to the clerk of the Supreme Court, the sum of $1170.00 damage, $55.60 costs and interest on said $1225.60 at the rate of six per cent per annum from the 16th day of December, 1925, to the date of said payment.

It is further ordered, that immediately upon receipt of this money, which shall be held by the clerk for the use of Joseph Rabinowitz, plaintiff, that the judgment against the defendant appearing of record in Volume 19 of judgments, page 203, in the office of the clerk of this Court, be, by the said clerk, cancelled of record, and that the judgment of nonsuit on the second and third counts be allowed to stand.

(Signed) LUTHER A. CAMPBELL,
Justice Supreme Court.

Entered August 14, 1926.
On motion of
S. Rusling Leap,
Attorney.

A true copy.
Edward J. Kelleher,
Clerk.

RECEIPT.

Office of the Clerk of the Supreme Court.
Trenton, N. J., Aug. 18, 1926.

Rabinowitz,
v.
De Bow. } No. 956.

Received of S. Rusling Leap twelve hundred seventy-four and 56/100 dollars amount deposited in payment of judgment.
$1,274.56.

Edward J. Kelleher,
Clerk.

TESTIMONY.

CAPE MAY COUNTY SUPREME COURT.

JOSEPH RABINOWITZ,
Plaintiff,
v.
THEODORE E. DEBOW,
Defendant.

Action at Law.

APPEARANCES:
MESSRS. CARR AND CARROLL, for plaintiff.
CHARLES K. LANDIS, JR., ESQ., for defendant.

The above entitled case was tried December 8th, 1925, before HON. THEODORE W. SCHIMPF, Judge, and a jury.

A jury was impaneled, accepted and sworn.

Mr. Carr: We would like to make an amendment, if your Honor please, to the complaint, adding a third count. I have shown it to my adversary—a copy of the proposed amendment. I do not know whether he has any objection to it or not. Is there any objection, Mr. Landis?

Mr. Landis: Well, I cannot consent to it because it is too suddenly presented. I do not like to make up my mind so quickly. I do object to the expression in it that the defendant refused to convey the land to the plaintiff. I will object to it and leave it to your Honor to dispose of.

The Court: I will permit the amendment. The third count proposed is very similar to the second and I think states the same cause of action in a little more definite way.

Mr. Landis: I will take an exception.

The Court: Yes.

(Which exception was duly allowed and noted.)

(Mr. Carr opened the plaintiff's case to the jury.)

(Mr. Landis opened the defendant's case to the jury.)

Joseph Rabinowitz, the plaintiff, called as a witness in his own behalf, being duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Carr:

Q. Mr. Rabinowitz, where do you live?
A. Philadelphia.

Q. Did you live at Woodbine at one time?
A. Yes, sir.
Q. For a number of years?
A. Yes, sir.
Q. Were you engaged in business there?
A. Yes, sir.
Q. Do you know Mr. De Bow, the defendant in this suit?
A. Yes, sir.
Q. Do you remember coming down to Sea Isle City about the nineteenth of February, 1923, to look at some real estate?
A. Yes.
Q. Was there a sign upon that real estate?
A. Well, I couldn't say positively whether there was or was not, as I have not called at any particular day. I was familiar with the property before I purchased it, but I did call Mr. Sofroney.
Q. Who is he?
A. He was an agent, a real estate agent.
Q. Real estate agent there?
A. Yes, sir.
Q. Did you see him with reference to this property?
A. Yes, sir.
Q. Did he have it in charge for sale?
A. He did, sir.
Q. You talked to him generally about the matter, I suppose?
A. May I explain to you?
Q. No. Did you talk to him generally about the subject matter?
A. I did.
Q. Did you meet Mr. De Bow?
A. I did, sir.
Q. Did you enter into an agreement for the sale of certain lands in Sea Isle City?

A. Yes, sir.

Q. Generally speaking, what was that property?

A. The property was sold to me for $15,000.

Q. Now, just what sort of property was it?

A. It was a piece of property on the beach front, something like 88 feet by -100 or 120; I don't remember exactly the dimensions.

Q. Any buildings on it?

A. There were two old buildings on it.

Q. Did you enter into a written contract to purchase the land?

A. Yes, sir.

Q. Agreement dated the nineteenth day of February, 1923, between Theodore E. De Bow and Joseph Rabinowitz, signed by Theodore E. De Bow and Joseph Rabinowitz, and witnessed by M. Sefroney and Moe Goodman. Is that the agreement you entered into?

A. Yes, sir; this is the agreement.

Mr. Carr: The paper is offered in evidence as Exhibit P1.

(The paper offered is received in evidence and marked as an exhibit for the Plaintiff P1.)

Q. At the time of the making of this agreement, did you pay Mr. De Bow any money?

A. I paid him $1,000 by check.

Q. I show you check dated February nineteenth, 1923, to the order of Theodore E. De Bow, one thousand dollars, signed Joseph Rabinowitz, and bearing the bank's cancelled marked. Is that the check that you used?

A. Yes, sir.

Q. That was paid, was it?

A. Yes, sir.

Mr. Carr: I offer it in evidence.

(The paper offered is received in evidence and marked as an exhibit for the plaintiff P2.)

Q. Did you have any talk with Mr. De Bow after the signing of this agreement as to fixing the time and place of settlement?

A. When this agreement was signed by Mr. De Bow I asked Mr. Sefroney if it required his wife's signature, Mrs. De Bow. Mr. Sefroney said that "It is not necessary. Mr. De Bow and his wife is willing to deliver the property to you when the time comes for delivery."

Q. Did you have any talk about the time and place when settlement was to be made?

A. Immediately ——

Mr. Landis: I object. The agreement speaks for itself. It is a written contract, and it states no other times and place of settlement than that stated in the agreement, and it cannot be altered by parol.

The Court: The agreement is silent as to the place of settlement?

Mr. Carr: The agreement is silent as to the place of settlement.

The Court: I will permit the question.

Mr. Landis: I ask an exception.

(Which exception was duly allowed and noted.)

Q. Did you have any talk about the time and place when settlement was to be made?

A. Immediately when Mr. De Bow signed this agreement I had talked to Mr. Sefroney, who was the agent at that time for this property, for Mr. De Bow, I presume, and I questioned him "Why doesn't Mrs. De Bow sign?"

Q. Where were you to settle, I mean?

A. Immediately after signing this agreement I had requested Mr. Sefroney to get the necessary searches done for the property and I questioned, "Where would you like to have this settlement take place?

The Court: You are asked a very simple question. Did you have any conversation with Mr. De Bow about the time and place of settlement? Now, did you or didn't you?

The Witness: I had—I did not.

The Court: Well, why don't you tell us that?

The Witness: I had talked with Mr. Sefroney.

Q. What place was fixed as the place of settlement?

A. Camden.

Q. Where?

A. West Jersey Title Company.

Q. Now, shortly before the nineteenth of February, which was a Saturday, I believe, did you have any talk with either Mr. De Bow or Mr. Sefroney as to the time and hour and place of settlement?

A. On the eighteenth, the day previous, before the settlement was supposed to take place at the West Jersey Title Company, I called up Mr. Sefroney on the telephone.

Q. Yes.

A. And asked where they were going to—and asked whether they were going to be there at the settlement the next day, which I am ready to make settlement.

Q. Yes.

A. He answered me that he will be there with the necessary papers and Mr. De Bow will be there and settlement will be taken place at the West Jersey Title Company at Camden, New Jersey. That is on May nineteenth.

Q. Was any hour fixed for settlement?

A. Well, it happened to be on a Saturday; it should be at twelve o'clock; because it is business usually.

Q. Well, did you fix any hour or was it just Saturday morning?

A. Why, we told him over the telephone that settlement will take place between ten and twelve o'clock.

A Juror: May I ask what date that was, what day of the year?

The Witness: On May 19, 1923.

Q. Do you mean by that May 19, 1923—that was the date ——

A. Date of settlement.

Q. That was the date fixed for settlement, is that it?

A. Exactly.

Q. Now, on the date fixed for settlement, May 19, 1923, did you go to the West Jersey Title and Guarantee Company in Camden?

A. Yes, sir.

Q. Who went with you?

A. My son was with me, Ben.

Q. Who else went with you?

A. And Sefroney was there.
Q. In Camden?
A. In Camden, yes, sir.
Q. Did your counsel go with you, too?
A. No, sir; I called counsel afterward when Mr. De Bow did not appear.
Q. Did Mr. De Bow appear at the title company that morning?
A. No, sir.
Q. Was any word left at the title company for you as coming from Mr. De Bow?
A. No, sir.
Q. Did you have any money or check with you?
A. I had a certified check of $14,000 payable to Mr. De Bow.
Q. Did you have any message at all from Mr. De Bow explaining his absence?
A. No, sir.
Q. I mean on that morning?
A. Why, Mr. Sefroney had advised me that Mr. De Bow has told him he will not come to Camden to make settlement as his wife refuses to sign the deed.
Q. That is what Sefroney said?
A. That was what Sefroney told me.
Q. Now, did you go to Sea Isle City later in the day?
A. I did, sir.
Q. What time did you get down there?
A. I got down there I presume about three o'clock or half-past three in the afternoon.
Q. Who was with you?
A. My son, Ben.
Q. How did you go to Sea Isle City?
A. I believe by train.
Q. Did you take any money with you?
A. I did.
Q. What did you take with you?

A. $14,000 in cash.
Q. Did you go to Mr. Sefroney's office?
A. I did.
Q. Was he there?
A. No, sir.
Q. Where else did you go?
A. Then we went to Mr. De Bow's house.
Q. Yes.
A. And we didn't find him; so next I went to Mr. —Captain Moore's office and asked him what I can do in that matter, explaining the condition, and I also handed the $14,000 which I asked him to count it over and give me an affidavit to that effect, that I was in Sea Isle City to deliver this money to Mr. De Bow and get a deed in return, and that he was not there to be found.
Q. Did he count the money?
A. Yes, sir.
Q. Did Moore go with you to De Bow's house?
A. He did.
Q. When?
A. In the afternoon around four o'clock or half-past three; I am not sure.
Q. While you still had the $14,000 with you?
A. Yes, sir.
Q. Was anybody at home?
A. Nobody.
Q. No word for you there?
A. Nothing.
Q. Now, Mr. Rabinowitz, do you know Mr. H. S. Fox?
A. I do.
Q. And do you know Mori Brothers of Vineland?
A. I know one of the gentlemen, Mr. Mori.
Q. Did you have any communications with them for the sale of this property—did you have any negotiations with them for the sale of this property?

A. Yes, sir.
Q. Did they make you an offer to buy?
A. Yes, sir.
Q. At what figure?
A. $20,000.
Q. Do you know whether they are men of financial responsibility?
A. They are. They were in good standing and they are today.
Q. You were never able to make title to them, were you?
A. No, sir.
Q. Did you ever receive a deed from Mr. De Bow and his wife?
A. No, sir.
Q. Did Mr. De Bow ever tender you a deed?
A. No, sir.
Q. Did he ever offer to deliver a deed to you?
A. No, sir.
Q. Did he ever pay you back your thousand dollars?
A. No, sir.

The Court: When you paid the thousand dollars originally, whom did you give the money to?

The Witness: To Mr. De Bow.

Cross-examination.

By Mr. Landis:

Q. Where did that transaction occur, when you paid this thousand dollars?
A. In Sefroney's office.
Q. Do you remember distinctly that you handed the check to Mr. De Bow?

A. I handed the check to De Bow and it is made to the order of De Bow.

Q. I know it is made to the order of De Bow, but didn't you give the check to Mr. Sefroney?

A. Gave the check to Mr. De Bow. He was there.

Q. But didn't you first give it to Sefroney?

A. I have given it to Mr. De Bow.

Q. Did you send your son Friday night to see Mr. De Bow, the night before the day of settlement that you say it was agreed upon in Camden?

A. Yes, sir.

Q. You sent your son there?

A. Yes, sir.

Q. What did your son report?

A. He reported that he is going to be there the next day in Camden to make settlement.

Q. Who, De Bow?

A. Mr. De Bow.

Q. When you met Mrs. De Bow on the street, what did she tell you, on Saturday?

A. She didn't know where her husband was. She couldn't do nothing without him.

Q. Didn't she tell you he would be home at six o'clock?

A. I don't remember her telling me.

Q. You don't remember that?

A. No.

Mr. Landis: That is all.

Re-direct examination.

By Mr. Carr:

Q. Mr. Rabinowitz, did your son report to you anything with reference to how the deed would be signed when it was to be delivered the following Saturday?

A. The deed would be signed by Mr. De Bow and Mrs. De Bow.

Q. Did your son so report to you?

A. Yes, sir.

(Witness excused.)

JOHN L. MAHER, called as a witness on behalf of the plaintiff, being duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Carr:

Q. You live in Sea Isle City?

A. Yes, sir.

Q. What is your business?

A. Real estate and insurance.

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

A. About three years.

Q. Do you know this property involved in this suit?

A. Yes, sir.

Q. Were you in the office when the agreement was signed?

A. Yes, sir.

Q. You do know the property, however?

A. Yes, sir.

Q. Now, do you know what its value was as of May 19, 1923?

A. It was worth $20,000.

Q. Was that its fair market value?

A. Yes, sir.

Q. At that time?
A. Yes, sir.
Q. Did you negotiate the sale of this property to Fox and Mori Brothers?
A. Yes, sir.
Q. What price did they agree to pay?
A. $20,000 and a thousand dollars bonus for a mortgage.
Q. Are they responsible people?
A. Yes, sir.
Q. Did you deal with them before?
A. Yes, sir.

Mr. Carr: That is all.

Mr. Landis: No cross-examination.

(Witness excused.)

PLAINTIFF RESTS.

DEFENDANT'S CASE.

THEODORE E. DEBOW, the defendant, called as a witness in his own behalf, being duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Landis:

Q. Mr. De Bow, how did you come to first meet Mr. Rabinowitz?

Mr. Carr: Objected to as immaterial and irrelevant.

Q. In regard to selling this property?

The Court: I think the objection will have to be sustained. I do not think that it is relevant.

Q. Who approached you in regard to the sale of this property?

Mr. Carr: Same objection.

The Court: It will be sustained, because the question is irrelevant.

Q. How did you come to go to Mr. Sefroney's office?

Mr. Carr: Objected to as immaterial and irrelevant.

The Court: Well, Mr. Landis evidently thinks it is important. I will let it be answered.

Mr. Carr: I pray an exception.

(Which exception was duly allowed and noted.)

Q. How did you come to go to Mr. Sefroney's office?

A. Mr. Sefroney telephoned to me and said he had a client.

Mr. Carr: I object to what Mr. Sefroney said.

Q. Mr. De Bow, were you residing at Sea Isle City during the time of this contract, when the contract was made?

A. Yes, sir.

Q. Did you ever agree, as Mr. Rabinowitz says, to go to Camden for settlement?

Mr. Carr: I object to that. It calls for a conclusion, if your Honor please. He can say what was said.

The Court: It would be better if he would state the conversation he had, if he had any, with Mr. Rabinowitz about Camden.

Q. Did you have any conversation with Mr. Rabinowitz about going to Camden for settlement?

A. No, sir; none whatever.

Q. Were you present at the office when this conversation about going to Camden was had with Mr. Sefroney?

A. I didn't hear any conversation of that character.

Q. On Friday afternoon, the day before the Saturday when Mr. Rabinowitz says you were due to go to Camden, and his son—did his son come to your house?

A. Friday evening about seven o'clock.

Q. Who came with him?

A. Mr. Sefroney.

Q. Did he ask you then to go to Camden?

A. He did.

Q. What did you reply?

A. I told him I could not go.

Q. Did you say why you could not go?

A. Yes.

Q. Why couldn't you go?

A. I was engaged at the time on work, on route 14 on the bridge; and it was important and I could not go that day; that the notice was too short.

Q. When did you tell him you could settle?

A. I told him anytime he come down.

Q. Where?

A. To Sea Isle.

Q. Well, what time of the day did you tell him that you would be home?

A. I told him he would be home six o'clock that night, Saturday night.

Q. Well, were you home at six o'clock that night?

A. Yes, sir.

Q. Did Mr. Rabinowitz ever offer you this $14,000?

A. No, sir.

Q. You never saw it?

A. No, sir.

Q. Never had a chance to get it?

A. No, sir.

Q. Did you pay the thousand dollars to Mr. Sefroney?

Mr. Carr: I object to that. We are not bound until the agency is shown. I do not care whom it was paid to.

The Court: I think that is true. I would like to know how they justify a payment to Mr. Sefroney?

Mr. Landis: Well, we will prove Mr. Rabinowitz ratified the payment through his attorney, Mr. Carr.

Mr. Carr: If you examine the letters you will find there was no ratification.

The Court: I have already read the letters. They seem to me to be a very direct refusal to abide by any such payment. I have read the letters attached to the pleadings. I suppose they are the same.

Q. Well, I ask the question whether Mr. De Bow

paid the thousand dollars to Mr. Sefroney, the real estate agent, who was transacting this matter.

Mr. Carr: I object.

The Court: Objection sustained.

Mr. Landis: And I take an exception.

(Which exception was duly allowed and noted.)

Mr. Landis: I wish to recall this witness later.

Mr. Carr: I will defer my cross-examination until he has completed his direct examination of the witness.

(Witness withdrawn for the present.)

MAURICE M. SEFRONEY, called as a witness on behalf of the defendant, being duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Landis:

Q. Mr. Sefroney, have you heard Mr. Rabinowitz's testimony?

A. I have.

Q. Did Mr. Rabinowitz engage you as his agent?

Mr. Carr: I object to that, if your Honor please. That is a conclusion.

The Court: That is a conclusion. The objection will be sustained.

Q. Did you act as ——

Mr. Carr: I object.

The Court: The question is not quite completed; but do not answer these questions when there is an objection, Mr. Sefroney.

The Witness: Yes, sir.

Q. Was your answer "yes, sir," intended to be in assent to his Honor's statement?

The Court: I think it was in answer to my injunction.

The Witness: That is right.

Q. Were you present at the transaction ——
A. I was.
Q. —as Mr. Rabinowitz testified? Who wrote the agreement?
A. I wrote the agreement of sale.
Q. Was a check written and drawn and signed by Mr. Rabinowitz at that time?
A. Yes, sir.
Q. To whom did he hand the check?
A. He handed the check to me.
Q. Did the parties then sign this agreement?
A. After I seen the check was properly drawn I handed the agreement to the two parties to sign it.
Q. Then what did you do?

A. Then I handed the check to Mr. De Bow and gave them each an agreement.

Mr. Landis: I would like to show this Exhibit P1 to the witness.

Q. Is that one copy of the agreement? (Showing the witness Exhibit P1.)
A. Yes, sir.

The Court: Was there agency agreement in it, Mr. Carr?

Mr. Carr: No, sir, no agency agreement. A copy of it is attached to the pleadings, if your Honor please, too.

The Court: I see.

Q. How did you come to act in this transaction?

Mr. Carr: I object, if your Honor please. This calls for his reasons. I object to it as immaterial and irrelevant and calls for a conclusion.

The Court: Yes. I think the only things that you can examine this witness about are the conversations that he had with the parties. It is for the jury to conclude what was meant by that.

Q. Well, Mr. Sofroney, please state what your conversation was with Mr. Rabinowitz that brought about this transaction.

Mr. Carr: I object to the "that brought about this transaction."

Q. Well, what was the first conversation you had with Mr. Rabinowitz shortly before this transaction?

A. Mr. Rabinowitz came to my office ——

Mr. Carr: He asked you when.

Q. When?

A. Why, the day—I think it was the nineteenth of February that he said he would like to buy that particular property and I told him that I would find out. He waited at the office until I phoned Mr. De Bow. I went and had a talk with Mr. De Bow and he gave me the terms and particulars of the property and I went back to my office, met Mr. Rabinowitz, and we walked up to the property and we came back, talked about the terms and conditions and then he decided he would buy it, and I called Mr. De Bow on the phone and told him Mr. Rabinowitz had decided to buy it, whether he would come to my office so that we could arrange to draw up the necessary papers and pay him the money for it, which was done.

Q. You say "we would draw up the papers and pay him the money for it." Whom do you mean would draw up the papers and pay the money?

A. Why, the party who was buying the property, Mr. Rabinowitz.

Mr. Carr: I object to that. He is simply defining his own words. What he means is not important. It is what he says.

The Court: Yes, it is for the Court and jury to determine what he meant by what he said.

Mr. Carr: I ask that it be stricken out.

The Court: Can't you tell the difference between what you know about a thing and what somebody said to you?

The Witness: That was the conversation that me and Mr. Rabinowitz had.

The Court: "I was to receive a commission;" that is not telling that Mr. Rabinowitz said that. Why can't you say what you said to Mr. Rabinowitz and what Rabinowitz said to you?

The Witness: Well, I said to him that the price is $16,000, and he said to me: "I will pay you the commission. You leave the price go in at $15,000 and the commission will be paid to you at the settlement. I will pay it." And we drew the agreement afterward for the $15,000.

Q. When you say "he" you mean Rabinowitz was to pay you the commission?

A. Yes, sir.

Q. What did he say with respect to engaging you as his agent to buy this property?

Mr. Carr: I object to that as absolutely leading and very suggestive.

The Court: It is leading, and, therefore, objectionable.

Q. Did Mr. De Bow pay you $1,000?

Mr. Carr: Objected to as irrelevant and immaterial. No agency has yet been established to receive the money and compromise a dispute.

The Court: That will be stricken out.

Q. Who was to pay you your commission?

Mr. Carr: I object to that.

The Court: That calls for a conclusion.

Q. What was said by Mr. Rabinowitz to you about in what way you would serve or act and how you were to be paid for it?

A. What was said? Why, the property was offered for sale ——

Mr. Carr: No, what was said, Mr. Sofroney?

The Witness: That was said—that he could have the property for $16,000.

Q. Where was that conversation?
A. In my office.
Q. Between whom?
A. Between me and Mr. Rabinowitz.
Q. Was Mr. De Bow there?
A. No, sir.
Q. This was between you and Mr. Rabinowitz?
A. Yes, sir.
Q. First conversation?
A. When he asked about that property, and I gave him the impression that I had received from Mr. De Bow. The property was for sale to him at $16,000, and out of that I was to receive a commission ——

Mr. Carr: No, what was said—what was said?

The Witness: I don't quite understand what you mean.

The Court: Presently that is true. The objection will be sustained.

Q. Did you write a letter to Messrs. Carr and Carroll? I ask you if that is a copy of the letter you wrote to Messrs. Carr and Carroll?

A. I did, sir. This is the copy of the letter I wrote.

Q. Did you receive a letter in reply to your letter from Messrs. Carr and Carroll?

A. I did.

Q. Is that the answer?

A. Yes, sir.

Mr. Landis: I will offer the two letters in evidence.

Mr. Carr: Objected to as immaterial and irrelevant, if your Honor please. It is a self-serving declaration of Mr. Sofroney's, and the reply indicates that the proposed settlement of Mr. Sofroney was not accepted or ratified, and evidence cannot be made in this way.

Mr. Landis: Your Honor, he did not give the money to a messenger. He gave the money to a man of profession said to be the agent of Rabinowitz, who wrote a letter ——

The Court: And who up to this point in the case was not.

Mr. Landis: But he was declared to be in the letter, and the letter in reply does not make any denial or contradiction.

The Court: Mr. Landis, I cannot hear the suggestion that you can prove agency by a failure to deny under these circumstances. I overrule that as a proposition of law.

Mr. Landis: I will take an exception, if your Honor please.

(Which exception was duly allowed and noted.)

Q. Mr. Sofroney, were you with the son of Mr. Rabinowitz when they called at the house of De Bow on Friday evening?

A. I was.

Q. The day before the nineteenth of May?

A. Yes, sir; Friday night.

Q. 1923?

A. Yes, sir.

Q. What did you go there for?

A. We went to make arrangement for settlement.

Q. At Camden the next day—what settlement?

A. Mr. Rabinowitz's son stopped at my office and together we went down to see Mr. De Bow. When we got there we talked about the settlement. Mr. De Bow requested that we have the settlement at Sea Isle because he could not get away on account of his work. Mr. Rabinowitz's son requested the settlement to be made in Camden, and one wanted it in Camden and the other wanted it in Sea Isle, and when we left there there was practically this—disagreed; in other words, Mr. Rabinowitz said that he wanted to settle in Camden; Mr. De Bow said he would not be in Camden, but would be home in Sea Isle after six o'clock Saturday night, and we left there.

The Court: Then you went to Camden the next day?

The Witness: Mr. Rabinowitz called me on the phone that day and asked me to come to Camden.

The Court: Well, did you go to Camden the next day to make settlement?

The Witness: I went up; yes, sir.

Q. Well, why did you go?
A. Mr. Rabinowitz called me on the phone and asked me to come up.
Q. Did you attend the settlement?
A. No, sir.
Q. Why not?
A. Well, I didn't go to the West Jersey; I didn't meet him at the West Jersey.
Q. Where did you meet him?
A. I met him in the corridor of Carr and Carroll's office on Market Street, I think it is.
Q. Were you in Sea Isle City that Saturday afternoon?
A. I was.
Q. When Mr. Rabinowitz was in town there?
A. Yes, sir.
Q. Did you see Mr. Rabinowitz?
A. I did.
Q. He knew you were there?
A. Yes, sir; it was about a quarter after three I seen him.
Q. Where was this, at your office?
A. In my office.

Mr. Landis: That is all; cross-examine.

Cross-examination.

By Mr. Carr:

Q. I understand Mr. De Bow was willing to go on with this contract when you and Ben Rabinowitz talked to him on Friday night?

A. Yes, sir.

Q. And the only question between them was where the settlement was to take place?

A. Yes, sir.

Q. Was that all there was to do?

A. Yes, sir.

Q. And you—they agreed upon the place?

A. No, sir.

Q. Did you try to get them to agree upon a place?

A. I did.

Q. You went up the next day, did you, to Camden?

A. Yes, sir.

Q. Did you suggest that you could carry the deed up with you and since it was executed it would not be necessary for Mr. De Bow to go to Camden at the time of settlement?

A. I did not.

Q. You did not? That did not occur to you at all; did it?

A. It did, yes.

Q. And you did not suggest it?

A. No, sir.

Q. Why didn't you suggest it?

A. Because I didn't think it was necessary for him to trust me with the deed.

Q. You didn't think he would trust you with the deed?

A. No; the deed meant $14,000.

Q. Did you suggest to him that he might send it up by a more trustworthy messenger?

A. No, sir, I did not.

Q. Did you—that did not occur to you?

A. No, sir.

Q. You are an experienced real estate man; aren't you?

A. Yes, sir.

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

A. Eleven years.

Q. You know, as a matter of fact, that settlements of this kind are made at the title company as a rule; don't you?

A. Not on every occasion.

Q. You know that is the rule, however, don't you?

A. No, sir.

Q. You say it is not the rule to make it in the title company?

A. Not all the time.

Q. I ask you whether it is not the rule?

A. It is not.

Q. Most settlements are not made in the title company?

A. I do not say most of them are not, but it is not absolutely a rule.

Q. But most settlements are made in the title company office, aren't they?

A. On some occasions.

Q. Now, if you were going to make this settlement in Sea Isle City, who would pass on the question of the exceptions to the title and all that sort of thing?

A. Why, we have them generally removed when the settlement is not made in the trust company.

Q. But they were not removed in this case?

A. I believe they were.

Q. Well, do you know?

A. I don't know for sure.

Q. Well, you made a charge, didn't you, for getting the settlement certificate?

A. I paid for it.

Q. I say, you made a charge for doing it; didn't you?

A. I did.

Q. And you got one, didn't you?

A. Yes, sir.

Q. A whole lot of exceptions on it, aren't there? Isn't that the one you got?

A. Yes.

Q. How in the world did you expect to make settlement down in Sea Isle City with those exceptions on there?

A. Well, maybe he had it to my office there to remove them.

Q. Maybe? Who did?

A. Mr. De Bow.

Q. Did you ask him?

A. I know it. I seen them. He had affidavits.

Q. Don't you get the title company to strike these off at the time of settlement?

A. Yes.

Q. You had not made any provision about that in making the settlement at Sea Isle City; had you?

A. I don't know.

Q. Well, you had not, had you?

A. I don't know.

Q. Well, don't you know whether you had or not?

A. I don't know that.

Q. What provision did you make on the removing of these exceptions upon the assumption that you were going to have a settlement in Sea Isle City?

A. It was not my office to remove them.

Q. You did not care, eh?

A. I did care, but it was not my place to remove them. That was up to the seller.

Q. Don't you know that is part of the routine of any real estate settlement to remove the exceptions that can be removed?

A. I do.

Q. And don't you know that it was impracticable to make settlement at Sea Isle City until those exceptions were removed?

A. Not necessarily.

Q. Don't you know it was impracticable to do it?

A. No, sir.

Q. You don't know that?

A. No, sir.

Q. How long have you been a real estate man?

A. Eleven years.

Q. Would you, as a real estate man make a settlement at Sea Isle City with all those exceptions rather than go to the title company so they could be removed? Would you do that?

A. Under certain conditions I would.

Q. Is that your general rule?

A. Sometimes.

Q. Is it your rule?

A. Sometimes.

The Court: Mr. Sefroney, you are not answering Mr. Carr's question.

A. Well, I think so.

The Court: No, I do not think so. I hate to have to caution you about it, but this "sometimes, maybe," and "I don't know," and all that sort of thing are not definite answers to these questions, and these questions are definite questions and they are entitled to be definitely answered.

Q. Is that your general rule?

A. No.

Q. And why would you make an exception to that general rule in this case?

A. I would have—I had nothing to do—I was looking after Mr. Rabinowitz's efforts.

Q. Oh, you thought you were representing Mr. Rabinowitz?

A. I was.

Q. And you didn't care whether these exceptions were removed or not?

A. I did.

Q. And you were willing to make settlement down here, seventy miles away from the title company, without having them removed?

A. No.

Q. You were not willing?

A. I didn't say I was.

Q. Well, how could you do it except by going to the title company?

A. I didn't know that Mr. De Bow didn't have them removed. How could I know that until we come to the settlement?

Q. Weren't you the man who got this settlement certificate?

A. Yes, and I turned it over to Mr. Rabinowitz.

Q. You expected him to clear it up then?

A. No; I expected De Bow to clear it up.

Q. Did you say to De Bow "clear these exceptions up" ——

A. Yes, sir.

Q. Now, wait a minute. I haven't finished my question.

A. All right.

Q. Did you say to De Bow: "You must first remove these exceptions and when you do we will settle?"

A. Yes, sir.

Q. Did you? When did you say that?

A. When he got the report.

Q. When did you say that?

A. When I turned the title report over to Mr. De Bow.

Q. Did you say that on the Friday night when you were arranging, trying to arrange for a definite settlement?

A. We talked about that long before that night.

Q. Just a minute. Did you say that on that Friday night when you were arranging for a definite time of settlement?

A. We didn't talk about that that night.

Q. Did not at all?

A. No, sir.

Q. So that you had all these matters open which ordinarily would be decided and disposed of at a title company; isn't that so?

A. Yes, sir.

Q. And it never occurred to you to make your objection to a proposed settlement in Sea Isle City; did it?

A. No, sir.

Q. That is another deviation from your prudent practice as a prudent realtor; isn't it?

A. No, sir.

Q. And that is your usual practice, is it?

A. I didn't say it was.

Q. Well, it must be either your usual practice or a deviation from it. Now, which is it?

A. It is not either.

Q. Not either. Of course, you are expecting to get a commission; you wanted to see this sale go through, didn't you?

A. I certainly did.

Q. You never did anything after this time toward getting the deed; did you?

A. Well, Mr. Rabinowitz ——

Q. I asked you?

A. No; I did not.

Q. You never did a thing at all; did you?

A. No, sir.

Q. As a matter of fact, on the very same day you accepted a thousand dollars back and claimed to be the agent of Mr. Rabinowitz in taking it, so that the matter was at an end; didn't you?

A. I don't know whether it was the same day or not. I did take the thousand dollars. I don't know exactly what date it was.

Q. Wasn't it on the same day?

Mr. Landis: It was on the twenty-first.

A. I think it was on a Monday—I think.

Q. What time of day Monday was it that you took the thousand dollars back?

A. I couldn't exactly say.

Q. In the morning?

A. I don't recall it.

Q. Then haven't you any memory at all on this thing?

A. Well, this is two and a half years ago, my friend.

Q. Can you remember whether it was any time at all on Monday?

A. I said it was Monday.

Q. Twenty-four hours on Monday.

A. During the business day on Monday.

Q. In the afternoon or morning?

A. I cannot say positively.

Q. What do you think it was?

A. I think it was in the afternoon.

Q. Mr. De Bow wasn't too busy that day, was he, to stay off the bridge job and hand you the thousand dollars?

A. I don't know about that.

Q. He wanted to get this $14,000; didn't he?

A. He did; yes, sir.

Q. And the way he wanted to get it was by giving you back a thousand dollars on the next week-day after this thing and you told him—he said the deal was off; isn't that true?

A. No, sir.

Q. Didn't he say it was off?

A. Yes, he did, Monday.

Q. On Monday he said it was off?

A. Yes.

Q. And you agreed, as far as you could agree, that it was off; didn't you?

A. No; it was not my business.

Q. But so far as you could agree, you agreed and took his thousand dollars; didn't you?

A. Yes.

Q. And still you say that De Bow wanted to get his fourteen thousand?

A. He did.

Q. And you wanted to see it go through?

A. Certainly.

Q. And when did you change your mind from Saturday until Monday?

A. I did not change my mind at all.

Q. Well, your efforts to put it through ceased on Monday; didn't they?

A. There was no effort to make any settlement.

Q. You made no effort whatever?

A. No; I did not.

Q. On Saturday you made no effort to put it through?

A. I did.

Q. What did you do?
A. I went to Camden with Mr. Rabinowitz.
Q. Empty-handed?
A. No, sir.
Q. Did you take the deed with you?
A. No, sir.
Q. How was the settlement to be made without the deed?
A. The settlement was arranged to be in Sea Isle City on Saturday night.
Q. Is that so?
A. Mr. De Bow said he would settle.
Q. Now, you gave that message to Mr. Rabinowitz; didn't you?
A. Yes.
Q. And Mr. Rabinowitz had fourteen thousand dollars certified check that he showed you?
A. He didn't show it to me; he told me he had it.
Q. And you believed him?
A. Yes, sir; I did.
Q. Then why didn't you come down to Sea Isle City and make the settlement, if that had been agreed upon?
A. I can tell you why I didn't come with him if you want to know.
Q. Why didn't you stay with the man that had the $14,000 if you wanted it made?
A. Because he was not going to pay me.
Q. He was not going to pay you?
A. No.
Q. So you were through with him, weren't you?
A. I was through with him; yes, sir.
Q. You were through with the whole transaction then; weren't you?
A. No.
Q. Well, why didn't you stick to him, the man who

had the fourteen thousand dollars, and get the thing closed?

A. I knew we couldn't have it closed in Camden because I knew De Bow wasn't to be there.

Q. You said he was to go to Sea Isle City?

A. Yes, sir.

Q. You were going to Sea Isle City?

A. Yes, sir.

Q. He had fourteen thousand dollars in his pocket?

A. Yes, sir.

Q. You wanted the fourteen thousand dollars for your client; that is right, isn't it?

A. That is right.

Q. Then you walked away and didn't see him the rest of the day?

A. I did see him that day.

Q. Saw him to speak to?

A. Yes, sir.

Q. What did you say to him?

A. I seen him in his office.

Q. What did you say to him?

A. I said Mr. De Bow would be home at six o'clock.

Q. You didn't carelessly mention the fourteen thousand; did you?

A. I don't know what I mentioned. I said Mr. De Bow would be home at six o'clock and he better wait for him.

Q. How did you know so much about Mr. De Bow?

A. I was to his house Friday night with his son.

Q. And you were going by that?

A. Yes, sir; by his statement.

Q. And on Friday evening the matter was up in the air; nobody had agreed upon the time or place; isn't that true?

A. Yes; that is right.

Q. And you were assuming, the matter not having been agreed upon, that somehow Mr. Rabinowitz

would come down and settle Saturday afternoon after everything was closed and the title company was closed, and make the settlement at Sea Isle City; is that your story?

A. Yes, sir.

Q. And you left the man with the $14,000 get away from you; did you?

A. No, I didn't let him get away. He got away himself. He was holding tight to it.

Q. Well, didn't you say that when he said he would not pay any commission that you lost interest in the matter?

A. I left him in Camden; yes, sir; in your corridor.

Q. I say, didn't you say, when he told you he would pay you no commission that you lost interest in the matter?

A. I didn't say I lost interest.

Q. What did you say with reference to it?

A. I just spoke to Mr. Rabinowitz.

Q. No, what did you say on the stand?

A. I said I left him in Camden in the corridor in your hall.

Q. Didn't you say his saying he would not pay you the commission had something to do with that?

A. No, sir.

Q. Nothing at all?

A. No, sir; I didn't say that.

Q. But, at any rate, you were satisfied by sometime on Monday to call it off and to cease any further efforts on your part?

A. No.

Q. Weren't you?

A. No.

Q. Well, you took DeBow's money on Monday for the purpose of calling it all off; didn't you?

A. Yes, sir.

Q. And you were satisfied to do that without asking Rabinowitz a word about it?

A. Because Rabonowitz didn't make the settlement.

Q. You were satisfied to do that without asking Rabinowitz a word about it; weren't you? You were, weren't you?

A. Yes.

Q. So that by sometime on Monday you had reached the conclusion that so far as you were concerned, you had called the whole matter off; isn't that right?

A. Yes.

Q. Do you still say that you wanted to see it go through or that DeBow wanted to get the $14,000?

A. I absolutely did.

Q. And you couldn't get it away from the man that was carrying it around in his pocket and told you he had it; is that right?

A. Absolutely right.

Re-direct examination.

By Mr. Landis:

Q. The man that was carrying it around in his pocket, kept it there and went out of town?

A. Bet your life he did.

Q. Before DeBow came back?

A. He never made any attempt to give it to De Bow.

Q. Well, Mr. Sofroney, are you got this thousand dollars from De Bow, did you offer it to Mr. Rabinowitz?

Mr. Carr: I object. Whatever was done was done by letter——

Q. I am asking you was Mr. Rabinowitz at your office, did you offer him the thousand dollars?

A. No, sir, not that I can recall. I think there was some correspondence, Mr. Landis.

Q. No, some letters.

A. Yes, sir; I think it was letters.

Q. You haven't those letters?

A. No; I think there——

Mr. Carr: I object to what you think.

The Witness: Well, there was some correspondence; I don't remember it.

Mr. Landis: Before Sofroney leaves the stand, I wish to identify the two letters, one of June 13, 1923, sent by Mr. Sofroney to Messrs. Carr and Carroll and their reply to him of July 14th, 1923, which your Honor has refused to admit as evidence.

(The papers referred to are marked as exhibits for the defendant for identification respectively D1 and D2.)

Mr. Landis: I wish to offer in evidence the receipt given by Mr. Sofroney for the thousand dollars, cancelling the contract.

Mr. Carr: Objected to, if your Honor please. It purports to act as the agent of Mr. Rabinowitz.

The Court: Objection sustained.

Mr. Landis: May I show it to Mr. Sofroney for identification?

The Court: Yes.

Q. Is that the receipt you gave for one thousand dollars to Mr. DeBow?
A. Yes, sir.

Mr. Landis: I wish to have it marked for identification.

(The paper referred to is marked as an exhibit for identification for the defendant D3.)

Q. Mr. Sofroney, I show you the report of the West Jersey Title and Guarantee Company, application number 38478, about which Mr. Carr has been cross-examining you. Did you procure that from the title company?
A. I ordered it from the title company; yes, sir.
Q. For whom did you order it?
A. For Mr. Rabinowitz.
Q. Did he ask you to get it?
A. He did.
Q. Were you acting for him in the matter at the time?

Mr. Carr: I object to that.

The Court: Objection sustained.

Mr. Landis: All right; that is enough.

The Court: Mr. Sofroney, did you have a listing of this property in your office?

The Witness: No, sir.

The Court: Did you have a sign on the property?

The Witness: No, sir, there was no sign on it.

The Court: And when you cancelled the agreement between Rabinowitz and Mr. DeBow, you did it on your own initiative; did you?

The Witness: Well, I presume I was agent for Mr. Rabinowitz.

The Court: Well, did you? Never mind about your presumption. Did you do it without any consultation with Mr. Rabinowitz?

The Witness: Yes, sir.

The Court: That is all.

(Witness excused.)

THEODORE E. DEBOW, recalled, having been previously sworn, was further examined and testified as follows:

Direct examination.

By Mr. Landis:

Q. Mr. De Bow, did Mr. Rabinowitz ever offer this $14,000 to you?

A. No, sir.

Q. Did you ever refuse to accept it?

A. No, sir.

Q. Well, how did it happen, as Mr. Carr asked, that you were not in Sea Isle City on Saturday, but you were there on Monday to pay this thousand dollars back? Now, how did that happen?

A. Well, Monday was a stormy day and I couldn't

work. It stormed very hard and the work we were on we couldn't work that day.

Q. Where was this work? What sort of work was it?

Mr. Carr: I object to the kind of work.

Q. Was it out door work?

A. Yes, sir.

Q. Well, where was it? Was it far from Sea Isle City or near by?

A. It was over at Petersburg, building a bridge across Cedar Swamp Creek on route 14, State Highway.

Q. Did Mr. Rabinowitz ever notify you that he would be in Sea Isle City on Saturday with that money, as he was?

A. No, sir.

Q. You never knew he was coming to Sea Isle City on Saturday?

A. No, sir.

Q. But you told his son on the Friday evening before, you would be there any evening after six o'clock?

A. Yes, sir.

Mr. Landis: That is all.

Cross-examination.

By Mr. Carr:

Q. Mr. De Bow, did you want this deal to go through and were you eager to get out of it?

A. I wanted it to go through. I was sincere in the matter.

Q. You were sincere?

A. Yes, sir.

Q. On Friday evening you wanted it to go through and get your $14,000; isn't that right?

A. Yes, sir.

Q. And all you had to do to get that $14,000, was to execute a deed and send it to Camden, whether you were there or not; isn't that true?

A. Well, probably it is. I don't know whether it is or not.

Q. Well, you knew that you could act that way?

A. I knew I could send it, yes.

Q. You knew you didn't have to be personally present; didn't you?

A. Yes, sir; I knew that.

Q. Then, why was it that you didn't consent to a settlement at Camden at the title company where such settlements are usually held?

A. Well, I took it for granted from the bill of sale, as it didn't state, that I had to go to Camden, that I didn't have to go there.

Q. It didn't say that you had to go anywhere, did it?

A. No, sir; I presumed it would be at my home.

Q. Well, assuming that you wanted to get the $14,000, weren't you willing to sign a deed and have your wife sign it and send it to the title company at Camden?

A. Yes.

Q. You knew that the West Jersey Title Company was doing the work; didn't you?

A. I knew they were making the search.

Q. You knew they were making the search, didn't you?

A. Yes, sir.

Q. And all you had to do was to mail it to them there and you would have gotten your $14,000; isn't that true?

A. Yes; I presume it is.

Mr. Landis: I object to these questions, because they are irrelevant.

The Court: Well, it is cross-examination and it goes to his good faith.

Q. Had you executed, yourself and your wife, and acknowledged a deed in this case, ready for delivery?

A. I don't think it had been executed. We had the deed ready for execution at the settlement.

Q. Signed by you and your wife?

A. No; we didn't sign it. We had to—we had it ready to sign.

Q. You knew that this provided that settlement must be made by the nineteenth of May, 1923, on a Saturday; you knew that; didn't you?

A. Yes.

Q. You knew that the business day ended by twelve o'clock noon on that day; didn't you?

A. Yes.

Q. And up to twelve o'clock of that day you had not even executed the deed on your part; had you?

A. No.

Mr. Landis: I object to it as immaterial.

The Court: I think it is very material.

Mr. Landis: I ask an exception.

(Which exception was duly allowed and noted.)

Q. Were you familiar with the settlement certificate showing eighteen exceptions to the title?

A. I saw this a day or so before this evening that they called. That is all I know.

Q. You had seen it?

A. Yes.

Q. What steps had you taken, if any, toward removing those exceptions?

A. Well, I asked in regard to some of the exceptions and they said that they were——

Q. No, what steps had you taken with regard to clearing them up yourself?

A. Well, there were affidavits for some of the exceptions.

Q. Did you obtain the affidavit?

A. Yes, sir.

Q. Exception number six water bill—had you paid that before the time fixed for settlement?

A. Yes, sir.

Q. 8. Liens, defects and encumbrances, if any, in the title of "Miller C. Landis," etc. Had you cleared that up?

A. No, sir; I had not done anything with that.

Q. All right. You had not cleaned up exception number eight. Exception number 9, had you cleared that?

A. I don't know what it is.

Q. Take a look at it.

A. Well, all these exceptions——

Q. Just answer my question. Had you cleared up exception number nine?

A. It cannot be cleared up.

Q. Well, you have not cleared it; that is an answer.

A. It cannot be cleared up.

Mr. Landis: Is the answer, it cannot be cleared up?

The Witness: That is it.

Q. Now, look at the rest of these, 11, 12, 13, 14, 15, 16, 17 and 18 and tell me which of them you have cleared off, if any.

A. Starting with ten?
Q. Yes.
A. Well, ten cannot be cleared off; 11 and 12 were affidavits.
Q. Well, had you cleared them off at that time?
A. Yes, sir, by affidavits.
Q. Had you cleared them up, at that time?
A. Well, we took an affidavit to the effect that there was not——
Q. Had that been submitted to anybody and approved?
A. No, sir.
Q. The title company had not seen them?
A. No, sir.
Q. Had you cleared up the rest of them?
A. Number 13 we had not; that was a waiver.
Q. Well, you had not cleaned it up?
A. No.
Q. 14?
A. 14, was an affidavit for.
Q. Had you cleared it up?
A. No; I had not cleared any of it up.
Q. Had not cleared any of those exceptions off?
A. No, sir.
Q. So that you were not in a position to settle at any time on Saturday, having cleared off the exceptions; were you?
A. Yes, sir.
Q. You mean to say you were in a position to deliver a title free and clear of any encumbrances in accordance with the agreement, at any time on Saturday?
A. That would have been satisfactory to the West Jersey, yes, sir.
Q. You mean that on Saturday, however, practically all of these exceptions were outstanding?
A. Yes, sir.

Q. That is right, is it?

A. Yes, sir.

Q. And if you had made a deed on Saturday, the purchaser would have gotten the title subject to most of these exceptions; is that right?

A. But some that couldn't be removed.

Q. Most of them, wasn't it?

A. Well, I couldn't say most of them.

Q. Well, some of them?

A. Well, there are some of them that cannot be removed in Sea Isle, in any title——

Q. You talked a good bit about that. How about this $700 mortgage? Had that been paid off on that date?

A. No, sir.

Q. That was there without question, wasn't it?

A. Yes, sir.

Q. Had you made any arrangement with the mortgagee, to come in and produce his mortgage and have it cancelled?

A. He could not be found.

Q. Well, it had not been done; had it?

A. No, sir.

Q. So that he would have had to take title subject to that mortgage, at least?

A. No, sir.

Q. Why not?

A. Because I would have deposited that amount with interest with the West Jersey Company and they would have removed that exception.

Q. West Jersey?

A. Yes.

Q. Weren't you going to make settlement down here, at Sea Isle City, Saturday afternoon?

A. (No answer.)

Q. How could you——

A. I asked him—I asked him to come—well, go ahead.

Q. How could you on Saturday afternoon, you having fixed that time, as you say——

A. Yes.

Q. How could you have deposited the money on that day with the West Jersey Title Company?

A. I couldn't.

Q. You could not?

A. I could not.

Q. So that he would have had to take title subject to a number of defects in title if he made settlement here; wouldn't he?

A. Yes.

Q. And no provision was made by you toward relieving him from those conditions at that time; is that right?

A. No; other than affidavits.

Q. Only affidavits that nobody had to prove; is that right?

A. I suppose that would be it.

The Court: No notary had been arranged for to take acknowledgement for the deed or anything, I suppose—six o'clock Saturday night?

The Witness: No; we could have gone out and done that in the bank. It is customary to do it that way.

Q. You say up to Saturday at six o'clock, you wanted to get this $14,000?

A. I was ready to settle, yes, sir.

Q. You wanted to get it and were willing to go on Saturday?

A. Yes, sir.

Q. Now, sometime after that you changed your mind; didn't you?

A. Yes, I did.

Q. When did you change your mind?

A. Monday, when I got your letter.

Q. Then you made up your mind the following Monday, that you would not go on with it; isn't that right?

A. I made up my mind Mr. Rabinowitz didn't want to go on.

Q. On Monday you made up your mind you would not go on with it; isn't that right?

A. Yes.

Q. And then on Monday, without consulting Rabinowitz at all, you went and paid the money over to Sofroney with the idea of closing the whole thing; isn't that true?

A. That was my idea.

Q. So that by Monday, you decided you didn't want to go on; is that right?

A. Not under those conditions, I didn't.

Q. What were the conditions?

A. Threatened suit.

Q. Were you to be sued if you did go on?

A. No, but I was ready. He didn't come near me to go on.

Q. What?

A. Mr. Rabinowitz never came down to see me about the matter.

Q. No, he didn't—your wife reported he had been there on Saturday, didn't she?

A. She told me he was there, yes.

Q. She told you what his errand was; didn't she? He was down there to settle?

A. Yes.

Q. So that you knew he had come all the way

to Sea Isle City to give you fourteen thousand dollars; you knew that on Saturday evening; didn't you?

A. Yes, sir.

Q. You never called up Rabinowitz and said: "Let us settle on Monday or Tuesday, or any other time;" did you?

A. No.

Q. Well, on Monday you called the deal off, didn't you?

A. After I got your letter, I did, yes.

Q. What had the letter to do with it?

A. A good deal, I thought.

Q. Tell me what it had to do with that?

A. Well, I felt that a man wanted to sue me for his money back—I thought I would give it back to him. That is what he said in the letter; he was going to sue me for the thousand dollars. So I considered he didn't want to go on with that deal.

Q. Didn't think it was necessary to talk to him, did you?

A. No.

Q. You didn't think it necessary to tell the lawyer that you were willing to go on with it; did you?

A. I turned it over to my attorney.

Q. I ask you whether you told the lawyer that you were willing to go on with it?

A. Mr. Landis?

Q. No, the lawyer who wrote you the letter.

A. No; I didn't. I don't know what Mr. Landis answered.

Q. Well, you didn't answer?

A. No.

Q. You went out and hired a lawyer to fight right away; didn't you?

A. Yes, sir.

Q. And you hadn't any idea then of going on with this agreement, had you, from that time on?

A. I didn't think he wanted me to.

Q. And you hadn't any idea then of going on with this agreement, had you, from that time on? That is, from Monday on?

A. No; I hadn't any idea of it.

Q. But from Monday, you never intended to carry out this agreement; did you?

A. I cannot say no to that, because I would have if he had come to me.

Q. I say from Monday on, you had no idea or no desire to carry out this agreement; is that true?

A. No; I would not say that.

Q. Isn't the reason, because prices had gone up and you sold it to somebody else at a higher price?

A. Absolutely not.

Q. You did sell at a higher price; didn't you?

A. About three months ago, I did.

Q. At a much higher price?

A. Yes.

Q. How much did you get for it?

Mr. Landis: I object.

The Court: His answer states that he had a defective title and could not make title good. I suppose he is entitled to examine him to show that he did make title.

Q. Did you sell this property at an increased price, later?

A. Yes.

Q. And you made title?

A. Title is not perfected yet.

Q. Well, you made title that the other fellow took; isn't that right?

A. It has not been accepted yet.
Q. Has the consideration been paid?
A. He paid a binder on the property. The matter is in the hands of the trust company now.
Q. Title company?
A. Yes, sir.
Q. Settlement to be made at Sea Isle City, or at the title company's office?
A. The settlement I don't know; I don't have to appear in the settlement.
Q. Don't have to appear—didn't have to appear in this settlement; did you?
A. Well, I didn't know that.
Q. How did you find out since, that you didn't have to appear?
A. I have been told so.
Q. As a matter of fact, you now know that you did not have to appear on that Saturday?
A. Yes; I know it now; yes, sir.
Q. And you could have sent up a deed and the whole thing would have been closed on Saturday?
A. Absolutely. I know all that now.

Re-direct examination.

By Mr. Landis:

Q. Is this the letter to which you referred?
A. Yes, sir; that is the letter.

Mr. Landis: I offer that letter in evidence.

The Court: I think I will admit all of those letters, copies of which are attached to the pleadings. I think they have something to do with the issue in this case.

Mr. Carr: Your Honor will allow me an exception?

The Court: Yes.

(Which exception was duly allowed and noted.)

Mr. Landis: I offer this letter and the application.

(The application referred to is received in evidence and marked as an exhibit for the defendant D4.)

(The letter referred to is received in evidence and marked as an exhibit for the defendant D5.)

By Mr. Carr:

Q. In the sale you recently made, does exception number 8 appear in your title report?
A. Yes, sir.
Q. Have you been able to remove it?
A. No, sir.
Q. You cannot remove it?
A. No, sir.
Q. Did Mr. Rabinowitz or his attorney, ever tell you they would not accept title unless you were able to remove it?

Mr. Landis: I object to that. They naturally would not volunteer that unless they were asked.

Q. Did he ever offer to accept title if you did not remove the exception?

Mr. Landis: I object. It is leading and not relevant.

Mr. Carr: Well, that is all, Mr. DeBow.

(Witness excused.)

Mr. Landis: There are some copies of letters attached to the pleadings, and in the reply it is not clear to me whether the intention was to admit or deny those letters. It says they admit the accuracy of the letters.

Mr. Carr: We admit that they are correct copies of letters. What we intended to do was to challenge their admissibility, however, and their relevancy.

Mr. Landis: Well, you admit, as I understand it, that such letters were sent and received in reply?

Mr. Carr: I will if you will put in, as you properly should, the reply letter to you dated July 14, 1923. There is another letter. There is a reference to it in the Sofroney.

The Court: I will let in all the correspondence on both sides. I think it would be just as well if all the correspondence went in by consent.

Mr. Landis: I offer this letter in evidence.

(The paper offered is received in evidence and marked as an exhibit for the plaintiff P3.)

DEFENDANT RESTS.

PLAINTIFF'S REBUTTAL.

BEN RABINOWITZ, called as a witness in rebuttal on behalf of the plaintiff, being duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Carr:

Q. Where do you live?
A. Philadelphia.
Q. Are you a son of Joseph Rabinowitz, the plaintiff?
A. I am.
Q. Do you know Mr. Sofroney?
A. I do.
Q. Mr. De Bow?
A. Yes.
Q. Do you remember being present on Friday evening, the eighteenth of May, at the home of Mr. De Bow, at Sea Isle City?
A. Yes, sir.
Q. Who was with you?
A. Mr. Sofroney.
Q. What was said by you with reference to fixing a time and place of settlement?
A. I told Mr. De Bow in the presence of Mr. Sofroney, that my father was ready to settle at the title and trust company at Camden, anywhere between ten and twelve the following day; that he would be there with $14,000 cash and whether they would have everything ready. Mr. De Bow said he didn't think it was possible for him to be there, but he said Mr. Sofroney would be there with the deed signed by himself and his wife; that everything would be O. K., ready for settlement.

Q. Did you report that fact to your father?

A. I believe—yes, sir; called him up the same afternoon.

Q. When did you next see your father?

A. Why, I was there the next morning at the trust company, with my father.

Q. You were at the trust company?

A. Yes, sir.

Q. Did he have the money with him?

A. He had a certified check, but Mr. De Bow didn't show up, and he cashed it and got $14,000 in bills.

Q. Was there any word from Mr. De Bow?

A. None at all.

Q. Did you see Mr. Sofroney on that occasion?

A. I did, at the hall of your office.

Q. Was any appointment made with Mr. Sofroney or anybody at Sea Isle City for six o'clock that evening?

A. None whatsoever.

Q. Any talk of that kind?

A. None whatsoever.

Q. Did you come down with your father to Sea Isle City?

A. I did.

Q. What time did you come down?

A. About three in the afternoon.

Q. Did your father have the $14,000 with him?

A. He did.

Q. Where did you go in Sea Isle City?

A. To Mr. Sofroney's office.

Q. Was he there?

A. Not then. He was afterwards, about an hour or two hours; I don't just remember.

Q. What time did you first stop there?

A. Around three o'clock.

Q. Was that your first stop?

A. I believe so.

Q. And your father was with you, and anyone else?

A. Just myself.

Q. Now, after leaving Mr. Sofroney's office, where did you go and whom did you see?

A. We went to Mr. De Bow's home and there was not anyone home.

Q. No one home at all. Then where did you go next?

A. Captain Moore's office.

Q. Did you show him the fourteen thousand dollars?

A. He counted it. Captain Moore counted that. I believe he counted all the bills.

Q. Where did you go from Captain Moore's office?

A. I just think we stuck around town until we found Mr. Sofroney. When we did we went into his office, laid the cash on his desk.

Q. Was Mr. Moore there with you?

A. No, he was not.

Q. And what did Mr. Sofroney say?

A. He said he didn't know what was t he matter with De Bow. He said he couldn't tell him anything just then.

Q. Did Mr. Sofroney have any deed there?

A. I don't recollect seeing any.

Q. Did he offer any deed?

A. None at all.

Q. Did you go anywhere else after that?

A. We met Mrs. De Bow on the street after we left the office and we told her that we were ready for settlement and we had the money there, whether she wanted to count it or not, and she said she couldn't do anything without Mr. De Bow; he was not home; didn't know what time he would be home.

Q. What time did you finally leave Sea Isle City?
A. Oh, around five. I just don't remember just what the hour was.

Mr. Carr: Cross-examine.

Mr. Landis: No cross-examination.

(Witness excused.)

JOHN L. MAHER, recalled in rebuttal, having been previously sworn, was examined and testified as follows.

Direct examination.

By Mr. Carr:

Q. Captain, do you remember Mr. Rabinowitz and his son Ben, coming down to Sea Isle City that afternoon?
A. I do; yes, sir.
Q. Did they come to your office?
A. Yes, sir.
Q. Did they have any money with them?
A. They did. I counted it.
Q. How much?
A. $14,000.
Q. Now, did you and Mr. Rabinowitz go somewhere after that?
A. Yes, sir; Mr. Rabinowitz asked me if I would drive them around to Mr. De Bow's house.
Q. Did you drive them there?
A. I did.
Q. Was he at home?

A. No, sir.

Q. After that where did you go?

A. I told them that if Mr. De Bow was in town he would be probably at one or two shops, and in driving to them or one of them—I forget which—we met Mrs. De Bow on the street. Mr. Rabinowitz and his son got out, had some conversation with her. I don't know what it was. I stayed in the car.

Q. You didn't go back to Sofroney's after that?

A. I didn't go to Sofroney's at all; no, sir.

Mr. Carr: Cross-examine.

Mr. Landis: No cross-examination.

(Witness excused.)

JOSEPH RABINOWITZ, recalled, was examined further in rebuttal, and testified as follows:

Direct examination.

By Mr. Carr:

Q. Mr. Rabinowitz, did Mr. De Bow say to you that he would not come to Camden and that settlement would not be held in Camden on that Saturday morning?

A. Nobody said to me anything.

Q. Did your son report to you the result of his conversation with De Bow?

A. Yes, sir, over the telephone. He told me that Mr. De Bow is go—either he will come himself or he will deliver the deed to Mr. Sofroney, at the

West Jersey Title Company, on Friday before twelve o'clock.

Q. Now, on Saturday morning you saw Sofroney

A. On Saturday; beg pardon.

Q. On Saturday morning you saw Sofroney?

A. Yes, sir.

Q. Did you say to Sofroney that you would come down to Sea Isle City for the purpose of settlement?

A. I did, sir.

Q. Did you go down?

A. I did.

Q. Did you see Mr. Sofroney at Sea Isle City?

A. Late in the afternoon.

Q. Who was with you?

A. My son.

Q. Did you say anything to him or do anything in his presence?

A. Yes, sir; I told him I had since—I was at the West Jersey Title Company before twelve o'clock and he was not there—since I was at the West Jersey Title Company before twelve o'clock and he was not there, I had decided to cash the check and went to Sea Isle City to see whether I can find him in Sea Isle City, and offer him the money, which I tendered the money to Mr. Sofroney, showing I have the cash money to settle it.

Q. In Mr. Sofroney's office?

A. In Mr. Sofroney's office.

Q. Did he take it?

A. No, sir.

Q. Was any deed ever tendered to you?

A. No, sir.

Q. By anyone?

A. Beg pardon?

Q. Was any deed tendered to you by anyone?

A. Nothing was handed to me and nothing was tendered to me.

Cross-examination.

By Mr. Landis:

Q. Mr. Rabinowitz, how were you going to make this settlement?

A. How was I?

Q. Yes.

A. By offering the money and he is supposed to give me the deed for it.

Q. Well, you had arranged for settlement at the title company, hadn't you?

A. Well, if the title would be presented clear of every defect possible, I would have received the deed, accept the deed.

Q. You wanted these exceptions cleared off; did you not?

A. Of course. I wasn't sure whether they did clear them off or not.

Q. I show you D4, application number 38478. You wished those exceptions cleared off; didn't you?

A. Sure.

Re-direct examination.

By Mr. Carr:

Q. When you made this tender of $14,000, did you say anything at all about the exceptions?

A. I haven't said anything.

Q. Just made the tender?

A. Made the tender.

Q. So you had not discussed with anybody, the question of the exceptions?

A. No, sir.

(Witness excused.)

PLAINTIFF RESTS.

DEFENDANT'S MOTION FOR A DIRECTION OF VERDICT.

Mr. Landis: If the Court please, I wish to move for a directed verdict as to the second and third counts which asks for damages for the alleged loss of $5,000, and calls the attention of the Court to the sale of land Act: 2. Cumulative Supplement to the Compiled Statutes of New Jersey, 183-67. This cites Robinson against Miller, and the interpretation of this statute by that case is that in a case of this kind, the recovery is limited to the deposit money. As to the second and third counts, I move for a directed verdict.

Mr. Carr: If your Honor please, the statute in question changes the common law liability in a certain class of cases by enlarging the measure of damages. The statute is not restrictive. So the question arises what was the liability at common law under such a situation? This question first came up in an opinion by Beasley, Chief Justice, in the case of Lake or Drake against Baker. (Citing 70 New Jersey Law, Brown v. Honnis; Stein v. Francis, opinion by Vice Chancellor Leaming; 91 Equity, 205; 92 Equity, 109.)

The Court: I am inclined to think the motion should be granted as to the second and third counts, because I think the testimony as it now stands, cannot be disregarded by the jury. The defendant has testified that his title was defective and he could not make a good title, and the plaintiff has stated in his testimony, that he would not have taken the title if it had the slightest defect in it. I do not

know how a jury or anyone else is going to refute the statements of these two men themselves, one as to the knowledge of his title, and the other the knowledge of his own attitude toward that property. I will allow the direction of a verdict as to the second and third counts.

Mr. Carr: I ask for an exception, if your Honor please.

The Court: Yes.

(Exception was duly allowed and noted.)

Mr. Carr: Now I move for a directed verdict on the first count. I do not know what is left. There was no payment back and no proof of agency. I think we are entitled to a verdict of a thousand dollars with interest from the nineteenth of February, 1923.

Mr. Landis: I do not think it is established at all, that Mr. Sofroney was the agent of Mr. De Bow.

Mr. Landis: Well, if that is not established, then a tender to Mr. Sofroney was not a tender to Mr. De Bow.

The Court: I do not think it is either, Mr. Landis.

The Court: I will direct a verdict on the first count. Have you figured the amount?

Mr. Carr: $1,170.

Mr. Landis: Well, what is the $170?

The Court: Interest.

Mr. Carr: Interest.

The Court: You will find a verdict, then, for the plaintiff for the sum of $1,170.

(The jury found as directed.)

The Court: On the second and third counts you will find a verdict for the defendant.

(The jury found as directed.)

EXHIBIT P1.

12/8/25

AGREEMENT, made the 19th day of February A. D. 1923 BETWEEN Theodore E. De Bow of Sea Isle City N. J. of the first part, and Joseph Rabinowitz of Woodbine N. J. of the second part, as follows, to wit: The said party of the first part agrees to sell and convey to the said party of the second part, who agrees to purchase all that certain land and buildings thereon situated including all furniture and fixtures and bowling alleys being lots number 18 and 19 of Block 41 Section A Sea Isle City N. J. on the terms and conditions following to wit:—The said party of the second part agrees to pay for the said property the sum of Fifteen Thousand Dollars ($15,000.00) Dollars, as follows: One Thousand Dollars ($1000.00) Dollars on the signing of this agreement (which deposit shall be forfeited to the said party of the first part as liquidated damages in case of the default by the said party of the second part in the performance of the terms of this agreement) and the balance of the purchase money as follows, Fourteen Thousand ($14,000.00) dollars at the signing of the deed.

A policy of Fire Insurance for $ all to be transferred to said party of the second part upon payment of the premium, less the discount named in policy.

The premises are to be conveyed free and clear of all incumbrance and easements

The gas fixtures, heaters, ranges, etc., annexed to the said building are all included in the sale, as also any water pipe laid on any street bounding said lot.

Possession is to be given at the signing of the deed.
Taxes, water rent, house rent and interest on incumbrance (if any) to be apportioned for the current term.
Gas bills, if any, to be paid by the seller.
The title is to be such as will be insured by any reptuable title company.
And the said parties hereby bind themselves, their heirs, executors and administrators, for the faithful performance of the above agreement within 90 days from the date hereof, said time to be the essence of this agreement, unless extended by mutual consent in writing endorsed hereon, subject to lease on apartment known as the North side apartment made to August Wahm. Inventory of all personal property will be attached to and made a part of this agreement.

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

Sealed and Delivered }
in the presence of }

Theo E. DeBow (Seal)
Joseph Rabinowitz (Seal)

M. M. Sofroney
Moe Goodman

Received the day of the date of the within agreement the sum of one thousand Dollars, on account of the purchase money named therein.

#101 on Franklin Natl Bank
of Phila Pa.
Theo E. DeBow (Seal)

WITNESS:
M. M. Sofroney

STATE OF NEW JERSEY, } SS.
COUNTY OF }

BE IT REMEMBERED, that on this day of , nineteen hundred and twenty-three, before me , personally appeared M. E. Goodman, of full age, and to me well known, and who, being duly sworn according to law, on his oath, doth say and prove that he saw Theodore E. De Bow and Joseph Rabinowitz, the parties named in the within agreement, to him personally known, sign, seal and deliver the said agreement as their voluntary act and deed; and that he, the said M. E. Goodman, subscribed his name to the same at the same time, as an attesting witness.

Moe E Goodman

Sworn and subscribed before me at Sea Isle City N J. the day and year aforesaid. on May 29-1923.

Charlotte M. Sofroney.

(Seal) Notary Public.

My commission expires Feby 23, 1928.

4521 1.50 c

No.....

AGREEMENT

91

Between Theo E DeBow

and

256

Joseph Rabinowitz

Deed to be made

Memorandum for Deed

Received in the clerk's office of Cape

May County, N. J. at Cape May C. H., on the 29th day of May 1923 at 3 o'clock P. M. and recorded in Book No. 375 of Deeds, pages 435

A. C. Hildreth
Clerk.

EXHIBIT P2.

12/8/25

FRANKLIN NATIONAL BANK 3-44

Philadelphia Feb. 19 1923 No. 101

Pay to the order of Theo E. DeBow $1000.00

one thousand XX Dollars

Joseph Rabinowitz

(Endorsed)

On account of part of money as per agreement of sale dated Feb- 19th 1923; Pay to order of First Nat. Bank Sea Isle City N. J.

Theo E DeBow

Pay to the order of any bank, banker or trust company

Prior Endorsements Guaranteed

FIRST NATIONAL BANK

55-544 Sea Isle City, N. J. 55-544

Received payment
Through the
Feb 27 1923
Clearing House
Corn Exchange Nat'l Bank, Phila.

(Perforated)
PAID
2 . 27 . 23
3 . 44

Thomas B. Kenworthy

July 14, 1923,

Mr. M. Sofroney,
Sea Isle City, N. J.
Dear Sir:

I am returning herewith your check to the order of Carr & Carroll Attorneys for Joseph Rabinowitz, amounting to $881.50. Mr. Rabinowitz declines to accept this, and insists that the full $1000. be returned to him. Any expense of title examination should be borne under the circumstances by Mr. De Bow. I am writing to Mr. De Bow's attorney in accordance with the above.

Harvey F. Carr

HFC/B

EXHIBIT D3.

Sea Isle City, N. J., May 21st, 1923.

1000.— RECEIVED of Theo E. De Bow One Thousand (1000) Dollars returned to Joseph Rabinowitz on rescission of contract between them dated February 19th, 1923 as to Lots 18 & 19 of Block 41 Section A, Sea Isle City, N. J.

Maurice M Sofroney, agent for
Joseph Rabinowitz.

EXHIBIT D4.

WEST JERSEY TITLE AND GUARANTY COMPANY

S. E. Cor. Third and Market Streets, Camden
N. E. Cor. North Carolina and Atlantic Aves., Atlantic City

Camden, N. J. May 7, 1923.

Pursuant to application No. 38478 the "West Jersey Title and Guaranty Company" will, upon the surrender of this certificate, the payment of the premium and expenses, and the production and record of the papers, hereinafter called for, insure Joseph Rabinowitz as Owner of an estate in fee simple of premises—as per Schedule hereinafter written—to the amount of Two Thousand Dollars, against all liens or defects in title, except the following, which may now exist, and will be made exceptions in the policy unless removed, viz:

NOTE—No liability assumed after this date; if settlement is postponed search should be continued.

Where insurance is under a mortgage, the production and approval of the bond and mortgage will be required before issuing policy.

It will not be guaranteed that there are any buildings or improvements on the land intended to be insured.

This Company will not assume any responsibility for unpaid gas, electric lights, sewer or other corporation claims NOT LIENS; nor for the proper execution of papers until approved by it; nor will it perform the work required for the removal of any proper exception. Counsel should be employed where legal services are required. All papers should be submitted for approval BEFORE settlement day.

1. Tenure of present occupants.
2. Rights of way, not of record.
3. Any variation in location of lines, or dimensions, encroachments, objections or easements, which an accurate survey, showing all physical conditions, including ways, buildings, fences and windows, would disclose, or which are visible, or are known to the Insured.
4. Loss or damage by reason of mechanics' lien claims not filed or of record at this date.

5. Taxes, water rents and municipal claims for the year 1923. (Tax 1923, $308.20).

6. Liability of premises for municipal improvements, such as grading, curbing, guttering, paving, sidewalks, sewers, water pipe, etc., constructed or being constructed, but not assessed.

7. Collector reports under date of May 14, 1923:
Water bill, $1.80
Add interest and costs.

8. Estates, liens, defects and encumbrance, if any, in the title of Matilda T. Landis, as the same may affect insured premises, existing at the date of deed from said Matilda T. Landis to Henry Whelan, dated March 19, 1888, recorded in Book 80, page 145 &c.

9. Condition and restriction that the lands situate between Marine Place and low water mark of Atlantic Ocean, shall ever remain open and unonstructed, and free for public use.

Note—this condition or restriction appears in the deeds in our line of title, but insured premises lie altogether Northwest of the Northwest side of Marine Place.

10. Estate in fee and right of way of the West Jersey Railroad Company (now West Jersey and Seashore Railroad Company), being a strip of land 66 feet wide (33 feet on both sides of the centre line), extending along Ocean Avenue from the Northwest side of Marine Place Northwest to Ludlam Thoroughfare, as conveyed by Matilda T. Landis to Thomas Townsend, by deed recorded in Book 52, page 321, and by Thomas Townsend to West Jersey Railroad Company, recorded in Book 55, page 36.

11. Proof that there were no children born to or adopted by Susan L. Krouse after the making of her will, dated April 15, 1909, proved in Cape May County August 2, 1911, recorded in Book I, page 332 &c.

12. Proof that there were no children born to or adopted by John W. Krouse after the making of his will, dated July 8, 1915, proved in Cape May County October 26, 1915, recorded in Book L of Wills, page 75.

13. Inheritance Tax due the State of New Jersey under will of John W. Krouse, deceased.

Note—Receipt or waiver to be produced.

14. Federal Estate Tax, if any, payable upon the Estate of John W. Krouse, according to Act of Congress approved September 8, 1916, as amended.

Note—Upon production of satisfactory evidence that the Estate does not amount to $50,000. this exception will be removed.

15. Mortgage John H. Krouse
$700. Marion V., his wife
— to —
A. W. James
Covers premises in question.
Dated Aug. 16, 1916.
Recd. Aug. 16, 1916.
Book 141, page 147.
$700. expiration of 1 year, 6%.

Assigned by A. W. James to Victoria Realty and Mortgage Company, by Assignment dated August 16, 1916, recorded in Book 17, page 11.

16. Production and record of a Deed from Theodore E. DeBow and wife to Insured.

Note— Title of record to premises in question became vested in Theodore E. DeBow by Deed from Horace H. Fritz, sole Executor under last will and testament of John W. Krouse, dated Nov. 1, 1917, recorded in Book 327, page 101.

17. Conditions and restrictions as imposed by deeds of Matilda T. Landis and Henry Whelen, and as in Agreement between said Matilda T. Landis and Henry Whelen & al—dated August 13, 1881 and recorded in Book 50, page 505 &c.

18. Estate in dower of the widow of John W. Krouse, if he left any him surviving.

West Jersey Title and Guaranty Company
Wm. S. Casselman, Pres. L.

SCHEDULE.

Land and premises situate in the City of Sea Isle City, in the County of Cape May and State of New Jersey:—NO. 1— BEGINNING at a point in Northwest line of Marine Place, 44 feet from Southwest side of Ocean Avenue; thence along the Northwest side of Marine Place South 30 degrees West 44 feet in front or breadth, and extending thence Northwest between lines of that width parallel with Ocean Avenue and at right angles to Marine Place, 110 feet in length or depth.

BEING lot No. 18 in Block No. 4, on plan of Southwest Section of Sea Isle City, on file in the Clerk's Office of Cape May County.

NO. 2— BEGINNING at the Southwest corner of Marine Place and Ocean Avenue, and extending thence Southwest along the Northwest side of Marine Place 44 feet in front or breadth, and extending thence Northwest between lines of that width parallel with said Ocean Avenue and at right angles to Marine Place, 110 feet in length or depth.

BEING lot No. 19 in Block No. 4, on aforesaid plan.

West Jersey Title and Guaranty Company
Incorporated 1888
Capital, Surplus, Etc. over $450,000

Complete Plants of
Camden and Atlantic Counties

OFFICERS
Wm. S. Casselman
President
Hon. C. L. Cole
C. H. Laird, Jr.
Vice-Presidents
C. R. Lippincott
Treasurer
F. C. Robbins
Ass't Treasurer
W. E. Barto
Secretary
R. E. Fagan
2nd Ass't Treasurer

SETTLEMENT CERTIFICATE
Under Application No. 38478
for Joseph Rabinowitz
premises Sea Isle City,
N. J.

To be returned
To the Company when the Policy is issued.

WEST JERSEY
TITLE AND GUARANTY COMPANY.
S. E. Cor. Third and Market Sts., Camden.
N. E. Cor. N. Carolina and Atlantic Aves.,
Atlantic City.

DEFENDANT'S EXHIBITS,
RABINOWITZ VS DEBOW
EXHIBIT D-5
Law Offices
CARR AND CARROLL,
S. W. Cor. Fourth & Market Sts.
Camden, New Jersey.

May 19, 1923.

Harvey F. Carr
Walter R. Carroll
Thomas B. Kenworthy
Mr. Theodore DeBow,
Sea Isle City, N. J.

Dear Sir:

This is to advise you that Mr. Joseph Rabinowitz, of Woodbine, New Jersey, whom we represent, appeared at the office of the West Jersey Title & Guaranty Company, Camden, New Jersey, pursuant to an appointment made by M. Sofroney, your agent, prepared to make settlement and pay over the consideration named in a certain agreement dated February 19, 1923.

Mr. Sofroney delivered to Mr. Rabinowitz settlement certificate of the West Jersey Title & Guaranty Company issued under application number 38478, showing a number of liens and defects to title.

Mr. Sofroney also advised that you refused to sign the deed for this property. A deed for this property was prepared by Mr. Sofroney and delivered to you last night for signature of yourself and wife. Under the terms of the agreement of February 19, 1923 time is of the essence of the agreement. $1000 was paid you under this agreement. We are advised also that you are unable to give possession in accordance with the terms of this agreement. Mr. Rabinowitz had this property resold, subject to your delivering title to him, at an advance of $5000. Under these circumstances we are compelled to ask that you forward us your check for $6000. If you desire to contest this matter please advise us whether you have an attorney authorized to accept service of process on your behalf.

Very truly yours,
Carr & Carroll

HFC/B

NOTE: The above exhibit was inadvertently omitted from the printed state of the case.

NEW JERSEY COURT OF ERRORS AND APPEALS.

JOSEPH RABINOWITZ,
Plaintiff-Appellant,
v.
THEODORE E. DE BOW,
Defendant-Appellee.

ACTION AT LAW.

ON APPEAL.

DEFENDANT-APPELLEE'S BRIEF.

Generally speaking the plaintiff's statement of facts in his brief are correct with two or three exceptions.

The first point of difference, "That the premises will be conveyed free and clear of all encumbrances and easements" (S. C., 64, l. 31), is not limited by the provision that the title was to be such as will be insured by any reputable title company (S. C., 65, l. 7), but in fact merely is a statement as to how it shall be determined whether or not the title was free

and clear as above. Further discussion of this point is unnecessary as no evidence was introduced by the plaintiff to show that any title company would so insure defendant's title without exceptions.

The second arises by reason of the fact that the contract did not specify a place of settlement. (S. C., 5, l. 27.)

The plaintiff admitted (S. C., 6, l. 18) that he had no conversation with De Bow as to place of settlement.

The plaintiff testified (S. C., 6, l. 33) that he had arranged for settlement at Camden by calling Sefroney and, evidently as an additional safeguard, sent his son, Ben Rabinowitz, to call on Mr. De Bow, the defendant, on Friday evening, May 18. (S. C., 11, l. 8.)

The plaintiff claimed that De Bow agreed to meet them in Camden, or in event of his being unable to be present there, that Mauric Sefroney would be present with the executed deed. De Bow, however, denies this (S. C., 15, l. 24), and states that he told Ben that he could not go to Camden on the 19th of May, but in fact told Ben that he would settle at Sea Isle on Saturday evening, May 19th, at six o'clock (S. C., 16, l. 1) and that he was in fact at home at that time. De Bow is supported in this by Mr. Sefroney (S. C., 24, l. 30) who testified, "Mr. De Bow requested that we have the settlement at Sea Isle because he could not get away on account of his work." Mr. De Bow said he "would be home in Sea Isle after six o'clock Saturday night."

Sefroney denied (S. C., 26, l. 28) that it was suggested to De Bow that the deed be executed and carried by Sefroney to Camden.

Rabinowitz after finding that De Bow was not at Camden on May 19th went to Sea Isle City and dur-

ing the afternoon at about four o'clock went to De Bow's home. (S. C., 9, l. 22.) No testimony was offered to show that plaintiff did call on De Bow at six o'clock that evening as suggested by De Bow.

De Bow, however, testified (S. C., 48, l. 28) that Mr. Rabinowitz never came down to see me about the matter. De Bow testified (S. C., 15, l. 34) that he was working at a bridge *and that he could not* go to Camden as the time was too short.

The third point in plaintiff's statement of facts to which we take exception is that a title policy was *not* procured from the West Jersey Title and Guaranty Company, an inspection of D4, S. C., 70, l. 31, *et seq.*, will show this to be a settlement certificate showing eighteen exceptions.

The defendant also testified (S. C., 48, l. 5) that he was ready to settle up to the time of receiving a letter, Exhibit D5, S. C., 76, from Carr and Carroll, plaintiff's attorneys, which letter demanded the return of the deposit and also demanded damages in the amount of $5,000.00 suggesting suit if defendant did not meet their demands.

The above facts are not important except for the purpose of showing the attitude of the parties.

The trial Court in granting the defendant's motion for direction as to the second and third counts was faced with the following propositions: First, was De Bow (defendant) in a position on May 19th, 1923, to convey a title free and clear of all encumbrances and easements such as would have been insured by a reputable title company? Second, was Rabinowitz willing to accept the title subject to the exceptions which according to the defendant's uncontradicted testimony could not be removed?

In answer to the first question, the exception sheet or settlement certificate, Exhibit D4 (S. C., 70, l. 30),

shows eighteen exceptions. The defendant testified (S. C., 44, l. 11) that he had obtained affidavits to remove certain of the exceptions and had paid taxes and thereby put himself in a position to remove certain other exceptions. Beginning with (S. C., 44, l. 15) on through (S. C., 45, l. 3) that other exceptions could not be removed. De Bow's testimony remains uncontradicted that the settlement certificate, Exhibit D4 (S. C., 70, l. 30), contained exceptions that could not be removed and must necessarily remain as exceptions in any title policy. No testimony concerning title was offered by plaintiff. Further, no testimony was offered by the plaintiff to show the willingness of any title company to insure the title without exceptions in the policy. The Court therefore was correct in holding that the undisputed facts disclosed that the title was not free and clear of encumbrances and easements.

In answer to the second question: Was Rabinowitz willing to accept the title subject to the exceptions which De Bow testified could not be removed? Rabinowitz by his testimony and his actions clearly expressed his unwillingness so to do. Rabinowitz at (S. C., 60, l. 18) was asked:

> "You wanted these exceptions cleared off, did you not?
>
> A. Of course, I wasn't sure whether they did clear them off or not.
>
> Q. I show you D4, application number 38478. You wished those exceptions cleared off, didn't you?
>
> A. Sure."

Next we must consider the letter, D5, S. C., 76, written by plaintiff's attorneys on the same day that he attempted to make settlement in Camden and ap-

parently written prior to his trip to Sea Isle City on Saturday afternoon, March 19th, 1923. The second paragraph of the letter called attention to "a number of liens and defects to title" as shown by the settlement certificate. It next calls attention to the fact that time is the essence of the agreement and that a deposit of $1,000 was made by plaintiff. Then follows a statement "We are advised also that you are unable to give possession in accordance with the terms of this agreement" (which was raised by exception #1 on settlement certificate). And last, "*Under these circumstances* we are compelled to ask that you forward us your check for $6,000." "If you desire to contest this matter, please advise us whether you have an attorney authorized to accept service of process on your behalf."

This letter stands unexplained by the plaintiff and certainly amounts to an election on his part not to accept the title that the defendant had to give. After having authorized the writing of this letter, his later visit to Sea Isle City can only be considered in one way, that he had no further or other intention of accepting De Bow's title but in fact made his trip to Sea Isle for the purpose of making or attempting to make legal tender fearing that his tender in Camden was not sufficient considering the request of De Bow that settlement be made at Sea Isle.

If Rabinowitz actually wanted to settle, why did he not postpone his visit to De Bow's house until six o'clock in the evening of May 19th rather than go there at three-thirty or four P. M. (S. C., 9, l. 22)?

So far as De Bow is concerned his uncontradicted testimony (S. C., 48, l. 5) was that he was willing to settle until he received the letter, Exhibit D5. (S. C., 76.)

It is evident that after the writing of this letter, Rabinowitz would not have accepted title subject to the exceptions and even though he might have met De Bow that afternoon, there is no testimony on his part that he would have done other than as indicated by his attorneys' letter of the same date, and refused to accept the deed, first, by reason of the liens and defects in the title, second, by reason of the defendant's inability to give possession in accordance with the terms of the agreement. As to this point there is no testimony in the case.

The Court had no other alternative than to grant the defendant's motion for direction as to the second and third counts of the complaint, as the defendant said that his title was subject to encumbrances and easements which could not be removed, and the plaintiff recognizing this condition of title demanded his money back, and both by his testimony and the evidence of this letter D5, declared his unwillingness to accept the title subject to the exceptions shown in the settlement certificate.

The situation thus presented is covered by Chapter 159, Pamphlet Laws 1915, at page 316.

> "Whenever any person shall contract to sell real estate or any interest therein, and shall not be able to carry out such contract because of a defect in the title to such real estate or interest therein, the person with whom such contract was made, or his legal representatives or assigns, shall be entitled to recover from such vendor, in an action for the breach of such contract, not only the deposit money, with interest and costs, but also the reasonable expenses of examining the title and making survey, except where the contract shall provide otherwise; provided, this act shall not limit the recovery where

the purchaser may seek to recover for the deceit or fraud of the vendor."

It will be noted that in the complaint there is no allegation or charge of deceit or fraud on the part of the vendor. The plaintiff has no evidence to support his statement (d) on page 15 of his brief. To the contrary the evidence discloses that the breach complained of occurred on May 19, 1923, and that he had not resold the property until (S. C., 50, l. 19) "about three months ago" referring to the date of the trial which was December 8th, 1925 (S. C., XIV), and at that time title was in fact not perfected (S. C., 50, l. 34), so that the defendant held title for more than two and a half years after May 19, 1923.

In conclusion, the judgment should be affirmed.

Respectfully submitted,
S. RUSLING LEAP,
Attorney for Defendant-Appellee.

NEW JERSEY COURT OF ERRORS AND APPEALS.

JOSEPH RABINOWITZ,
Plaintiff-Appellant,
v.
THEODORE E. DEBOW,
Defendant-Appellee.

ACTION AT LAW.

ON APPEAL.

APPELLANT'S BRIEF.

This is an appeal from a judgment of the Supreme Court based upon a verdict of a jury at the Cape May County Circuit directed by the Court, denying the plaintiff's right to recover on a real estate contract the loss of his bargain, *i. e.* the difference between the market value of the property and the purchase price provided in the contract.

THE APPEAL CHALLENGES THE CORRECTNESS OF THE COURT'S ACTION IN DIRECTING SUCH VERDICT.

The Court's ruling (S. C. 62, l. 30, *et seq.*), which was challenged at the trial, and to which an exception was duly taken and noted on the record (S. C. 62, L. 9), is based upon facts which may briefly be stated as follows:

By a written contract (Ex. P1, S. C. 64), dated February 19, 1923, the plaintiff agreed to purchase, and the defendant to sell, certain property in Sea Isle City, for the sum of $15,000—$1000 of which, under the terms of the contract, was paid on the signing of the agreement (Ex. P1, S. C. 65, l. 29; Ex. P2, S. C. 67). The contract provided that the premises were to be conveyed free and clear of all encumbrance and easements (S. C. 64, l. 31). This is limited, however, by a later provision that the title was to be such as will be insured by any reputable title company (S. C. 65, l. 7). The contract further provided that settlement should be made within ninety days from February 19, 1923 (S. C. 65, l. 9, &c.). May 19, 1923, was, therefore, the last day for the making of settlement.

The sale was negotiated through the offices of one Maurice W. Sefroney, a real estate agent of Sea Isle City (3 S. C., l. 10, *et seq.*). His relationship to the parties is in dispute, defendant alleging that he was plaintiff's agent, and the plaintiff alleging Sefroney to be the agent of the defendant. It appears that on May 18, 1923, plaintiff advised Sefroney over the telephone that he was ready for settlement on the day following (Saturday, May

19th) (S. C. 6, l. 33), and that Sefroney replied that he would be at the West Jersey Title Company at Camden, New Jersey, with the necessary papers (S. C. 7, l. 6). It further appears that plaintiff's son, Ben Rabinowitz, went to Sea Isle City on Friday evening, May 18th, and arranged with defendant, DeBow, for settlement on May 19th, between 10 A. M. and 12 M., at the West Jersey Title Company in Camden (S. C. 11, l. 8, *et seq.;* S. C. 54, l. 28, *et seq.*), at which time defendant said he did not think it possible for him to be there, but that Sefroney would be there with the deed signed by himself and his wife (S. C. 12, l. 1), and that everything would be ready for settlement. Defendant denies there was any talk of going to Camden (S. C. 15, l. 11, *et seq.*).

On Saturday morning, May 19, 1923, plaintiff went to the West Jersey Title Company in Camden with a certified check for $14,000. Defendant put in no appearance. Sefroney was present and stated that DeBow told him he would not come to Camden to make settlement as his wife refused to sign the deed (S. C. 8, l. 20, *et seq.*). This is, of course, no evidence of the wife's unwillingness to sign, and there is nothing in the pleadings, and no other evidence of the wife's refusal. Plaintiff then journeyed to Sea Isle City, taking with him $14,000 in cash, going first to Sefroney's office (S. C. 25, l. 29, *et seq.*), and later to DeBow's home (S. C. 8, l. 35, *et seq.*). This is substantiated by testimony of Sefroney and one Maher (S. C. 57, l. 20, *et seq.*). DeBow was not at home. Late in the afternoon plaintiff met Mrs. DeBow on the street, and she told him that she didn't know where her husband was, and that "she couldn't do nothing without him" (S. C. 11, l. 22). Defendant admits that Ben Rabinowitz (plaintiff's son) came to his house Friday evening (May 18th) S. C. 15, l.

22, *et seq.*, and that he said he could settle any time plaintiff came down (S. C. 15, l. 37; S. C. 16, l. 1, *et seq.*), but further states that he said he wouldn't be home before six P. M., Saturday (May 19th).

A title policy was procured from the West Jersey Title and Guaranty Company, ordered by Sefroney (S. C. 39, l. 10, *et seq.*, Exhibit D4, S. C. 70, l. 31, *et seq.*). Since the title policy was taken through the West Jersey Title and Guaranty Company the inference is strong that settlement was to be made there. DeBow knew that the title company was making the search (S. C. 42, l. 30), and that settlement was to be made by May 19, 1923 (S. C. 43, l. 14), and had seen the settlement certificate a day or so prior to May 18th (S. C. 43, l. 31). Defendant states that up until six P. M., May 19th, 1923, he was ready to settle (S. C. 47, l. 30), and that sometime thereafter he changed his mind, and on Monday, May 21, 1923, paid over the $1000 deposit to Sefroney "with the idea of closing the whole thing" (S. C. 48, l. 14).

Defendant's pleadings state (Second Defense to Second Count, S. C. X) that his refusal to convey was due to a defect in his title, and it is true that certain encumbrances are shown on the title policy (Exhibit D4, p. 70). Defendant admits, however, that he made practically no effort to clear the title prior to the time of settlement (S. C. 44, *et seq.*); that no deed had been executed (S. C. 43, l. 6, *et seq.*); that no arrangement had been made for taking an acknowledgement in Sea Isle City (S. C. 47, l. 22, &c.), and that he made no effort after May 19, 1923, to effect a settlement (S. C. 49, l. 5), and the defendant further testified (S. C. 45, l. 29, *et seq.*) as follows:

"Q. Do you mean to say that you were in a position to deliver a title free and clear of any encumbrances in accordance with the agreement at any time on Saturday?

A. That would have been satisfactory to the West Jersey, yes, sir."

Since that time he has sold at a much higher price (S. C. 50, l. 20), and the inference to be drawn is that the title is marketable.

Rabinowitz testified that he made a tender of $14,000 in cash to Mr. Sefroney (S. C. 59, l. 18, &c.). There is no evidence that the plaintiff made any objection whatever to the exceptions or encumbrances noted on the title policy, and his tender was unconditional, he having had no discussion with anyone regarding the exceptions (S. C. 60, l. 28, *et seq.*). He states that he expected to make settlement by offering the money and receiving the deed, and that if the title were cleared of every defect, possible, he would have received the deed (S. C. 60, l. 5, *et seq.*). Of course, he wanted to have removed such exceptions as it was possible to have removed, and his testimony is indicative of nothing further than his desire to have all removable exceptions removed.

The testimony is undisputed that plaintiff had entered into negotiations with Mori Bros. of Vineland, men of financial responsibility, for the sale of the property in question to them for $20,000, and that he was unable to make title to them due to defendant's failure to give him a deed (S. C. 35, l. 35, *et seq.;* S. C. 10, ls. 1 to 16; S. C. 13, ls. 3-13).

The testimony stands undisputed that the fair market value of the property on May 19, 1923, was $20,000 (S. C. 12, testimony of John L. Maher).

It is, therefore, undisputed that the plaintiff has suffered a loss of $5000.

At the close of the whole case defendant moved for a directed verdict as to the second and third counts, relating to the above loss, on the ground that the Sales of Land Act (2 N. J. C. S., 183-67) limits the recovery in cases of this kind to the deposit money (S. C. 61). In granting the motion the Court says:

> "The Court: I am inclined to think the motion should be granted as to the second and third counts, because I think the testimony as it now stands, cannot be disregarded by the jury. The defendant has testified that his title was defective and he could not make a good title, and the plaintiff has stated in his testimony, *that he would not have taken the title if it had the slightest defect in it.* I do not know how a jury or anyone else is going to refute the statements of these two men themselves, one as to the knowledge of his title, and the other the knowledge of his own attitude toward that property. I will allow the direction of a verdict as to the second and third counts."
>
> (S. C. 61, l. 30, *et seq.* to l. 7, p. 62.)

The above charge is apparently based on two misconceptions of the evidence, and of the legal consequence thereof.

AS TO THE EVIDENCE:

A. That the defendant *could not* make a good title, whereas the defendant testified (S. C. 45, l. 29, *et seq.*) that he was in a position to have made

a title free and clear of encumbrances that would have been satisfactory to the West Jersey Title Company, and the defendant further testified (S. C. 50, l. 18, *et seq.*) that at a later date he had sold the same property to some one else at a much higher price, although he testified that the title "is not perfected *yet.*"

B. That "the plaintiff has stated in his testimony *that he would not have taken the title if it had the slightest defect in it.*" The plaintiff's testimony in this respect was as follows:

> "Well, if the title would be presented clear of every defect possible, I would have received the deed, accept the deed."
>
> (S. C. 60, l. 15, *et seq.*)

To our mind this meant that if the title would be presented clear of every defect possible to be removed he would have accepted the deed. His whole course of action was consonant with such an interpretation. Having the settlement certificate before him, he appeared at the office of the title company at Camden on the day of settlement with a certified check for $14,000, and, not finding the defendant at the appointed place, he had the check cashed and took the actual cash with him to Sea Isle City, and tendered the same to Sefroney, whom he considered to be the defendant's agent, and attempted to locate the defendant himself, but was unable to make a tender because the defendant absented himself from his home, and left no word as to his whereabouts.

On the question of tender, while there was a dispute as to whether or not the appointed place of settlement was the West Jersey Title and Guaranty Company, such dispute was for the jury and not for

> rent reserved is one peppercorn, a release of which may be procured by paying the cost of drawing the necessary papers, is not such a defect of title as will excuse the non-performance of a contract to purchase lands providing that the property was 'to be conveyed by warranty deed by a record marketable title free from all encumbrances.' "
>
> *Meyer v. Reed,* 91 Eq. 237 (Ch. 1919).

Under the case of *Gerbert v. Trustees,* 59 N. J. L. 160, at 184 (E. & A. 1896), the seller is only excused from making title and exempted from liability for failure to do so, by a showing of his inability so to do, and he is not excused from offering or tendering such title as he can deliver or control, leaving it to the buyer to accept or reject.

> "In distinguishing *Engel v. Fitch* he said: 'The vendor in that case was bound by his contract to do all that he could to complete the conveyance. *Whenever it is a matter of conveyancing and not a matter of title,* it is the duty of the vendor to do everything that he is enabled to do by force of his own interest, and also by force of the interest of others whom he can compel to concur in the conveyance.' "
>
> *Gerbert v. Trustees, supra,* at p. 184.

A wilful failure to offer to convey such title as the seller has it in his power to convey is not protected by the rule in *Gerbert v. Trustees.* This rule is stated in that case as follows:

> "In an action on contract for breach of covenant to convey real estate with warranty of title, where the vendor's title is defective, nominal damages only can be recovered."

It seemed to be the view of the Court, and based entirely upon a misconception of the testimony, that in some way a state of mind on the part of the plaintiff unaccompanied by any overt act, and undisclosed until the date of the trial, which was eighteen months after time for performance, in some way exonerated the defendant from liability. It is not claimed that the defendant knew of this mental state, nor was in any way influenced by it. It is respectfully submitted that the plaintiff was entitled to have presented to him for decision under the terms of the contract, and within a time fixed therein, an actual situation rather than a hypothetical situation presented eighteen months later as to what the plaintiff would have done if the defendant had done some other act.

With relation to this settlement, the plaintiff was represented by counsel at the time of the intended settlement. There is every probability that upon an actual situation being presented to him he would have conferred with counsel and would have been advised as to his rights, and as to the character of defects or objections to title (if any) that could not have been removed from the settlement certificate, and would likewise have been advised that he had the right to accept such title as could be conveyed to him, and would have been entitled to compensation for any defects not capable of being removed.

At the time the contract was breached by the defendant there was an undoubted cause of action; at the time the suit was instituted this right of action existed. Under the ruling made by the learned trial Judge this right ceased to exist. What took it away? Usually an existing right of this character ceases to exist only by payment, release or estoppel. None of these elements appear in the case. We have

been unable to find any authority which sustains the view expressed by the learned trial court.

The learned trial Judge withdrew this case from the jury upon the theory that the defendant could not make a good title, and the plaintiff would not have taken such title if it had the slightest defect in it. The question of whether the defendant could have made a good title was obviously one of fact for the jury, the defendant having testified, p. 45, that he was in a position to deliver a title free and clear of any encumbrance in accordance with the agreement that would have been satisfactory to the West Jersey Title Company, and also that he had since sold the property at a much higher price, and that with reference to the title: "Title is not perfected *yet.*" From the word "yet" it is to be inferred that the title was capable of being perfected, and one reasonable inference would be simply that the deed had not yet been delivered. It was, therefore, a jury question as to whether or not the defendant was able to deliver such a title as the plaintiff would have accepted.

The defendant, under the rule in *Gerbert v. Trustees, ubi supra,* is not excused from making such title as it is within his power to make; and would not be protected against a verdict in favor of the plaintiff, except by a showing of his inability to convey.

The situation in the case *sub judice* is more nearly analogous to the facts of *Brown v. Honniss,* 70 N. J. L. 260, at 264 (E. & A. 1903), where the Court says:

> "Gerbert (referring to Gerbert v. Trustees) was unable to make this conveyance because Snyder had only a life estate in the property covered by the lease—an estate by curtesy—the title to the property being in his wife, deceased

at the time of making the lease. Here there was an absolute inability in the seller or his executor to convey by reason of total failure of title in them. In the case *sub judice,* there is no allegation of any disability in the seller to convey but a refusal to convey for a totally inadequate reason, and in such case the plaintiff is entitled to recover for the loss of his bargain. Engel v. Fitch, L. R., 8 Q. B. 659."

This case is followed by *Cohen v. Cyzam Realty Co.,* 3 N. J. Miscl. Rep. 1028 (not reported in the official reports) where the Court approved the charge of the trial Court:

"That the plaintiff, if the jury should find in his favor, was entitled to be reimbursed the amount of money which he had paid on account of the purchase price of the property, and also the loss of his bargain—that is, the difference between the market value of the property and the purchase price provided by the contract, if the jury should find that the market value was in excess of the purchase price. This instruction was in accordance with the rule laid down by the Court of Errors and Appeals in Brown v. Honniss, 70 N. J. L. 260, and the damages were assessed by the jury on the basis of this instruction."

Subordinate to the above are questions relating to tender. These involve disputed questions of fact, and, if material, come within the province of the jury and not within that of the Court. Ben Rabinowitz testified that an appointment was made for the purpose of settlement at the office of the West Jersey Title Company at Camden on May

19th, and that the defendant agreed to be present at that time and place. This is denied by the defendant. There was also a question of fact as to whether Sefroney was the agent of plaintiff or defendant. This, however, is wholly immaterial in view of the testimony relating to a definite appointment at the office of the title company in Camden for purpose of settlement. Under these circumstances an actual tender by the plaintiff is excused.

In the case of *Meyer v. Reed,* 91 N. J. L. 237 (Ch. 1920), the Court held that a vendor's conduct in refusing to answer the purchaser's request and meet him for the purpose of receiving the balance of the purchase money and delivering his deed, thus preventing the making of a tender, excused the purchaser from making a tender.

In conclusion, it is respectfully submitted that the Court should not have directed a verdict because:

(a) The question of whether DeBow could or could not have made a good title was a question of fact for the jury.

(b) DeBow was obliged to tender such title as he had, with the right on the part of Rabinowitz to have accepted such title with compensation, or wholly reject it.

(c) The plaintiff did not testify as stated in the Court's opinion "that he (Rabinowitz) would not have taken the title if it had the slightest defect in it," but did testify instead thereof as follows: "Well, if the title would be presented clear of every defect possible I would have received the deed, accept the deed."

(d) On the whole case it appeared that the defendant had a sufficiently good title to sell to another person at a largely increased price, and the defendant's whole conduct was consistent with the theory that he was evading the plaintiff and attempting to escape his legal obligation in order to sell the property at a higher price to a third party.

In conclusion, the judgment should be reversed, and a *venire facias de novo* issue.

Respectfully submitted,
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