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NOTICE OF APPEAL.

(Filed Dec. 21, 1928.)

NEW JERSEY SUPREME COURT.
CAMDEN COUNTY.

MORRIS SIMON and RAE I. GOLDFARB, Executrix under the last Will and Testament of Abraham Goldfarb, *Plaintiffs,* v. RUDOLPH L. D. ROSENTHAL and HARRY ROSENTHAL, co-partners, trading as ROSENTHAL LABORATORIES, and RUDOLPH L. D. ROSENTHAL and HARRY ROSENTHAL, individually, *Defendants.*	Action at Law. Notice of Appeal.

To Riggins & Davis, Esquires, Attorneys of Plaintiff:

Take notice that the defendants, Rudolph L. D. Rosenthal and Harry Rosenthal, co-partners, trading as Rosenthal Laboratories, and Rudolph L. D. Rosenthal and Harry Rosenthal, individually, appeal to the Court of Errors and Appeals from the whole of the judgment entered in this cause, in

favor of Morris Simon and against the said defendants.

CARR & CARROLL,
Attorneys of Defendants, Rudolph L. D. Rosenthal and Harry Rosenthal, co-partners, trading as Rosenthal Laboratories, and Rudolph L. D. Rosenthal and Harry Rosenthal, individually.

[ENDORSED.]

Due and legal service of the within notice of appeal is hereby acknowledged this 16th day of April, A. D. 1928.

Riggins & Davis,
Attorneys of Plaintiff,
Morris Simon.

GROUNDS OF APPEAL.

(Filed Dec. 24, 1928.)

The following are the grounds of appeal in the above-entitled cause:

The following question was admitted:

1. To Morris Simon:
"Q. Who did?
A. Harry Rosenthal, and he says, of course,

it would be settled; he says, 'I will fix it so you won't get anything, if you win the case, and I will show this party up.'

By Mr. Davis:

Q. And by 'party,' he referred to you?

A. To me, and then—do you want to know what happened after that?

Q. No, we are not concerned with that.

Mr. Carr: If your Honor please, it appears that was not an admission of liability at all, and I, therefore, ask it be stricken out.

The Court: I don't know whether it is or is not; I think it may stand.

(Exception noted for defendants.)''

The following questions were overruled:

2. To Morris Simon:

''Q. And you know, do you not, that the suit was brought upon contract and not upon the written contract?

The Court: Well, I suppose that suit speaks for itself, Mr. Carr, and better than the layman can speak about it.

Mr. Carr: I think he can still answer that question.

The Court: No, he cannot; I don't think it is proper.

(Exception noted for defendants.)''

3. To the witness, Joseph Varbalow:

''Q. I am asking you whether you didn't know as a lawyer that if the old contract had been rescinded and a new contract had taken its place, that you could not have brought any action whatever on the old contract.

Mr. Davis: Objected to as not cross-examination.

The Court: I think it is going pretty far.
The Witness: Am I to answer that?
The Court: No, don't answer; the objection is sustained.
(Exception noted for defendants.)"

4. Because at the conclusion of the whole case the defendants' motion for a direct verdict in favor of the defendants was overruled and exception noted.

5. Because there was no evidence to sustain the verdict.

CARR & CARROLL,
Attorneys of and Counsel with Appellants.

COMPLAINT.

(Filed Dec. 9, 1926.)

The plaintiffs, residents of the City of New York, State of New York, say that:

1. On or about the 17th day of March, 1922, the defendants, Rudolph L. D. Rosenthal and Harry Rosenthal, co-partners, trading under the firm name or style of Rosenthal Laboratories, were engaged in business in the City and County of Camden, State of New Jersey, said business being the manufacture of electrical apparatus and appliances.

2. At or about the date aforesaid, the defendants induced plaintiff, Morris Simon, and Abraham Goldfarb, now deceased, the intestate of plaintiff, Rae I.

Goldfarb, administratrix, to respectively invest the sum of $1,500 in the said business upon certain representations, covenants and warranties made to them by the defendants.

3. On or about the day aforesaid, to wit, March 17, 1922, said Morris Simon and the said Abraham Goldfarb, now deceased, entered into an agreement in writing, with the defendants, a true and correct copy of which is hereunto annexed, hereby made part hereof, and marked "Schedule A."

4. The said agreement as set forth in "Schedule A" contains the representations, covenants and warranties made by the defendants to the said Morris Simon and Abraham Goldfarb, deceased.

5. In the said agreement mentioned, the defendants represented, *inter alia,* that they had a plant capable of turning out "at least 200 special type vacuum tubes per day."

6. In the said agreement mentioned, the defendants represented, *inter alia,* that "they had enough orders on hand to turn out approximately 400 of said special type vacuum tubes per day which can be sold by them for strictly cash."

7. In the said agreement mentioned, the defendants represented, *inter alia,* that "there were no debts, liabilities, mortgages, or incumbrances of any kind or nature existing against the said plant and business."

8. In the said agreement mentioned, the defendants represented, *inter alia,* that on each and every week there would be paid to the said Abra-

ham Goldfarb, now deceased, and to Morris Simon, "the sum of 12¢ for each and every special type vacuum tube manufactured and disposed of by them for the week preceding."

9. In the said agreement mentioned, the defendants represented, *inter alia,* that they would "comply with all fire and other ordinances required by the public authorities and will keep sufficient fire and other insurance to protect the said business of the said defendants so that in the event of a fire or other accident that the said Rudolph L. D. Rosenthal and Harry Rosenthal would be sufficiently reimbursed without calling upon Morris Simon and Abraham Goldfarb (now deceased), for any contribution or charge, and will provide in the fire insurance policies that $3,000 of the amount insured shall be paid $1,500 to said Morris Simon and $1,500 to Abraham Goldfarb (now deceased)."

10. In the said agreement mentioned, the defendants represented, *inter alia,* that the said Abraham Goldfarb, now deceased, and Morris Simon, would be permitted and given "full access to the plant and business and the books of the business of the said Rudolph L. D. Rosenthal and Harry Rosenthal at all times."

11. In the said agreement mentioned, the defendants represented, *inter alia,* that the defendants with their remittance to the said Morris Simon and Abraham Goldfarb, now deceased, "of the amount that may be due them on 12¢ a tube as aforesaid, will attach a statement showing how said amount was arrived at, and will send remittance for half of said amount to Morris Simon, 136 W. 85th Street, Manhattan Borough, New York City, and the other

half to Abraham Goldfarb, 5 Columbus Circle, Manhattan Borough, New York City, or to any other place that the said Morris Simon and Abraham Goldfarb (now deceased), may designate."

12. The plaintiff, Morris Simon, and the intestate of the plaintiff, Rae I. Goldfarb, administratrix, relying upon the representations and covenants as being true and relying upon the promises made by the defendants, did, each of them, pay to the said defendants the sum of $1,500 or $3,000 in all.

13. Subsequent to the making of the agreement set forth in "Schedule A" and prior to the institution of this suit, said Abraham Goldfarb departed this life, intestate, and Rae I. Goldfarb, his widow, has been appointed by the Surrogate of the County, City and State of New York, administratrix of the estate of the said Abraham Goldfarb, so deceased. The said letters of administration are in the possession of plaintiff, Rae I. Goldfarb, which she offers to produce for the inspection of the defendants, upon demand therefor.

14. The representation contained in paragraph 5 hereof was untrue and was so known to be by the defendants at the time of the execution of the contract set forth in "Schedule A."

15. The representation contained in paragraph 6 hereof was untrue and was so known to be by the defendants at the time of the execution of the contract set forth in "Schedule A."

16. The representation contained in paragraph 7 hereof was untrue and was so known to be by the

defendants at the time of the execution of the contract set forth in "Schedule A."

17. The representation contained in paragraph 8 hereof was untrue and was so known to be by the defendants at the time of the execution of the contract set forth in "Schedule A."

18. The representation contained in paragraph 9 hereof was untrue and was so known to be by the defendants at the time of the execution of the contract set forth in "Schedule A."

19. The representation contained in paragraph 10 hereof was untrue and was so known to be by the defendants at the time of the execution of the contract set forth in "Schedule A."

20. The representation contained in paragraph 11 hereof was untrue and was so known to be by the defendants at the time of the execution of the contract set forth in "Schedule A."

21. After the execution of the agreement set forth in "Schedule A," the plaintiff, Morris Simon, from time to time received from the defendants checks totaling $72.66, representing that which the defendants alleged he was entitled to receive from the defendants under and by virtue of the terms of the agreement set forth in "Schedule A."

22. After the execution of the agreement set forth in "Schedule A," the plaintiff, Abraham Goldfarb, now deceased, the intestate of the plaintiff, Rae I. Goldfarb, from time to time, received from the defendants checks totalling $72.66, representing that which the defendants alleged he was entitled to

receive from the defendants under and by virtue of the terms of the agreement set forth in "Schedule A."

23. Sometime subsequent to the receipt of the said moneys, to wit, in April, 1923, the defendants, Rudolph L. D. Rosenthal and Harry Rosenthal, agreed, at the City and County of Camden, and State of New Jersey, with the plaintiff, Morris Simon, and Abraham Goldfarb, now deceased, the intestate of the plaintiff, Rae I. Goldfarb, to rescind, cancel and render wholly null and void the said agreement set forth in "Schedule A."

24. At the time of the rescission of the said contract, which rescission is set forth in the preceding paragraph, and, as a part of the foregoing agreement to rescind, the defendants, in consideration of the premises and of the previous payment to them by the plaintiff, Morris Simon, and Abraham Goldfarb, now deceased, the intestate of the plaintiff, Rae I. Goldfarb, of the sum of $1,500 each, to return to the said plaintiff, Morris Simon, and the intestate of the plaintiff, Rae I. Goldfarb, the said Abraham Goldfarb, now deceased, respectively, the sum of $1,427.34, which said amount respectively represents the difference between the respective investments of the plaintiff, Morris Simon, and the intestate of the plaintiff, Rae I. Goldfarb, the said Abraham Goldfarb, now deceased, and the amounts respectively received by each from the defendants under the terms of the agreement set forth in "Schedule A," the said balance to be returned by the said defendants in accordance with their later agreement in this and in the foregoing paragraph set forth, which said sums were to be paid at the

rate of $200 per month beginning with September 15, 1923.

25. The said defendants have wholly failed and refused to comply with the terms of their said agreement subsequently made as hereinbefore set forth, and have failed and refused to repay to the plaintiff, Morris Simon, and to the plaintiff, Rae I. Goldfarb, administratrix of the estate of Abraham Goldfarb, now deceased, any sum or sums whatever of the said balance so due to the said plaintiffs.

26. Plaintiffs demand from the defendants as damages upon the premises hereinbefore set forth, the sum of $1,427.34, respectively, together with interest from the 15th day of September, 1923.

27. The venue hereof is Camden County.

RIGGINS & DAVIS,
Attorneys of Plaintiff.

SCHEDULE A.

ARTICLES OF AGREEMENT.

Entered into by and between Rudolph L. D. Rosenthal, and Harry Rosenthal, co-partners under the firm name and style of the Rosenthal Laboratories, hereinafter called the party of the first part, and Morris Simon and Abraham Goldfarb, of the City of New York, Borough Manhattan, hereinafter called the party of the second part.

Whereas the party of the first part represents to the party of the second part that they are in business as research engineers and conduct the business of manufacturing electrical apparatus and appli-

ances at their plant in the City of Camden, State of New Jersey. And further represent to the said party of the second part that their said plant at Camden, New Jersey, has a capacity for turning out at least 200 special type vacuum tubes per day, and that they have enough orders on hand to turn out approximately 400 of said special type vacuum tubes per day which can be sold by them for strictly cash and whereas they the said party of the first part further represent that if the party of the second part will invest with them the sum of $3000.00, that they will immediately install sufficient equipment for the purpose of manufacturing and disposing of at least 200 of said special type vacuum tubes per day. Manufacture and sale to commence within two weeks of date hereof, and WHEREAS

The party of the first part further represents that there are no debts, liabilities, mortgages or incumbrances of any kind or nature existing against the said plant and business of the party of the first part, and that the said sum of $3000, is to be used wholly and solely by the party of the first part for the purposes heretofore mentioned.

Now therefore, this agreement WITNESSETH that for and in consideration of $3000.00, paid to the party of the first part by the party of the second part, the receipt whereof is hereby acknowledged, hereby agrees to pay over every week to the party of the second part 12¢ for each and every said special type vacuum tube manufactured and disposed of by them for the week preceding.

It is further understood and agreed by and between the parties hereto that in no sense is this agreement to be understood or considered as a partnership existing between the party of the first part and the party of the second part, and the party of the first part is in no way to call upon the party of

the second part or cause them to be called upon for any debts or obligations that may be incurred by the party of the first part in the conduct of their business as aforesaid, and the party of the second part it is agreed and is understood is not to call upon the party of the first part for any profits or any monies other than the 12¢ per tube hereinbefore arranged.

The party of the first part agrees to comply with all fire and other ordinances required by the public authorities and will keep sufficient fire and other insurance to protect the said business of the party of the first part so that in the event of a fire or other accident that the party of the first part will be sufficiently re-imbursed without calling upon the party of the second part for any contribution or charge, and will provide in the fire insurance policies that $3000 of amount insured shall be paid to party of the second part, that is to say $1500. to said Morris Simon, and $1500. to said Abraham Goldfarb.

The party of the second part it is agreed by the party of the first part is to have full access to the plant and the business, and the books of the said business of the party of the first part at all times. That the party of the first part will with their remittance to the party of the second part of the amount that may be due them on 12¢ a tube as aforesaid will attach a statement showing how said amount was arrived at, and will send remittance for half of said amount to Morris Simon, 136 W. 85th Street, Manhattan Borough, New York City, and the other half to Abraham Goldfarb, 5 Columbus Circle, Manhattan Borough, New York City, or to any other place the party of the second part may designate. The term of this agreement is for the term of five (5) years from the date hereof.

IN WITNESS WHEREOF the parties hereto

have set their respective hands and seals in duplicate this 17th day of March, 1922.

ROSENTHAL LABORATORIES
By Rudolph L. D. Rosenthal (LS)
By Harry Rosenthal (LS)
Morris Simon (LS)
Abraham Goldfarb (LS)

IN PRESENCE OF
Sarah Fischer

ANSWER.

(Filed March 14, 1927.)

The defendants, Rudolph L. D. Rosenthal, of the City of Camden, New Jersey, and Harry Rosenthal, of the City of Atlantic City, New Jersey, both as copartners and individually, answering the complaint of Morris Simon and Rae I. Goldfarb, administratrix of the estate of Abraham Goldfarb, deceased, say:

1. Admitted.

2. Denied.

3. Admitted.

4. Denied.

5. Defendants deny the allegations thereof, and crave oyer of the original agreement.

6. Defendants deny the allegations thereof, and crave oyer of the original agreement.

7. Defendants deny the allegations thereof, and crave oyer of the original agreement.

8. Defendants deny the allegations thereof, and crave oyer of the original agreement.

9. Defendants deny the allegations thereof, and crave oyer of the original agreement.

10. Defendants deny the allegations thereof, and crave oyer of the original agreement.

11. Defendants deny the allegations thereof, and crave oyer of the original agreement.

12. Defendants admit the payment of the moneys therein referred to, but deny the other matters alleged in this paragraph.

13. Defendants have no knowledge or information sufficient upon which to found a belief as to the allegations set forth in the thirteenth paragraph.

14. Denied.

15. Denied.

16. Denied.

17. Denied.

18. Denied.

19. Denied.

20. Denied.

21. Defendants admit that Morris Simon received checks totalling $72.66.

22. Defendants admit that Abraham Goldfarb received checks totalling the sum of $72.66.

23. Denied.

24. Denied.

25. Defendants deny the existence of the agreement referred to in paragraph 25.

26. Defendants deny that plaintiffs are entitled to recover any damages against the defendants.

First Defense.

The defendants, and each of them, have completely performed each and every obligation owed by them, or either of them, to the plaintiffs.

Second Defense.

Morris Simon and Abraham Goldfarb, and each of them, became, by virtue of their investment and agreement, co-partners with defendants.

Third Defense.

Morris Simon and Abraham Goldfarb each invested the sum of $1,500 in the Rosenthal Laboratories, a co-partnership, and are not entitled to the principal amount invested, but only to such profits as may accrue in accordance with the terms of their contract.

FOURTH DEFENSE.

The defendants, and each of them, performed each and every obligation owed by them to Morris Simon and Abraham Goldfarb, or either of them, or to the administratrix of the said Abraham Goldfarb, and continued to pay them, and each of them, the profits derived from the sale of tubes, in accordance with their agreement, until the defendants were compelled to discontinue the manufacture of said tubes because of a preliminary injunction, issued by the United States District Court for the Southern District of New York, on the 20th day of February, 1923, and directed to Harry Rosenthal and his associates, enjoining him and them to desist from making or selling any vacuum tubes or appliances or parts thereof that infringe Letters Patent No. 841,387 and No. 879,532. This injunction caused the defendants to cease the manufacture of tubes contemplated by the said agreement. The preliminary injunction is still in force.

FIFTH DEFENSE.

Plaintiff, Morris Simon, and Abraham Goldfarb, now deceased, received sundry payments under the terms of the said agreement, to wit, each the sum of $72.66. Plaintiffs have not returned or offered to return the same. Plaintiffs are, therefore, disentitled to rescind said contract.

CARR & CARROLL,
Attorneys for Defendants.

RULE AMENDING ANSWER.

It is, on this 9th day of April, 1927, ordered that the answer be amended by striking out the second defense, and substituting therefor the following:

"SECOND DEFENSE.

Morris Simon and Abraham Goldfarb and the defendants became and are, by virtue of the agreement annexed to the complaint and designated 'Schedule A,' joint adventurers, and the transaction arising out of such joint adventure has not been terminated, and, consequently, the plaintiffs are not entitled to maintain their action at this time."

On motion of

CARR & CARROLL,
Attorneys for Defendants.

Let this rule be entered.

FRANK S. KATZENBACH,
J. S. C.

REPLY TO AMENDED ANSWER.

(Filed Dec. 31, 1927.)

Plaintiffs, by way of reply to the amended answer of the defendants, say that:

1. They deny the affirmative allegations of the answer of the defendants.

Reply to First Defense.

They deny the allegations contained in the first defense.

Reply to Second Defense.

The allegations contained in the second defense set forth no valid, legal, just or meritorious defense, to the cause of action of the above-named plaintiffs, upon its merits.

Reply to Third Defense.

The allegations contained in the second defense set forth no valid, legal, just or meritorious defense, to the cause of action of the above-named plaintiffs, upon its merits.

Reply to Fourth Defense.

The allegations contained in the second defense set forth no valid, legal, just or meritorious defense, to the cause of action of the above-named plaintiffs, upon its merits.

REPLY TO FIFTH DEFENSE.

The allegations contained in the second defense set forth no valid, legal, just or meritorious defense, to the cause of action of the above-named plaintiffs, upon its merits.

RIGGINS & DAVIS,
Attorneys of Plaintiffs.

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POSTEA.

(Filed Jan. 11, 1928.)

NEW JERSEY SUPREME COURT.

STATEMENT.

20

MORRIS SIMON,

v.

RUDOLPH L. D. ROSENTHAL and HARRY ROSENTHAL, and RUDOLPH L. D. ROSENTHAL and HARRY ROSENTHAL,

Action at Law.

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Judg't entered Jan. 11, 1928.

Damages		$1,759.38
COSTS	Attorney	39.00
	Disbursements	33.10
		$1,831.48

EDWARD J. KELLEHER,
Clerk.

TESTIMONY.

NEW JERSEY SUPREME COURT.
CAMDEN COUNTY.

MORRIS SIMON, *et al*, *Plaintiffs*,
v.
ROSENTHAL LABORATORIES, *et al*, *Defendants*.
Action at Law. #33.

January 5th, 1928.

APPEARANCES:
For the plaintiffs, RIGGINS & DAVIS, ESQS.
For the defendants, CARR & CARROLL, ESQS.

Before DONGES, J., and a jury.

(Mr. Davis opens the cases for the plaintiffs to the jury.)

(Mr. Carr opens the cases for the defendant to the jury.)

Mr. Carr: These are rather peculiar letters of administration. It doesn't seem to me it authorizes the plaintiff to do anything. There is a restriction there as to the cause of action expressed in the margin. It says she has no power to collect any money. Of course, it is not exemplified under the Act of Congress at all. I would be willing to waive that, but I don't see that this lady has any power to sue. I don't think this lady has power to maintain the suit.

(At this point, a recess was taken until January 9, 1928, at ten o'clock A. M.)

Camden, N. J., January 9, 1928.

(Trial of the cause resumed at ten o'clock A. M., pursuant to adjournment, in the presence of counsel for the respective parties.)

Mr. Davis: I have here, if the Court please, and I offer in evidence a certificate of the clerk of the Prerogative Court, and ask that it be marked P1.

The Court: May I see the certificate?

Mr. Davis: Yes.

Mr. Carr: This is it? Where are the letters themselves that this refers to?

Mr. Davis: You cannot have them; they are filed in the clerk's office.

Mr. Carr: I want to see what is filed there. If it is the same paper you had before, I shall make objection to its admission in evidence. My objection is, if your Honor please, that it appears by this that there was filed in the Prerogative Court on the 7th of January, an exemplified copy of the proceedings for the granting of the letters of administration in the estate of the deceased, and that that is after the institution of this action. On the face of it, it does not show that when this suit was instituted there was any authorization to do so.

The Court: You will have to show me authority on that.

(After further argument.)

Mr. Davis: I ask for a voluntary non-suit as to the administratrix.

The Court: Then it goes on as to the Simon case.

THE CASE FOR THE PLAINTIFF.

Mr. Davis: If the Court please, I would like to offer in evidence the original agreement made between these parties in this suit.

The Court: That seems to be admitted.

(Said paper marked Exhibit P1.)

Mr. Davis: I ask to withdraw the certificate of letters of administration.

The Court: Very well.

Morris Simon, sworn.

By Mr. Davis:

Q. What is your full name, please?
A. Morris Simon.
Q. And where do you live?
A. 100 West 80th Street.
Q. What city?
A. New York City.
Q. You are the plaintiff in this suit?
A. I am.
Q. Do you remember a certain agreement that you made in writing with the defendants in this suit, together with Mr. Goldfarb, now deceased?
A. I do.
Q. How much money did you receive from the defendants during the course of or existence of this contract?
A. I think about $72.00 and some cents each got, that is all.
Q. $72.66?
A. And some cents, yes.
Q. Sixty-six cents, is that correct?
A. I think so.
Q. Both you and Mr. Goldfarb received the same amount?
A. Yes.
Q. Under the terms of this contract, did you both pay some $1500 to the defendants?

A. I did.

Q. Did Mr. Goldfarb, to your knowledge?

A. He did.

Q. Subsequent to the execution of this contract, did you and the defendants have any trouble with respect to that which the defendants were supposed to have done under the terms of the contract?

Mr. Carr: I object to that, if your Honor please, if he had any trouble with respect to that which they were supposed to have done.

Mr. Davis: I think he can answer yes or no. This is an introductory question.

The Court: I suppose the question is whether or not any disputes arose between them.

Mr. Davis: Yes.

The Court: He may answer that question.

Q. Yes or no, please.

A. Yes, we did.

Q. After this contract which has been marked Exhibit P1 was entered into, did or did not you and Mr. Goldfarb come to Camden to see the defendants?

A. We did.

Q. And at that time did you have any conversation with the defendants?

A. Yes, we called on ——

The Court: No, did you?

The Witness: We did.

Q. And can you tell us approximately when?

A. It was 1923, sometime in April, I think it was, between the tenth and twentieth—I really don't know exactly the date; some time in April.

Q. 1923?

A. Yes.

Q. And the date of this contract, Exhibit P1, is marked March 17, 1922?

A. Yes, the contract, yes.

Q. Now, where did this conversation take place which was had upon the occasion of this visit to Camden to which you have just testified, which was made around in April of 1923?

A. Yes, it was in Mr. Rosenthal's home.

Q. And who was present besides you and Mr. Goldfarb?

A. Just the father and the son and Mr. Goldfarb and myself.

Q. And the son, when you refer to the son ——

A. The son wasn't there; Harry Rosenthal wasn't there when we came into the house, but Mr. Goldfarb asked the father, "Where is Harry?" and he picked up the phone and got ——

Mr. Carr: Do we have to have all that?

The Witness: And he called up on the phone and he came within a few minutes, about ten minutes he came in. I don't know where he came from, but he came in.

Q. All right, now; relate the conversations or conversation that you had with either or both of these defendants at the time of this visit to which you have just testified?

A. Well, when Harry Rosenthal came in, after

the father had sent to him, he said, "What are you going to intend to do with the balance of that money?"

By the Court:

Q. Who said this?
A. Mr. Goldfarb first said.
Q. Who said?
A. Mr Goldfarb. I was sitting right there. He says to him, "You know you always promised you were going to invite us down to see your plant, but you didn't," he says, "so we came down here to see your plant." He says, "Now, I would like to see the books." He said—the son says to the father, "Pop, where's the books?" He says, "They are in the bank." He says, "Now, what do you intend to do with regards to that money?" "Well," he says, "we will pay that money back on the following September 15th of that year at the rate of $200.00 a month until it is paid up," so Mr. Goldfarb says, he listened, so that I and he made an appointment in New York City two days later in an attorney's office, 1482 Broadway, by the name of Harry Bloomberg, and we went there the day of the appointment.

By Mr. Davis:

Q. Don't say anything that Mr. Bloomberg said; just tell what happened.
A. And we went there and he wasn't there.

The Court: Who wasn't there?

The Witness: Mr. Harry Rosenthal wasn't there.

Q. Now, this Bloomberg, whom did he represent, did he represent you or the Rosenthals?

A. He represented the Rosenthals.

Q. Now, have you ever received any of this money, the balance of this money?

A. Not since some time ago; I don't know the date.

The Court: You are asked, have you ever received the balance of the money.

The Witness: No, I haven't.

Q. And the balance is the difference between $1500 or what you received subtracted from it?

A. Yes, $72.

Q. $72.66 and the balance was $1427.34?

A. Yes, sir.

By the Court:

Q. You say Rosenthals agreed to re-pay this difference beginning September 15, 1923, at the rate of $200 a month?

A. $200 a month.

Q. On the 15th of each month?

A. On the 15th of each month.

By Mr. Davis:

Q. Now, was there any other conversation at the time of this visit of April, 1923, other than that to which you have just testified?

A. Well, sometime before then, in New York City.

Mr. Carr: No, I object to that, not responsive.

The Court: Repeat the question.

(Question repeated.)

A. Not in Camden.
Q. Well, you had had at other times, however?
A. Yes.
Q. Conversations with these defendants?
A. Yes.
Q. About the performance of this contract?
A. We did.
Q. Will you please state the times, as nearly as possible, when and the places where and what took place at these other conversations or conferences?
A. Well, one time was in 5 Columbus Circle in the office—Mr. Goldfarb had an office there, New York City. Harry Rosenthal came there and I told him that I wasn't ——

Mr. Carr: If your Honor please, it seems to me that is wholly irrelevant. As I understand the pleadings in this case, there was originally a contract, some dispute arose between the parties as is claimed, that the contract was rescinded and in place of it this new agreement was made.

The Court: Parol agreement on this day, that is what we are concerned with, I guess.

Mr. Davis: Yes, that is true, if the Court please, absolutely.

The Court: All right.

Q. Now, subsequent ——

Mr. Davis: I will withdraw that question, if the Court please, for the record ——

Q. Subsequent to the making of this alleged oral contract in April of 1923, did you or did not you later at any time have any conversations or conversation with the defendants in the course of which the question as to performance of this agreement to re-pay the money was raised? Now, yes or no.

A. No—yes, that I can explain; we met him in New York. I met him in New York.

The Court: Wait; you are asked whether after your visit to Camden in April.

The Witness: No, only right here.

The Court: Wait a minute. You cannot answer a question before you understand it, and apparently you did not understand it. After your visit to Camden in April when you say Rosenthals agreed to re-pay you this money, $200 a month ——

The Witness: Yes, sir.

The Court: ——did you have a talk with either one of them afterward, mind, about paying you this $200.00 a month?

The Witness: Yes, right in this ——

Q. Where?

A. In the prosecuting attorney's office, he sent for me.

Q. Wescott & Varbalow formerly represented you?

A. Yes.

Q. And was it in their private office that you had this conversation?

A. Yes, in Mr. Varbalow's office.

Q. Who were present at that time?

A. Mr. Varbalow, Mr. Rosenthal, Harry Rosenthal, some attorney—I don't know his name.

Q. Mr. Gaskill, wasn't it?

A. Some attorney, my sister.

Q. Mrs. Goldfarb?

A. Yes.

Q. Who is the widow?

A. The widow.

Q. Of Mr. Goldfarb?

A. Yes, and the stenographer who drew this agreement up.

Q. Now, was that before or after the other suit which was originally instituted in this case was started, was that before or after that was started?

A. I think it was after, I think, or before. I don't know really the date. If I knew the date—I don't know the date. Tell me the date.

The Court: Do you know the date of your meeting?

The Witness: Well, Mr. Varbalow sent for me.

The Court: Do you know the date of that meeting?

The Witness: That I don't remember, the date of that time, no.

Q. At any rate, you had referred the matter to Wescott & Varbalow for attention?

A. Yes.

Q. And it was after that that this meeting took place?

A. Yes, sir.

Q. Tell us what was said with reference to that meeting, with respect to the performance by the defendants of their contract to re-pay this money?

A. Mr. Varbalow says to me—they were here, Harry Rosenthal and his attorney—he sent to New York for me ——

The Court: No, you are asked what was said at this meeting.

The Witness: He said, "They are going to be here."

By the Court:

Q. No, no. What was said at the meeting after they got there?

A. Well, all right; I will tell it that way. He says his father would like to have a piece of mine, Harry Rosenthal says, and Mr. Varbalow says, "What is it worth?" He says, "$1000," and his attorney said, "$1500," so then I says, "You know you promised me that money back at the rate of $200 a month from September 15, 1923," and he jumped up.

Q. Who did?

A. Harry Rosenthal, and he says of course it would be settled; he says, "I will fix it so you won't get anything if you win the case, and I will show this party up."

By Mr. Davis:

Q. And by "party," he referred to you?
A. To me, and then—do you want to know what happened after that?
Q. No, we are not concerned with that.

Mr. Carr: If your Honor please, it appears that was not an admission of liability at all, and I therefore ask it be stricken out.

The Court: I don't know whether it is or is not; I think it may stand.

(Exception noted for defendants.)

Q. And you never received the money?
A. No.
Q. Answer.
A. No.

Mr. Davis: Take the witness.

Cross-examination.

By Mr. Carr:

Q. Mr. Goldfarb was a lawyer, was he not?
A. Yes, sir.
Q. Mr. Varbalow, of course, is a lawyer also?
A. Yes.
Q. Now, have you repeated everything that was said at the meeting at which Mr. Goldfarb, yourself and the two Mr. Rosenthals were present in April? Have you repeated everything that you can recall that was said in reference to this?

A. The money end of it?
Q. Yes, have you?
A. Yes.
Q. Now, I am going to ask you again if you will please to repeat what was said by either you or Mr. Goldfarb, and then what reply was made to it by either of the Rosenthals.
A. Well, Mr. Goldfarb said, "You always said you were going to invite us down to show us your plant," he says, "that's why I came down here," and said, "What do you intend to do in regards to that money, the balance of that money?" and he, the son, says, "Pop, what will we do about that?" Well, they made an agreement verbal, they said they would pay it back at the rate of two hundred a month for the following September 15th.

Mr. Carr: I ask that "they made an agreement" be stricken out, if your Honor please.

The Court: Yes, strike out the latter part.

Mr. Carr: And the balance of the answer be stricken.

The Court: No, I think that was responsive to your question.

Q. Now, what was it Harry Rosenthal said?
A. They would pay back at the rate of $200 a month, from the following September 15th, and Mr. Goldfarb thought in August ——
Q. Now, what reply did you and Mr. Goldfarb make to that?
A. Well, Mr. Goldfarb says, "All right; we will wait," then they made an appointment in New

York in this law office. We were there two days later.

Q. Now, was that for the purpose of entering into an agreement?

A. Why, yes, that was on the purpose of getting some writing or something to show that we had something to show for that two hundred a month, but they didn't show up.

Q. In other words, this agreement was to be reduced to writing over in New York at some attorney's office?

A. Some attorney's; we were expecting writing for our money.

Q. As you understood it, some two or three days later the Rosenthals were to meet you in New York at some lawyer's office?

A. Yes.

Q. When a formal written agreement would be entered into?

A. We expected that.

Q. Was that your understanding?

A. Well, naturally, he is a lawyer ——

The Court: Just answer the question.

The Witness: We did expect that.

Q. That was your understanding from the conversation on that occasion, is that right?

A. Yes, naturally.

Q. Nothing was signed at that time, isn't that right?

A. Well, there was nobody there, only Mr. Goldfarb and myself.

The Court: No, just answer the question, no matter who was there.

The Witness: No, there was nothing signed at the house; when we visited the house, there was nothing signed.

Q. Mr. Goldfarb didn't suggest the drawing of a little agreement and having it signed by the parties?
A. We expected ——

The Court: No.

The Witness: No, he didn't; he didn't say anything about any signing; no, he didn't.

Q. Did Mr. Goldfarb ever prepare an agreement based upon that conversation, that you ever saw?
A. No, he did not.
Q. So no agreement was ever put in writing or typewriting ready to be signed by the Rosenthals, was it?
A. Not at that date.
Q. Nor at any time, isn't that true?
A. He gave him a chance; we didn't get no agreement, no.

The Court: Wait a minute; it is a perfectly plain question; strike out the answer.

(Question repeated.)

The Witness: No, there was no agreement drawn up.

Q. And at this meeting, before, at this meetting before, Mr. Varbalow's office, no agreement had been prepared for the signature of the Rosenthals, had there been?
A. No, Mr. Varbalow wouldn't settle it.

Mr. Carr: I ask that the latter part be stricken out.

The Court: That part about Mr. Varbalow wouldn't settle it will be stricken out.

Q. Now, you had previously told Mr. Varbalow about this $200 arrangement, had you?
A. In that office that day when he sent for me.
Q. Well, is the answer yes?

Mr. Davis: I think the answer ought to stand.

Mr. Carr: He hasn't completed it yet.

The Court: Repeat the question.

(Question repeated.)

The Witness: I did, yes.

Q. You told him about all the facts in the case, didn't you?
A. Told him where I went down and called on him.

The Court: No, just answer the question.

Q. You told him all the facts in the case that you knew, didn't you?
A. Well, naturally, when he got my case, he got my case.
Q. Well, did you or did you not?
A. I did.
Q. And Mr. Goldfarb, your New York lawyer, was present?
A. Oh, no, he was dead.

Q. Oh, he was dead then?
A. He was dead.
Q. Pardon me. You showed Mr. Varbalow the written agreement, the original agreement, did you not?
A. He had the agreement; it was sent to him.
Q. All right; he had the agreement?
A. Yes.
Q. And you told him all the facts that you knew about that; that is right; isn't it?
A. Yes, yes.
Q. Including the $200 a month arrangement, isn't that right?
A. That is right.
Q. Then Mr. Varbalow began suit for you?

Mr. Davis: I object to this.

Mr. Carr: Wait until I finish, please.

Mr. Davis: I thought you had.

Mr. Carr: No, you scared me.

Q. Mr. Varbalow began suit on your behalf and on behalf of Rea I. Goldfarb, Executrix, did he not?
A. That is right.

Mr. Davis: I object to that as immaterial.

The Court: I think the answer may stand.

Q. And you were present when that suit was properly tried in this court room?

Mr. Davis: I object to that. That other case has nothing whatever to do with this issue.

The Court: I don't know.

Mr. Davis: The issue in that case was entirely different.

Mr. Carr: Well, I want to show, if your Honor please ——

The Court: I suppose, after all, it is part of the transaction between the parties, for whatever it may be worth.

Mr. Davis: I don't see that it has any relevancy at all, because how can a client be bound in a trial of the same facts on a different principle by reason of a misapprehension of the legal principles involved previously.

The Court: He may explain it.

Mr. Davis: Very well.

(Question repeated.)

The Witness: Yes.

Q. And you know, do you not, that that suit was brought upon contract and not upon the written contract?

The Court: Well, I suppose that suit speaks for itself, Mr. Carr, and better than the layman can speak about it.

Mr. Carr: I think he can still answer that question.

The Court: No, he cannot; I don't think it is proper.

(Exception noted for defendants.)

The Court: I don't think you can ask him about the contents of pleadings. That is the effect of your question.

Mr. Carr: No, I am not asking him that; I am asking him whether he was present in the court room and heard this case tried, if your Honor please. I ask to have marked for identification the transcript of the pleadings in the case of Morris Simon and Rae I. Goldfarb, Executrix under the last will and testament of Abraham Goldfarb, plaintiffs, against Rudolph L. D. Rosenthal and Harry Rosenthal, trading as Rosenthal Laboratories, and so forth.

The Court: It may be marked for identification.

Mr. Carr: Being the first suit in this matter and bearing the file number 73600.

Mr. Davis: I might call the Court's attention to the fact that this transcript is incorrect, because the pleadings were afterwards amended to present Mrs. Goldfarb in her present capacity. They had first thought he had left a will. That is the only change.

Mr. Carr: This transcript was only received from the Supreme Court a few days ago.

The Court: It is not uncommon for the amendments to be suggested on the trial record and not

on the record in the clerk's office. I find repeatedly counsel do not actually make the amendments suggested on the trial record, as it should be done, that is, the amendment to be filed in the clerk's office.

Mr. Davis: I think that was done; it was done upon the opening of the case.

Mr. Carr: That is all.

By Mr. Davis:

Q. I just want to ask you one question. When you stated you had previously informed Mr. Varbalow, about this verbal agreement to repay the money, do you mean prior in point of time on the day you had the conference in Mr. Varbalow's office?

A. The same —— The day, I don't exactly remember the day he sent for me. He sent for me to New York to come here and I came on.

By the Court:

Q. Wait. Is that the first day that you ever discussed the matter in person with Mr. Varbalow?

A. No, I made several visits to his office up here.

By Mr. Davis:

Q. Why don't you listen to the questions before you answer? I asked you whether or not on the day before you came down to Mr. Verbalow's office, when you had the conference with Mr. Varbalow, Mr. Gaskill, Mrs. Goldfarb and yourself, had you

previously told Mr. Varbalow other than on that day, about this agreement to repay your money?
A. I did.
Q. Had you told him on that day or before then?
A. Before then, too.
Q. How long before then, if you remember?
A. I came here so many times I really don't know.
Q. When you met here in Camden ——
A. Yes.
Q. ——and had the conference to which you have testified Mr. Varbalow knew previous to that day of this verbal agreement to repay the money?
A. Yes, he did.

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

The Court: I take it he had been informed of it by this witness, this plaintiff.

Mr. Davis: That is what I meant. I will reframe the question and make it this way.

Q. You had previously told Mr. Varbalow of what you have testified here today, with respect to the alleged promise of the defendants to repay the money to you?
A. I did.
Q. Is that sufficient?
A. I did.

The Court: Is that all, Mr. Davis?

The Witness: We were willing to give him plenty of time.

RAE I. GOLDFARB, sworn.

By Mr. Davis:

Q. Mrs. Goldfarb, what is your full name, please?
A. Rae I. Goldfarb.
Q. And are you the wife of Abraham Goldfarb, deceased?
A. I am.
Q. Or rather, the surviving wife?
A. I am.
Q. Were you or were you not present sometime after your husband's death at a conference which took place at Mr. Varbalow's office between you, Mr. Simon, Mr. Harry Rosenthal, sitting there, Mr. Varbalow and Mr. Gaskill?
A. I was.
Q. Was there or wasn't there, during the course of that conference, anything said by anyone present —— Pardon me—— with respect to an alleged promise on the part of these defendants to repay to your husband and to Mr. Simon the money which had been previously paid under the agreement which has been marked Exhibit P1?
A. There was.
Q. Tell us, if you please, who said whatever was said and what was said.
A. Well, Mr. Varbalow sent for us and I came down with brother——

The Court: No, you are asked what was said on that day.

The Witness: First, there was some argument about settling, and then after that, my brother said,

"You know you made an agreement to pay back that money at the rate of $200 every month at September 15th and after," so Mr. Rosenthal, I believe it was, he said ——

Q. This gentleman sitting here?

A. Yes, that gentleman, he got very angry, and he said, "I will fix this party; I will show you up," something like that.

Q. Referring to your brother?

A. To my brother, yes.

Q. Did he deny having made this agreement to repay the money?

A. He didn't deny it, no.

Q. Other than that, Mrs. Goldfarb, you know nothing about the facts in this case?

A. No, I left it entirely to my husband.

Q. The only thing you know besides what you have testified to is what you know from hearsay?

A. Absolutely.

Mr. Davis: Take the witness.

Mr. Carr: No cross-examination.

(No cross-examination.)

JOSEPH VARBALOW, sworn.

By Mr. Davis:

Q. Mr. Varbalow, when the difficulty in this suit, involved in this suit arose, your firm was representing the plaintiff in this case, were you not?

A. Originally, yes.

Q. Do you remember a conference which was had in your office, after your firm was retained, in which you, Mrs. Goldfarb and Mr. Simon, Mr. Rosenthal and Mr. Gaskill were involved?

A. Well, Mr. Gaskill wasn't in the office. The senior Mr. Rosenthal was there, but he didn't partake in the conversation. In the room was Mrs. Goldfarb, Mrs. Simon, both of the Rosenthals, and I. Although Mr. Rosenthal, Sr., didn't partake in any of the conversations, he sat there.

Q. You are sure that both the Rosenthals were there?

A. Yes, senior was there too.

Q. At that conference, was anything said by anyone about an alleged previously made verbal agreement to repay the money, balance of this money paid under the original contract?

A. There was quite a good bit of conversation about the return of money.

The Court: That is not what you are asked; repeat the question.

(Question repeated.)

Q. Let me reframe it this way; perhaps I can make it a little less involved. Was anything said at that conference about a promise previously made to repay the money paid under this contract?

A. Yes.

Q. What was said and who said it?

A. Why, the case was listed for trial shortly after the—shortly after the issue had been joined, and Mr. Gaskill at that time was attorney.

The Court: Which Mr. Gaskill?

The Witness: Tom Logan Gaskill was attorney for the defendants at that time, and he called up and spoke about the possibility of settling the case, so as the result of that conversation, the Rosenthals came into the office and ——

Mr. Carr: Pardon me for interrupting, but I want to inquire whether that conference was without prejudice.

The Witness: Well, I don't know; nothing was said about prejudice or anything about that, so that then an offer was made at that time to settle for less, and Mr. Simon very indignantly rejected the offer to settle for less, on the grounds that a promise had been made to settle in full, and then it continued along the lines about the terms of payment, and as the result of that conference, why, the case was put at the bottom of the list and not moved for trial.

Q. Was there any denial made by the Rosenthals of the assertion made by Mr. Simon of the promise previously made to repay the money? Did Mr. Rosenthal deny having made it?

A. The senior, of course, didn't partake in any of the conversation at all; he sat by.

Q. Well, did the younger man deny having made that agreement to repay the money?

A. I don't recall whether he did or not. He rather hinged his conversation, the bone of the contention seemed to be about some arrest in New York and about the term of payment, but I don't recall specifically now that he did not promise but rather hedging because of the arrest and also ——

Q. In other words, you cannot say that he did not deny it?

A. Oh, I can say that, that he did not deny it, but there seemed to be some dispute about the mode of payment, and there was a bitterness also of an arrest as the result of fraud in New York, something like that.

Mr. Davis: Take the witness.

Cross-examination.

By Mr. Carr:

Q. Mr. Varbalow, you were counsel or attorney, rather, for Simon and Goldfarb, were you not?

A. Yes, sir, that is right.

Q. And Mr. Gaskill represented the defendant?

A. That is right.

Q. And this was a conference looking toward a possible settlement of the suit, wasn't it?

A. That is right.

Q. And you say that conference was not without prejudice?

A. I don't know what the legal construction would be. I guess possibly it could be so construed, but I mean there was nothing said being without prejudice.

Q. Don't you recall saying yourself to Mr. Gaskill that this meeting was without prejudice?

A. No, I don't; Mr. —— As a matter of fact, he said he would send them over to see if they could settle this matter. That was all he said.

Q. By "settlement", you understood same compromise, adjustment, did you not?

A. Yes, I had no idea just what was wanted, but I thought if they could get the parties together, it would be an ideal thing.

Q. Now, before you instituted the suit, were the facts told to you by Mr. Goldfarb and by Mr. Simon?

A. You mean this suit or the one I instituted?

Q. The suit you instituted.

A. Why, substantially all the facts were told to me.

Q. You didn't begin an action based upon a rescission of the contract and a new contract to pay at the rate of $200 a month in place of the old one?

Mr. Davis: I object on the ground that it is not cross-examination.

(Objection overruled.)

(Exception noted for plaintiffs.)

A. No, I did not.

Q. I take it from that that you were not informed by your client that the old contract had been rescinded and that a new contract to pay at the rate of $200 a month had taken its place; is that correct or not?

Mr. Davis: Objected to on the ground it is not cross-examination.

The Court: I think he may answer it.

(Exception noted for plaintiffs.)

A. I don't think I was informed at that time. They brought in the contract and alleged general fraud, and it seemed to me it looked like a rescission, that is, a failure of consideration, and I thought it was an open and shut case on that. They said quite

a good bit, but the thing impressed me was the failure of consideration, so I didn't pay much attention to the other phase of it.

The Court: You took what you thought was the stronger ground?

The Witness: The stronger case. That was my opinion at that time.

Q. You, of course, knew as a lawyer that if the old contract had been rescinded and a new contract had taken its place, that you couldn't proceed on the old contract, whether you regarded that stronger or not, is that true?

A. Not necessarily. I really now can say I should have instituted a lot more of counts, but that's one of the things I learned.

Q. I am asking you whether you didn't know as a lawyer that if the old contract had been rescinded and a new contract had taken its place that you could not have brought any action whatever on the old contract.

Mr. Davis: Objected to as not cross-examination.

The Court: I think it is going pretty far.

The Witness: Am I to answer that?

The Court: No, don't answer; the objection is sustained.

(Exception noted for defendants.)

The Court: I am not so sure it is the law, anyway.

The Witness: No, that is what I was going to answer, that I didn't know that was the law.

The Court: In other words, if it be a fact that there was a fraud in the original undertaking and then a party to that fraud says, "I will give you your money back," and never does, I am not so sure that you are without a remedy on your original contract.

Q. Mr. Varbalow, are you sure that the elderly Mr. Rosenthal was present at that conference?

A. I am pretty certain that he was.

Q. Are you very sure?

A. Well, it's been so long—I know this much, that he didn't partake in any conversation, but I know Mr. Rosenthal was in my office several times.

Q. Are you clear he was in your place on the occasion you mention, the elder Mr. Rosenthal?

A. To be perfectly candid, up until now I was pretty clear, but now you have created some sort of doubt. I know Mr. Rosenthal, Jr., partook of the conversations and he was the one made those statements, but I somehow got the impression, my memory is as the result of my conversation with Mr. Gaskill, that both of them came over, because it was on the eve of the trial and it was there Mr. Rosenthal reiterated the agreement, that is, the junior Rosenthal.

Q. Did Mr. Simon tell you that the $200 arrangement was to be reduced to a contract in writing over in New York?

Mr. Davis: Objected to as not cross-examina-

tion. This witness testified to this conference and that is all.

The Court: Yes, I suppose he ought to be limited to what, what took place in this conference.

Mr. Carr: Yes, sir. I understood him to say that there was a conversation in reference to the $200 arrangement.

The Court: Exactly.

Mr. Carr: So I am dealing with that supposed $200 arrangement.

The Court: At the conference between the witness and the defendants?

Mr. Carr: Yes.

The Court: Yes.

Mr. Davis: The question is objected to.

The Court: If it is re-framed to inquire whether on the day of the conference between the plaintiff and defendants, it was stated by any of the parties that the parol contract, alleged parol contract was in fact to be reduced to writing, Mr. Varbalow may answer the question.

Q. As amended by his Honor, will you answer the question?

A. As I understand this question, whether any conversation took place to the effect that the intention to return the money was to be reduced to writing?

Mr. Davis: At the conference.

The Witness: No, there was no statement about reducing it to writing; it was just merely a rehashing of the conversations and agreements elsewhere.

By the Court:

Q. You didn't hear anything said at any time about the agreement to be reduced to writing?
A. No.
Q. I mean this parol agreement?
A. No, sir.

Mr. Carr: I think that is all, Mr. Varbalow.

Mr. Davis: That is our case, if the Court please; we rest.

PLAINTIFF RESTS.

THE CASE FOR THE DEFENDANTS.

Mr. Carr: I will put Mr. Gaskill on the stand in order to release him, if your Honor please.

THOMAS L. GASKILL, sworn.

By Mr. Carr:

Q. Mr. Gaskill, are you a member of the New Jersey bar?
A. I am.

Q. And referee in bankruptcy in Camden?

A. I am.

Q. Do you know Mr. Rosenthal, Harry and his father?

A. I do.

Q. And did you represent them in the former suit between the same parties?

A. I did.

Q. Do you remember going to Mr. Varbalow's office when the former case was pending?

A. I do.

Q. Who sent for you, do you know?

A. Mr. Joseph Varbalow.

Q. And who went with you?

A. Mr. Harry Rosenthal.

Q. Did his father go?

A. He did not; I feel very sure of that.

Q. What was the object of that call?

A. As I now recall it ——

Mr. Davis: If the Court please, I object to the object. I think what was said and done ——

Q. The object as stated by Mr. Varbalow.

The Court: I suppose what Mr. Varbalow said may be ——

Q. What did Mr. Varbalow say?

A. I cannot at this time recall what he said, except that he asked me to come up and see him and asked me to bring Mr. Harry Rosenthal with me. Now, whether he stated that it was to discuss the suit which was then pending or whether I assumed that, of course, I don't know, but I went to see him with Mr. Harry Rosenthal.

Q. Now, at that meeting did anyone say that Harry Rosenthal and his father had promised to pay, settle this case at the rate of $200 a month commencing the 15th of September, 1923?

A. Will you read that to me, the first part?

(Question repeated.)

The Witness: That is, at that meeting they said that they had previously made such a promise?

Q. Yes.

A. I don't recall such a statement, no.

Q. Would you recall it if it had been made?

Mr. Davis: I object to that.

The Court: I suppose he says he doesn't recall it; that is as far as he can go.

Q. Do you know whether or not this meeting was held without prejudice?

A. As to that, I would say first that I didn't know that it was a general meeting and in the second place, that I went there to confer with Mr. Varbalow personally as an attorney, and whether anything was said as to the matter of prejudice or not, I cannot now recall, but I know that I did assume in talking ——

Mr. Davis: I object to what he assumed.

The Court: Wait.

Q. Now, what was said and done at that meeting?

A. Very little on our part, I mean, Mr. Rosen-

thal and myself. I was surprised to find his clients there. Mr. Varbalow introduced me to all of them, and after some little introduction, they began talking very vigorously as to what they alleged to be their rights and as to the position of the Rosenthals, and after listening to them for some time, without saying anything, because there was no opportunity to talk, I said to Mr. Varbalow we would have to go ahead with the trial of the case, and with Mr. Rosenthal, we left the room.

Q. Did you hear Mr. Rosenthal say something in reply to Mr. Simon, that he would fix that party, or something to that effect?

A. I did not.

Q. Did he make use of any such language?

A. He did not. Mr. Rosenthal, I feel very confident, said nothing except to greet these people whom he knew.

Q. You were there to speak for him, were you not?

A. I was and with Mr. Varbalow only.

Mr. Carr: Cross-examine.

Mr. Davis: No questions.

(No cross-examination.)

HARRY ROSENTHAL, sworn.

By Mr. Carr:

Q. Mr. Rosenthal, are you one of the defendants in this suit?

A. I am.
Q. And are you a son of Rudolph L. D. Rosenthal?
A. I am.
Q. Do you know Morris Simon?
A. Yes, sir.
Q. Do you remember the occasion of his coming to Camden sometime about April, 1923?
A. I do.
Q. Did you see him on that occasion?
A. Yes, sir.
Q. Who was present?
A. Well, just myself, father, Mr. Simon and his attorney, Mr. Goldfarb.
Q. Mr. Goldfarb, a lawyer, too?
A. Yes, sir.

Mr. Davis: I object to that, his attorney. Let him say who was there. He cannot testify to capacity.

The Court: No, I suppose not; strike it out.

Q. Mr. Goldfarb was an attorney at law?
A. Yes, sir.
Q. Now, what was said by Simon and Goldfarb, if anything, and what was said in reply?
A. Well, I was rather surprised to see them.

Mr. Davis: I object to the surprise.

The Court: Strike it out.

The Witness: And they spoke to us about making some arrangement where they could take back the money that they invested with us, and Mr. Gold-

farb made us various forms of propositions and we listened to him, my father and myself, and when he was all through, said and done, I said I wouldn't do anything.

Q. Did he make any proposal to settle on the basis of $200 a month, commencing in September?

A. Well, that exact proposal I don't remember, Mr. Carr, but he made some definite proposals there of what he would like to do.

Q. Did you accept any of them?

A. No, sir, we didn't accept anything from him.

Q. What did you do with reference to the various proposals he made?

A. Well, I told him if he wanted to do anything in a definite way, he would have to see my attorney, who was originally in the contract and he was in New York; he could go see him, I gave him his name, and that's the last I ever heard of it.

Q. Did you ever propose, either to Mr. Simon or Mr. Goldfarb, that the claim was to be paid at the rate of $200 a month commencing in September of 1923?

A. Not my proposition.

Q. You never proposed that?

A. No, sir.

Q. Did your father ever make such a proposal, in your hearing?

A. I never heard him say it.

Q. You and your father together during the whole conference?

A. During the conference when Goldfarb and Simon were there?

Q. Yes.

A. Yes, sir, I was there all the time.

Mr. Carr: Cross-examine.

Cross-examination.

By Mr. Davis:

Q. As a matter of fact, Mr. Rosenthal, you were not at the home when Mr. Goldfarb and Mr. Simon first arrived, were you; you came there later, pursuant to a telephone call of your father, didn't you?

A. That I don't remember exactly, whether I was there or whether they were already there, whether I came right afterwards; that I don't remember.

Q. Where did Mr. Simon and Mr. Goldfarb call, at your home?

A. No, not at the home.

Q. Where did they call?

A. They called at a place we have on Berkley, place, 659 Berkley Street, known as the laboratories.

Q. Do you have any employees to attend the door?

A. Not at that place, no.

Q. Any employees at all?

A. At Berkley Street?

Q. Yes.

A. No, nobody at Berkley Street.

Q. Well, who greeted Mr. Simon and Mr. Rosenthal upon their arrival, did you or your father?

A. That I don't remember; it's quite a while ago; I don't remember exactly who did do it.

Q. As a matter of fact, you want to correct your statement that you were there during the whole time they were there, don't you?

A. Possibly there is a difference of five or ten minutes.

Q. In other words, they might have had some conversation with your father before you arrived?

A. They might have, yes.

Q. And there might have been some conversation that you didn't hear?

A. There might have been, yes.

Q. Now, I understand the gist of your testimony then to be that there were requests made, demands made for the return of this money and various propositions submitted for the settlement, repayment of the balance of the money, none of which you accepted, is that correct? That is, made to you?

A. Made to me is right, yes, that's right.

Q. None of which you accepted?

A. That is right.

Q. And you haven't repaid the money, of course?

Mr. Carr: I object to that; there is no obligation, apparently.

Mr. Davis: I can ask him the question, if the Court please.

The Witness: They only got ——

Q. Just a minute; answer the question.

A. What was that?

Q. The balance of the money in question, the difference between what they received and you received is still retained by you and your father?

A. No, no.

Q. Well, you haven't paid it back, have you?

A. We haven't paid it back; it was not retained by us.

Q. Well, you received it?

A. I don't think we received it, even.

Q. Well, the pleadings admit the receipt of the money.

A. Well, we handled it for them.
Q. You received the $3000, didn't you?
A. I? No.
Q. Your company, you and your father, trading as the Rosenthal Laboratories?
A. We received some money. We all put some money into the business, yes.
Q. You received under this contract $3000, didn't you?
A. I did?
Q. Don't equivocate with me, please.
A. I am trying to find out what to say, yes or no.

By the Court:

Q. Is there any doubt that Goldfarb and Simon put up $3000?
A. No, there is no doubt about it.
Q. You and your father got it, didn't you; didn't they give it to you and your father or to one of you?
A. One of us; I don't remember who it was.
Q. There cannot be any doubt about that?
A. No, it was turned over, yes.

Mr. Davis: I have no further questions.

Mr. Carr: That is all.

RUDOLPH L. D. ROSENTHAL, sworn.

By Mr. Carr:

Q. Mr. Rosenthal, are you one of the defendants in this suit?

A. Yes, sir.

Q. And you are the father of Harry Rosenthal here?

A. Yes, sir.

Q. You know Morris Simon, do you not?

A. Yes, sir.

Q. And did you know Mr. Goldfarb in his lifetime?

A. I did.

Q. Do you remember Mr. Simon and Mr. Goldfarb coming to Camden sometime in April, 1923?

A. I do.

Q. Did they come to your place of business in Camden?

A. They came to my laboratory.

Q. On Berkley Street?

A. Yes, sir.

Q. Was Harry there when they came?

A. He wasn't there at the time, when he entered.

Q. Did he come in later?

A. They asked for him there, and I called him up on the phone and he came in.

Q. Within a few minutes?

A. Took about five or six minutes, something about there.

Q. Now, what was the talk between Simon and Goldfarb on the one part and your answer, if you made any answer, on the other part?

A. Simon and Goldfarb wanted to know why they couldn't get ——

Mr. Davis: What was said and done?

The Witness: Simon and Goldfarb asked me why they couldn't get the pro rata payment as per agreement of so much per tube, and I answered

them we couldn't get it, that we were restricted by the court and couldn't operate.

Q. You mean enjoined by the court?
A. Yes, sir.
Q. Was that in some patent suit?
A. That was the patent suit, yes, sir.
Q. And what did they do next?
A. And they wanted to know how they would reimburse themselves for moneys advanced, and I told them in the same way as I am reimbursing myself.
Q. What was said next?
A. Next was said, we didn't go in partnership, they simply made an investment. I said, "So did I."
Q. Now, what, if anything, was said by them or by you with reference to paying them back at the rate of two hundred a month?
A. The proposal was made by Mr. Goldfarb there, if we wouldn't like to pay him back half of it at one time, then afterwards one-fourth, then afterwards two hundred per month. I said, "You will get your money back when I get mine, that I have lost in this invention."
Q. Did you ever accept any proposal?
A. None whatsoever; they went away sore.
Q. Did you ever propose on your part that you pay them $200 a month?
A. I did not; I couldn't.
Q. Did Harry ever make such a proposal in your presence?
A. Not to my knowledge.
Q. Were you present in the office of Mr. Varbalow along with Harry and Mr. Thomas Logan Gaskill?
A. I wasn't there at all.

Mr. Carr: Cross-examine.

Mr. Davis: I have no questions.

(No cross-examination.)

DEFENDANTS REST.

BOTH SIDES REST.

Mr. Carr: If your Honor please, I have a motion that I wish to make.

The Court: Go ahead.

Mr. Carr: If your Honor please, I move for a directed verdict in favor of the defendants, on the ground that there is no proof of the contract alleged in the pleadings. The proof by the plaintiff, Morris Simon, was that he proposed—or rather that the defendants proposed to the plaintiffs that the matter be settled by the payment of installments, monthly installments of $200, beginning on September 15, 1923, and that the arrangement was to be later reduced to writing in New York, and that he so understood from the conversation. In addition to that, there is no proof that he accepted the proposal, the alleged proposal of Mr. Rosenthal, so that it stood as a proposal unaccepted by him, so far as his testimony was concerned, and as a tentative arrangement at the most which was later to be reduced to writing, and that, of course, in itself shows that it lacks the definiteness and conclusiveness of a contract; that if there was such

a proposal, they had a right, until it should have been withdrawn, of course, to accept or reject it, once they made their election that particular matter was closed. If there was such a proposal, they made their election when they began the first suit in this matter, which was to treat the contract, the original contract, as existing and not as having been rescinded.

(After argument.)

The Court: I think I shall leave it to the jury.

(Exception noted for defendants.)

CHARGE OF THE COURT.

DONGES, J.:

Ladies and gentlemen, this suit is brought to recover the sum of fourteen hundred and some dollars upon what is claimed to be an expressed, definite contract entered into orally between the plaintiff and the defendants sometime in April of 1923, in the City of Camden. We are not dealing with any other contract except as it may throw light upon this oral or verbal contract. If you find from a fair preponderence of the evidence that the dedendants definitely and specifically and unequivocally agreed between the plaintiff and themselves that they would pay to the plaintiff the sum of $200.00 a month, beginning September 15, 1923, and that they have not done it, then the plaintiff is entitled to recover.

Now, that is the contract and the only one that this suit is based on, and the law is that it is not sufficient that a person make a proposal of settlement and go away with the idea that he is going to get it; there must be, as we say in law, a meeting of the minds, both parties must agree and assent, they must give their approval and assent to the contract and say, "Yes," either in words or by words that mean as much, "Yes, I do agree with you to pay this money under these terms." That is what you must find took place on this occasion, that there was a binding agreement made, on the one part plaintiff said, "I want you to pay me this money," and that the defendants said, in effect, "Yes, we now solemnly agree that we will pay you $200,00 each month beginning September 15,

1923," and if you find that that agreement actually was made, then plaintiff is entitled to recover, and if that agreement was not made in such some form, verbally, to be sure, but still it must be definitely made, then your verdict will be for the defendant.

If your verdict be for the plaintiff, it will be with interest at six per cent on such sums as ought to have been paid; if the agreement was in fact made, from the time that the money was due.

You may retire.

EXHIBIT P1.

Exhibit P1 is completely set forth in the complaint, pp. 10 to 13.

EXHIBIT D1.

NEW JERSEY SUPREME COURT.
CAMDEN COUNTY.

MORRIS SIMON and RAE I. GOLDFARB, executrix under the last Will and Testament of Abraham Goldfarb, Plaintiffs, -vs- RUDOLPH L. D. ROSENTHAL and HARRY ROSENTHAL, co-partners trading as Rosenthal Laboratories, and Rudolph L. D. Rosenthal and Harry Rosenthal, individually, Defendants.	TRANSCRIPT OF PLEADINGS FOR TRIAL. Wescott & Varbalow, Attorneys for Plaintiffs. Thomas L. Gaskill, Attorney for Defendants.

Summons issued June 25, 1924.

The plaintiffs, residents of the city of New York, in the state of New York, respectfully show that:

FIRST COUNT.

1. On or about the 17th day of March, 1922, and for some time thereafter, the defendants, Rudolph L. D. Rosenthal and Harry Rosenthal, were engaged in the manufacturing of electrical apparatus and ap-

pliances in the city and county of Camden and State of New Jersey.

2. At that time, one of the defendants visited the plaintiff Morris Simon, and also Abraham Goldfarb, testator of the other plaintiff, and requested them to invest moneys in the said business.

3. Pursuant to such request, the said Morris Simon and Abraham Goldfarb did enter into an agreement with the said defendants on the 17th day of March, 1922, a copy of which agreement is hereunto made a part hereof and indicated as Schedule "A"; which agreement inter alia contained representations and covenants on the part of the defendants.

4. The defendants represented that they had a plant capable of turning out "at least 200 special type vacuum tubes per day."

5. The defendants represented that "they have enough orders on hand to turn out approximately 400 of said special type vacuum tubes per day which can be sold by them for strictly cash."

6. The defendants represented that "there were no debts, liabilities, mortgages or incumbrances of any kind or nature existing against the said plant and business."

7. The defendants promised that on each and every week there would be paid to the said Abraham Goldfarb and Morris Simon "the sum of twelve cents for each and every said special type vacuum tube manufactured and disposed of by them for the week preceding."

8. The defendants promised that they would "comply with all fire and other ordinances required by the public authorities and will keep sufficient fire and other insurance to protect the said business of the said defendants so that in the event of a fire or other accident that the said defendants will be suffi-

ciently re-imbursed without calling upon the said plaintiffs for any contribution or charge, and will provide in the fire insurance policies that $3,000 of amount insured shall be paid to the defendants, that is to say, $1500 to said Morris Simon, and $1500 to said Abraham Goldfarb."

9. The defendants promised that the said Abraham Goldfarb and Morris Simon would be permitted and given "full access to the plant and the business, and the books of the said business of the said defendants at all times."

10. The defendants promised that they would with their remittance to the said Morris Simon and Abraham Goldfarb of the amount that may be due them on 12¢ a tube as aforesaid will attach a statement showing how said amount was arrived at, and will send remittance for half of said amount to Morris Simon, 136 W. 85th Street, Manhattan Borough, New York City, and the other half to Abraham Goldfarb, 5 Columbus Circle, Manhattan Borough, New York City, or to any other place that the said Morris Simon and Abraham Goldfarb would designate."

11. The plaintiff, Morris Simon, and also Abraham Goldfarb did rely on each of the said representations as being true, and relying on the fact that the promises would be carried out, did each of them pay unto the said defendants the sum of Fifteen Hundred Dollars ($1500) each.

12. That at some time subsequent to the making of this agreement and before the filing of this suit, the said Abraham Gold*th*arb departed this life and has appointed his executrix under his last Will and Testament one Rae I. Goldfarb, one of the plaintiffs named in the within suit, a copy of which Will and Letters of Administration are in the possession of the said Rae I. Goldfarb, and which she is will-

ing to produce at any time that the defendants may request.

13. That the representation contained in paragraph four of said complaint was untrue.

14. That the representation contained in paragraph five of said complaint was untrue.

15. That the representation contained in paragraph six of said complaint was untrue.

16. That the representation contained in paragraph seven of the said complaint was untrue.

17. That on the strength of said representations, the said plaintiffs did pay over the sum of Three Thousand Dollars.

18. Because such representations were untrue, the plaintiffs have elected to rescind said contract and demands a return of the said sum of Three Thousand Dollars paid unto the said defendants, together with interest at the rate *os* six percent per annum from the 17th day of March, 1922.

SECOND COUNT.

For brevity sake, paragraphs 1 to 12 inclusive are hereby included as paragraphs 1 to 12 of the second count.

13. The defendants did not perform the premises contained in paragraph eight of said complaint.

14. The defendants did not perform the promises contained in paragraph nine of said complaint.

15. The defendants did not perform the promises contained in paragraph ten of said complaint.

16. Because of the defendants failure to perform any or all of the promises contained in paragraphs 8, 9 and 10 of said complaint, the defendants have demanded the return of said money.

17. The consideration mentioned in said agreement upon which the sum of Three Thousand Dollars ($3,000) was paid over has totally failed.

18. Plaintiffs therefore have elected to demand

back the sum of Three Thousand Dollars ($3,000) paid in to the said defendants.

Judgment will therefore be asked in the sum of Three Thousand Dollars ($3,000) together with interest at the rate of six percent per annum from the 17th day of March, 1922, together with all costs of suit.

Wescott & Varbalow,
Attorneys for Plaintiffs.

SCHEDULE "A"

ARTICLES OF AGREEMENT.

Entered into by and between Rudolph L. D. Rosenthal, and Harry Rosenthal, co-partners under the firm name and style of the Rosenthal Laboratories, hereinafter called the party of the first part, and Morris Simon and Abraham Goldfarb, of the City of New York, Borough Manhattan, hereinafter called the party of the Second part.

Whereas the party of the first part represents to the party of the second part that they are in business as research engineers and conduct the business of manufacturing electrical apparatus and appliances at their plant in the City of Camden, State of New Jersey. And further represent to the said party of the second part that their said plant at Camden, New Jersey has a capacity for turning out at least 200 special type vacuum tubes per day, and that they have enough orders on hand to turn out approximately 400 of said special type vacuum tubes per day which can be sold by them for strictly cash and whereas they the said party of the first part further represent that if the party of the second part will invest with them the sum of $3000.00,

that they will immediately install sufficient equipment for the purpose of manufacturing and disposing of at least 200 of said special type vacuum tubes per day. Manufacture and sale to commence within two weeks of date hereof, and WHEREAS,

The party of the first part further represents that there are no debts, liabilities, mortgages or incumbrances of any kind or nature existing against the said plant and business of the party of the first part, and that the said sum of $3000, is to be used wholly and solely by the party of the first part for the purposes heretofore mentioned.

Now therefore, this agreement WITNESSETH that for and in consideration of $3000.00, paid to the party of the first part by the party of the second part, the receipt whereof is hereby acknowledged, hereby agrees to pay over every week to the party of the second part 12¢ for each and every said special type vacuum tube manufactured and disposed of by them for the week preceding.

It is further understood and agreed by and between the parties hereto that in no sense is this agreement to be understood or considered as a partnership existing between the party of the first part and the party of the second part, and the party of the first part is in no way to call upon the party of the second part or cause them to be called upon for any debts or obligations that may be incurred by the party of the first part in the conduct of their business as aforesaid, and the party of the second part it is agreed and is understood is not to call upon the party of the first part for any profits or any monies other than the 12¢ per tube hereinbefore arranged.

The party of the first part agrees to comply with all fire and other ordinances required by the public authorities and will keep sufficient fire and other in-

surance to protect the said business of the party of the first part so that in the event of a fire or other accident that the party of the first part will be sufficiently re-imbursed without calling upon the party of the second part for any contribution or charge, and will provide in the fire insurance policies that $3000, of amount insured shall be paid to party of the second part, that is to say $1500, to said Morris Simon, and $1500, to said Abraham Goldfarb.

The party of the second part it is agreed by the party of the first part is to have full access to the plant and the business, and the books of the said business of the party of the first part at all times. That the party of the first part will with their remittance to the party of the second part of the amount that may be due them on 12¢ a tube as aforesaid will attach a statement showing how said amount was arrived at, and will send remittance for half of said amount to Morris Simon, 136 W. 85th Street, Manhattan Borough, New York City, and the other half to Abraham Goldfarb, 5 Columbus Circle, Manhattan Borough, New York City, or to any other place the party of the second part may designate. The term of this agreement is for the term of five (5) years from the date hereof.

IN WITNESS WHEREOF the parties hereto have set their respective hands and seals in duplicate this 17th day of March, 1922.

ROSENTHAL LABORATORIES

(signed)	By Rudolph L. D. Rosenthal	(L.S.)
(signed)	By Harry Rosenthal	(L.S.)
(signed)	Morris Simoan	(L.S.)
(signed)	Abraham Goldfarb	(L.S.)

IN PRESENCE OF
(signed) Sarah Fischer
Filed July 3, 1924.

The plaintiffs repeat the paragraphs hereinbefore set out and in addition thereto say:

1. That since the contract hereto attached became effective, the defendants have manufactured large quantities of the vacuum tubes therein mentioned and have failed to properly account to the plaintiffs for the number of vacuum tubes so manufactured, as required by said contract, or to pay over to said plaintiffs the sum of 12½ cents for each vacuum tube so manufactured as required by said contract.

2. That the plaintiffs are at present unable to state the exact number of vacuum tubes manufactured as aforesaid, but believe said number to be of large proportions.

3. That because of the aforesaid failure on the part of said defendants to account to said plaintiffs as said contract provides, or to pay over to said plaintiffs the 12½ cents provided for by said contract, the said plaintiffs have suffered substantial loss and demand damages in the sum of Five Thousand Dollars.

Wescott & Varbalow,
Attorneys for Plaintiffs.

Filed July 30, 1924.

The defendants, Rudolph L. D. Rosenthal and Harry Rosenthal, both of the City and County of Camden and State of New Jersey, both as co-partners and individually, answering the Complaint of Morris Simon and Rae I. Goldfarb, Executrix, etc., say:

ANSWER TO FIRST COUNT.

1. They admit the matters stated in the first paragraph of the Complaint.

2. They deny the matters stated in the second paragraph of the Complaint.

3. Defendants deny the matters stated in the third paragraph of the Complaint except that an

Agreement was entered into between the parties, as stated in "Schedule A."

4. They deny the matters stated in the fourth paragraph of the Complaint.

5. They admit the matters stated in the fifth paragraph of the Complaint.

6. They admit the matters stated in the sixth paragraph of the Complaint.

7. They admit the matters stated in the seventh paragraph of the Complaint.

8. They admit the matters stated in the eighth paragraph of the Complaint.

9. They admit the matters stated in the ninth paragraph of the Complaint.

10. They admit the matters stated in the tenth paragraph of the Complaint.

11. They admit that Abraham Goldfarb and Morris Simon did each pay the sum of $1500, into the partnership but deny the other matters stated in the eleventh paragraph of the Complaint.

12. The defendants have no knowledge of the matters stated in the twelfth paragraph of the Complaint and leave the plaintiffs to their proof.

13. Answering paragraphs 13, 14, 15 and 16 of the Complaint, the defendants say that no representations made by the defendants, or either of them, to Morris Simon or Abraham Goldfarb, or either of them, were untrue.

14. The defendants admit the payment of the sum of $3,000. but deny the other matters stated in the seventeenth paragraph of the Complaint.

15. The defendants deny the right of the plaintiffs to rescind the contract referred to and deny that they owe the plaintiffs anything.

ANSWER TO SECOND COUNT.

The defendants, answering the Second Count of the Complaint, say:

1. The answers to paragraphs 1 to 12 of the Second Count are hereby made the same as the answers to paragraphs 1 to 12 of the First Count.

13. The defendants admit that they did not perform the matters set forth in the eighth paragraph of the Complaint because of a subsequent Agreement made between the parties.

14. The defendants deny that they did not perform the promises contained in paragraph nine of the Complaint.

15. The defendants deny that they did not perform the promises contained in the tenth paragraph of the Complaint.

16. The defendants deny that they have failed to perform any obligation or promise made by them to Morris Simon or Abraham Goldfarb.

17. They deny the matters stated in the seventeenth paragraph of the Complaint.

18. The defendants deny the legal right of the plaintiffs to elect to demand a return of the sum of $3,000. or any other sum.

FIRST GROUND OF DEFENSE TO THE FIRST AND SECOND COUNTS.

The defendants, and each of them, have completely performed each and every obligation owed by them, or either of them, to the plaintiffs.

SECOND GROUND OF DEFENSE TO THE FIRST AND SECOND COUNTS.

Morris Simon and Abraham Goldfarb, and each of them, became by virtue of their investment and Agreement, co-partners with the defendants.

THIRD GROUND OF DEFENSE TO FIRST AND SECOND COUNTS.

Morris Simon and Abraham Goldfarb each invested the sum of $1500. in the Rosenthal Laboratories, a co-partnership, and are not entitled to a return of the principal amount invested but only to

such profits as may accrue in accordance with the terms of their Contract.

FOURTH GROUND OF DEFENSE TO THE FIRST AND SECOND COUNTS.

The plaintiffs have accepted the Contract, made their election and cannot now rescind their Contract.

FIFTH GROUND OF DEFENSE TO THE FIRST AND SECOND COUNTS.

The defendants have fully performed their part of the Contract and are prepared to continue with the fulfillment of the Contract for five years from the date thereof and in accordance with the terms thereof when and if permitted by law to do so.

SIXTH GROUND OF DEFENSE TO THE FIRST AND SECOND COUNTS.

The defendants, and each of them, performed each and every obligation owed by them to Morris Simon and Abraham Goldfarb, or either of them or to the Executrix of the said Abraham Goldfarb, and continued to pay them and each of them the profits derived from the sale of tubes, in accordance with their Agreement until the defendant, Rosenthal Laboratories, was compelled to discontinue the manufacture of said tubes because of a Preliminary Injunction, issued by the United States District Court for the Southern District of New York, on the 20th day of February, 1923, and directed to Harry Rosenthal and his associates, enjoining him and them to desist from making or selling any vacuum tubes or appliances or parts thereof that infringe Letters Patent No. 841,387 and No. 879,532. This Injunction caused the defendants to cease the manufacture of tubes contemplated by the said Agreement. The Preliminary Injunction is still in force and the plaintiffs were aware of the possibility of such an Injunction when they made their investment.

The defendants hereby reserve the right to move

for a dismissal of the Complaint upon the call of the case for trial.

Thomas L. Gaskill,
Attorney of Defendants.

Filed July 15, 1924.

The defendants repeat the paragraphs herein before set out in their Answer and in addition say as to the three paragraphs set forth in said Amendment:

1. They deny the matters stated in the first paragraph.

2. They are uninformed as to the alleged inability of the plaintiffs and their belief as set forth in the second paragraph.

3. They deny the matters stated in the third paragraph.

The defendants rely further upon the six grounds of defense as stated to the First and Second Counts of the Complaint as set forth in their Answer thereto.

Thomas L. Gaskill,
Attorney of Defendants.

Filed August 5, 1924.

It is, on this 5th day of May, A. D., 1925, ORDERED that the answer heretofore filed by the defendants be, and the same is hereby amended by adding thereto the following:

SEVENTH GROUND OF DEFENSE TO FIRST AND SECOND COUNTS.

The plaintiffs received sundry payments under the terms of the agreement, a copy of which is annexed to the complainant and marked Schedule A, to wit, the sum of $500. Plaintiffs have not returned or offered to return the same. Plaintiffs are therefore disentitled to rescind said contract.

Ralph W. E. Donges,
C. C. J.

Entered May 6, 1925.
On motion of

Thomas L. Gaskill,
Attorney for Defendant.

In reply to defendants' Answer in this cause, the plaintiffs join issue upon the complaint and Answer, and in reply to paragraph number 13 of the Answer to the second count assert that no subsequent agreement existed; and in reply to the second ground of defense say no copartnership existed; and in reply to the sixth ground of defense say they have no knowledge concerning the matters therein set out and allege that such matters are foreign to the issue or issues involved in this suit.

The plaintiffs hereby reserve the right to move to strike out the defendants' Answer either before or upon the call of this cause for trial.

Wescott & Varbalow,
Attorneys for Plaintiffs.

Filed July 30, 1924.

I, Edward J. Kelleher, clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true transcript of the pleadings in the above-stated cause as the same remain on file in my office.

In testimony whereof, I have set my hand and the seal of said court at Trenton, this nineteenth day of December, A. D. nineteen hundred and twenty-seven.

Edward J. Kelleher,
Clerk.

(Seal.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

MORRIS SIMON and RAE E. GOLDFARB, Administratrix of the Estate of ABRAHAM GOLDFARB, Deceased,
Appellees,

v.

RUDOLPH L. D. ROSENTHAL and HARRY ROSENTHAL, Co-partners, trading as ROSENTHAL LABORATORIES, and RUDOLPH L. D. ROSENTHAL and HARRY ROSENTHAL, jointly, or in the alternative,
Appellants.

ON APPEAL.

DEFENDANTS-APPELLANTS' BRIEF.

STATEMENT OF FACT.

Defendants appeal from a judgment in a suit wherein the plaintiffs seek to recover certain moneys from the defendants, which suit is based, according to the complaint, upon a certain rescission and cancellation of an agreement referred to therein as Schedule A, and to repay to each of the plaintiffs the sum of $1,500.00, after making allowance for certain checks received by each of the defendants

and totalling $72.66. The original agreement, Schedule A, appeared to be in the nature of a joint adventure between the plaintiffs and defendants whereby the plaintiffs were to "invest with them (the defendants) the sum of $3,000.00" for the purpose of installing sufficient equipment for the manufacturing and disposing of at least two hundred special type vacuum tubes per day. The only method of repayment provided in said agreement was stated as follows: "The party of the second part it is agreed and is understood is not to call upon the party of the first part for any profits or any moneys other than the 12¢ per tube hereinbefore arranged." The manufacturing operations were not successful, having been terminated by a patent injunction suit. The plaintiffs claim that in April, 1923, they called upon the defendants in Camden, where, according to the plaintiff, Morris Simon, the following conversation took place (p. 25, l. 36 &c): "Well, when Harry Rosenthal came in, after the father had sent to him, he said, 'What are you going to intend to do with the balance of that money?' * * * He says, 'Now, what do you intend to do with regards to that money?' 'Well,' he says, 'We will pay that money back on the following September 15th of that year at the rate of $200.00 a month until it is paid up,' so Mr. Goldfarb says, he listened, so that I and he made an appointment in New York City two days later in an attorney's office, 1482 Broadway, by the name of Harry Bloomberg, and we went there the day of the appointment." Simon testified that the Rosenthals did not appear at the appointed time and place and that the moneys were never paid.

On cross-examination Mr. Goldfarb was asked whether he had repeated everything that was said at the meeting above referred to and he replied in the affirmative (p. 32).

He further testified on cross-examination that the purpose of the appointment in New York was for the entering into of an agreement, which agreement was to be reduced to writing (p. 34). While this testimony was contradicted by both of the defendants, for the purpose of this argument the plaintiffs' story must be regarded as true.

Previously to the institution of this suit, but subsequently to the alleged interview of April, 1923, the plaintiffs instituted a suit based upon the original contract (see Exhibit D1). The appellant claims that the institution of the first suit with full knowledge of the alleged agreement of April, 1923, constituted an election to proceed under the original contract, and that the plaintiffs are estopped, by reason of election of remedies, from any action under the alleged agreement of April, 1923, and further that the so-called agreement of April, 1923, consisted of an unaccepted offer, indefinite as to terms and intended to be reduced to writing and placed in definite form; and that the institution of the first suit was, in itself, a definite refusal of such proposal and an election to proceed under the original contract. At the conclusion of the case a motion was made for a directed verdict in favor of the defendants, which was overruled, and an exception noted. In addition to this, there were certain exceptions based upon the admission and rejection of certain evidence.

GROUNDS OF APPEAL.

The following question was admitted (p. 31, l. 31 &c):

"1. To Morris Simon.

Q. Who did?

A. Harry Rosenthal, and he says, of course, it would be settled; he says, 'I will fix it so you won't get anything, if you win the case, and I will show this party up.' "

This was clearly unresponsive and prejudicial and should be stricken out. Counsel had no opportunity to properly object until the complete answer was given by the witness. It was irresponsive and volunteered, and placed the defendant in the light of threatening to "fix it so you won't get anything if you win the case." Certainly it was unfair to permit testimony of this kind to go to the jury and apparently with judicial sanction.

"2. To Morris Simon (p. 38, l. 27 &c):

Q. And you know, do you not, that the suit was brought upon contract and not upon the written contract?"

The purpose of this question was to show that the party had made an election to proceed under the original contract and that he was bound thereby. It was further intended for use as a foundation question in further cross-examination to call upon the defendant to reconcile the conflict between these two positions. We feel that this question was perfectly proper and the overruling thereof was prejudicial.

"3. To the witness, Joseph Varbalow (p. 48, l. 20 &c):

Q. I am asking you whether you didn't know as a lawyer that if the old contract had been

rescinded and a new contract had taken its place, that you could not have brought any action whatever on the old contract?"

The purpose of this question was this: Presumably all the facts, including the rescission, had been stated, or should have been stated, to Mr. Varbalow as the original counsel in the case. If such facts had been stated to him, the only basis for his bringing the second suit would have been his ignorance of the legal question involved. We, therefore, had a right to ascertain whether he did know the legal doctrine expressed in the question. Had his answer been in the affirmative, a complete repudiation of the plaintiffs' story would have come from the mouth of his own attorney. Further cross-examination would probably have developed the fact that the statement of the alleged interview of April, 1923, was never made by the plaintiff to his attorney at a time when he was informing him of all of the relevant facts necessary for an attorney to institute a suit.

"4. Because at the conclusion of the whole case the defendant's motion for a direct verdict in favor of the defendant was overruled and exception noted (pp. 62, 63).

5. Because there was no evidence to sustain the verdict."

Both of these grounds were embraced in the motion for a directed verdict. This motion was based upon the ground that the interview of April, 1923, was nothing more than an unaccepted proposal and that so far as the testimony was concerned, it was at the most a tentative arrangement which was later to

be reduced in writing and that it lacked the definiteness and conclusiveness of a contract, and that if there were such a proposal the plaintiffs had a right to accept or reject it, and once they had made their election the matter was closed, and that their institution of the first suit was an election to treat the original contract as existing and not as having been rescinded:

> "An election of a right in disaffirmance of a contract made with full knowledge of the facts is irrevocable and bars any subsequent action based on the affirmance of the contract. The institution of a suit determines the election." *Blum Bldg. Co. v. Ingersoll,* 99 N. J. Eq., 563.

Vice-Chancellor Backes, in the above case, says:

> "The principle is so fundamental and universal of application that our Court of Errors and Appeals, in Claron v. Thommessen, 96 N. J. Eq. 650, simply applied it without discussion."
>
> "It is the inconsistency of the demand which makes the election of one remedial right an estoppel against the assertion of the other, and not the fact that the forms of actions are different." *Kertesz v. Feldheim,* 6 N. J. M. R. No. 2, p. 10, N. J. Supreme Court.

The case *sub judice* is a striking illustration of the wisdom of the above rule. The plaintiffs tried this case originally upon a theory wholly inconsistent with that advanced in the second trial. They based their rights upon an affirmance of the written contract, Exhibit A. Being unsuccessful in this litigation, they wholly repudiated the contract and claimed that prior to the institution of the first suit it had been rescinded and a new contract had taken

its place. If this were true, they had no right whatever to harass the defendants by an absolutely unfounded suit. If it were not true that the contract has been rescinded, then certainly they were restricted to their first cause of action. This is an attempt to play fast and loose with the written contract and also with the facts. We do not believe that the Court will look with favor upon this inconsistency, and respectfully urge that the well-established doctrine of estoppel be applied in this case.

Respectfully submitted,

CARR & CARROLL,
Counsel for Appellants.

New Jersey Court of Errors and Appeals

MORRIS SIMON and RAE I. GOLDFARB,
Executrix under the last will and testament of ABRAHAM GOLDFARB,
Plaintiffs-Appellees,

v.

RUDOLPH L. D. ROSENTHAL and HARRY ROSENTHAL, Co-partners, trading as ROSENTHAL LABORATORIES, and RUDOLPH L. D. ROSENTHAL and HARRY ROSENTHAL, jointly, or in the alternative,
Defendants-Appellants.

On Appeal.

BRIEF OF MORRIS SIMON, CO-PLAINTIFF-APPELLEE.

The statement of facts contained in the defendants-appellants brief is correct so far as the statement goes but with regard to the acceptance or non-acceptance of the alleged promise to repay the moneys involved in this suit, the Court's attention is respectfully called to the testimony of Joseph

Varbalow, Esq., a member of the former firm of Wescott & Varbalow, which said firm was formerly counsel for the plaintiffs (pp. 44 to 46), as follows:

"Q. Let me reframe it this way; perhaps I can make it a little less involved. Was anything said at that conference about a promise previously made to repay the money paid under this contract?" (p. 44, l. 27, &c.)

"A. Yes" (p. 44, l. 31).

"The Witness: Well, I don't know; nothing was said about prejudice or anything about that, so that then an offer was made at that time to settle for less, and Mr. Simon very indignantly rejected the offer to settle for less, on the grounds that a promise had been made to settle in full, and then it continued along the lines about the terms of payment, and as the result of that conference, why, the case was put at the bottom of the list and not moved for trial" (p. 45, l. 11, &c.).

"Q. Was there any denial made by the Rosenthals of the assertion made by Mr. Simon of the promise previously made to repay the money? Did Mr. Rosenthal deny having made it? (p. 45, l. 22, &c.)

"A. The senior, of course, didn't partake in any of the conversation at all, he sat by." (p. 45, l. 26, &c.)

"Q. Well, did the younger man deny having made that agreement to repay the money?" (p. 45, l. 28, &c.)

"A. I don't recall whether he did or not. He rather hinged his conversation, the bone of the contention seemed to be about some arrest in New York and about the term of payment, but I don't recall specifically now that he did

not promise, but rather hedging because of the arrest and also ——" (p. 45, l. 30, &c.)

"Q. In other words, you cannot say that he did not deny it?" (p. 45, l. 36, &c.)

"A. Oh, I can say that, that he did not deny it, but there seemed to be some dispute about the mode of payment, and there was a bitterness also of an arrest as the result of fraud in New York, something like that." (p. 46, l. 1, &c.)

"Q. Are you clear he was in your place on the occasion you mention, the elder Mr. Rosenthal?" (p. 49, l. 21, &c.)

"A. To be perfectly candid, up until now I was pretty clear, but now you have created some sort of doubt. I know Mr. Rosenthal, Jr., partook of the conversations and he was the one made those statements, but I somehow got the impression, my memory is as the result of my conversation with Mr. Gaskill, that both of them came over, because it was on the eve of the trial and it was there Mr. Rosenthal reiterated the agreement, that is, the junior Rosenthal." (p. 49, l. 23, &c.)

And further with regard to so much of the case as pertains to the question as to whether or not the agreement was later to be reduced to writing, the Court's attention is respectfully called to other of the testimony of Mr. Varbalow, as follows:

"Q. Did Mr. Simon tell you that the $200 arrangement was to be reduced to a contract in writing over in New York?" (P. 49, l. 33, &c.)

"Mr. Carr: Yes, sir. I understood him to

say that there was a conversation in reference to the $200 arrangement." (P. 50, l. 7, &c.)

"The Court: If it is re-framed to inquire whether on the day of the conference between the plaintiff and defendants, it was stated by any of the parties that the parol contract, alleged parol contract was in fact to be reduced to writing, Mr. Varbalow may answer the question." (P. 50, l. 25, &c.)

"Q. As amended by his Honor, will you answer the question?" (P. 50, l. 31.)

"A. As I understand this question, whether any conversation took place to the effect that the intention to return the money was to be reduced to writing?" (P. 50, l. 33, &c.)

"The Witness: No, there was no statement about reducing it to writing; it was just merely a rehashing of the conversations and agreements elsewhere." (P. 51, l. 3, &c.)

"By the Court:

"Q. You didn't hear anything said at any time about the agreement to be reduced to writing?" (P. 51, l. 9, &c.)

"A. No." (P. 51, l. 11.)

"Q. I mean this parol agreement?" (P. 51, l. 12.)

"A. No, sir." (P. 51, l. 13.)

REPLY TO DEFENDANTS-APPELLANTS' BRIEF.

1. Counsel for this appellee are unable to understand how the testimony involved in the first ground

of appeal can be suggested to be irresponsive and volunteered. In the first place, the objection to the testimony came too late and in fact after the testimony objected to had gone into the record, two additional questions were asked and answered before objection was made. Further it is respectfully submitted that the testimony objected to was wholly responsive. It was a portion of the conversation which took place at the conference which was arranged between the parties litigant and their respective counsel. We take the position that anything which was said at this conference, pertaining to the controversy between any of the parties present, was admissible as against each one respectively, and that, therefore, there is no merit in the first ground of appeal.

2. With respect to the second ground of appeal, which is based upon the exclusion of a question which is set forth in said ground of appeal, which question was directed to the appellee, Morris Simon, we respectfully submit that the Court was entirely correct in excluding the question which was propounded to the witness and that in language of the Court, "That suit speaks for itself, Mr. Carr, and better than the layman can speak about it." (P. 38, l. 31, &c.)

There was no question about the fact that a suit had been previously brought to rescind the contract on the ground of fraud and misrepresentation, which suit resulted in a voluntary non-suit for the plaintiffs. The question as to whether or not the bringing of that suit constituted an election of remedies was a legal question to be determined by the Court, and this question based upon the inten-

tion as set forth in the defendants-appellants' brief was entirely improper and inadmissible and that the Court committed no error in excluding it.

3. As to the third ground of appeal, which rests upon the exclusion of a certain question propounded to Joseph Varbalow, Esq., a witness for the plaintiffs, which question involved a legal principle propounded by counsel for the defendants, we respectfully submit that the Court committed no error in sustaining the objection made thereto, for the reason that the legal principle involved in said question is incorrect as a matter of law. As we understand the law, in order for there to be an election of remedies, the rights or the remedies arising from the rights must be based upon the same set of facts. The original suit was based upon the theory of rescission of the contract because of fraud and misrepresentation. The case at bar was based upon an entirely different set of facts, to wit: a subsequent verbal promise to re-pay the moneys paid by the plaintiffs under the contract. The other reasons set forth in said third ground of appeal, in urging that the Court was in error in excluding the question, we submit are without merit, because the witness was fully interrogated thereto in the remainder of his testimony. We therefore respectfully submit that the Court committed no error in excluding this question.

4 and 5. The argument advanced by counsel for the defendants-appellants in support of grounds of appeal numbered 4 and 5, as well as the legal principle involved, are similar in part to those discussed in support of grounds of appeal number 3.

First, with respect to the question as to whether or not there was a definite binding agreement to repay the money, we respectfully submit that this was a question of fact, properly left to the jury. The Court very carefully and fully charged the jury as to this phase of the case (p. 64, l. 7; p. 65, l. 5).

We respectfully submit that there was ample testimony or facts from which proper inferences might be drawn that there was this definite promise to repay and an acceptance by the plaintiffs of the promise to repay, and that the jury having found the facts against the defendants, the verdict should not be disturbed.

The Court of Errors and Appeals, in the case of *Wharton v. Stoutenburgh,* 35 N. J. Eq., p. 266, held:

> "1. The fact that parties negotiating a contract contemplated that a formal agreement should be prepared and signed, is some evidence that they did not intend to bind themselves until the agreement was reduced to writing and signed. But, nevertheless, it is always a question of fact, depending upon the circumstances of the particular case, whether the parties had not completed their negotiations and concluded a contract definite and complete in all its terms, which they intended should be binding upon them, and which, for greater certainty or to answer some requirement of the law, they designed to have expressed in a formal written agreement."

Also in the case of *Levine v. Lafayette Building Corporation,* Vol. VI., No. 27, N. J. Advance Reports, 1196, Vice-Chancellor Fallon, held among other things as follows:

> "It is a question of fact depending upon the circumstances of the particular case whether the parties had not completed their negotiations and concluded a contract definite and complete in all its terms, which they intended to be binding upon them and which for greater certainty * * * they designed to have expressed in some form of written agreement."

We respectfully submit that there was no election by the plaintiffs in this suit. By reference to *Blum Building Company v. Ingersoll,* 99 N. J. Eq. on page 568, the very case cited by counsel for the defendant, the principle as therein quoted from "Bigelow on Estoppel" clearly shows, we respectfully submit, that there has been no election in this case, "upon that rule election is founded, a man shall not be allowed to approbate and reprobate." As we pointed out in answering ground of appeal number three, in neither of the actions instituted against these defendants, has there been in one an affirmance of the original contract and in the other a disaffirmance of the original contract. As we also said previously, both actions were based upon an entirely different set of facts. The first suit a disaffirmance of the original contract because of fraud and misrepresentation and the second suit an action upon an entirely different contract, to wit: an express promise to repay certain moneys which had come into the hands of the defendants from the plaintiffs. We cannot see how there is any difference between what has taken place between the parties to this suit in legal effect and maintaining an action on an express contract and then maintaining a subsequent action upon a *quantum meruit.* This would not constitute an election, 20 *C. J.,* p. 16.

In the Blum case cited above, on page 568, the Court quoted from a Massachusetts case cited therein, which held as follows:

> "The defense of waiver by election arises when the remedies are inconsistent as where one action is founded on an affirmance and the other upon a disaffirmance of a voidable contract."

There has been no affirmance by these plaintiffs of an original contract, but on the other hand, a constant and continued disaffirmance of the original contract.

We respectfully submit that the grounds of appeal in this case are wholly without merit; that the Court committed no error in excluding any of the testimony complained of and that the judgment should in all things be affirmed.

Respectfully submitted,

RIGGINS & DAVIS,
Attorneys of Morris Simon,
Plaintiff-Appellee.