NEW JERSEY COURT OF ERRORS AND APPEALS,

Between
JOHN T. HARROP, et al,
Complainants and Respondents,
and
LEWIS E. COLE, et al,
Defendants and Appellants.

On Bill &c.

BRIEF FOR DEFENDANTS.

Statement.

This suit was brought to compel the defendants to execute and deliver to the complainants a deed to certain premises in the Borough of Garfield, County of Bergen in this State, which the defendant Lewis E. Cole purchased from one Edward A. Isaacs on the twenty-first day of July, Nineteen hundred and five. The complainants alleged and testified that they employed the defendant Lewis E. Cole to purchase the land at a reasonable price as their agent and in their names and they would pay the purchase price and also pay to him the regular real estate agents commission on such sale. The defendant Lewis E. Cole

denied such agreement and alleged and testified that he purchased the property as his own, took title in his own name and paid for it with his own money and was under no obligation to convey to complainants. Sometime after the title passed, complainants offered to pay said defendant the amount he had expended and his fee and demanded the conveyance of the property to them. This was refused.

There was no written contract or memorandum relating to the transaction. The learned Vice Chancellor held that there was a constructive trust and that defendants should convey the property upon payment of the purchase price, with interest, and the taxes paid by defendant, Lewis E. Cole.

The question raised upon this appeal is, whether there was a constructive trust and that complainants are the real owners of the land. Defendants-appellants contend that there was no such trust and that the title is properly and legally vested in the defendant Lewis E. Cole.

Questions to be Settled:

I. Did purchase of land in question by defendant Lewis E. Cole (payment being made therefor with his own money) create a trust in favor of complainants?

II. Was defendant agent of complainants at the time of purchase of land in question?

III. Does question of status of parties depend upon *"statute of frauds"?*

IV. Was there such a *fiduciary relation* existing between parties to suit at time of purchase as to create a "constructive trust," *ex mulificio?*

POINT I.

A trust can only be created by a written instrument signed by the party creating it, except such as is created by operation of law.

It is contended by complainants that the defendant Lewis E. Cole was a trustee. The testimony shows conclusively that there was nothing in writing between the parties.

It is clear that there was no trust created between the parties. It could not be created by parol. The Statute of Frauds and Perjuries of New Jersey provides:

> *"Declarations or creations of trust to be in writing; trusts arising, transferred or extinguished by operation of law excepted.* That all declarations and creations of trust or confidence of or in any lands, tenements or hereditaments, shall be manifested and proved by some writing, signed by the party, who is or shall be by law enabled to declare such trust, or by his or her last will in writing, or else they shall be utterly void and of no effect; provided always, that where any conveyance hath been, or shall be made of any lands, tenements or hereditaments, by which a trust or confidence shall or may arise or result by implication or construction of law, or be transferred or extinguished by act or operation of law, such trust or confidence shall be of the like force and effect, as the same would have been if this act had not been made."

Comp. Stat. Vol. 2, page 2611.

This is conclusive against the contention of complainants unless they can satisfy the court that the case at bar falls within the doctrine of

"Constructive Trusts" or "Resulting Trusts." Such trusts only can be created by parol.

In *Wallace* v. *Brown,* 10 N. J. Eq. 308 the facts were:

Brown purchased premises in question from McClintock for $3500. *He took the deed in his own name and paid his own money* for it. Complainant alleged he purchased the property for her. She proved that Brown told McClintock, at the time he made the purchase, that he was making it for her. Chancellor Williamson held:

Such contract must be in writing, being within the statute of frauds and complainant could not recover.

Baker v. *Baker,* 75 N. J. Eq. 305 (decided April 1, 1909 by Vice Chancellor Emery), is conclusive on the question of the statute of frauds being a bar in a suit to impress a trust unless the evidence shows a resulting trust to have been established.

In the case now before the court, defendant contends there is no resulting or constructive trust established.

In *Ostheimer* v. *Single,* 73 N. J. Eq., p. 539, V. C. Leaming held:

Under the statute of frauds, requiring an express trust in land, to be manifested by some writing signed by the parties to be charged, parol evidence as to an agreement for the purchase of certain lands is insufficient to establish an express trust in relation thereto.

"It is urged on behalf of the defendant Single that the title of Herman Ostheimer was a trust title as to the one-third share now held by defendant, and that in consequence no dower right in that share has been acquired by complainant. I am entirely satisfied that it was the original intention of the three parties named (Herman Ostheimer, George Walker and defendant) that the land should be regarded as owned by them as tenants in common. Had they taken the precaution

to properly reduce their trust agreement to writing no difficulty would now be encountered in giving effect to the intention of the parties to the transaction. But the statute of frauds requires that an express trust in land must be manifested and proved by some writing, signed by the party to be charged. The effect of this statute is to render the evidence offered insufficient to establish an express trust in favor of defendant."

POINT II.

If any trust whatever can be read into this case, it would be an express trust and if so, it cannot be enforced, as such trust must be in writing.

The evident contention of complainants is that under the testimony (pages 34, 35, 41, 65 and 66) defendant was trustee for them under a certain and specified agreement, viz: to purchase the premises in question for them.

George S. Davenport (complainant) testified, under cross examination:

Page 34:

"Q. When you talked with Mr. Cole, as you say, with reference to the purchase of this property, did you fix a price as a limit—a maximum price?

A. No, sir.

Q. And what did you say that was?

A. I told him to start at $500 and if he could not get it for that why he could raise it to $600, and then to consult us if he could not get it for that.

Q. Did you and Mr. Harrop ever together see Mr. Cole about this transaction?

A. No, sir, not together.

Q. Was there any commission agreed upon by you and Mr. Cole?

A. No specific amount."

Page 35:

"Q. Did you ever write to him or have any written communication from him about it?

A. No, sir.

Q. Never had any written contract with him about it?

A. No, sir."

Page 41:

(John T. Harrop, complainant, testifying):

"Q. Now, Mr. Harrop, will you please tell us what negotiations you had, if any, with Mr. Cole, with reference to this property that is in litigation here?"

"A. An or about June 26, 1905, in the forenoon, I called at the grocery store of Mr. L. E. Cole and told him that I had just come from the office of Dr. Davenport and there we had a talk as to the purchase of these twelve lots formerly owned by Mr. Austin, which were held at that time by a man by the name of Isaacs as trustee for the creditors of this man Austin. I stated that we would like to purchase them and we wanted to get hold of them immediately; that we had the cash to pay for them and were ready to buy them; and I told Mr. Cole that the amount of money would be a small amount and asked him if he wouldn't just as well come in and take a chance with us, &c. &c.

Q. Was he in the real estate business too?

A. Why, he has been in the real estate

business as a small operator, as agent, for at least fifteen years to my knowledge."

Page 65:

"Q. Now, going back, Mr. Harrop, to your transactions with Mr. Cole, and calling your attention to the conversation of June 26, 1905, you say you asked Mr. Cole to take a chance with you and Dr. Davenport in the purchase of the disputed property, and that he refused unless you would guarantee that the steam shovel would take off all the earth; is that the whole of the conversation?

A. No, that isn't all of the conversation.

Q. What was said at that time between you and Mr. Cole with reference to Mr. Isaacs?

A. I asked Mr. Cole to act as agent, or to come in and take a chance with the doctor and I and purchase this particular piece of property and naturally he was to see Mr. Isaacs."

Page 66:

"A. I did not fix a maximum price; I told him if he couldn't get them for $75 to come back and see us and we would determine what to do."

Page 67:

"A. No, I left it open to him to accept and told him if he didn't come in with the doctor and I why he could think it over and if he was afterwards willing to come in and take his third interest we would be perfectly satisfied to have him do so. Up to the time this suit was started I was willing to give him a third interest rather than to get into any legal entanglements about it.

Q. Have you ever employed him as a real estate agent?

A. Why, not directly.

Q. Then you have not?

A. Not directly.

Q. Did you ever put any propertly in his hands for sale as a real estate agent?

A. I never did."

The theory of an express trust is entirely untenable under the doctrine in *Coffey* v. *Sullivan*, 63 N. J. Eq. 296 (decided June 17, 1901). In that case complainants sought to set aside a deed from their father to defendant and also a son, for lack of consideration. The son testified "that what was given to him he got to take care of his parents and he was going to take care of them." The case was taken to the Court of Errors and it was there decided that "these declarations of John go to establish an express trust, which it must be held was void because not reduced to writing and not signed by him, and was therefore not enforceable.

POINT III.

There is no resulting or constructive trust in this case.

"A constructive trust" is defined by Perry in his work on Trusts (6th Ed. Sec. 27) as follows:

> "*A constructive trust* is one that arises when a person clothed with some *fiduciary* character, by fraud or otherwise, gains some advantage to himself. Courts construe this to be an advantage for the cestui que trust or a constructive trust."

Resulting trusts are defined by the same author as follows:

"Resulting trusts are trusts that the courts presume to arise out of the transactions of parties, as if one man pays the purchase money for an estate and the deed is taken in the name of another. Courts presume that a trust is intended for the person who pays the money." Sec. 26.

Perry, Sec. 127.

A *resulting trust* is based upon the *intention* of the party who directs the transaction; a *constructive trust* is *imposed* upon him by equity. There was no fraud, hence this is not a *constructive trust.* Complainants have not shown by the evidence any fraud whatever. The *burden* is on them. This is universally construed to mean where fraud is established.

Section 210. "A gift or sale will not be set aside merely because it is to a confidential friend or adviser."

Complainants will undoubtedly contend that the case at bar falls within this rule and Cole and themselves sustained such relations. The testimony shows clearly that they were ordinary acquaintances and even if such relations were sustained, Cole was under no duty to purchase for complainants.

This is the *only* chance they have to even attempt to hold Cole and under the doctrine above quoted, even that fails.

Perry on Trusts, Sec. 135 (6th Ed).

"Parol proof cannot be received to establish a resulting trust in lands purchased by an agent and paid for by him with his own funds, no money of the principal being used for the payment: for the relation of principal

and agent depends upon the agreement existing between them, and the trust in such a case must arise from the agreement and not from the transaction, and where a trust arises from an agreement, it is within the statute of frauds and must be in writing."

Defendant Cole contends that there is no *fraud* shown and no *constructive* trust and if any trust at all, it must be a *resulting trust,* which is also denied. If we concede agency (which we do not) and the court should consider there is any question of resulting trust in the case, we are confronted with the above proposition as to parol evidence, and as there is no other kind of evidence in the case, the bill must be dismissed. The evidence is clear and uncontradicted that defendant Cole paid for the property *with his own money.*

There is no dispute as to this. When land is purchased *with the money of another, a resulting trust arises.*

Vice Chancellor Leaming in deciding *Ostheimer* v. *Single,* 73 N. J. Eq., 539 (542) said:

"When a person purchases land with his own money, and takes title in his own name, a trust canont be raised in favor of another by reason of the existence of a parol agreement upon the part of the purchaser that he would make the purchase for the benefit of another and permit the other thereafter to make payment. One who sets up a resulting trust in himself, the conveyance being to another, must show that the land was bought *with his money* and not merely that the purchase was made *for his benefit* or *on his account.*"

A subsequent payment of the money will not by relation attach a resulting trust to the origi-

nal purchase, for a resulting trust arises from the fact that the *money of the real* and not the *nominal* owner formed the consideration of the purchase *at the time* and became converted into land. Citing:

> *Reed St. Frauds* S. 911, 912;
> 3 *Pom. Eq. J. S.*, 1037;
> *Howell* v. *Howell*, 15 N. J., Eq., 75 and numerous others.

Also:

> "The statute of frauds requires that an express trust in land must be manifested and proved by some writing, signed by the party to be charged. The effect of this statute is to render the evidence offered insufficient to establish an express trust in favor of defendant."

In this case Ostheimer paid for the land and made a written agreement to sell to Walker and Single, each a one third interest therein free from encumbrance. He subsequently received one third of the purchase money from Walker and conveyed one third of the land to him. Singer paid one third but Ostheimer refused to convey. A bill for specific performance resulted in a decree directing Ostheimer to convey to Singer. Ostheimer made the deed but his wife refused to join and to that extent, the property was not free from encumbrance. Partition was subsequently had and each of the three, Ostheimer, Walker and Single had their shares set off severally. Ostheimer died and his widow sued for dower in the share of Singer. In that suit, it was necessary to show that Ostheimer was lawfully the owner of the land conveyed to Singer in order that his widow would recover. Dower was assigned by decree of the court. The court said, page 543,

"It is also manifest that the facts proven do not raise a constructive trust *ex maleficio.*"

This case sustains our contention on every point.

To establish a resulting trust in this case it must be clear that the consideration for the deed came from complainants.

Chancellor Runyon in deciding *McKeown* v. *McKeown,* 33 N. J. Eq., 384, says:

> "It is established that when a trust is sought to be raised as a resulting trust from the payment of the purchase-money, the proof must be very clear of the payment of the purchase money by the person in whose favor a trust by implication of law is sought to be raised; the fact must be distinctly established by satisfactory evidence."

In the case now before the court, it is clear that the complainants paid no part of the purchase money.

Yetman v. *Hedgman,* 88 Atl. Rep., 206, was an action brought to establish a resulting trust.

Complainant purchased a house and lot and took the deed in the name of his wife. There were no children. She died, leaving a brother and sisters, defendants in the suit, who claimed title by inheritance.

Complainant paid $1600 for the property. Husband and wife were ignorant and it was understood by them when the purchase was made that if she predeceased him, he would take by inheritance. It was contended that the property was absolute in the wife. Vice Chancellor Backes in his opinion, says:

> "When lands are purchased by one person, who pays the purchase price, and they are conveyed to another person, who is a strang-

er, a trust in the lands is implied or results in favor of him who has paid the consideration. But where a husband purchases and pays for lands and takes the title in the name of his wife, such a trust does not necessarily result."

He decided that the title descended to the defendants but that they held as trustees for the complainant and decreed conveyance to him.

POINT IV.

The burden of proof to establish a trust of any kind is on complainants.

The case of *Phillips* v. *Phillips*, 86 Atl. Rep., 949, decided May 9, 1913, is directly in point.

Bill was filed to establish a resulting trust in favor of complainant in a farm near Trenton, the legal title being in defendant. The deed was taken in the name of defendant, who was a cousin of complainant, and complainant paid the amount of consideration and claimed the title for that reason. Defendant claimed she had *borrowed* the amount from complainant and that she had used it to buy the farm.

The testimony was absolutely irreconcilable and evenly balanced. V. C. Backes held:

"The burden of establishing a resulting trust is on the party asserting it." He decided that complainant had not sustained the burden.

In *Parker* v. *Snyder*, 31 N. J. Eq., 164, certain premises were conveyed to defendant Lydia W. Snyder and complainant Elizabeth A. Parker sought to have same conveyed to her alleging that the purchase price had been paid by her and that it was understood the title was to go to her. The evidence was very contradictory as to how the purchase price was procured and paid, as there

were various dealings between the parties. Chancellor Runyon said (page 169): "To establish a trust resulting from the payment of purchase money under such circumstances, the proof must, where the trust and the grounds of it are denied, be clear." He cites *Groves* v. *Groves*, 3 Y and J 163; *Andrews* v. *Farnham*, 2 Stock, 91.

It is submitted that in the case at bar, the breach of a fiduciary relation is of a *quasi* criminal nature, and that in view of that fact, the complainants' case should be submitted to a more severe test with respect to the burden of proof than if it were an ordinary contractual relation between the parties. It will be observed from a reading of the testimony that the two complainants differed with each other in their testimony as to the so-called fiduciary relationship and how it was created and what they did say was denied by the defendant. This raises at once the question of doubt which in a case of this character should be resolved in favor of the defendant.

POINT V.

Defendant was not the agent of complainants in the transaction under review.

While it is true that an agency may be established or created without a writing, such agency must be proved by clear and irrefutable evidence.

The only testimony as to this is as follows:

Complainant Davenport testifying, p. 34:

Q. When you talked with Mr. Cole, as you say, with reference to the purchase of this property, did you fix a price as a limit—a maximum price?

A. No, sir .

Q. And what did you say that was?

A. I told him to start at $500 and if he could not get it for that why he could raise it to $600, and then to consult us if he couldn't get it for that?

Q. Did you and Mr. Harrop ever together see Mr. Cole about this transaction?

A. No, sir; not together.

Q. Was there any commission agreed upon by you and Mr. Cole?

A. No specific amount.

Q. Did you ever write to him or have any written communication from him about it?

A. No, sir.

Q. Never had any written contract with him about it?

A. No, sir.

In *De Vita* vs. *Loprete,* 75 N. J. Eq., 418 (decided 1909) it was decided:

If parties became agents for each other, for a sufficient consideration to procure a municipal contract for removal of garbage, and one of them procured it, but conducted the business for *his own benefit* with *his own capital* and labor and at his own risk, *equity would not impress a trust* on the business for the benefit of the defrauded parties.

The case of *Rogers* v. *Genung,* 76 N. J. Eq., 306 was cited by the learned Vice Chancellor, and doubtless is relied upon by the counsel for complainants as being conclusive in the case at bar and sustaining the doctrine of a constructive trust as applicable to this case. A critical examination of this case discloses that there is a marked difference in the facts between the two cases. The rule laid down in *Rogers* v. *Genung,* does not apply to the case now before the court.

In *Rogers* v. *Genung,* the defendant was a real estate broker who was employed by the complainant to purchase two tracts of land known as the

"Murphy" and "Conkling" properties. He was told that both were needed in order to constitute one large plot to be so held. He purchased the Murphy tract for his employer. The suit arose over the Conkling tract.

Genung negotiated with the owner and reported from time to time, difficulties about price and terms to his employer. The suit arose over the Conkling tract. Genung negotiated with the owner and reported from time to time difficulties about price and terms to his employer. At each report, the employer made new suggestions and propositions to be submitted by the agent. A contract was finally drawn, satisfactory to the employer and in accordance with what seemed to be the final terms as agreed upon. This was taken by the agent with the ostensible purpose of getting it signed by the owner—as the employer understood, and as discussed between himself and his agent. At this very time the agent had already drawn, and procured to be signed, a contract for the sale of the same property to his own wife. This was absolutely in fraud of his employer, in whose active employ he still was for the purchase of the same property. The court very properly held that the sale to the wife of the agent was a mere cover and that the fiduciary relation between employer and gent had not ceased at the time of the sale and decreed that the property should be conveyed to the employer upon payment of the purchase price.

We contend that the learned Vice Chancellor erred in applying the principles of that case in the case now before the court.

In this case we must bear in mind: (1) Cole was not a real estate agent (see testimony of complainants John T. Harrop, page 67, 69; George S. Davenport, page 75 and of defendant Lewis E. Cole, page 76); (2) Cole was *never employed* by complainant to purchase the property. A sug-

gestion or request was made (see testimony of John T. Harrop, page 41, fol. 30):

> "On or about June 26, 1905, in the forenoon. I called at the grocery store of Mr. L. E. Cole and told him that I had just come from the office of Dr. Davenport and there we had a talk as to the purchase of these twelve lots formerly owned by Mr. Austin, which were held at that time by a man by the name of Isaacs as trustee for the creditors of this man Austin. I stated that we would like to purchase them and we wanted to get hold of them immediately; that we had the cash to pay for them and were ready to buy them; and I told Mr. Cole that the amount of money would be a small amount and asked him if he wouldn't just as well come in and take a chance with us and he said "no, he wouldn't care to go in with the doctor and I unless I would give him the assurance that the steam shovel which was working in that vicinity at the time—unless I would give him a guarantee that the steam shovel which was working in the vicinity at the time would remove all excess of earth above what is known as the grade of Cambridge Avenue. I told him that I couldn't give him any assurance that the steam shovel would remove the earth, but I was willing to take the chances, and that the amount of money invested was so small that we wouldn't lose very much in any event. So, I asked him when he could go and see Mr. Isaacs, knowing that he usually went to New York once a week, about Wednesday, I believe, to buy goods in his line in the grocery business."

We are not bound by what Harrop and Davenport *thought* or *assumed*. Cole was *never in any fiduciary relation* to them. They have no more right to question what he did than has any stranger. Cole suggested that he *might be interested*

in the *purchase* of the lots if Harrop could "give" him any assurance that the steam shovel would remove the earth" from the lots in question (from tetsimony, fol. 10, page 42, also fol. 20, page 110). This assurance was never given and the condition made by Cole to complainants was not fulfilled, therefore there was no community or partnership interest. There was never an actual employment *as agent*. Complainants cannot show any agreement as to Cole making the purchase for them other than the one above referred to. Dr. Davenport testified to the general effect that he had asked Cole to purchase the lots and if he could not get them at a certain figure to report back (testimony, page 13, fol. 40) and that subsequently he, Davenport said, "Yes, I will get out of it" meaning the sale of the lots (page 15, fol. 30). He again withdrew any claim in a subsequent interview (page 78, fol. 10). Cole testifies that the only conversation with complainants relative to the purchase before the same was made was with Dr. Davenport and that was that he and Davenport were to go in together (page 76).

The attention of the court is particulary called to the *variances and contradictions* in the *testimony of the complainants* as to the alleged employment of Cole as agent (page 113, fol. 30). They cannot both be right and this testimony (*which is the vital element in the case*) is against them. Defendant C. E. Cole positively denies any arrangement with Harrop (page 70, fol. 30; 79, fol. 10).

We now have this situation as to the testimony relating to the alleged employment:

Harrop is eliminated;
Davenport testifies generally as to the fact of employment;
Cole denies.
Burden of proof upon complainants.
They fail to sustain it.
Cole is entitled to verdict.

Cole told Davenport he had purchased the lots with his own money—which he had raised—and to save hard feeling would divide (p. 79, fol. 20) but this was not accepted. The offer was wholly without consideration but was an evidence of his fairness.

Another great distinction between the present case and that of *Rogers* v. *Genung* is that in the latter, the negotiations were pending and never had been concluded—by lapse of time or actual conduct.

In the pending case, *whatever fiduciary relations* existed (if any) between any of the parties, they had absolutely and completely terminated and complainants had such knowledge.

Cole testified (page 87, fol. 10 to 40, and page 88, fol. 10 to 30, page 89, page 90) that he had asked the owner of the property to sell it—after his first conversation with Davenport and that there was a flat refusal. This he communicated to Davenport and there were no longer any relations at all between them and Davenport knew and understood it. In fact, he, Davenport then said he wanted Cole and himself to purchase another property, the Pos Farm. The substance of this testimony is not denied.

This *absolutely ended* negotiations and relations between the parties so far as concerned the premises in question and Cole was free to do as he chose. *Rogers* v. *Genung* therefore has no application.

POINT V.

A constructive or resulting trust to be valid must arise at time of execution of deed and not after.

Tunnard v. *Littell*, 23 N. J. Eq., 264, establishes the doctrine that a trust must arise *at the time of the execution of the deed.* In that case, the

lands in question were conveyed to defendant for $4000. It was contended by complainant that the lands were conveyed to defendant pursuant to an agreement between complainant and her husband and defendant and her husband, and each were to pay one half of purchase price. Defendant denied this and claimed that after the delivery of the deed to her, she was told by her husband that he and the husband of complainant had certain business transactions and as a result, the son of complainant was to have one half of the property. Complainant claimed a decree upon the ground of either an express or implied trust. Chancellor Zabriskie decided against both contentions. He held "When the trust is sought to be raised as a resulting trust from the purchase money, the proof must be clear of the payment of the purchase money by the person in whose favor a trust is sought to be raised. Such a trust must also arise at the time of the execution of the deed." He also held that the evidence disclosed no ground for the claim of an expressed trust and dismissed the bill.

In *Cutler* v. *Tuttle,* 19 N. J. Eq., 549, defendant attended a public sale and purchased property and took title in his own name. The purchase price was paid partly by money due from defendant to complainant and partly by money given to him by one Daniel L. Tuttle. Defendant contended that he held title in trust for complainant and Tuttle and complainant contended defendant held title wholly in trust for her. The evidence as to Tuttle's interest showed transactions between defendant and himself, which were not convincing as to consideration.

The court was satisfied that complainant was entitled upon the evidence to a decree and so decided. Mr. Justice Depue in his opinion, says:

> "Where there is a resulting trust, it must arise at the time of the execution of the deed;

it cannot be raised from subsequent matter arising *ex post facto.*"

In the case now before the Court it is clear from the testimony that defendant Cole paid *his own money* for the deed and complainants seek to show that because of conversations had with him after *he took the title,* he should permit them to take title and pay him the amount paid by him.

There is no proof whatever of any existing agreement at the time he obtained the deed that complainants were in any way entitled to receive it.

POINT VI.

There was no fiduciary relation between the parties at the time the deed was taken and no constructive trust can arise.

Perry, in his work on Trusts, defines "constructive trusts" as those which arise when a person clothed with some fiduciary character, by fraud or otherwise, gains some advantage to himself.

See also, "Words & Phrases" Vol. 2, page 1477.

The testimony shows clearly that there was no fiduciary relation at the tme. Cole had received no money from complainants with which to purchase the property. There was no consideration or thing of value between them; no general or special agency existed.

There were no such relations existing between them as to constitute the action of Cole in purchasing the property *with his own money* a fraud upon complainants.

He made no false representations and was under no obligation.

There was no trust *ex maleficio.*

POINT VII.

At the time of the purchase of the land in question, defendant was under no obligation to complainants and no fiduciary relation existed between them, and he had full right to purchase the same for himself.

There was an agreement originally between the parties that Cole should endeavor to purchase the land but this had expired by limitation of time and Cole was free to purchase for himself, the agreement not having been renewed.

POINT VIII.

Defendant is the legal owner of the land purchased and complainants bill should be dismissed, with costs.

CORNELIUS DOREMUS,
Counsel for Appellant.

New Jersey Court of Errors and Appeals.

Between
JOHN T. HARROP, ET AL.,
Complainants and
Respondents

AND

LEWIS E. COLE, ET AL.,
Defendants and
Appellants.

On Bill, &c.
Brief of
Complainants
Respondents.

Statement of the Case.

The complainants in this cause filed their bill in the court below to establish a constructive trust in a certain tract of land in the Borough of Garfield, purchased by the defendant Cole from one Isaacs on July 21st, 1905. They alleged that Cole purchased the land, while he was bound to them, under a verbal agreement to act as their agent in buying the property for them.

The defendant Cole, in his answer, admitted that he was requested by the complainants to obtain an "option" upon the land, and that in pursuance of the request had attempted to do so and failed, subsequently buying the property on his own account, after his employment on the part of the complainant had ceased. The complainants both substantiated the allegations of the bill by their testimony at the trial. The defendant produced no witnesses other than himself.

The court found the facts in favor of the complainants, and therefore advised a decree establishing a constructive trust on behalf of the complainants in the land, and directing the defendant to execute the trust by making a conveyance to Harrop and Davenport, on their payment of the purchase price.

The defendant below has taken an appeal to this court contending that there was no constructive trust in the land in question in favor of the complainants and therefore that the decree below should be reversed. The respondents contend that the decree was right and should be affirmed.

POINT I.

The complainants were properly held by the court below to be entitled to a constructive trust in the lands in question. It is not essential that such trust should be in writing.

The statute of frauds specifically exempts from its operation "a trust or confidence" arising by "implication or construction of law" (*2 Comp. Stat., 2611*).

The case *sub-judice* is on all fours with *Rogers v. Genung, 76 N. J. Eq., 306* (*1909*). In that case, precisely as in this one, an agent was employed to purchase land, and after negotiating with the owner for some time, bought the property in the name of his wife and refused to convey the same to his principal. The defendants there made the same contention as those here—that as there was no agreement in writing, a trust could not be decreed. This court,

speaking through Mr. Justice BERGEN in answer to this contention said :

> " The defendants also insist that, if it be true that the transaction was carried out for the express purpose of defrauding the complainant, still he is without remedy, because the trust, not being declared in writing is subject to the statute of frauds. But the statute does not apply where the ' trust or confidence shall or may arise or result by implication or construction of law.' No trust was created in this case by any agreement of the parties. It arose by implication or construction of law out of the confidential relations of the parties. Genung was not authorized to buy and hold in trust. His duty was to aid his principal in purchasing, and, having been engaged to do this, he cannot, by any fraudulent act, during the period of his engagement, thwart his principal by making it impossible for him to accomplish his purpose, and, if in carrying out such disloyal intent he makes a contract of purchase in his own name, it is the contract of his principal."

The case of *Wallace v. Brown, 10 N. J. Eq. 308*, cited by the appellants, is a decision by Chancellor WILLIAMSON in 1855, and if applicable to the case in hand is distinctly overruled by *Rogers v. Genung, supra.*

Baker v. Baker, 75 N. J. Eq. 305, cited by appellants, is a case with respect to *resulting* trusts and therefore has no application here.

Ostheimer v. Single, 73 N. J. Eq. 539, cited by the appellants, is an opinion by *Leaming V. C.* The words quoted in my adversary's brief are with respect to an *express* trust and not a *constructive* one such as was proven in the case *sub judice.* Later in the same opinion the learned Vice-Chancellor says : " It is also manifest that the facts proven do not raise a constructive trust *ex malificio.*" Of course this is just what we contend the facts in the present case do prove.

POINT II.

The appellants cannot obtain the benefit of the statute of frauds as they have admitted a contract of employment in their answer, and did not claim the benefit of the statute.

Paragraph one of the answer sets out:—"the complainants, on or about said date, asked this defendant if he would endeavor to obtain an option for the purchase of said lands for said complainants, which defendant agreed to do."

Paragraph four sets out the attempt of the defendant Cole to obtain an option and his failure so to do. Sufficient facts are thus averred to admit a contract of employment.

Under such circumstances if the defendant Cole desired to take advantage of the statute of frauds he should have set it up in his answer.

Gough v. Williamson, 62 *N. J. Eq. 526.*
Ashmore v. Evans, 11 *N. J. Eq. 151.*
Wakeman v. Dodd, 27 *N. J. Eq. 564.*
Dean v. Dean, 9 *N. J. Eq. 425.*

As stated by Chancellor ZABRISKIE in *Walker v. Hill*, *21 N. J. Eq. 202:*

> "The settled doctrine of the courts is, that if the answer admits a contract, without stating that it was not in writing and setting up the statute of frauds, the statute cannot be used as a defence. The admission will be held to be of a legal contract, that is, a written one, and no proof need be offered of it."

The learned Vice-Chancellor said in the court below with respect to this aspect of the case (page 127 of the case) :

> " After parties have joined issue on their pleadings as to what oral contract they entered into, and each has endeavored in a protracted trial by the production of witnesses, to support his view as to the terms of the contract, I have a very grave doubt whether it is permissible to the defendant, acting upon a suggestion from opposing counsel or from the Court, to say at the end of his argument, or by a supplemental brief : Well, it does not make any difference what this contract was. I have denied by existence of the contract set forth in the bill of complaint and I now invoke the statute of frauds as a complete defence even if the Court is satisfied as the result of the trial that the complainant's account of the verbal contract is true and mine untrue."

POINT III.

As defendant Cole has admitted a contract of employment in his answer the burden is upon him to show that his obligation to the complainants had ceased before he purchased the land in his own name for his personal benefit.

The complainants not only had the benefit of their own evidence in the court below, but were corroborated by the answer which admitted that a contract of employment with respect to the purchase of the land in question, had existed. The burden was upon the defendant to show that it had terminated.

The circumstances in this case are singularly like those of *Rogers v. Genung, supra.* In that case the complainant desired to purchase two tracts independently of each other and in order to carry out a scheme of development. In this case, the complainants below were the owners of a large tract of land adjoining the premises in question. The greater part of the land they already owned either was or had been very much above the grade of the adjacent streets. In order to grade the property, they had at great expense, laid railroad tracks over it and were loading the extra earth on cars and thus having it carried away. The tract described in the bill was also very much above grade, and on account of their peculiar facilities for improving it on account of the tracks in question, the complainants conceived the idea of purchasing it.

It will be seen by the examination of the case that no such complication as existed in *Rogers v. Genung, supra,* as to whether the agent was acting for the purchaser or seller, arises in this instance. Cole represented no one but the complainants.

It is no answer to the present suit to contend, that as the defendant Cole was not an ordinary real estate agent and had received no compensation, he cannot be held to account. *Wright v. Smith, 23 N. J. Eq., 106, cited in Rogers v. Genung, supra,* holds that a voluntary or gratuitous agent is under the same obligation as a paid one. In the present instance, however, the defendant would have been entitled to what his services were reasonably worth.

For these reasons and those further set forth in the opinion of the court below the decree should be affirmed.

Respectfully submitted,

WILLIAM W. WATSON,
of counsel with Complainants
and Respondents.

INDEX.

Bill of Complaint.

IN CHANCERY OF NEW JERSEY.

To His Honor William J. Magie,
Chancellor of the State of New Jersey.

Humbly complaining showeth unto your Honor your orators John T. Harrop and George S. Davenport of the Borough of Garfield, in the County of Bergen.

That on or about the third day of July, in the year One thousand nine hundred and five, Edward A. Isaacs of the City of New York, in the County of New York and State of New York, was lawfully seized of all that certain tract or parcel of land, situate, lying and being in the Borough of Garfield aforesaid, and described as follows:

Beginning at a point on the westerly side of Cambridge Avenue distant two hundred and twenty-five feet southerly from the corner formed by the intersection of the westerly side of Cambridge Avenue with the southerly side of Hudson Street and running thence (1) Westerly parallel with Hudson Street two hundred feet to the easterly side of Bloomingdale Avenue; thence (2) Southerly along said side of Bloomingdale Avenue one hundred and fifty feet; thence (3) Easterly parallel with the first course two hundred feet to the westerly side of Cambridge Avenue, and thence (4) Northerly along said side of Cambridge Avenue one hundred and fifty feet to the place of beginning.

That on or about the day and date last aforesaid your orators, being desirous of purchasing

said lands approached one Lewis E. Cole of the Borough of Garfield aforesaid, and requested him to act as agent for them in and about the purchase of said land, promising and agreeing that your orators would compensate the said Cole, for his services in that behalf by paying him the regular real estate agent's commission in that locality for purchasing land, that then and thereupon the said Lewis E. Cole promised and agreed to and with your orators that he would purchase said real estate for them and in their name at such reasonable price as might be agreed upon between your orators and the said owner.

That soon after the said Lewis E. Cole undertook said employment in behalf of your orators as aforesaid the said Cole entered into negotiations with the said owner for the purchase of said land and bought the same for an amount unknown to your orators but which your orators believe to have been a reasonable price and well within the amount that your orators were willing to pay for the same, but the said Lewis E .Cole disregarding his duty, as agent in the employment of your orators as aforesaid, purchased said land and took title thereto in his own name or in the name of some other person unknown to your orators who holds title thereto for him; that after such purchase, your orators went to said Cole and requested him to disclose to them the price that he had paid for said land, but this the said Cole refused to do.

That since the purchase of said land by said Cole he has treated the same as his own and has sold under contract of sale upon which partial payment has been made a small part of said land for the sum of one hundred and fifty dollars to one Robert Geschine of the Borough of Garfield aforesaid, which portion is particularly described as follows:—Beginning at a point on the westerly

side of Cambridge Avenue distant one hundred and ten feet northerly from the corner formed by the intersection of the westerly side of Cambridge Avenue with the northerly side of Somerset Street, and running thence (1) westerly parallel with Somerset Street one hundred feet; thence (2) northerly parallel with Cambridge Avenue twenty-five feet; thence (3) easterly parallel with the first course one hundred feet to the westerly side of Cambridge Avenue and thence (4) southerly along said side of Cambridge Avenue twenty-five feet to the place of beginning.

That although the said Cole procured a deed for said land on or about the twenty-first day of July last past, he has kept the said deed from record up to the present time and refuses to disclose the said deed or the purchase price paid for the said property.

That the said parcel of land purchased by your orators was and is of peculiar value to your orators, and they employed the said Cole to purchase said land because your orators believed the said Cole to be a person of character and ability and would well and faithfully perform the duties of such employment.

That the reasons which animated your orators in the purchase of said land and which make the same more valuable to them than any ordinary individuals were these; that the premises in question as well as most of the surrounding property was or is of so high an elevation above the grade of the streets and highways adjoining as to be unfit for use in building or otherwise improving it; that the said premises were of little value to any ordinary person having no facilities for grading the same, but your orators had for some years prior to the date in question at great trouble and expense procured tracks for steam cars to be laid on a large tract of land adjoining the premises

in question and of which your orators were part owners and connected with the Erie Railroad, with which railroad your orators made arrangements for the removal by steam shovel without any expense to them of any earth on any lands of theirs in that vicinity, that your orators intended to extend their tracks to the premises in question and have the elevation of these lots removed without expense to them and then convert the property in question from a value of about six hundred dollars in its present condition to about three thousand dollars if such elevation was removed.

And your orators have frequently and in a friendly manner applied to the said Lewis E. Cole and requested him to disclose the price paid for said premises and accept the amount thereof from your orators and deliver to them a deed therefore, which the said Lewis E. Cole refused to do, but your orators well hoped that the said Lewis E. Cole would have complied with such reasonable requests, as in justice and equity he ought to have done.

To the end, therefore, that the said Lewis E. Cole may, without oath, oath being waived, full, true and perfect answer make to all and singular the matters aforesaid, and that as fully and particularly as if the same were here repeated and more especially that he may set forth and discover what price he paid for the said premises and in whose name the title thereto is now placed, and that the said premises be decreed to be the property of your orators' upon their payment of the price paid therefor by the said Lewis E. Cole together with the compensation for his services for your orators and that the said defendant account to your orators for any moneys received on account of the sale by him of any part of said premises, and that your orators may have such other

and further relief in the premises as the nature of the case may require, and as shall be agreeable to equity and good conscience.

May it please your Honor, the premises considered to grant unto your orators the state's writ or writs of subpoena, issuing out of and under the seal of this honorable court, to be directed to the said Lewis E. Cole and Emma Cole, his wife, Robert Geschine and Edward A. Isaacs, commanding them, and each of them, by a certain day and under a certain penalty therein to be expressed, to be and appear before your Honor in this honorable court, then and there to answer all and singular the said premises and to stand to, abide by and perform such order and decree therein as to your Honor shall seem meet, and shall be agreeable to equity and good conscience.

And your orators, as in duty bound, will ever pray, &c.

WATSON & WATSON,
Solrs. of Complt.
A True Copy

ROBERT H McADAMS,
Clerk.

Answer.

IN CHANCERY OF NEW JERSEY,

Between

JOHN T. HARROP and GEORGE S. DAVENPORT,
Complainants,

and

LEWIS E. COLE, EMMA COLE, his wife; ROBERT GESCHINE and EDWARD A. ISAACS,
Defendants.

Answer.

The defendants, Lewis E. Cole, and Emma Cole, his wife, herein, answering the bill of complaint, allege;

I. Said defendant, Lewis E. Cole, denies the allegations contained in the third paragraph on page 1, of the Bill of complaint that said complainants approached this defendant and requested him to act as agent for them in the purchase of the land described in said bill of complaint, and alleges that on the contrary, the complainants, on or about said date, asked this defendant if he would endeavor to obtain an option for the purchase of said lands for said complainants, which defendant agreed to do.

II. Defendant also denies that there was any offer or promise on the part of the complainants to pay the defendant, Lewis E. Cole, any commissions or compensation for his services as agent for obtaining such option or purchasing said land.

Answer.

III. And this defendant further denies the allegations in said paragraph that he would purchase said real estate for them and in their names at such reasonable price that might be agreed upon between complainants and the owner.

IV. And this defendant further answering denies that he undertook to purchase said land, or any employment for or on behalf of the complainants as alleged in said Bill of Complaint except that defendant immediately after the request made by the complainants that defendant should obtain an option for the purchase of said land, and in pursuance thereof, called upon the owner of said land and endeavored to obtain an option for the purchase thereof, for said complainants, and said owner absolutely refused to give an option to said complainants or to any other person and this defendant immediately notified said complainants of the aforesaid refusal and no further employment request or arrangement was made or entered into between said complainants and this defendant with reference to the purchase or obtaining in any manner of the aforesaid property and all transactions bewteen them with reference thereto at that time ceased and determined

V. And this defendant further answering alleges that some time thereafter, this defendant again sought the owner of the aforesaid premises and purchased said premises paying the purchase price therefor and obtaining a deed which this defendant now has and is ready to produce to this honorable Court, and defendant alleges that said purchase was made in good faith and after all negotiations or arrangements between this defendant and said complainants had long ceased and this defendant was under no duty or obliga-

tion to purchase said premises or obtain an option thereon for the benefit of said complainants or either of them.

VI. And this defendant further answering claims and alleges that the title to said premises is a bona fide title for a valuable consideration in this defendant, and free and discharged from any claim of any character, or any interest therein, on the part of the complainants and that this defendant was not bound and is not bound to disclose to the complainants the amount of the purchase price given by him for said premises or to exhibit to them the deed thereof or in any manner to account to them for his actions in the premises.

VII. And this defendant further answering admits that he was contracted to sell to Robert Geschine that portion of said premises described in the Bill of Complaint at folio 3 thereof, but denies that the sum of One hundred and fifty dollars has been paid to this defendant by said Robert Geschine.

VIII. This defendant further answering alleges that he has no knowledge as to the alleged peculiar value to the complainants of the said land and that if it has a peculiar value to them, this defendant is not bound to convey the same to them or give them any interest whatever therein.

IX. This defendant further answering admits that the premises in question as well as some of the surrounding property, is of a high elevation but denies that it is unfit for use in building or otherwise improving it, and further denies that said premises are of little value to any ordinary person having no facilities for grading the same but alleges that on the contrary said

premises are of value for the sand and gravel now thereon which sand and gravel can easily be disposed of by selling the same to persons requiring such materials for building purposes.

X. And this defendant further answering alleges that he has been informed on credible authority and believes it to be true that the complainants are not and never have been the owners of the tract of land adjoining the premises in question or that said complainants have made arrangements for the removal of the earth upon said premises or the adjoining premises but believes and charges the fact to be that said land is and has been for some time last past, owned by the New Jersey Construction Company and that whatever arrangements have been made looking to the removal of said earth in the manner set forth in the bill of complaint, have been made by said New Jersey Construction Company and not by complainants.

XI. And this defendant further answering alleges that he has no knowledge as to the intention or claimed intention of the complainants to convert the property in question from a value of Six hundred dollars to Three thousand dollars, and that if such intention were true, this defendant denies that it is of any value in the present contention and is wholly immaterial thereto.

XII. And this defendant further answering admits that said complainants have requested him to disclose the price paid for said premises or to accept the amount thereof from said complainants, but denies that said complainants ever requested him to deliver to them a deed therefor or that he ever refused so to do.

XIII. And this defendant further answering alleges that he is under no obligation or claim

to convey said premises or any portion thereof to the complainants, or to make discovery to them of any of his acts with relation to the title thereto, and alleges that said premises are his bona fide property purchased with his own money and free from any claim whatsoever on the part of the complainants.

And these defendants humbly pray to be hence dismissed with their reasonable costs and charges this behalf most wrongfully sustained.

CORNELIUS DOREMUS,
Solicitor and of counsel with said
defendants, Ridgewood, N. J.

State of New York } ss.:
County of New York }

LEWIS E. COLE, being duly sworn on his oath doth depose and say, that the matters and things set forth in the above answer so far as relate to his own acts are true and so far as relate to the acts of others, he believes them to be true.

LEWIS E. COLE.

Sworn to and subscribed on the sixth day of November, A. D. 1905, before me

WM. L. CLARK,
Master in Chancery of New Jersey.

A True Copy,

ROBERT H. McADAMS,
Clerk.

George S. Davenport—For Complainants—Direct.

Chancery Chambers, Jersey City,

Tuesday, October 22, 1907, 10 A. M.

IN CHANCERY OF NEW JERSEY.

Between

JOHN T. HARROP, et als.,
Complainants,

and

LEWIS E. COLE, et als.,
Defendants.

On Bill &c.

Testimony of witnesses, taken in the above stated cause, at the Chancery Chambers in Jersey City, this twenty-second day of October, 1907, before his Honor

Hon. EUGENE STEVENSON,
Vice Chancellor.

APPEARANCES:

WILLIAM W. WATSON, Esq., For the Complainants.

CORNELIUS DOREMUS, Esq., For the Defendants.

GEORGE S. DAVENPORT sworn for the complainants, testified as follows:

Direct Examination by Mr. Watson:

Q. Where do you live?
A. At Garfield, New Jersey.
Q. What is your occupation?
A. Physician.
Q. How long have you lived in Garfield?
A. 15 years.

Q. Do you know Mr. Cole, the defendant in this suit?

A. Yes, sir.

Q. Will you please state to the Court what relations, if any, you have had with him in reference to this property that is in dispute?

A. Yes, sir. On June the 26th, 1905, Mr. Harrop stopped at my office and said it was time that we purchased those lots, inasmuch as we had the shovel on the hill——

Mr. Doremus: Of course, I don't want to be technical in making objections all the time, but that conversation is clearly objectionable.

The Court: Certainly. The witness should not give any conversation between himself and Mr. Harrop.

Q. Doctor, were you interested in any property in the neighborhood of these lots in dispute?

A. Yes, sir.

Q. In the spring of 1905?

A. Yes, sir.

Q. What property were you interested in in that neighborhood?

A. About 58 or 60 lots adjoining.

Q. In the borough of Garfield?

A. Yes, sir.

Q. What were you doing with those lots?

A. We were improving them; they were too high as to elevation for building purposes and we got a steam shovel to take away the earth.

Q. Did you ever see Mr. Cole with reference to the 12 lots that are in dispute in this suit?

A. Yes, sir.

Q. On what date?

A. June 26, 1905.

Q. Just tell us, please, the conversation you had with Mr. Cole.

A. I asked Mr. Cole if Mr. Harrop had seen him that morning in regard to the purchase of lots for him and he said he had but didn't know as he was going to do it, because Harrop was a mighty independent fellow and he didn't know as he wanted to do it for him. I asked him to explain what he meant and told him if he couldn't attend to it I would go over and get Mr. Howland, a real estate agent in Passaic, to do so. I asked him why he couldn't attend to it right away and he said he would be quite busy that week, because his brother-in-law would be married and he wasn't sure whether he could do so that week or not, but he would attend to it the following week anyway. I asked him if Mr. Harrop hadn't given him an opportunity to share in this property and he said yes, but that he had told Mr. Harrop he did not care to take a share in it unless he could be assured that the remainder of the earth on these lots could be removed and that Harrop said he couldn't do that. That he said he wouldn't join with us in the purchase of the property—said it was poor property anyway; it wasn't worth more than $500 he thought, and he didn't care anyway to own any property with Mr. Harrop; that he was a mean sort of fellow and he didn't think he would get the right sort of treatment. I assured him that so far as I could have any control over the matter he would get right treatment, and I also said I would like to see him purchase the property because I wanted to see him get the commission. But he said he didn't know; he was afraid Harrop would cheat him out of it. I told him he knew me well enough to trust me, and I would see that he got a square deal and also his commission. And then he appeared discouraged over it; he didn't think the property was worth much. I told him I didn't think that made much difference, as we were will-

ing to take chances whether he was in the deal or not. And we kept on in that way, and I finally said: "Are you going to purchase it for us or not; if not, we will go and see Mr. Howland about it", and then he said "yes". He then asked how much he should offer for it, and I told him he could start off with an offer of $500 and if he couldn't get it for that he could raise it to $600, and if he couldn't obtain it for that sum to report back to us. He then said all right, he would try to do it—that he would try to attend to it that week, but on account of his brother-in-law being married that week he might not be able to attend to it until the following week. Then he says, if you see Harrop you be sure to tell him not to go near Howland, because that will spoil the deal, and I says, "all right". Later in the week I called on him and asked him how he was succeeding with the deal and he said he hadn't done anything yet; that he didn't want to trust to writing about the matter as he thought he could do better by seeing him. So the next week I was in twice to see him and he said he hadn't done anything but was making arrangements to meet Mr. Isaacs; that he didn't want to write him because he was sure he could do better by having a conference with him about it. Then the latter part of the week I dropped in and asked him how he was getting along with the deal and he said he was very much encouraged and thought he could put it through all right. He said he had his clerk take some pictures showing how high it was above the grade of the street and said he thought he could get it quite reasonably, and he would submit our offer. The next Sunday I saw him on the street and invited him to get in the carriage with me; I was going over to Passaic to make a professional call, and on the way over there I asked him if he had heard from Isaacs in

regard to the lots and he seemed a little discouraged and somewhat embarrassed. He said he was afraid he wouldn't be able to put the deal through— was afraid he wanted more than we were willing to give. I told him he needn't worry about that, to go ahead and see what he could do. The next week I was in again, the fore part of the week and also around the latter part of the week and he hadn't heard yet. I asked him why he hadn't heard whether Isaacs would take the offer or not, and he gave as his excuse that Isaacs —I believe as trustee, or attorney, or agent— would have to see the different people who owned an interest in it. There were several who owned an interest in it and that was one reason why it took longer. The next week I went in for something in the store and he says: "Say, George, I've got the lots". I says: "That's good; what did you have to give?" "Well" he says—he hung his head and says, "more than expected". "Well", I says, "what is it?" He still hung his head and said he had to give more than he thought he would have to. I was a little puzzled then, and I asked him further about it. He says: "Why, George, I'm going to put Harrop out of this deal". I says, "why should you do that?" He says, "why, Harrop is mad at me". I asked him if he had had any trouble with him and he said "no, it was just Harrop's way". I says, "what makes you think he is mad at you?" and he says, "he went past the store twice and didn't speak to me." I asked him where he saw him and he said once he was in the driveway one day and Harrop passed and didn't speak to him. He says: "Say, George, you have got a good many lots and I want these myself; you get out of this deal, wont you?" I says, "yes, I will get out of it and went away and left him. Just as I was leaving he says, "Now, you know I haven't got entire control of

this property yet, but I have an agreement to get it and I guess the deed will be along the first of the week", and he says, "now you be careful and don't say anything to Harrop about it, because I'm afraid he might block me yet in getting it", and then I went away and left him. Mr. Harrop and I consulted about the matter later on, and he called on Mr. Cole, and of course that is for him to testify to.

Q. Don't tell us what Mr. Harrop said, but just what you said.

A. Later on I called on Mr. Cole and told him he had put me in a mean position, and here was a case where he hadn't done the right thing and I should have to pursue the honorable course and support Mr. Harrop in the matter, and if there was going to be any trouble he would have to hand over these lots. He then said he had no objection to my going in with him, but he wouldn't have Harrop in the deal at all, and he wouldn't have any dealings with him. I told him that he had certainly done wrong in not delivering them over—I thought he had violated the law, or at least he had violated his neighbor's trust. He laughed a little and said I would see things different when I got older. I told him there would be trouble over the lots if he didn't turn them over, and he told me I could have my share, but he wouldn't have anything to do with that man Harrop. I says, "you ought never to have done anything about it then; you should have refused to purchase them for him," and he told me he had not violated any law, inasmuch as he hadn't received any money from Harrop and had no writing with him, and he says, "a man isn't held legally responsible for a thing of that kind." He wanted to know if I denied he had a right to purchase the lots and I told him under those conditions I thought he had not. Then he went

and got a letter to the effect that two years ago he tried to purchase these lots, and he thought that showed he had a right to purchase them now. I told him that made it all the worse for him. I told him at the time when he purchased them why didn't he refuse, and tell Harrop he wouldn't purchase those lots for him, and he says, "because Harrop was so hot after them and he would have gone after them himself, and then he wouldn't have been able to get them."

Q. Did you ever see him after this suit was started?

A. Yes, I had several talks with him after that. In one conversation he bored me a good deal and says he and I had always been friends and that I should stand by him in the matter. I says, "that would be impossible now;" that I would rather have owned the lots with him than with Mr. Harrop before this happened, but that under the circumstances I would have to support Mr. Harrop. I told him I felt so annoyed over it that I was willing to give up any claim I had on the lots if he could settle the matter up with Mr. Harrop. But no, he said he wouldn't have anything to do with Harrop, but he said he would divide up with me though. Then I asked him what he paid for them. "Well," he says, "it was a little less than $800." I asked him why it was as much as that, and he said he had a lot of expenses in connection with it, in order to get them. I told him he could submit to me the exact amount, but that I didn't think it would go through; I didn't know that Mr. Harrop would take them from me. But he says he could give me half and then he would have half and I would have half; but I told him I didn't know as it was in his power to give me half of it at that time.

Q. Did you have anything else to say to him?

A. Well, there were some other conversations,

but I don't know as there was any other conversations I could repeat.

Q. Why did you desire to purchase these lots?

A. Because, as I said, we owned 58 or 60 other lots adjoining that property.

Mr. Doremus: I desire to interpose an objection to this. What was in the mind of the doctor was not in any sense binding upon us, unless it was communicated to Mr. Cole.

The Court: I suppose the object of the question is to bring out the special value alleged.

Mr. Doremus: Is that the proper way to do it?

The Court: No, I think the form of the question is not proper; I think the inquiry should be directed to the special circumstances of the property, its relation to other property belonging to the witness.

Q. Doctor, were you interested in any other property in that neighborhood?

A. Yes, sir.

Q. Just explain the situation of these lots and the property you were interested in. This is a map of a portion of the borough of Garfield, isn't it? (exhibiting to the witness a map marked Exhibit C-1) Where are these lots located?

A. I should think about right over in this locality here, fronting on Cambridge Avenue and Bloomingdale Avenue, 12 lots, six lots each way, and right over here is the rest of our property.

Q. How many lots were you interested in in that neighborhood?

A. I think it is about 58 or 60.

Q. (By the Court) Is the portion of the map which shows these lots indicated by number?

A. Well, it would be the portion of this block No. 29.

Q. How much of that?

A. Well, there are 12 lots under dispute.

Q. Lying whereabouts in block No. 29?

A. Right here (indicating on map).

Q. You mean, pointing to the north of the number mark?

A. No, right included in this line south of the number 29.

Q. On the westerly side of Cambridge avenue, 110 feet north of Somerset street?

A. Yes, sir.

Q. Now, how long have you been interested in this other property?

A. Oh, six years, I should think.

Q. And do you hold title to it in your own name, or how are you interested in it?

A. At that time I held title as trustee.

Q. Now have you been improving the other property in any way?

A. Yes, sir.

Q. What have you been doing?

A. Been taking off the excessive earth from it.

Q. In what way have you been taking off the excessive earth?

A. With a steam shovel.

Q. And what has been the condition of that property through there, prior to the time that you had the steam shovel working?

A. Well, it was very high above grade.

Q. What was the condition of these lots with reference to the grade of the streets adjoining before you employed Mr. Cole to purchase them?

A. Well, I don't know the exact elevation, but quite a good many feet above the established grade of the streets.

Q. (By the Court) What was the character of the soil?

A. There was a top soil of a few feet and underneath that it was gravel, good for concrete work,

which we knew by taking off the top excess earth as far as we dared to go up to the lots.

Q. Do I understand that you had, on your other adjacent property, removed the gravel and this excess of soil or earth, up to the line of this property?

A. Yes, sir.

Q. And how did you do it?

A. Well, along there where the best gravel was, we were selling off sand and gravel, and the major portion of the work was with steam shovel.

Q. How far has the steam shovel gotten in the work of taking the surplus earth from these other lots?

A. I should think three-quarters. We are now up near Bergen street.

Q. Is it anywhere near the property in litigation?

A. Yes, I think one more cut of the shovel through there will enable us to strike that property.

Q. Who obtained the steam shovel for the work there?

A. Mr. Harrop did most of the planning and most of the work. I did some.

Q. Is the property in litigation in this case of any value to be used in connection with the other property which you have there?

A. Well, yes, sir.

Q. (By the Court) What was the value of the 12 lots, in your judgment, when you first went to Mr. Cole to buy the property?

A. That would depend on whether you could handle the gravel on it.

Q. Well, with the facilities which you had, what would be the value to any purchaser who would either use the land as it is or sell the gravel and sand off of it?

A. Well, for building purposes it was almost

valueless, and that would have to be figured out by the amount of gravel that was in it and what it would cost to remove the top soil. Of course we had the shovel there and we could remove the excess earth immediately and then remove the gravel.

Q. Do I understand you to say that, in your judgment, those twelve lots were practically incapable of any beneficial use until the excess soil had been removed in some way?

A. Yes.

Q. Why?

A. No person would want to build on a hill like that, the way it stood, because the cuts through made the lots very high. The cuts were very deep all around.

Q. Why was it you had special facilities for removing this excess?

A. Because we already had this steam shovel on the property and one more cut would bring us up to this property.

Q. Did you have a track on this property?

A. Yes, the Erie track; otherwise it would be very expensive to use.

Q. What do you mean by that?

A. They wanted the excessive earth; they wanted the dirt.

Q. Was this steam shovel on a track connected with the Erie track?

A. Yes; they had a switch right off the Bergen County short cut.

Q. Where were they taking the material?

A. The most of it was used by the Erie just out of Jersey City, to fill in what they called the "island", and they had one switch around to the mills of Passaic.

Q. What was their arrangement with you; did they do the hauling?

A. Yes.

Q. And pay you in addition?

A. No, sir.

Q. You hired the shovel?

A. No sir, they hired the shovel.

Q. Did you pay for the shovel?

A. We had to pay for the grading and laying the track in there for the shovel.

Q. And was the expense for that the only expense you were subjected to?

A. Well, I believe we had to keep a switchman, paying for the grading at the switch and pay for the switch, and we had to obtain the right of way for that, and made some concessions—I don't remember just how many lot-holders we had to pass over. Mr. Harrop is more familiar with that than I am.

Q. And did you pay for operating the shovel?

A. No, sir.

Q. Did you have to hire any employes around the works?

A. Yes, we had a switchman there all the time to guard it.

Q. Now, doctor, could you form any estimate of the value of these lots in the condition that they were before Mr. Cole purchased them?

A. Why, Mr. Cole himself said he wouldn't go in with us on the basis of $500 for the whole tract, yet we were willing to take them at that and more too, owing to the gravel, etc. that was there, and having the shovel ready to improve the lots we could handle it to advantage.

Q. How near to these lots have the building operations there in Garfield progressed?

A. Well, lots are built on right here on Somerset street, and also along here (indicating on map). There are the disputed lots.

Q. (By the Court) Where are you pointing to now?

A. This is the disputed point, right in this block, and there are houses right in here.

Q. Now you say "houses right in here," but that doesn't mean anything on the record.

A. Those are 110 feet deep there.

Q. Fronting on what street?

A. Somerset street.

Q. Adjacent to the property in question?

A. Yes, right in the heart of the borough.

Q. Now, could you tell us what lots in that neighborhood sell for, that are at grade with the street?

Mr. Doremus: Now, may it please the Court, unless the doctor has bought and sold lots there, I object to the question.

The Court: He may know. He is asked to answer of his own knowledge. The presumption is that, with his interests there, he knows something about the value of adjacent property.

A. Well, I don't know of any lot that can be purchased, I don't think, for less than $300 in that neighborhood of the borough, that is, if they are at grade. We have refused over on Palisade Avenue $500, only one block away.

Mr. Doremus: They may have had some reason for refusing, and I object to that.

Q. I mean, lots in that neighborhood.

A. I don't know just what the price is that has been paid lately.

Q. Are you extensively interested in property in Garfield?

A. Well, not so very extensively. I own my own place and have an interest in a farm.

Q. How much property do you own there?

A. Why, I own my house and three lots; I own also a half interest in a twenty-five acre plot.

Q. Well, do you buy and sell?

A. I don't make a business of it; I am not in the real estate business. I am trying to sell off this 25-acre plot through.

Cross Examination by Mr. Doremus:

Q. Doctor, is it not a fact that the property known as the adjacent lots in or was owned at this time by the New Jersey Construction Company?

A. No sir, I held it as trustee at that time.

Q. When did you convey title as trustee?

A. Oh, a few months ago.

Q. To the New Jersey Construction Company?

A. Yes, sir.

Q. Did the New Jersey Construction Co. ever own any lots in the vicinity of the lots in dispute?

A. Yes, sir.

Q. Were you a member of that company?

A. Yes, sir.

Q. And how large a stockholder were you?

A. Well, as large as any of them.

Q. Who composed that company?

A. Mr. Harrop, Mr. Finnegan, Mr. Hepworth, Mr. Shafto, Mr. Trost, Mr. Gillin, Mrs. Harley and myself, and there were one or two others whose names I don't remember now.

Q. Well, as I understand you, the premises you have spoken of as being immediately contiguous to this property were owned by you as trustee and not by the New Jersey Construction Company?

A. At that time, yes.

Q. And how near to the premises in dispute did the property of the New Jersey Construction Company lie?

A. Well, right adjacent to it here (indicating on map). This is north, and over across the street east we bought through Mr. Cole, block 33.

Q. On both sides of Cambridge Avenue?

A. Yes.

Q. Describe the character of the property on the north of the figure "29" in block 29, and also block 33, as to being high or low?

A. This was high too.

Q. (By the Court) What was?

A. The soil there.

Q. Where?

A. All along here on Cambridge avenue.

Q. How did the height of the ground in the premises in dispute compare with the height of the ground in block 33?

A. On block 33, it was probably a little bit higher in some points than block 29.

Q. Now, referring to the houses and buildings on the north side of Somerset street, contiguous to the premises in question, were those lots excavated by you?

A. No, no, those houses were there—I think all those houses were there when I came, say, 15 years ago.

Q. And was there a steep bank there?

A. Right behind it, yes.

Q. (By the Court) Had the earth been removed from those lots?

A. It slanted right down there, so that it had been removed a little—practically none, because the houses were set up and you had to take quite a few steps to get up there—probably five or six steps.

Q. Will you indicate on the map where the railway track is?

A. We have another map showing that.

The Court: Before you introduce another map, the one you have been using had better be marked.

(Blue-print map, known as plate 1, is accordingly marked Exhibit C-1 for identification.)

Q. I will ask you where that switch from the main track of the Erie did begin and where it ended with reference to the property in question—at the present time.

A. Well the switch begins at the Bergen County Short Cut, just north of Somerset street, then forming a circle, swinging out through blocks 31 and 34, crossing Palisade avenue and coming over into block 33.

Q. How far down into block 33 did it extend?

A. You mean at the present time?

A. No, at the time you were negotiating, as you claim, for this property.

A. The shovel had been in there; I don't remember just how long, but I think three or four weeks.

Q. I mean, how far?

A. Well, they were working right in here (indicating on map).

Q. How far from Palisade avenue?

A. They had made a cut all the way through, as I recollect it, and came in here.

Q. Through what?

A. All the way through the block.

Q. Which block?

A. Block 33, and it went right in across Hudson street; I believe they took a portion of the street out, and extended I think, across a part of block 49.

Q. Had the grading been done and the tracks laid so that a locomotive could pass over it all through block 33 down to Cambridge avenue?

A. Well, it was all graded over here.

Q. You mean it crossed block 33 and went into block 49, and was excavated all the way through, so that a continuous track could be laid down to the southwesterly corner of block 49?

A. Whether the cuts had been made all the way through or not I wouldn't swear to that, but there had been considerable earth taken out.

Q. You say, as I recollect it, that the cut didn't go all the way through to Cambridge avenue?

A. I think it was all the way through, but I

don't remember about that; Mr. Harrop was watching it more than I was.

Q. But the switch didn't go on block 29 at all, did it?

A. Not until they had got enough earth removed to get over to it.

Q. Has it ever gone there?

A. I am not sure about that, but they may have gone beyond that, because we had removed so much earth from here.

Q. (By the Court) What do you mean by "here"?

A. Block 29—the portion of the property in block 29.

Q. That portion is north of the property in question?

A. Yes, sir.

Q. Had you used the steam shovel of the Erie Railway to excavate the northerly portion of block 29?

A. Not very much of it.

Q. Had you any?

A. There might have been a few shovels taken out.

Q. But you are not sure?

A. I think when they crossed over—when they got over here (indicating on map)—we didn't care about taking more out, because we needed that down on this lower end.

Q. I thought you said a moment ago that the steam shovel had gone across block 33 into block 49 and stopped there?

A. No, it had to go across the cut in block 31 and 34 and 33, to form a circle, and it struck in like this (indicating).

Q. Where was the end of it?

A. We usually stopped them when we got across the street here.

Q. You are now referring to Cambridge avenue?

A. Yes. Below that it was too high grade above the street and they considered it best to let the shovel take it out all the way across the street, so as to bring it down to the grade below.

Q. But, what I want to know is, if you used this steam shovel to excavate in block 29 how it was you got into block 29 if it was terminated at the southwest corner of block 33?

A. My dear sir, when you are removing earth you have to keep moving your shovel over. We would have a very small amount of earth removed if we never turned our switch over. That switch has to be removed every time you take a new cut.

Q. (By the Court) When you said you had taken off material from property that you owned in block 29, north of the lots in question, did you mean that you removed it with the shovel?

A. There has been very little removed with the shovel.

Q. Had the shovel got to that point?

A. Yes, but we didn't want to remove so much; we needed ourselves what was left there to fill in this lower portion.

Q. Then, am I correct in understanding you, that the earth that you removed from the north of block 49 had been removed by hand and not with the steam shovel?

A. Yes, the major portion of it.

Q. (By the Court) And sold?

A. Yes, the first gravel and sand we sold.

Q. Now, the property in block 33 was owned by you as trustee?

A. Yes, sir.

Q. And never was owned by the New Jersey Construction Co.?

A. Yes sir, we purchased it through Mr. Cole.

Q. Well, which of you two owned it first?

A. The New Jersey Construction & Supply Company.

Q. They owned it and conveyed it to you as trustee?

A. Yes, sir.

Q. And you held it as trustee for the stockholders of the New Jersey Construction Company?

A. A portion of it.

Q. And you subsequently conveyed that, or do you still hold it as trustee?

A. No, sir.

Q. You don't own it yourself?

A. I own a part of it.

Q. In block 33?

A. Yes, sir.

Q. How about block 30?

A. Yes, sir. I have forgotten which it is, either 8 or 12 blocks that we own together.

Q. You mean the same syndicate?

A. The same people.

Q. And you hold that as trustee for them?

A. No, sir.

Q. Is it held by the New Jersey Construction Company?

A. No, sir.

Q. Was it ever?

A. Yes.

Q. And sold to you as trustee?

A. Yes, sir.

Q. Then you either hold it or have transferred it since?

A. I still retain my interest in it.

Q. Do you hold the title as trustee?

A. Not as trustee; I have a personal interest in it.

Q. It has been divided up now?

A. Yes, I have a personal interest in it.

Q. How about block 28; did the New Jersey Construction Company ever own that?

A. No, sir.

Q. Did you?

A. No, sir.

Q. In other words, what you said about lots 33 and 30 doesn't apply to any portion of block 29?

A. No, sir. That is way down by the river road, you know.

Q. Did the New Jersey Construction Company own any portions of block 29?

A. Yes, sir.

Q. And do you own that as trustee?

A. No, sir.

Q. Have you parcelled that out too?

A. Yes.

Q. Now what other excavating have you done except on block 33?

A. A portion of 49 and the northerly part of 29. That is all that I can think of.

Q. Have you built any houses through there, doctor?

A. No, sir.

Q. Are there any improvements on block 28, except those as indicated by the squares on this map?

A. Yes.

Q. There are others?

A. Yes.

Q. How many are there?

A. There is one large brick building right down here and a small frame building next to it on Somerset street, block 28; a brick building also on the corner; a three-story building right next to it and there are two or three cottages that have been put up right on the southeasterly portion of block 28.

Q. Are there any buildings opposite the premises in dispute, in block 28?

A. No sir, I don't think there are.

Q. Are there any in block 30?

A. No, sir.

Q. How about block 33?

A. There are no buildings on that block.

Q. And no bulidings on the northerly portion of block 29?

A. No, sir. It is all surrounded, right in the heart of the borough, but it has been held back and no buildings have been put on it, because of the elevation of the ground.

Q. How high, vertically, is the highest point in the disputed property?

A. I never measured it.

Q. 30 feet?

A. From Bloomingdale avenue up—I couldn't say about that. Mr. Harrop knows more about that than I do.

Q. (By the Court) Is it as high as a man?

A. I should say from Bloomingdale avenue down there it would be over 20 feet—25, or 30 almost. This cut here at one place I think was 17 feet, and this was not quite so much on Cambridge avenue as block 33.

Q. When was the last work done by the steam shovel right in this vicinity?

A. I think it is a little over a year ago, but they are repairing the tracks now, in order to start in a few days.

Q. Were the tracks taken up and dismantled?

A. No sir, they are left there; they are going in there now, fixing the tracks to come right in again.

Q. Was the steam shovel taken away?

A. Yes sir, they have gone away several times and taken dirt off back and forth.

Q. Under whose auspices are they coming back now—at whose request? Yours?

A. Yes, we have been trying, particularly Mr. Harrop and I have taken an active part in dealing with them.

Q. In other words, you are now about to take

away some portion of the earth, as you were doing before?

A. Yes.

Q. (By the Court) Where? Describe it?

A. On the southerly part of block 33 the shovel will now come in, right across from block 34, across over block 33, and there is a cut started now, and when they remove that across block 33 the next cut I expect will take in a part of Bergen street.

Q. Is there a great deal of material to be removed between the premises in question and this railroad?

A. No sir, this is almost all the excessive dirt that is left now that they can get; there is a small part over back of the church, in block 348—there is a small amount of earth there, but I don't think enough to warrant putting in a switch.

Q. Do you sell the earth to the railroad company?

A. No sir, it costs us money to take that out, as I testified a little while ago.

Q. What is the contract between you and the railroad company in regard to that?

A. We shall be glad to show it to you; Mr. Harrop has it.

Mr. Watson: We have the contract here.

The Witness: We will show it to you, if you want to know.

Q. I want to know, if you know, of course.

A. I couldn't repeat the contract, Mr. Doremus.

Q. Well, generally, as I understood you to say, you give the earth to the Erie Railway Company in exchange for the use of the steam shovel to take it away, and you pay for one switchman, and they do all the rest?

A. No; you will remember I testified we paid for the getting of the switch in there, grading, etc.

—incidental grading—and keep a switchman there.

Q. Do you mean by that the grading required down below, where you actually excavate, or do you mean the grading up to the hill?

A. No sir, to get the shovel in.

Q. Is there much grading required?

A. Yes, quite a little.

Q. An embankment to be made, do you mean?

A. We have to dig out the embankment, so we can get in there and also cross these lots on block 31 and 34. We had to grade that in order to get the switch in.

Q. What portion of the earth is taken away from the property adjoining the property in dispute; do you retain any portion of the gravel on the top?

A. So far, we haven't retained anything; they have taken it right off; in this portion of the hill here on block 33, there were pockets of sand, but they were not large enough to be of commercial value to us.

Q. How does that apply to the disputed lands?

A. Well, on three sides of it there is gravel, as I stated before, except a few feet of top soil.

Q. And you say gravel has no commercial value?

A. O yes, it has commercial value.

Q. Is it a part of your contract that you were to reserve any portion of that?

A. We haven't given them the privilege to go on any portion of block 29; we haven't got title to it yet.

Q. You haven't made any arrangements yet?

A. No; they want to get all they can before going back; it makes so much less labor for them to change their switch, the more earth they can take out in one cut.

Q. As a matter of fact, isn't there a great demand for earth taken off of these lots for building purposes?

A. Yes, for gravel.

Q. So that it has some value?

A. Yes; material for building purposes, but for residences, not until the grading is done.

Q. (By the Court) Do you know what a load of gravel sells for?

A. Why, I can't speak as well as Mr. Harrop on that point. I remember we used to get $1.25 and $1.40 a load for sand and I think gravel is a little more; but Mr. Harrop is in the contracting business and can tell you more than I can about that.

Q. When you talked with Mr. Cole, as you say, with reference to the purchase of this property did you fix a price as a limit—a maximum price?

A. No, sir.

Q. A minimum price?

A. Yes.

Q. And what did you say that was?

A. I told him to start at $500 and if he couldn't get it for that why he could raise it to $600, and then to consult us if he couldn't get it for that.

Q. Had you ever known Mr. Isaacs?

A. No sir, I never saw him.

Q. How did you happen to go to Mr. Cole?

A. Well, he is a neighbor.

Q. I mean with reference to this transaction?

A. He used to be agent for it, and we bought these other lots through him, and then he said he had these other 12 lots he would like to sell too—the 12 lots in dispute. He said he was pretty sure they could be bought for $500 or thereabouts, and inasmuch as we had taken so much of the hill he wished we would take the rest.

Q. Did you and Mr. Harrop ever together see Mr. Cole about this transaction?

A. No sir, not together.

Q. Was there any commission agreed upon by you and Mr. Cole?

A. No specific amount.

Q. Did you ever write to him or have any written communication from him about it?

A. No, sir.

Q. Never had any written contract with him about it?

A. No, sir.

Q. Did you ever see Mr. Isaacs yourself?

A. No, sir.

Q. Was there anything said at the time you saw Mr. Cole, on June 26, 1905, with reference to his obtaining an option?

A. No sir, nothing was said about an option.

Q. Was there, during any conversation with Mr. Cole, anything said about an option?

A. No sir, not in my conversation with him.

Q. Where did those conversations take place?

A. In Mr. Cole's store, except the one when he was in my carriage. The conversation wasn't in the store, it was in the back yard. He was raking out his yard that morning when the first conversation occurred.

Q. Had you ever spoken with Mr. Howland yourself about the property?

A. No, sir.

Q. Do you know the date, doctor, of that conversation when you say that Mr. Cole told you that he had the lots and that he had to give more than he thought he would to get them?

A. Yes sir, I believe it was on Saturday the 22nd of July.

Q. And did Mr. Cole then show you any paper relating to this property?

A. No sir, nothing at all.

Q. Did he say that he had a deed or contract?

A. Well, he said he had an agreement, but he didn't have a deed yet, and that is the reason he didn't want me to let Mr. Harrop know anything about it, because he was afraid Mr. Harrop might block the deal yet.

Q. You say he asked you to get out of the transaction at that time?

A. Yes, sir.

Q. What led him to say that, if you know?

A. He said he wanted these lots for himself; I had so many lots and he thought he would like to have these himself.

Q. At the time you asked him, as you say, to act as agent for you in the purchase of these lots was there any time limit in which he was to purchase?

A. No sir, he was to do it as quickly as possible. He would try to do it that week, but he wasn't sure that he could, on account of the marriage of his brother-in-law, which he said would take up a little time.

Q. You say you asked him how much he paid for the property?

A. Yes, sir.

Q. Do you remember when that was?

A. That was the same conversation, the last of the week; I think it was Saturday.

Q. Did he tell you how much he paid?

A. O no, he hung his head and he wouldn't talk.

Q. Do you know of any lots that have been sold in that vicinity for $300 apiece, doctor—clear lots, I mean?

A. Well, I can't swear to that, no sir.

Q. I take it that when the New Jersey Construction Company sold out to you there was no money passed; that was simply to close out your arrangements?

A. Well, if you want to go into the details in regard to that—

Q. No, I mean this—let us not waste any time about it—what I am getting at is this:—

A. There was good value.

Q. No, I don't mean to say it wasn't a bonafide

arrangement; but was there anything else that would fix the value of the lots at open sale?

A. No, we had to take them at a poor bargain.

Q. In other words, the value of the lots in all of that section was speculative, without any fixed value, because of sales not having taken place to the general public?

A. Yes, and on account of the elevation of the lots above grade.

Q. So that one man's guess would be as good as another?

A. Well, in a way you might say; still, if you wish it I can give you the price that we paid for the other lots or somewhere near it, when we purchased those, if that will help any.

Q. You mean with the earth upon them?

A. Yes.

Q. I don't know as that would help any.

A. We paid a great deal more for the ones next to it.

Q. Do you remember a conversation with Mr. Cole, with reference to this property in which you suggested to him that instead of taking the disputed property you and he go in and buy the Pos property; do you remember that?

A. No, sir.

Q. You don't remember any such conversation?

A. No sir, but I think I know what Mr. Cole had in mind in regard to that, if you will permit me—

Q. Certainly.

A. This Sunday when he was along, riding with me, he seemed for some reason or other—I didn't understand it then but I understand it now, though—very much embarrassed when he was telling about these lots and he was afraid he wasn't going to get them. I told him not to feel bad as there were other places, and I think I spoke of the Pos farm, told him I thought of buying a half

interest in it shortly after that. That was the only reference to the Pos farm in Mr. Cole's presence at all.

Q. Did you make a remark to the effect that you didn't care at all to go into this particular property; that you would rather have the Pos property?

A. No, I wouldn't have made such a remark to him. It was purely out of friendliness to him that I offered to share the deal with him, and I intended to give him a share in it and Mr. Harrop said he would. It was through me that he had the opportunity to have a share in it and he had the opportunity to have a share in it and he had the chance to make a commission besides.

Q. You mean in the property in dispute?

A. Yes; and I also told him: "You remember we bought the other lots through you," and inasmuch as he was a neighbor we should take him into consideration before doing anything through Mr. Rowland.

Q. (By the Court) When Mr. Cole told you that he had got the property himself and had got Harrop out of it, what was it you said?

A. I asked him why he should do that, and he says, Harrop was mad at him. I asked him what had happened between them and he said nothing. "Why do you think he is mad at you," I asked and he said: "He went down past my store twice and didn't speak to me." I says, "perhaps he didn't see you" and he said he was pretty sure he saw him, and he also said he was in the driveway when he passed and he didn't speak to him.

Q. When was it that Mr. Cole said you could come in and have a share with him?

A. Well, that was in a conversation after this I was trying to get him to straighten the matter out, and during the conversation he told me that

he had got the deed himself and had put Harrop out.

Q. He didn't make any offer to you?

A. No, not at that time; he invited me to get out at that time.

Q. What did you say?

A. I told him I would get out.

Q. Did you make any objection?

A. Well, I was considerably embarrassed over the matter. No, I didn't at that time, no sir, and I thought that he was trying to put Harrop out. It came so sudden that I didn't realize hardly what was happening.

Q. Then what you did was to assent to getting out?

A. Well, on the basis that he was putting Mr. Harrop out I felt at the time that Mr. Harrop was out of it I couldn't in good faith go on with him, because it would place me in a bad light.

Q. But you didn't reproach him at all?

A. I asked him why he should do such a thing as that, as I felt he was doing wrong, and the way he hung his head and wouldn't look up at all—it was all very plain to me.

Examination by Mr. Watson:

Q. When you said you would go out did you believe that Mr. Harrop was out too?

Mr. Doremus: I object, and the ground of my objection is this: His belief, it seems to me, would hardly be a matter that would control, because what a man has in his mind on any subject doesn't seem to me to be a proper basis for action. The question is, what was done.

The Court: I will take it subject to objection.

Q. I will put it in a different form: Now, doctor, you said that you would get out?

A. Yes.

Q. What did you mean by that?

Mr Doremus: I make the same objection, if Your Honor please. I can't see how that is permissible.

The Court: It hardly seems to be permissible.

Q. Well, if that is objectionable, may be it can be put in another way that isn't: Did he say anything to you about Mr. Harrop's position in that deal before you said that you would get out?

A. Yes, he said he was going to put Harrop out of the deal, and I asked him why he should do that and he said Harrop was mad at him and he was a mean man anyway.

Q. Now, when you said that you would get out, what position did you think Mr. Harrop occupied with reference to the deal?

Mr. Doremus: Same objection.

The Court: Isn't it perfectly plain what the situation was? The witness learned when he went there that the man who he says was his agent and Mr. Harrop's agent, had gone back on him and had bagged the bargain. He was surprised and was asked to get out, which to him was an entirely new situation. Of course, he was not obliged to assert his rights there and threaten a law suit. The fact that he said he would get out then doesn't seem to have much force. I think, however, it is not proper to ask him his meaning or intention.

JOHN T. HARROP a witness sworn in his own behalf, testified as follows:

Direct Examination by Mr. Watson:

Q. Mr. Harrop, you are one of the complainants in this suit?

A. I am.

Q. What is your business?

A. I am general contractor.

Q. And you do what kinds of work especially?

A. All kinds of municipal work, such as the construction of roads, sidewalks, grading—anything that any city might require in the way of improvement.

Q. Have you any experience with reference to the value of property?

A. I have; I have been assessor in the borough of Garfield, and have also been called as an expert witness as to the value of property along the Passaic river, in cases between owners of land and others, from Paterson down to Passaic, and in the city of Paterson very recently.

Q. Now, Mr. Harrop, will you please tell us what negotiations you had, if any, with Mr. Cole with reference to this property that is in litigation here.

A. On or about June 26, 1905, in the forenoon, I called at the grocery store of Mr. L. E. Cole and told him that I had just come from the office of Dr. Davenport and there we had a talk as to the purchase of these twelve lots formerly owned by Mr. Austin, which were held at that time by a man by the name of Isaacs as trustee for the creditors of this man Austin. I stated that we would like to purchase them and we wanted to get hold of them immediately; that we had the cash to pay for them and were ready to buy them; and I told Mr. Cole that the amount of money would be a small amount and asked him if he

wouldn't just as well come in and take a chance with us and he said "no, he wouldn't care to go in with the doctor and I unless I would give him the assurance that the steam shovel which was working in that vicinity at the time—unless I would give him a guarantee that the steam shovel which was working in the vicinity at the time would remove all excess of earth above what is known as the grade of Cambridge avenue. I told him that I couldn't give him any assurance that the steam shovel would remove the earth, but I was willing to take the chances, and that the amount of money invested was so small that we wouldn't lose very much in any event. So, I asked him when he could go and see Mr. Isaacs, knowing that he usually went to New York once a week, about Wednesday, I believe, to buy goods in his line in the grocery business.

Q. (By the Court) Was he in the real estate business too?

A. Why, he has been in the real estate business as a small operator—as agent—for at least 15 years, to my knowledge.

And I asked him if he could go and see Mr. Isaacs that week when he was down to New York on his other business, and he said he didn't think he could go down that week, as there was to be a marriage in the family and he wouldn't like to be obliged to go down until the following week; and so I told him, then if that was the case it might be best that I should interview Mr. Rowland, a real estate agent in the city of Passaic and get him to put the deal through. And he said, "Well it doesn't make much difference about that particular property; it is up to you to determine or say whether that earth should be removed by reason of having in a way the control of the steam shovel." I says "Yes, that is true, that no earth will be removed from those 12 lots

without my consent," and it was talked over there that the lots without removing that earth were practically worthless to any person. I said, that being so I was willing to wait until the next week. And then the question came up about prices, and Mr. Cole stated that he had been offered the lots some time previous for $500, and he thought that they could be bought for less money, as Mr. Isaacs, the trustee for the creditors of Mr. Austin, was very anxious to settle up the affairs. And then he asked me what I would be willing to give. I told him that the doctor and I would pay $500 for the property, or a little more, if necessary. Then he wanted to know how high we would go. Well, having explicit confidence in the man at that time, and believing it was safe to be frank to tell him about how the doctor and I felt, I told him he could go as high as $75 a lot.

Q. Was anything said as to whether he should go in the deal or not?

A. Well, he said he would not go in the deal unless I would guarantee that the steam shovel would remove this surplus earth that was above the established grade of Cambridge avenue.

Q. (By the Court) Would, or could?

A. He said he would go in if I would guarantee that the steam shovel would take this excess of earth above the grade of Cambridge avenue.

Q. When you speak of the shovel removing the earth, are you referring to the nature of the soil which made it capable of being removed by the steam shovel, or—

A. Why, it was capable of being removed by the steam shovel.

Q. That was recognized, was it? No doubt about that?

A. It could be removed, provided I, as one of the parties to the contract between the Railway and Dr. Davenport would consent, because the

doctor had left the control of the steam shovel as to where it would go and what earth it would remove, as to the grade, etc. to me. In fact, there was a section in the contract—

Q. Never mind about the contract, we haven't it here.

Q. Now, what was the next conversation you had with him?

A. The next conversation was along in about July 22nd, or a day or two afterwards. I had a talk with Dr. Davenport and asked him—

Q. Never mind what you said to Dr. Davenport.

A. Well, on or about the 22nd of July I went to Mr. Cole and asked him what progress he was making in the purchase of this piece of ground, and at this time he told me that he had an agreement to purchase the lots from Mr. Isaacs, and thinking he was a party thereto I asked him what the price was, and he refused to disclose it, which I thought was rather peculiar at the time, and I asked him what he meant, and he said he had decided to keep the lots himself. I told him not to go into the matter too hasty; he had better think it over a few days and I would return. Then two or three days afterwards I returned and asked him what he had decided upon and he told me then that he had the deed to the property, and at this time I told him that he could expect to have the matter adjusted in Court. On or about the 22nd when I first went to him and he told me he had the agreement to purchase this property in his name, I asked him what his reason was, why he wanted to hold the property. Well, he says, "the doctor and you have property enough" meaning in that particular section.

Q. Did you have any other conversation with him that you remember?

A. No.

Q. Now, Mr. Harrop, what other property in

that neighborhood are you and Dr. Davenport interested in; show the Court just what it consists of.

A. This is Plate No. 1 of the Assessment Map of the borough of Garfield (referring to map marked Exhibit C-1). The lots in dispute are known as plot No. 10 in block 29. The property which Dr. Davenport and myself were having earth removed from I will describe as follows: Block 29, plate No. 1; Block 30, Plate No. 1; Block 33, plate No. 1. Then in Block 49, lots 6 to 17 inclusive the title is held by my wife and myself.

Q. That is the last parcel?

A. The last parcel, No. 49. This contract and agreement which we have here between the Erie Railroad and the doctor as trustee for the stockholders of the New Jersey Construction & Supply Company and myself as an individual representing my wife's interest, brought the track in from the Bergen County Short Cut, starting from the intersection of the Main Line and Somerset street on the west side; thence in a westerly direction, as more particularly shown and described on the map made by the Railroad Company, entitled—

Mr. Doremus: Just a minute—I object to the witness describing it in that peculiar way. I suggest that he ought to state it on this map, which has already been offered in evidence. I object to his referring to another map.

The Court: Why?

Mr. Doremus: Because it is not in evidence.

The Court: Presumably, it is going to be offered in evidence.

Q. Now, give the title of this map to which you are now referring.

A. "Erie Railroad, New York Division, Plan of Proposed Siding for John T. Harrop, Garfield, N. J."

(Said map is marked C-2 for identification).

Q. Now describe the switch.

A. The switch I have already described. It starts at a point on the westerly side of—

Mr. Doremus: Well, may it please the Court, is it not proper for me now to cross-examine on this map which is going to be used as a basis of the testimony of this witness. I think at this stage I ought to do it.

The Court: The map has not been offered in evidence as yet; it is only used as a sketch or diagram by this witness to explain his testimony. It is not considered as an instrument of evidence as yet; at the same time I do not know of any reason why it should not be proved and offered.

Mr. Watson: I offer the first map in evidence.

(Received and marked Exhibit C-1.)

The Court: Do you propose to prove this second map?

Mr. Watson: I think I can prove it by Mr. Harrop's experience.

Q. Mr. Harrop, are you accustomed—what is your business now?

A. I am a general contractor now.

Q. Have you any experience in the making of maps?

A. I am a mechanical draughtsman.

Q. As I understand you, you have been assessor of the borough of Garfield?

A. Assessor, yes sir.

Q. Do you know this section here, shown by Plate 1 of the Assessment Map of the Borough of Garfield?

A. Plate No. 1 is a map that I used when I made the assessments in the borough of Garfield.

Q. Are you familiar with the location of the streets in the borough of Garfield?

A. I am.

Q. Are you familiar with the tracks of the Bergen County Short Cut?

A. Yes.

The Court: Judge, I don't believe that you need to pursue that inquiry; that is admitted, and unless it is shown to be incorrect the Court will take it as true.

Mr. Watson: I want to show by this map that this was a correct portrayal of this property.

Q. Mr. Harrop, are you familiar with the land, the streets, and the general location of the objects shown on the map entitled: "Erie Railroad," etc. marked Exhibit C-2 for identification in his cause?

A. I am, and I gave the Erie Railroad the data and measurements and all the particulars from which to make this map. It was done from the assessment maps of the borough of Garfield.

Q. (By the Court) The same map on a larger scale?

A. The same map on a larger scale, yes sir.

Q. Have you made the measurements shown on this map?

A. I have not checked the measurements.

Q. Are you able to check up the measurements?

A. I am.

Q. You are familiar with the location of these streets?

A. Yes, sir.

Q. You know the location of the railroad?

A. I do.

Q. And you know where the switch is that stands on the land today?

A. I do.

Q. The Erie railroad switch?

A. Yes. I knew at the time it was put in, and its progress, and also what is going on at the present time.

Mr. Watson: I think I am entitled to offer that map.

Mr. Doremus: I don't think so. Shall I cross-examine Mr. Harrop on this map which is now before Your Honor, marked C-2 for identification?

The Court: Yes.

Q. (By Mr. Doremus) Mr. Harrop, do you know who made the red lines which are enclosed, reading as follows: "Proposed switch", etc.?

A. The engineer of the Erie Railroad.

Q. How do you know?

A. I don't know positively.

Q. Then you can't say?

A. This came from the Erie Railroad.

Q. Well, but you don't know who put them on?

A. What do you want to know?

Q. I asked you the question if you know who put those red lines on there?

A. No, I don't.

Q. I ask you the same question in regard to Plate 1, marked Exhibit C-1?

A. No, I couldn't tell you who put them on.

Mr. Doremus: If Your Honor please, I object, on the ground that the red lines are the very things to be used in evidence, purporting to show the location of that switch.

The witness says he doesn't know who put those lines on there, and he doesn't

know whether they are properly placed or not, and therefore I object.

Mr. Watson: According to Mr. Doremus' contention no map would be admissible in evidence unless the man who made it is produced.

The Court: That is the rule if the map is to be considered as evidence—if it is to be taken as a witness. The usual way of proving it is to produce the engineer or surveyor who made it, and of course counsel is aware that a map may be received and a witness may use any map or diagram from which to testify, but the testimony must come from the witness and not from the map.

Mr. Watson: It doesn't seem to me that that rule is right. It doesn't seem to me that the maker of a map should be required to prove the map any more than a photograph to prove the photographs he makes. If a diagram is a correct portrayal of the property the witness wishes to speak about, as long as the witness has sufficient knowledge of that property, it seems to me it ought to be allowed.

The Court: No doubt a surveyor might make a map and another surveyor or other person might verify it from his own knowledge—verify every detail, beginning at one point and proceeding to the other—from one side to the other—but the witness doesn't pretend to be able to say that the dimensions on that map are correct. He says he hasn't checked up the distances.

Mr. Watson: I think he would be able to. I think he possesses sufficient knowledge to verify all the details on that map.

The Court: He says he cannot do it.

Mr. Watson: He says he can do it if he has time.

The Court: You may qualify him, but at present he is not qualified.

The Witness: I can say, your Honor, that these lines defined on here are in accordance with the original sketch which I made and sent to the Erie Railroad.

Q. Did you make the original sketch?

A. I made the Erie Railroad a sketch of it and the Erie Railroad made this map from that sketch. Originally this was a blue print and showed white lines, and after it was transferred, somebody went over those lines and designated that particular section which they could remove earth from with my consent. This I have defined on Plate No. 1 on this very plot. This map of the Erie Railroad is simply a duplicate, only it is made on a larger scale, and this was gotten up more particularly to show how to get the switch in. It was sent to me as a working plan. The first thing I did when they sent this map to me was I looked over it and went to work right through the northerly part of that portion which was to be cut down, and made a cut so that they could get in there with their track and get to the embankment to make the first cut. Then after that, this track was shifted until now at the present time it is over nearly parallel with Bergen street, between Palisade avenue and Cambridge avenue. The Erie Railroad people now have their employes reconstructing this track today and are getting ready to put the steam shovel in again within a day or two to remove this earth.

Q. (By the Court) Remove earth where, what block?

A. Remove earth from Palisade avenue to Cambridge avenue, from the northerly side of Bergen street south.

Mr. Watson: I don't think I will insist upon this map going in; I don't think it is important enough.

Q. Now, I think you told us the blocks you were interested in.

A. I have defined that, yes.

Q. Now, will you tell us, Mr. Harrop, the elevations of these different blocks, so that we will know about that.

A. Before beginning to remove the earth by the steam shovel, the highest elevation in block No. 33 was, approximately, 54 feet. The elevation at the intersection of Hudson and Cambridge avenue by the grade that is now established is about 21 feet. This was the highest portion of block No. 33, the central portion of the block was the highest point. All the earth in block 33 has been removed by the steam shovel, with the exception of a slight cut along the northerly line of Bergen street. One cut by the steam shovel along the Bergen street line of block 33 will complete the entire removal of all the earth that we require from block 33, and the shovel will then work in a southerly direction until it cleans off that portion in block 30 known as "plot No. 1, and plot No. 17 and 21.

Q. Well now, will you tell us the elevation of this property in litigation at the time this suit was instituted?

A. I have photographs here which I have taken myself, and from those photographs I can tell you, approximately, the elevations. I can also—

Q. Well, tell us the elevations.

A. That is a photograph taken by me (producing photograph marked Exhibit C-3 for identification.) September 29, 1905, at about 10 A. M. with the steam shovel on the south side of Hudson street. That would be in that locality (in-

dicating on map), between Cambridge avenue and Palisade avenue, near Hudson street.

(C-4) On September 29, 1905, about 10 A. M. I took a photograph northwest from Somerset street on Cambridge avenue, showing the location of the property in dispute; and on this particular picture to more fully describe and designate the property it shows a tree, and to the left it shows a fence, or a portion of a fence rather, which is the southerly side of the property in question, or the southwest corner of the property in dispute.

Q. (By the Court) Southwest, do you mean?

A. That would be southeast in describing the entire property. I just wanted to define that corner—yes, I would define that the southeast corner, as relating to that particular plot.

(Photograph above referred to marked Exhibit C-4 for identification).

Q. What is the photograph you now have in your hand?

A. This was taken by myself September 21, 1905, about 4:30 P.M., showing the gravel pit on the property of George S. Davenport, trustee.

(Photograph marked Exhibit C-5 for identification).

Q. Where is that located?

A. That property is located just north of the property in dispute, in block 29, approximately half way through the block.

Q. What is the photograph you now have in your hand?

A. This was taken September 21, 1905, at 10 A. M. It was taken at the intersection of Cambridge avenue and Hudson street, looking south. The photograph shows up here on top of that high elevation Leonard Allman, who was our watchman

at this time, and he is standing on the property in dispute. The steam shovel is working over in the neighborhood of the intersection of Cambridge avenue and Hudson street—a view taken from that point, looking southerly.

(Photograph marked Exhibit C-6 for identification.)

Q. What is the photograph you now have in your hand?

A. This was taken by me September 29, 1905, about 10:30 A. M., from the west side of Bloomingdale avenue looking east, which shows the grade of Cambridge avenue and also shows the 12 lots in dispute. It also shows where Mr. Cole has been removing a large quantity of gravel, which was taken out on Bloomingdale avenue.

Q. Since the institution of this suit?

A. Yes, sir.

(Photograph marked Exhibit C-7 for identification).

Q. Now, what is the character of this property in dispute?

A. Why, it is various kinds. There is quite a lot of gravel and sand, and this gravel and sand lies in pockets. You dig into the bank and you may get a high grade or quality of sand, and after you have taken out five or six feet then you will run into a first-class grade of gravel, and then after you have removed that you are likely to run into sand, and that is the way it appears to run through this entire section.

Q. Is there enough sand and gravel so that a portion of the soil above the grade of Cambridge avenue could be removed and sold, so as to make the land at grade?

A. In some parts of this property that could be done, while in other sections of the property,

along Bergen street, for instance, between block 33 and 30—there the amount of earth is about ten feet to be removed at that point, and it would not pay to remove the earth for the gravel, but on the property in dispute, as shown by the photographs here, there were only about two feet of earth to be removed.

Q. (By the Court) Is all the rest, either sand or gravel, of commercial value?

A. Of commercial value, yes.

Now, as they go further in on this bank or pit Mr. Cole has made, the depth of the dirt or earth to be removed increases so that in places he may have five or six feet removed; but he is down there approximately 25 feet, so that this quantity of earth that rolls down—it is an easy matter to get rid of and it really makes it very valuable property on that account. I own—or rather, the title is in my wife's name—those lots that were mentioned as being in block 49. I bought those lots on account of the gravel and sand that they contained. I have been running in the neighborhood of on an average of somewhere, I should judge, ten teams hauling gravel out of that particular property.

Q. (By the Court) Hauling it yourself?

A. Hauling the most of it for myself and using it in my business, and every load of gravel that comes out of there takes the place of broken stone, and it has been as good as $1.50 a load to me; it was worth that. In other words, I saved that much by using it.

Q. Have you sold any to persons who removed it themselves?

A. I have delivered sand to the Heyden Chemical Works which are now building an addition to their factory in block 50, and received $1.00 a load for it.

Q. You delivered it?

A. I delivered it.

Q. Have you sold any sand and gravel where the parties removed it themselves?

A. I have made arrangements with Mr. James A. Hanlon of Passaic and he is delivering sand to John W. Ferguson for the factory he is constructing on Monroe Street, and receiving $1.35 a load.

Q. What does he give you for it?

A. He charges me up with the cartage and I get the rest.

Q. What does the cartage cost; or, in other words, what is the net value of the sand in the pit?

A. At the handkerchief factory on 8th Street, down near the corner of 8th and Passaic, I get $1.35 a load and they deliver 10 loads a day. I receive $13.50 and pay Mr. Hanlon $5 for cartage, and I am going to add $1.50 more for labor, which makes $6.50; that makes $7 net to myself.

Q. Now, Mr. Harrop, if this sand and gravel is so valuable why is the steam shovel any benefit in removing it?

A. Well, as I stated about the property in dispute on block 29, as they gradually go east towards Cambridge Avenue they have an embankment about six or seven feet of earth to remove before they can get to the gravel. Now, as I further stated, as you go on easterly on Palisade Avenue it still increases, and as the greatest amount of earth and greatest cut which was 27 feet is principally in block 33 and the earth over the gravel being on an average of 7 to 10 feet, why it was necessary to get the shovel in there and cut this down. As I had interests in the real estate in that section I wanted to get my money out of it as soon as possible.

Q. Could the gravel be removed and sold separately from the earth?

A. To no advantage.

Q. I mean, could the steam shovel remove the earth and leave the gravel?

Q. No, they couldn't do that, for the reason that this gravel or sand is in pockets, and you will have a pocket here, and then you might have five or six feet of soil, so that if that is removed this pocket might contain 10 or 15 loads and the pocket might go down and you might have ten or twelve feet of soil over this particular pocket.

Q. Wouldn't you lose the money that you would get from the gravel by having the steam shovel remove everything that was above grade?

A. Why, yes; if we removed it with the steam shovel we remove the gravel and everything is lost.

Q. Which is of the most advantage, to sell the gravel and let the earth remain or to remove the whole thing by the steam shovel?

A. I think it is of advantage to all the property owners to remove all the earth down until they got to pure gravel, and then they might go as deep as they liked.

Q. What, in your judgment, were these lots worth at the time you entered into negotiations with Mr. Cole?

Mr. Doremus: I don't think that is a fair question. Of course, he naturally would say it was worth considerable. How can that be competent in any way? They ought to bring some disinterested real estate man in to prove that and not an interested party.

The Court: Why not?

Mr. Doremus: Because I don't think that is fair; I don't think they have a right to prove by an interested man the value of his own property. He may have a peculiar idea of the value which would not be its general, public value. It has been stated by Dr. Davenport that it was largely speculative, and there are no sales that could be made a criterion in any way. So, why

should we be bound to accept this man's statement about it?

Mr. Watson: Question withdrawn.

Q. Mr. Harrop, I ask you what, in your judgment, this property was worth at the time you entered into negotiations with Mr. Cole, viewing it as an ordinary purchaser?

A. $85 a lot.

Q. What, in your judgment, would be the value of those lots if they were at grade with the streets adjoining?

Mr. Doremus: If your Honor please, I would like again to make objection.

The Court: I will take it, subject to your objection. The question is, what would be their value when cleared off.

Mr. Watson: Yes.

A. The lots fronting on Cambridge Avenue would be worth $350 apiece; those on Bloomingdale Avenue, $300 apiece.

Q. Now, Mr. Harrop, I would like to have you just tell the Court what, in your judgment, would be the minimum value of any lot on that plate, that is, an ordinary lot in the Borough of Garfield, such as is shown on the map and that had no special disadvantages connected with it.

A. There is hardly anything shown on this particular plate.

Q. Just the minimum value of a lot of ground there.

A. $300. Very few lots could be bought for that.

Q. (By the Court) You mean lots that are on the grade with the street?

A. There are lots that are not on the grade—

Q. I mean lots that are on the grade.

A. Of course there are some specially low lots that would be less.

Q. (By the Court): I thought you said a moment ago that the 12 lots in question in block 29 in your judgment were worth $85 a lot?

A. At the time, previous to the removal of the earth.

Q. The earth hasn't been removed?

A. No, only a portion of it.

Q. Then what do you mean by saying that there isn't a single lot that is not worth $300?

A. Those are the hardest lots to get in the borough today.

Cross Examination by Mr. Doremus:

Q. I don't understand that; you mean to say—

A. I was asked as a real estate proposition.

Q. Wait a moment; do you mean to tell me on this plate No. 1 there isn't a single lot that is worth less, as it now stands, than $300?

A. Selling it out lot by lot a man who does that should realize $300 a lot. If I owned any property on that particular plate and was disposing of it, I would want $300 a lot; but as a real estate dealer, buying the property on speculation, why those particular lots—$85 would be my price.

Q. When you speak of $300 you mean after they are all graded off and put in proper shape for building upon immediately?

A. Yes, after they are graded off there is no lot that would bring less than $300.

Q. Does that mean with or without street improvements?

A. Without street improvements.

Q. Do you know yourself of any lots that are graded to the street, without street improvements, that have been sold for less than $300, on this plate?

A. Where the street has been graded?

Q. No, where the lots have been graded to the street.

A. Do I know any that have been sold for less?

Q. Yes.

A. No, not where the street is graded. I can't recall of any at this time—not recently.

Q. What is the highest price that has been paid for any lot shown on that plate without a building on it and not immediately adjoining a building?

A. There is a plot there at the corner of Marcellus Place and Passaic Street where the price was $1500.

Q. How much was it sold for?

A. $1500 I say.

Q. Do you know it was sold?

A. Yes.

Q. You took part in that transaction?

A. I did.

Q. What makes the great value to that lot?

A. I don't know why it should have any particular value, but that was the price paid for it.

Q. Do you think that that vicinity of block 16 is better than block 29?

A. Yes, it is more desirable property; it is higher elevation.

Q. The entire contour of the land up there in block 16 is higher, is it not?

A. Higher than what point?

Q. Higher than block 29—I mean, if graded to the street?

A. Yes. Why take the highest point on the property in dispute and the corner of Marcellus Place and Passaic Street, and the elevations are the same.

Q. You evidently don't understand my question: I will put it to you again: Taking block 16, 15, 23 in there, my question is whether the general contour of that entire section is not, as graded and built upon and laid out for building purposes, very much higher than block 29 will be when it is graded to the grade of the street?

A. It will be about ten feet higher than that section when it is down to the grade.

Q. This section, again referring to block 16 and around there, is the best residential section of Garfield, is it not?

A. I would consider it so.

Q. And that fixes values, doesn't it?

A. That depends.

Q. And that accounts for the greatly increased value up there; isn't that true?

A. Why yes, naturally.

Q. Do you know of any lots that have been sold in the vicinity of block 29 at auction?

A. I have known of none that have been sold at auction.

Q. Foreclosure or general auction sale?

A. Not any, but I know of two that have been sold at private sale?

Q. You don't know of any that have been sold at auction sale?

A. I do not. I know of property that has been sold right in this particular section where the grading is going on; I drew up the deeds.

Q. You said that the value of Bloomingdale Avenue lots is $300 a lot?

A. When at grade.

Q. And on Cambridge Avenue $350?

A. When at grade.

Q. Now, how about the value of the lots, exclusively of the value of the houses on Somerset Street, on block 29? Do you know anything about that?

A. Why, they are no better than those on Cambridge Avenue.

Q. Do you know of any sales on Somerset Street between Cambridge and Bloomingdale?

A. There has been no sales along there, that I know of. Those houses have been built there a number of years. It is all built up.

Q. Why do you fix $85 as the price per lot before excavating?

A. That was before the excavating.

Q. I say, why do you fix it $85?

A. Because usually it costs a man a great deal of money to remove that earth, and it would cost me a great deal of money to remove it.

Q. Why do you make it $85? Why not $75?

A. Because, in my judgment it is worth $85.

Q. Do you arrive at that value from any experience which you have had?

A. Yes; from experience that I have had with other properties in that immediate vicinity.

Q. Have you sold any?

A. I have bought some for $83.30 a lot.

Q. Where were those lots?

A. The property described as belonging to Minnie M. Harrop, in block 49.

Q. How long before the beginning of this suit did you buy those lots at $83.30?

A. About six months.

Q. That you say was in block 49?

A. That was 12 lots in block 49. I paid $1,000.

Q. (By the Court): Did those lots have to have the earth removed with the steam shovel?

A. Yes.

Q. Was the depth of earth as great as on lot 29?

A. In some portions, yes.

Q. What was the average; as great as the average on 29?

A. In this particular property in dispute?

Q. Yes.

A. I would say that the average depth or cut on the property compared with that owned by Minnie Mr. Harrop would be about the same.

Q. I call your attention to this plate No. 1 and to the section on Commerce Street, between Cambridge and Palisade, and ask you if the squares there indicate houses erected?

A. They do, or cottages.

Q. And the two on the corners, respectively?

A. Yes. This is a church.

Q. And the others houses?

A. These are dwellings.

Q. And the others on the corner of Palisade and Hudson?

A. Dwelling.

Q. The lots that you purchased for $83.30 are where?

A. Lots 6 to 17 inclusive, in block 49.

Q. And were those buildings erected at the time you paid $83.30?

A. They were.

Q. You said the property in dispute was of value because the sand and gravel would roll down about 25 feet, as I understand it?

A. To the foot of the embankment. The Bloomingdale side of the property in dispute must be 25 feet or more below the highest point of the hill.

Q. And you say that created a value for that property because the gravel will roll down 25 fe

A. It's easy to get at from the main street and get out.

Q. So that you wouldn't need the steam shovel there?

A. No; all you want is to take the top off with the steam shovel.

Q. As your counsel has said, if you used the steam shovel you would take everything away, the good part and the bad?

A. As I have said, this gravel, in my judgment on Bloomingdale Avenue must be about 25 feet below the lowest point where they remove dirt from, and if I handled the property the way I would do it would be to remove the earth above the gravel, in other words, to strip it and save the expense of removing several hundred yards of earth.

Q. Do I understand, then, that your employment

of the steam shovel was for the purpose only of stripping the top off and not for taking the earth down to grade?

A. No, we couldn't do that very well with the Erie Railroad.

Q. I am simply asking you what the fact is.

A. The fact is that we established a grade according to the contract with the Erie and that contract reads that they must remove the earth according to the grade established by myself?.

Q. Is that the grade of the street?

A. Approximately the grade of the street.

Q. In whom is the title to plot 1, block 29?

A. At the present time?

Q. Yes.

A. The title to that property is in George S. Davenport's name and John T. Harrop.

Q. The same gentlemen that the doctor testified when he was on the stand?

A. Practically.

Q. How about block 30, plot 1.

A. The same, with the exception of one lot.

Q. Who owns that?

A. We have taken one plot off of that, 25 x 110, on the south side of the plot, of block 30, and that has been deeded to Mrs. Wright.

Q. How about block 33, plot 1?

A. We still own that.

Q. Do you own that, or do you mean the syndicate?

A. The syndicate, yes.

Q. And block 49 lots 6 to 17, are the lots you have spoken of as being owned by your wife?

A. Yes, but we don't own all of them now; we have sold several of them. We own 6 to 16 inclusive.

Q. Now, let me call your attention to the intersection of the two streets on block 49, where you testified you had been doing some work taking

out sand and gravel—on which corner is that, the southwest corner?

A. Northwest corner of the intersection of Hudson and Cambridge Avenue, right there (indicating on map).

Q. Well along the easterly side of Cambridge Avenue and north of Hudson Street; is that right?

A. It was in block 49, lots 6, 7, 8, 9 and 10.

Q. Now, how much of that excavation is taken from the street itself and how much from the lots?

A. Why, I have removed, approximately, three to four feet below the established grade of Cambridge Avenue, and then I go to work and remove the earth from here (indicating) and bring the Cambridge lots back to grade in front of my property.

Q. And the same thing applies to Hudson Street?

A. I haven't got up to Hudson Street yet; I expect to get there before a great while.

Q. Cambridge Street is a public street?

A. They are not using it as such.

Q. I mean, it is a dedicated public street?

A. Yes.

Q. And there is where you have been taking gravel from?

A. Yes, just as I have indicated.

Q. Now, this grading that you have testified about, Mr. Harrop, that has been done on these various blocks, 49, 33, &c., was that done by the Erie Railroad in conjunction with the New Jersey Construction Company?

A. It was done by arrangement between the Erie Railroad, George S. Davenport, trustee, and John T. Harrop individually.

Q. Did the New Jersey Construction Company own the land at this time?

A. They owned a portion of it by reason of George S. Davenport being trustee.

Q. That is not the question.

A. I will say that the title was not in their name at that time.

Q. Was it during the period when the Erie Railroad was taking away earth with the steam shovel?

A. It was not.

Q. So that the New Jersey Construction Company has had no interest whatever in the excavation of any of these blocks?

A. No direct interest, other than in the lots of George S. Davenport, trustee.

Q. Now, going back, Mr. Harrop, to your transactions with Mr. Cole, and calling your attention to the conversation of June 26, 1905, you say you asked Mr. Cole to take a chance with you and Dr. Davenport in the purchase of the disputed property, and that he refused unless you would guarantee that the steam shovel would take off all the earth; is that the whole of the conversation?

A. No, that isn't all of the conversation.

Q. What was said at that time between you and Mr. Cole, with reference to Mr. Isaacs?

A. I asked Mr. Cole to act as agent, or to come in and take a chance with the doctor and I and purchase this particular piece of property, and naturally he was to see Mr. Isaacs.

Q. Did you know Mr. Isaacs?

Q. I have met the gentleman.

Q. Before this time?

A. Yes, sir.

Q. Where did you meet him?

A. In his office.

Q. In New York?

A. Yes, sir.

Q. Did you attempt to purchase these lots yourself?

A. I never attempted to purchase them.

Q. How did you happen to meet Mr. Isaacs?

A. I can't recall the first time that I met him, which was some time previous to that—three or four years previous to that. It was in the interest of the New Jersey Construction & Supply Company, in regard to getting an option on the property.

Q. You knew Mr. Isaacs held these lots at the time of your conversation with Mr. Coles?

A. I did.

Q. Did you not at that time suggest to Mr. Cole that he obtain an option upon these lots?

A. No, I told him we had the money to pay—the cash—and we didn't require any option; all we wanted was the property.

Q. Did you fix the price?

A. I asked Mr. Cole what he thought the lots were worth and what he could get them for, and he said he thought $500, and I told him we were ready to pay $500, and a few minutes after I told him he could go as high as $75.

Q. How much would that amount to? How much did you fix as the maximum price other than $75 a lot?

A. I didn't fix a maximum price; I told him if he couldn't get them for $75 to come back and see us and we would determine what to do.

Q. Was there anything said about paying?

A. I told him he could get all the commission that was due him and also any legitimate expenses in putting the deal through; that I wanted to be fair and square with him all the way through the transaction.

Q. There was nothing more said in that transaction about Mr. Cole going in with you after that remark about the steam shovel?

A. At no time can I recall any conversation between us. That was all.

Q. That was all the conversation between you about his being a partner in this transaction, and it was all off after that was it?

A. No, I left it open to him to accept and told him if he didn't come in with the doctor and I why he could think it over and if he was afterwards willing to come in and take his third interest we would be perfectly satisfied to have him do so. Up to the time this suit was started I was willing to give him a third interest, rather than to get into any legal entanglements about it.

Q. You said Mr. Cole had been in the real estate business before, to your knowledge.

A. He has been in the real estate business for several years past.

Q. To your knowledge?

A. To my knowledge.

Q. Have you ever employed him as a real estate agent?

A. Why, not directly.

Q. Then you have not?

A. Not directly.

Q. Did you ever put any property in his hands for sale as a real estate agent?

A. I never did.

Q. Now what is his business and what was it at the time of these negotiations?

A. He is in the grocery business and also deals —dickers in real estate.

Q. How do you know that?

A. I know he has collected rents for this Austin property for several years—for this property in dispute.

Q. How do you know that?

A. Because he has asked me if I didn't want to buy it and said he was the agent, in fact I knew he was the agent for that particular property, because when I was Secretary and Treasurer of the New Jersey Construction & Supply Co. he tried to sell that particular property to me.

Q. To what extent did you have personal knowledge of his being a real estate agent?

A. I have been in the Borough of Garfield 20 some odd years——

Q. I am asking you a definite question, not for a history of your residence there. Can you answer that question?

A. I knew that he had been in business there for years, just as much so as I know he sells groceries, because I have seen him going around to various houses collecting rents.

Q. You have seen him collect rents, have you?

A. I have seen him and he has told me so.

Q. Do you recall any houses for which he acted as agent?

A. He was agent for that house owned by Mr. Austin, on the corner of Bloomingdale and Somerset Street, four family house.

Q. How do you know?

A. He has told me so and I have seen him there.

Q. When did he tell you, how long before this conversation of June 26, 1905?

A. Why, probably a year previous to that. I can recall when he was dickering with that property and he went down there.

Q. Do you understand my question? The question is, how long before this conversation of June 26, 1905, did he tell you?

A. All of two years ago; I will put it that way and then I will know I am safe, that he was agent for this building on the corner—four family house on the corner of Bloomingdale Avenue and Somerset Street, owned by Mr. Austin.

Q. Now, to fix it definitely, just think back for two years and see if you are correct.

A. Well, it may be a little longer than that—yes, it occurred over three years and a half back.

Q. Now what I ask you is, wasn't it before June 26, 1905?

A. Yes, it was before.

Q. Is there any other house that you know he was agent for?

A. Well, to get rid of that question I will say positively, no.

Q. You never knew of Mr. Cole advertising as a real estate agent, did you?

A. No, I can't recall.

Q. Did Mr. Cole ever, after the second conversation you say you had with him—did or did he not at that time or at any future time, offer you an interest in this property?

A. No.

Q. Did he show you the deed?

A. Never showed me the deed.

Q. Did he tell you the price that he paid?

A. Never told me the price.

Q. Did you ask him to let you see the deed?

A. I asked him to let me see the agreement with regard to the purchase of the property; I never asked him to let me see the deed.

Q. Did you ever make any tender to him of any money in settlement of the consideration for that property?

A. I told him I was all ready to pay the cash necessary to purchase this property.

Q. Did you offer to pay him a commission?

A. I did, and also his car fare or any other necessary expenses connected with the purchase of the property.

Q. After the purchase?

A. About the time he was purchasing the property; on or about July 22, I brought the question up and I told him we were willing to pay him the regular commission—four days' pay, as he claimed it had taken him four days to put the deal through, and I also told him we were willing to pay his carfare and any other legitimate expenses.

Q. Carfare and four days' pay?

A. Yes, and commission.

Q. Did you tell him at what rate of commission you would pay him?

A. No, we were willing to leave that to him.

Q. Did you say so?

A. That is what we were willing to allow him,

Q. Wait a minute, did you say so?

A. I didn't tell him so, but that was the impression I left on his mind.

Q. Did you ever get an option on this property from Mr. Isaacs, either for yourself, or for Dr. Davenport, or any other person?

A. Not for myself.

Q. Did you for anybody else?

A. Mr. Rowland got an option on the property in his name, in the interest of the New Jersey Construction & Supply Co.

Q. When was that?

A. Oh, that was at the time the Cambridge Avenue grading was being done.

Q. I know, but we don't know when that was.

A. That must have been four years ago, I think.

Q. A couple of years before this transaction took place; is that right?

A. A year or two.

Q. Do you know the amount of the option?

A. I can't just recall what it was. We were willing to let him put any price—what he might ask for it. We paid $100 to hold the property for the limited time, the purpose being to get control of the ground so as to make our bid as we would like to have it to make certain improvements—in other words, to get control of the property.

Q. Then you forfeited the $100?

A. Yes, certainly.

Q. Never took title?

A. Never had any intention of taking title.

Q. Wasn't the option price $1500?

A. It might have been $1500 or $3000; it didn't make any difference to us at that time.

Q. You were more in earnest when you were talking with Mr. Cole?

A. I was in earnest at that time.

Re-direct Examination by Mr. Watson:

Q. Mr. Harrop, where does Bergen Street end on that map, with reference to this property?

A. Why, it ends on Cambridge Avenue.

Q. Yes, but where with reference to the property in dispute, block 29?

A. It ends with Cambridge Avenue, according to this map.

Q. But where with reference to the property in dispute?

A. Why, almost directly in front of the property in dispute.

Q. Now, at the time that you had these negotiations with Mr. Cole, what was the grade of Bergen Street on the block in front of this property?

A. Why, there was no grade.

Q. How high was it?

A. It was all of 15 to 20 feet higher than the street.

Q. And was there any way of getting in to this property?

A. None whatsoever.

Q. And what have you been doing since with reference to that grade with the steam shovel?

A. Today we are working with a gang of men, getting this track ready to get the steam shovel in.

Q. What is the relative importance of Palisade Avenue at that point, as one of the streets in Garfield, as compared with the streets in other parts of Garfield?

A. Palisade Avenue is one of the principal streets of Garfield.

Q. Is property in the neighborhood of that avenue any advantage?

A. Why, yes, this property will be enhanced materially in value as soon as——

Q. (By the Court): What property?

A. That property in block 33, and also in block 29, by reason of the Bergen Street grade.

Q. So that a part of your general scheme in the excavation is to excavate not only the plots you have mentioned, but the streets adjacent?

A. Yes, that was a part of our scheme, and a further plan was to continue Bergen Street right down to the river road, provided we could get these 12 lots which Mr. Cole now owns. I made a map which showed the advantage of running Bergen Street down to the river road, and our idea was to close Bloomingdale Avenue. In that way why the property would be worth approximately $50 per lot more by having them all front on Bergen Street, because there is a drop on Bloomingdale Avenue of fully 10 feet. The idea was to get nice, easy grade.

Q. What is that bridge on the map crossing the river?

A. That is Garfield Bridge.

Q. Where does that lead to?

A. That leads to the principal part of Passaic.

Q. How many blocks is this property from that section to Passaic?

A. About three ordinary blocks.

Re-cross Examination by Mr. Doremus:

Q. Now, Mr. Harrop, you say that it was a part of your scheme to grade these streets like Bergen Street and others?

A. Yes.

Q. Are those not public streets?

A. They are.

Q. Did you have a contract with the borough to grade these streets?

A. No, but they are awful glad to have somebody else grade them if it doesn't cost anything.

Q. In other words, you expected to do this work for nothing?

A. Why, it is costing us to do the work.

George S. Davenport—For Complainants—
Recalled, Direct.

Q. I mean, so far as the borough is concerned?
A. So far as the borough is concerned it doesn't cost the borough anything. The entire expense is paid by Dr. Davenport and myself.

GEORGE S. DAVENPORT, recalled for further examination on behalf of the complainants, testified as follows:

Direct Examination by Mr. Watson:

Q. Have you ever had any conversation with Mr. Cole with reference to his being in business of buying and selling real estate?
A. Yes, sir.
Q. Will you please tell us what he said to you?
A. Why, shortly before this, before we purchased this, he was telling me what bad luck he had had in real estate several times and they had failed to give him his commission. He sold some property for the Woods family right across the street, on the corner, and he threatened to sue them but did not do so, because they didn't turn his commission over 8 or 10 years ago, when he sold it to Thomas Freeman, where he put the deal through and they failed to give him the commission. He has mentioned several houses where he has failed to collect the rent, one the Austin house and another belonging to Mr. Kays or where he lives, right down across the street from me, and he told me he sold a house for Mr. Murphy right across the street, on the corner, and he failed to get the commission.

Cross Examination by Mr. Doremus:

Q. When did you say this conversation took place?
A. The only conversation we had in regard to the Woods place was just a few months before

this transaction. One thing, I have always been friendly with him and in the deal with us I told him I would like to see him get his commission inasmuch as he had failed several times before, and I told him I would see that he got it.

Q. You say he spoke of the Woods place and the Murphy place, and what other places?

A. The Woods and the Murphy place and a lot down on Washington street right in front of his house.

Q. What others?

A. One deal he put through a short time before this occurred, or just after that, was the Trost house that he was instrumental in putting through, on the corner of Palisade and Somerset Street.

Q. Did he say he got his commission?

A. No, he didn't say.

Q. And do you know, doctor, whether there are any others?

A. On this one house, I remember his speaking definitely in regard to Murphy, getting the commission; he said he was shrewd enough to fix it that he would positively get his commission.

Q. Those are the only properties you know of his selling, are they?

A. No, I have heard many times of his putting deals through.

Q. Others than those you have mentioned?

A. Yes.

Q. Before this conversation in June, 1905?

A. Yes.

Q. Do you remember how many?

A. No; I only heard him mention incidentally about his putting them through, and you see we bought a portion of this hill through him and he was trying to sell me these lots; he asked me if the company wouldn't buy them.

George S. Davenport—For Complainants—Recalled, Cross.

Q. Do you know whether he has ever advertised as a real estate agent?

A. I don't know that he has.

Q. Do you know whether he has put out a sign as real estate agent?

A. Not that I know of.

Q. Do you know whether he has ever had cards or letter heads?

A. On his letter heads it just says he is in the grocery business.

Q. Anr that is the business he has been engaged in for the past 25 years, isn't it?

A. One of the businesses.

Q. Well, any other business?

A. I have just told you about these deals.

Q. Do you know whether Mr. Harrop has ever engineered any real estate deals?

A. Well, let's see—for others?

Q. Yes.

A. No, I don't know.

Q. Do you know of any other men in Garfield who have acted as real estate brokers?

A. Yes, the barber right across the street, and he does quite a business; and Mr. Carl, who is a plumber, and does real estate as a side-issue. Hardly anybody does that alone. Mr. Whitehead lately has started in there.

Q. These people advertise, don't they?

A. The most of them.

Q. The barber and the plumber?

A. I think Mr. Whitehead did a part of the time, but I think he told me he was cutting that out.

Q. (By the Court): Cutting out the advertising or the real estate business?

A. Cutting out the advertising in the real estate business.

Complainants Rest.

LEWIS E. COLE, one of the defendants, called in his own behalf, being first duly sworn testified as follows:

Direct Examination by Mr. Doremus:

Q. You are one of the defendants in this cause and reside at Garfield?

A. Yes.

Q. And your business is what?

A. Grocer.

Q. How long have you been in that business?

A. 19 years last July.

Q. Where?

A. On Passaic Street, Garfield.

Q. Do you know the complainants?

A. I do.

Q. Have you ever held yourself out as a real estate agent during the time you have been a grocer?

A. No, I haven't.

Q. Have you conducted real estate deals?

A. Why, about as much as the general of business men, I suppose.

Q. Do you remember meeting Mr. Davenport in May, 1905?

A. I do.

Q. With reference to the property that is now in dispute?

A. I do.

Q. Where was the meeting?

A. I think it was in my store.

Q. What was the conversation?

A. Why he and I were going in together to buy these lots.

Q. Go ahead and tell us all about it.

A. We talked the matter over and we were going to buy them together, he and I, and during the meantime—I don't know what all the conversation was between him and I, but it was about the price.

Q. Now what was said about the price?

A. I am not sure if there was anything said about the price, but he and I were going to try to get the option on the lots, and only a few days after that——

Q. Now, wait a minute; what was the option to be?

A. There was nothing said as to how much the price would be at all.

Q. What were you to do?

A. I was to get the option on the lots.

Q. From whom?

A. From Mr. Isaacs.

Q. Was Mr. Isaacs' name brought up in the conversation?

A. Yes.

Q. What arrangement, if any, was there between you as to how you were going to buy this property; was there any arrangement at all?

A. He and I were going in together.

Q. Is that all the conversation you remember?

A. That was all at that time.

Q. Wasn't the name of Mr. Harrop brought into the conversation?

A. Not at that time, no, sir.

Q. When did you next see the doctor or Mr. Harrop?

A. A few days after that Mr. Harrop came in and he says this to me: "How are you getting along with the lots"—came in my store—and I said we hadn't made much headway yet. The doctor and I talked the matter over and he says: "You ought to get an option on them," and he run out and caught the car and went away. That is all that was said at that time. A few days after that I went to New York and saw Mr. Isaacs, and I asked him if we could agree upon a price would he give us an option on those lots. Nothing was said in regard to price. He says, "No, I have sold the lots once with an option and they threw

them up and I won't consider it." I came home, and I think it was Sunday afternoon the doctor invited myself and little boy to go with him to Passaic, and we got into conversation about these lots, and I told him that I had been down and asked for an option on the lots and Mr. Isaacs—
10 well, the doctor turned his head towards me in this way, and he says, "Lew, I don't particularly care whether we buy those lots together or not; suppose we buy the Pos farm." Well, it rather surprised me to think that he was indifferent about it, as I supposed he would go in with me to buy them; and then the conversation drifted off to the Pos farm, adjoining the place that we now own together in Wallington, and I told him I didn't know that I could put in enough money to get a half interest in the Pos farm.

20 Q. Was there anything more said about this?

A. Nothing more about that. Then a short time after that Mr. Harrop came into the store again and said, "What are you going to do about the lots"? I said I was down and couldn't get any option, and he went out of the door, slamming the door, and nothing more was said about it.

Q. Was there anything more said at the conversation with Mr. Harrop about his taking a chance with you?

30 A. He said something about he would like to have an interest with us.

Q. Was there anything said about the steam shovel?

A. Nothing; I don't remember anything being said about the steam shovel.

Q. Well, as a matter of fact, did you buy these lots?

A. I did, yes, sir.

Q. Did you have any further conversation with Dr. Davenport with reference to these lots, after
40 the second one when you went riding with him?

A. No, I don't think we did. A few days after that I was talking with my wife, and I told her—

Q. Never mind what you told her.

A. I don't recollect of any other conversation that we had about the lots.

Q. With Dr. Davenport?

A. No.

Q. Well, at any of these conversations between you and Dr. Davenport, or between you and Mr. Harrop, was there anything said about agency?

A. Not one word.

Q. Or about commission?

A. Not one word.

Q. Did Mr. Davenport or Mr. Harrop ever see you together?

A. Never met me together in the world.

Q. Did you, after the purchase of the property, ever speak to Mr. Harrop or Dr. Davenport about the property?

A. Why, the doctor came in after I had told him I had bought the lots, and he said this: "This thing is getting me in a hole." I said, "In what way, doctor; you told me that you didn't particularly care whether you went in with me to buy them or not, and I raised the money and bought them myself", and I then said, if it is going to make any hardness between you and him you can have an interest in them.

Q. What did he say to that?

A. He said he would see what Harrop said.

Q. Then did he come back and talk with you about it again?

A. We had several conversations about it.

Q. After that?

A. Well, he came into the store and we talked the matter over, and re-hashed the matter over and over.

Q. Can you tell what was the next conversation after this one you have just testified to?

A. Why, I don't recollect of anything more than he came in shortly after that and said. "Well, you were our agent anyway and Mr. Harrop and I claim the property."

Q. Was that all the conversation?

A. That was about all the conversation.

Q. And there were no further conversations?

A. No further than they demanded the price I paid for them.

Q. What do you mean by that, did they come together?

A. No, they did not; I don't think the doctor demanded it, but Mr. Harrop.

Q. How long after you purchased this property did Mr. Harrop make this demand?

A. Well, I should say probably 2 weeks.

Q. Did you tell him what you had paid for the property?

A. I did not.

Q. Did either Dr. Davenport or Mr. Harrop ask to see the deed?

A. No.

Q. Did they ask to see the contract of sale?

A. I think Mr. Harrop did.

Q. Did you show it to him?

A. I did not.

Q. I show you a paper, Mr. Cole, and ask you if that is the agreement entered into between you and Mr. Isaacs for the sale of this property?

A. Yes, sir.

Mr. Doremus: I offer this agreement in evidence, dated the 19th day of July, 1905, between Edward A. Isaacs, trustee, and Lewis E. Cole, being an agreement to sell property in block D on the map, the purchase price being $500, of which $200 being paid and $400 to be paid on the delivery of the deed. The deed was to be delivered on the 31st day of July, 1905, at the office of

Mr. Isaacs in New York City. It is signed by Mr. Isaacs as trustee and by Mr. Cole.

(Admitted in evidence and marked Exhibit D-1.)

Q. Mr. Cole, I ask you if that contract was followed by a deed of the property?

A. Yes, sir.

Q. I show you a deed and ask you if that is the deed given you of the property in question?

A. Yes.

Mr. Doremus: The deed is between Edward A. Isaacs, as trustee, and Lewis E. Cole,—called a Trustee's Deed—dated the 31st day of July, 1905, and conveying the same premises as described in the contract. I offer the deed in evidence.

(Admitted in evidence and marked Exhibit D-2.)

Q. What price did you pay for the property?

A. $600.

Q. And how did you pay it?

A. In two payments, one of $200 and one of $400.

Q. The payments were in the shape of checks?

A. Yes, sir.

Q. I show you three checks and ask you if those were the checks which you paid the consideration with?

A. Yes, sir, those are the checks.

Q. And they are respectively dated what?

A. July 19, two of them, and one July 31.

Mr. Doremus: I offer the checks in evidence.

(Admitted in evidence and marked Exhibit D-3.)

Q. I call your especial attention, Mr. Cole, to a check of $30 under date of July 9, 1905, to the

order of J. T. Barry, and ask if that was a part of the considerations?

A. That was commission paid to the agent of Mr. Isaacs.

Q. By whose direction did you make that payable to the order of J. T. Barry?

A. Mr. Isaacs'.

Q. Now, Mr. Cole, you have heard the testimony as to the elevations of this land and the character of the soil; have you anything to say about it, whether that testimony is true or not?

A. Well, the bottom of the hill where I have started to take out the stone and gravel—the greater part of it is stone, but they have used it in the gravel. There is a large part of it stone there now, 50 or 60 loads that is of no use practically to anybody.

Q. Is that the hill shown on Exhibit C-7 for identification?

A. Yes, that is a picture of the hill.

Q. Are the railroad tracks laid down to anywhere near this property?

A. Well, I should judge the switch is in the neighborhood of 150 or 200 feet of my property.

Q. When was the last time that work was done with the steam shovel near your property?

A. I think it was a year ago last fall.

Q. Has any work been done by the steam shovel along this whole line of switch since that time?

A. No, sir.

Q. What has happened to the switch; is it in the same condition, physically, as it was when it was first put in?

A. O no, they went and pulled all the spikes and the street committee ordered Mr. Harrop to tear up the tracks on Palisade avenue; said they wouldn't permit them to remain there any longer.

Q. Is there any new switch being laid there now?

A. If there is I don't know it.

Q. Mr. Cole, you have had something to do with real estate in Garfield, will you give the Court your opinion as to the value of these lots at the time—we will say June 26, 1905, in the condition they were then in.

A. Well, I should judge it would be rather a hard thing to do to estimate the value of those lots. It would cost at the lowest calculation, $250. apiece to grade them down to the street if you had to hire the ground removed, but on account of there being some gravel there we might sell some gravel and come out all right that way. There is a great deal of earth that will have to be removed before we can get to the gravel.

Q. Is there a commercial value to sand?

A. There is no sand there to speak of, at all. We haven't run into any sand; it is coarse gravel and stones, as large as a bushel basket probably, and some of them larger.

Q. What is that gravel worth, to be taken away and sold?

A. Well, about 30 to 40 cents a load—that is, the man to move it himself.

Q. You have sold some of that gravel?

A. I have.

Q. At those prices?

A. 30 cents a load.

Q. You have heard the testimony of Mr. Harrop as to that property being worth $85. a lot in the condition in which it was then in; what have you to say to that?

A. I should say it was rather a high value for those lots.

Q. Well now, what is your estimate of the value?

A. I should say $50 or $60.

Q. What are those lots worth when graded down to the street grade—the earth all removed?

A. Well, I should say about $200 or $250. I wouldn't put a higher value on them.

Q. Do you remember a conversation with Dr. Davenport in which he spoke about your getting him into a hole with the lots?

A. Yes, sir.

Q. And thought that you were acting as agent?

A. Yes, sir.

Q. What is your recollection about that?

A. Then I related to him about our conversation in the carriage, about his saying he didn't particularly care whether he went in with us and bought the lots or not, and he spoke about the Pos farm.

Q. Did you ever have a conversation with Dr. Davenport with reference to Mr. Harrop not coming into the deal; do you remember any such conversation?

A. I think once he spoke to me about it and I told him I didn't particularly care to have Mr. Harrop in the deal with us.

Q. Was that before or after the purchase?

A. That was before.

Q. Do you remember a conversation with Dr. Davenport with reference to Mr. Rowland, the real estate agent?

A. Well, I don't recall.

Q. Did you ever say to Dr. Davenport to tell Mr. Harrop not to go near Mr. Rowland?

A. I don't remember making any such remarks.

Q. Do you remember a conversation with Mr. Harrop with reference to your taking chances with him in the purchase of this property?

A. I do not.

Q. Do you remember the conversation of June 26, 1905, with Mr. Harrop? You may not know it by that date, but it was the first conversation Mr. Harrop testified he had with you.

A. He came in that first time, as I told you

before—he came in and said he wouldn't mind taking a chance with us—with me and the doctor.

Q. What did you say?

A. I said I would see the doctor and have a talk with him about it.

Q. Was there anything said about a steam shovel at that conversation?

A. I don't remember that there was.

Q. What is your best recollection about it?

A. I don't think so.

Q. Do you remember Mr. Harrop saying anything to you about offering $75. a lot for the property?

A. No, nothing.

Q. What?

A. No, sir.

Q. You mean there was no such conversation?

A. No, sir.

Cross Examination by Mr. Watson:

Q. Mr. Cole, you have bought and sold property for people over in Garfield for years, haven't you?

A. Yes, I have sold some.

Q. Quite a number of parcels?

A. O yes, several.

Q. Now, who first suggested the idea of buying these lots, Dr. Davenport or yourself?

A. That I don't remember.

Q. Don't you remember his coming to your place and suggesting the idea of buying them?

A. I don't remember; I don't remember which spoke of it first.

Q. You do remember that he spoke about them and one of you spoke about purchasing the lots?

A. Yes.

Q. And in this first conversation you say no price was agreed upon?

A. No, I don't think there was.

Q. And who was to do the work of approaching the owner?

A. I was.

Q. And there was nothing said about any other person?

A. When we first talked about it no one else was mentioned?

Q. Was there any talk as to why the lots were desirable?

A. I don't think there was at that time.

Q. Nothing said about that?

A. I don't think there was.

Q. (By the Court) Was anything said about who should supply the money for that?

A. No, sir.

Q. Was anything said about what the share of each one should be if the property was purchased?

A. No sir; we were just to do that together—the doctor and I were to buy the property.

Q. How soon after that did he see you again, if you remember?

A. Well, you see it has been going on since three years ago and I couldn't recall anything like that. I think after I had a talk with the doctor then Mr. Harrop came in and said he wouldn't mind going in with us.

Q. After the talk with you and the doctor had left, were you to go and purchase the lots?

A. It wasn't that I was to purchase the lots; I was to get an option on them.

Q. Then, as I understood your direct examination, Mr. Harrop came in one day and asked you what you had done about it, didn't he?

A. He asked the first time how we were getting along with the lots; presumably he knew that the doctor and I had been talking of buying them.

Q. What did you say to him when he asked you that?

A. I told him we hadn't made much headway at that time.

Q. (By the Court) At that time had you seen Mr. Isaacs?

A. I don't think I had; I am not positive as to that.

Q. Did you have more than one interview with Mr. Isaacs with reference to the option?

A. Only one.

Q. Then, when you went down, after having these talks with Dr. Davenport, you approached the matter to Mr. Isaacs and got a flat refusal?

A. Yes.

Q. Did you have any more business with him that day?

A. No sir, I couldn't say that I did.

Q. Then what did you do after you came home?

A. Why, this was on a Wednesday and I think it was the following Sunday that the doctor and I went in a wagon together and had this conversation I have spoken of.

Q. You say you came home on a Wednesday?

A. I think so.

Q. How far is Dr. Davenport's house from your place of business?

A. I think I can throw a stone over in his yard.

Q. You are a near neighbor?

A. Yes, sir.

Q. And on the following Sunday you had this conversation with him, in which you say he suggested why not buy the Pos farm?

A. Yes, sir.

Q. When he stated that what did you say?

A. I told him I didn't know as I could raise money enough to pay my share.

Q. What did he say then?

A. He didn't make any remark—went on talking about something else.

Q. Then you left the thing right there?

A. Yes, sir.

Q. (By the Court) At that time, on this Sunday, did you tell Dr. Davenport of Mr. Isaacs' positive refusal to give the option?

A. I did, yes sir.

Q. Then as you understand it the whole thing was off?

A. I did, yes sir.

Q. Was anything further said between you and Dr. Davenport about buying it?

A. No, sir.

Q. At any time?

A. No, sir.

Q. When you told him that Mr. Isaacs refused to give the option what did he say?

A. He says he didn't care whether he bought that or not; "let's buy the Pos farm."

Q. Had you kept the matter alive with Mr. Isaacs in any way?

A. Yes, sir.

Q. Had you started negotiations on your own account?

A. Not then I hadn't, no sir.

Q. Mr. Cole, can you fix the date of this conversation in the buggy?

A. Well, it must have been—well, I don't know as I can; it must have been the fore part of June. I am not sure; can't tell exactly.

Q. (By the Court) June or July?

A. It must have been in June sometime.

Q. Don't you know, Mr. Cole that when you had that conversation you had already got the deed of the property?

A. No, it was long before that. I hadn't done anything about the purchase of the property when the doctor and I were talking about it.

Q. How many times did you see Mr. Isaacs?

A. Why, I must have went down there as much as four or five times.

Q. Did you get any price on the property when you first went down there?

A. No, sir.

Q. (By the Court) Can you tell us about the date of your first call on Mr. Isaacs when he refused to give you an option?

A. Well, it was the last of May or the first of June.

Q. I understand, you have been testifying to a conversation you had with Dr. Davenport with reference to the purchase of the property, on the 26th of June.

A. That was their claim.

Q. You don't remember the date that you had that conversation with Dr. Davenport?

A. I think they say it was on the 26th of June, but I can't recall that it was on that date.

Q. Was it in May or June when you went to Mr. Isaacs and he positively refused to give any option?

A. It was the last of May or the first of June.

Q. When you first took up this matter Dr. Davenport didn't suggest to you in any way that Mr. Harrop was going to have an interest in that property?

A. Not when we first talked about it.

Q. Didn't you think it was rather strange that he should come into your store and ask you how you were getting on?

A. I didn't.

Q. You didn't say anything?

A. As I told you, he asked me how the doctor and I were getting on with the lots.

Q. (By the Court) At that time Mr. Isaacs had positively refused an option and the thing was all off?

A. Yes, sir.

Q. Why didn't you tell Mr. Harrop the thing was all off, when he came into your office and asked you how you were getting on with that deal—why didn't you tell him it was all off?

A. Well I don't know why; I can't answer that question.

Q. Why didn't you tell Dr. Davenport that you couldn't get the option when you got home?

A. I did tell him.

Q. You say you went there on Wednesday and you didn't tell him until Sunday. He is a near neighbor of yours isn't he?

A. Yes, sir.

Q. Why didn't you call in and tell him?

A. I thought we had a plenty of time to talk the matter over later.

(At 1:15 recess taken until 2 o'clock p. m.)

Q. Mr. Cole, fix the date as near as you can when you had this conversation with Dr. Davenport in relation to the purchase of the property.

A. Well, if my memory serves me right, I think it was in May.

Q. Do you know the day?

A. I couldn't say.

Q. You are positive it was in May?

A. I am quite positive.

Q. How long was it then after that that you saw Mr. Isaacs?

A. Well, it might have been a week.

Q. And then how long after that was it before you saw Mr. Isaacs again?

A. Let's see, it must have been two or three weeks—probably later.

Q. (By the Court) That would be sometime in June?

A. Yes, I think it would, yes.

Q. And prior to June 26?

A. Yes.

Q. So that the second time you saw him you made the arrangement for the purchase of this property, did you—the second time you saw him?

A. I don't recollect whether I did the next time I saw him or not. I was down there three or four times.

Q. What were you doing all these times you were down there?

A. I went once there and he said he couldn't see me and so I had to come again.

Q. (By the Court) Well, was that about three weeks after the first interview with him?

A. Yes, I think it was.

Q. And when you first saw him, how long after your first interview was it that you first had a further talk with him about the property?

A. Well, it must have been three weeks, I think.

Q. No, I don't think you understand me: You say about three weeks after your first interview you went down there and couldn't see him?

A. Yes; it was only probably a week—anyway a few days after that.

Q. Then you did see him in a few days?

A. I did, yes.

Q. Then what did you do?

A. I made him an offer for the property.

Q. Did he accept the offer?

A. He didn't, no sir.

Q. What did he do?

A. Told me to call in again.

Q. And when did you call in again?

A. It was a few days after that; he set the date, but I don't remember it exactly.

Q. When was it, do you remember, when you went again finally?

A. Not exactly, no sir; I can't recall the exact date.

Q. Did you offer $600 then?

A. At that time?

Q. Yes?

A. No, I am not positive whether I made him an offer that day or not. The first time he turned me down and said he was too busy to bother with it, and I think I made him the offer the next time I was down there.

Q. Did he accept that offer?

A. No, he didn't.

Q. When did he accept the offer?

A. I think the next time I was there.

Q. When was that?

A. It might have been a week.

Q. About a week afterwards—when was that?

A. I can't recall just the dates, but I should judge it must have been about the last of June or the first of July—somewheres along there.

Q. What was done when you went there and he accepted your offer?

A. At first he wouldn't accept it; said he wanted

more money. I said, then I wouldn't bother with it. He says, "don't go away; we will talk the matter over," so we talked the matter over and he said he wanted $650 and I offered him $600 and he said that he had been instructed by the assignee or some of the creditors, or attorney for the creditors, to let it go for $650, but he said he guessed he had better close the deal.

Q. When was that?

A. Well, I think that was in July.

Q. What date?

A. I couldn't say.

Q. Now, at what time in these negotiations, Mr. Cole, had you broken off your arrangement with Dr. Davenport?

A. Well, at the time that I had the talk with him and told him that Isaacs had refused to give me an option.

Q. How far along had you gotten with Mr. Isaacs then?

A. I hadn't done anything at all when I told him that.

Q. You hadn't had any conversation with Mr. Isaacs?

A. Not in regard to buying the lots.

Q. Not until after you told the doctor that you were refused the option?

A. No, sir.

Q. Now, as I understand it, the time that you told the doctor that you had been refused the option was some time in May?

A. Well, it was the last of May or the first of June.

Q. About the latter part of May or the first of June you told the doctor that you couldn't get any option?

A. Yes, sir, I think so.

Q. And from that time on you never had any conversation with the doctor with reference to his going in and purchasing the property?

A. No, I don't remember having any conversation with him about it.

Q. You don't after that time?

A. No.

Q. Now, do you remember the time that your brother got married, Mr. Cole?

A. I can't recall the date.

Q. He got married up in Orange County, New York, didn't he?

A. Yes, sir.

Q. Do you remember when he got married?

A. I don't recall the date, no, but I think it was in June; I am not sure.

Q. The time during the first conversation with Dr. Davenport, didn't you say at that time that you would be busy that week because you had to go to your brother-in-law's wedding?

A. I don't remember any conversation of that kind.

Q. But your brother-in-law did get married sometime in June?

A. I think so; I won't be positive. I haven't the date with me when he got married.

Q. At the time you went out riding with the doctor and the little boy, Dr. Davenport invited you to go along, didn't he, to Passaic?

A. He did.

Q. How far had you got on your drive when you spoke to him about the option?

A. I think we were over south of Main avenue —somewhere over there towards Athenia.

Q. You had gone two or three miles, hadn't you?

A. Well, I should think a mile and a-half anyway.

Q. Did I understand you correctly when I thought that you said in your direct evidence that you were surprised that the doctor should say that he didn't want to have anything more to do with the property?

A. He said he didn't particularly care whether he went in with me to buy the lots or not.

Q. Didn't you say that you were surprised?

A. I felt surprised to think that he should change his mind.

Q. Why were you surprised if you had already told him that you couldn't get that option?

A. I thought possibly that we could get it afterwards, by making a bargain direct without getting an option.

Q. Mr. Cole, that is your signature to that answer, isn't it—you made that affidavit? (handing paper to witness).

A. Yes, I think so.

Q. Did you tell Dr. Davenport after you bought the property, that you had bought it? Did you tell him as soon as you bought it that you had bought it?

A. Very shortly after I did, I think.

Q. How soon?

A. I don't remember.

Q. Did you tell him of your own accord, or did he come and ask you about it?

A. That I don't remember. He came in the store and asked me something about it. I don't remember exactly what he said.

Q. At the time he spoke to you and suggested buying the Pos farm did you tell him you were going ahead and try to purchase this property?

A. No, sir.

Q. You didn't tell him at any time before purchasing the property that you were going to buy it after that?

A. I don't think I did.

Q. (By the Court) When?

A. After I told him that we couldn't get any option.

Q. But you told him when you were in in the carriage, on Sunday, that you

couldn't get any option; you had no conversation after that that you know of about buying it?

A. No, sir. He asked me one time.

Q. That is what counsel is asking you; when was that?

A. I think that was along in July sometime.

Q. Well, how long after you had bought the property?

A. Oh, it might have been two weeks.

Q. Two weeks after you got the deed?

A. I wouldn't say exactly—I wouldn't dare say that it was exactly two weeks; it might have been ten days, or something like that.

Q. After you got the deed?

A. Yes.

Q. Where did you have such talk with him?

A. In my store.

Q. Who mentioned the subject first?

A. I think the doctor did.

Q. What did he say?

A. He asked me what I had done about the Austin lots and I told him I had bought them.

Q. And you had had no talk with him about those lots since your conversation in the carriage?

A. I don't think that I did, no, sir.

Q. Can't you tell whether you did or not?

A. I don't remember that we had.

Q. I understood you to say when you told him in the carriage you had failed to get an option, that that was the end of the matter and it was all off?

A. I considered it so, but I don't remember saying it was all off.

Q. And then this was a month later, was it?

A. I think it was.

Q. Then he came and asked you what you did about the lots?

A. Yes.

Q. And you told him you had bought them?

A. Yes.

Q. Well, go on and give the rest of the conversation.

A. Well, as I said before, he went out then and then in a few days after that—

Q. That is, the conversation with Dr. Davenport?

A. Yes. Then he came in and said that thing had gotten him in a hole—

Q. Now, one minute; have you given all of that conversation that you now remember?

A. I think I have, yes sir; I can't recall anything more.

Q. All you recollect is that a month after the option had been refused and you told Dr. Davenport that it had been refused, he came into your store and asked you what you had done about these lots?

A. Yes.

Q. And you said you had bought them yourself?

A. Yes.

Q. And then he went out?

A. Yes.

Q. That is all you can recall?

A. Yes.

Q. Did he ask you what price you paid for them?

A. I don't think he did.

Q. You didn't tell him, though, did you?
A. No.

Q. (By the Court) Did he ask to see the contract or deed?
A. I think he did.

Q. Did he say anything about being interested in the property with you?
A. No, I don't remember.
Q. Did you offer to give him an interest in the property?
A. I did, yes sir; I said to him I would.

Q. (By the Court) At this second interview—I mean the first interview after your interview in the carriage.
A. I think that is the time; I am not exactly positive, I said to him after he spoke about getting him into a hole, we won't have any trouble about it, you can have a half interest in it if you want it.

Q. Then you said, "Doctor, we won't have any trouble about it"?
A. Yes.
Q. Was that in answer to his statement that he had an interest in the property?
A. What do you mean?
Q. Wasn't that in answer to a statement by the doctor that he had an interest in the property that you said, "Well, we won't have any trouble about it; I will let you have half"?
A. It is the same property we are talking about, yes sir.
Q. And he contended at that time that he was entitled to a half interest in the property, didn't he?
A. That I don't know.
Q. You don't remember that?
A. No, sir.

Q. You don't remember whether he did or not?

A. Well, he didn't demand it; I offered it.

Q. Why did you offer it?

A. Because I had gone and bought the property and rather than to have any trouble with a neighbor and a man that I had befriended and who had befriended me, I would rather turn around and give him a half interest.

Q. Did you tell him what you had paid for it?

A. I don't think he asked me.

Q. Did you tell him at some time that you didn't want Harrop in?

A. I think before that I told him that.

Q. What led you to say that you didn't want Harrop in the deal?

A. I don't know whether there was anything specific that led me to say it.

Q. Didn't you say that Harrop was mad at you or acted mad?

A. I don't remember saying any such thing to the doctor.

Q. Didn't you tell him that Mr. Harrop abused you on the street and wouldn't speak to you?

A. I don't remember such conversation.

Q. Might you not have said something of the kind?

A. I can't say that I did.

Q. You don't think that Dr. Davenport would tell an untruth about it, do you?

A. Well, I am not going to say that.

Q. Now, Mr. Cole, you have bought and sold a good deal of property on your own account, haven't you.

A. No, sir.

Q. Bought some property, haven't you?

A. Not on my own account I haven't no, sir.

Q. Well, you know a good deal about transferring property, buying and selling?

A. I don't pretend to know such a great sight; I am generally advised by an attorney.

Q. Mr. Cole, why didn't you record that deed after you got it?

A. I think Mr. Doremus can explain that matter.

Q. You kept it from the record?

A. No, sir, I went over there to have it recorded and showed it to the man that records the papers and he says, "Your certificate is wrong; you will have to take it back and have it changed."

Q. Why didn't you take it back and have it changed?

A. I did.

Q. Well, that was, when you went over there to have it recorded, in July, wasn't it?

A. I think it was in August.

Q. What part of August?

A. I don't recall the exact date; I didn't put it down and don't remember.

Q. You didn't go and have a new certificate put on and have it recorded, did you?

A. I think I did the next week.

Q. And put it on record?

A. I didn't put it on record.

Q. But you went and got a new certificate the next week?

A. Yes.

Q. Then why didn't you have it recorded?

A. They started this suit and I gave it to my attorney.

Q. Now you acted secretive about this matter; didn't you; after you got the deed you didn't tell them anything about the price?

A. I didn't think it was necessary that I should.

Q. Didn't he ask you whose name the deed was in?

A. No, sir, I don't remember that.

Q. Are you willing to say that he didn't ask you?

A. I don't remember their asking me whose name the deed was in.

Q. Did Mr. Harrop ask you whose name the deed was in?

A. He demanded to see the contract; I think that was all.

Q. When was that, Mr. Cole?

A. Well, I don't recall; I think it must have been in August.

Q. What part of August?

A. That I can't tell you.

Q. (By the Court) Before or after you had received the deed?

A. It was after.

Q. And didn't he ask you in whose name the contract was made?

A. I don't remember that he did, no.

Q. Don't you know that you refused to tell him whose name the contract was in?

A. Well now, I can't say; he might have asked me who it was.

Q. You are not able to say that you didn't refuse to tell him whose name the contract was in, are you?

A. I don't know whether I refused or not; I can't say positively.

Q. You think you may have done so?

A. I might have done so.

Q. What was your object in refusing to give him any information about it?

A. Well, I thought it was purely a matter of my own.

Q. (By the Court) But, Mr. Cole, when you refused to give him any information, you expected to immediately record the deed, I understand?

A. Yes.

Q. How did the consideration come to be made $10.?

A. Well, I think I wrote him a letter and asked him to make the consideration one dollar—it is customary, you know, in writing deeds, and I see he made it $10.

Q. (By the Court) Why did you want to have the consideration one dollar?

A. You see lots of property handled that way.

Q. What was your reason for doing that in this instance?

A. I didn't particularly care to let everybody know what I paid for it.

Q. How about other conveyances that have been made to you; have you or have you not had the true consideration inserted?

A. Sometimes I have and sometimes I have not.

Q. You had no special reason in this case why you requested him to make the consideration one dollar?

A. No special reason, no.

Q. Mr. Cole, didn't Mr. Harrop come to you and say that that property should be made over in the name of three and you said that you would consider it and let him know, and he came afterwards in relation to it and you told him you wouldn't do so? Isn't that so?

A. No; their claim was that they employed me as an agent; didn't say anything about turning it over to the three of us.

Q. Didn't he offer that as a settlement of the matter, that you should turn it over to the three of you?

A. No, sir.

Q. Wasn't it suggested as a way out of the difficulty that it be held by the three?

A. No sir, he demanded the property.

Q. In whose name did he demand it?

A. I don't know as he specified any one's name.

Q. Didn't say who claimed it at all?

A. No, I don't think he did.

Q. Didn't he say that he and Dr. Davenport claimed it.

A. I don't remember in whose name he made the claim to it now he just demanded the property.

Q. Didn't he speak to you between the time that you got this contract and the time the deed was delivered and you said you would consider it, and then when he came back you told him now you had him and you wouldn't give it up?

A. I don't remember such a conversation.

Q. Might you not have said that?

A. I don't think so.

Q. Did you have some negotiations with them, between the time you got this contract and the time that the deed was delivered in July?

A. No, sir.

Q. Did they see you?

A. No, sir.

Q. Did they have any talk with you about the property between those days?

A. I don't think they did, no sir.

Q. And during all this period, between the time Dr. Davenport first spoke to you and the time you finally got the deed, I understand you to say that there was no talk about the steam shovel being used on his property?

A. I don't remember of any conversation being used about the steam shovel.

Q. And you had no idea of that in your mind at any time you purchased it?

A. No I didn't; I didn't suppose the steam shovel would do me any good, unless I paid them for removing the gravel.

Re-Direct Examination by Mr. Doremus:

Q. I show you the deed which has been offered in evidence and ask you when you took it to the County Clerk's office and the County Clerk told you there was any other defect in that deed besides the certificate of the County Clerk?

A. I don't remember.

Q. Did he say anything about the acknowledgement being defective?

A. No.

Q. I call your attention to paragraph 12 of your answer, Mr. Cole, and read to you this clause: "And this defendant further answering admits that said complainants have requested him to disclose the price paid for said premises, or to accept the amount thereof from said complainants, but denies that said complainants ever requested him to deliver them a deed therefor, or that he ever refused so to do." Now, do I understand that you claim now that Dr. Davenport and Mr. Harrop did request that you disclose the price in the deed

A. I think they did.

Q. And did they ever request you to deliver a deed?

A. No, sir.

Q. When Mr. Harrop asked to see a paper do you remember whether that was a contract or deed? You were asked a moment ago as to Mr. Harrop demanding to see the deed.

A. No, I think he asked me to see the contract.

Q. (By the Court) When?

A. Well, it was after I made the purchase.

Q. How did he come to do that?

A. That I couldn't say.

Q. What did you say?

A. I refused to let him see it.

Q. What did you say to him?

A. I told him I bought the property with my own money and it was entirely a business affair of my own.

Q. Well, didn't it strike you as strange that Mr. Harrop should ask you to show the contract for the purchase of land with which he had nothing to do whatever?

A. I did.

Q. I understand you did not go down to see Mr. Isaacs on the first occasion to get an option in which Mr. Harrop had any interest; is that correct?

A. Well, I don't know whether he was considered in at that time or not. I don't remember.

Q. I understood you to say this afternoon that Dr. Davenport and you had a little talk between you about buying this property for the two of you?

A. Yes, sir.

Q. And nothing was said about Mr. Harrop at all?

A. Not when we were talking.

Q. You went down to get an option for yourself and the doctor?

A. Yes, sir.

Q. Then your statement in the answer, that you immediately after request made by the complainants that defendants should obtain an option for the purchase of said land, and in pursuance thereof called upon the owners of said land and endeavored to obtain an option for the purchase thereof for said complainants, is not correct, is it?

A. Well, I am not sure whether the doctor or Harrop or either one had been in

together. I don't know what their conversation was between them. This is merely an answer to the complaint. I don't know what view they took of it between themselves, whether they thought I was working for the two of them or only one.

Q. Mr. Cole, when did you first have an attorney during this trouble?

A. Just as soon as I was served with the notice —the subpoena.

Q. Then, before this suit was started you didn't have any counsel in this transaction?

A. No, because I was dealing with an attorney.

Q. And you didn't consult any lawyer in reference to it?

A. No, sir.

Defendants Rest.

JOHN T. HARROP recalled in his own behalf, in rebuttal, testified as follows:

Direct Examination by Mr. Watson:

Q. Mr. Harrop, is it true that you went to Mr. Cole and asked him if he wouldn't have the property made over in the three names and asked him to see the contract at the same time?

Mr. Doremus: May it please the Court, it strikes me that that is a very leading question.

The Court: It would be well to change the form of your question.

Q. Well, did you or not go to Mr. Cole, after he had gotten this contract that has been spoken

of, and ask him to have the deed made out in the names of all three of you, and did he or did he not say to you "I will consider it"?

Mr. Doremus: Now, I would like to interpose an objection to that. I still think it is extremely leading and not a proper question in that form.

The Court: Judge, you had better change the form of your question.

Q. Did you or did you not go to Mr. Cole after he had gotten this contract, and ask him to let you see it?

Mr. Doremus: Now, may it please the Court, it seems to me what he ought to ask is what did he do, not to suggest the answer.

The Court: I would suggest this form of question: Did you at any time have any conversation with Mr. Cole in which anything was said about a deed being made out to the three of you, and if so state that conversation.

Q. Did you or did you not have a conversation with Mr. Cole with reference to making the papers out in the three names?

A. I did not, not as regards having the papers made out in the three names, but in the two names I did.

Q. Well, did you or did you not have a conversation with reference to making the papers out in the two names?

A. I did.

Q. When was that?

A. That was on or about July 22.

Q. Then what was said between you about that?

John T. Harrop—For Complainants—Recalled, Cross.

A. At that time Mr. Cole told me that he then had the agreement or contract for the sale of this property and that he had it in his name, and I thought it was very queer.

Mr. Doremus: Never mind; I object.

Q. Then what did he say to you?

A. Why, I told him that that contract and the property should be turned over to Dr. Davenport and me.

Q. Then what did he say?

A. He said that he proposed to hold the property himself. So I told him that it might be well that he consider the matter and not act too hasty, as I thought he was doing the doctor and I an injustice, and I would let the thing go over a few days and I wanted the thing considered, and then after a few days I came for an answer.

Q. Then what did he say?

A. When I came again I asked him if he had reconsidered the matter and if he was satisfied to turn the property over to the doctor and me, and he then told me that he had the deed and proposed to keep it, and that Dr. Davenport and I had all the property we ought to have.

Cross Examination by Mr. Doremus:

Q. At that time when you say you came back and demanded that that the property be turned over to you and the doctor, did you say anything as to the conditions upon which the property should be turned over to you and Dr. Davenport?

A. I told him that we were ready to give him the price.

Q. Was a price mentioned?

A. In accordance with the terms of the agreement that we had made with him on or about June 26.

John T. Harrop—For Complainants—Recalled, Cross.

Q. You said that, did you?

A. I certainly did, and also told him we were ready and willing to pay him his commission and also his carfare. He spoke of having spent about four days in putting the deal through, and I told him we were willing to pay him for that and anything else that was just in the case.

Q. You said that on July 22; did you again repeat it at this interview?

A. No, along about July 22 was when I put it to him in that manner and came around to get his final decision as to what he was going to do about it, and he then said absolutely no, that he then had the deed of the property and proposed to keep it. I said: "Very well, Mr. Cole, we will now have a friendly lawsuit" and with that I walked out of the store.

Q. How long was this second interview after July 22?

A. Why, it wasn't more than four or five days at the most.

Q. And you are positive, then, that you repeated the same language as you did in the same interview, except you would pay him his commission and carfare and four days' services; is that right?

A. No, I don't say that. I said a minute ago that I didn't repeat the same thing.

Q. At which interview was it that you used this first language?

A. On or about July 22.

Q. And then you said, when you came back in the last interview, that you repeated what you had told him in your previous interview?

A. I asked him the question whether he had thought the matter over and was ready to turn the property over to us, and he said no, that he then had a deed.

John T. Harrop—For Complainants—Recalled, Cross.

Q. At this interview there was no such conversation as to paying his commission, the carfare and the four days' services?

A. I did not bring that out again, because there was no necessity for it.

Q. So that it was at that conversation on July 22 when all those things came up; is that right?

A. When all what things came up?

Q. What I have spoken of, the four days, and carfare and commission?

A. All that came up on July 22; but, understand, on my first meeting with him, which was on or about June 26, I also stated to him that we were ready to pay commission and reasonable expenses he might incur in getting this property for the doctor and me. That is the time that I asked the gentleman if he wouldn't come in and take a third with us. That is the time that he said absolutely he would not have anything to do with it unless I would guarantee to have the excess earth removed with the steam shovel.

Q. (By the Court) That was on or about the 26th of June?

A. Yes, sir.

Q. How do you fix that date?

A. I made a memorandum of that time.

Q. Where did you make the memorandum?

A. On certain things that I was doing and I traced it back so that I got that date.

Q. When did you trace it back?

A. Two or three months afterwards. Two months afterwards I traced it back as much as necessary; that is when I made my data, because I could recall two or three months back.

Q. (By the Court) The bill seems to allege that on or about the 3rd day of July

you made this arrangement with Mr. Cole.

A. Well, I think, to the best of my recollection, it was on or about the 26th of June.

Q. Can you tell us how you fix that date? You said a few minutes ago you figured it out from memoranda.

A. Well, I figured it out in this way. I had it fixed that Mr. Cole went to New York on a Wednesday, because that is the date that he would go to New York to transact business, to get in supplies. I am a contractor and every two weeks I pay my men. Now, following these weeks back, I can recall the particulars and the manner in which I arrived at the date, which was a very easy matter at the time, but when you go a year or two, it is going back too far for me.

Q. In other words, when you were getting ready to bring this suit in September, you set about fixing the date of the conversation?

A. Yes.

Q. And you were then able from memory, and the recollection of where you were at different times, to fix it?

A. I was at that time.

Q. But you can't do it now?

A. I couldn't follow it back now; it is too long ago.

Q. How then, two years after, can you say it was June 26, if you have made no effort since then to fix it?

A. Because, as I have explained, at this particular time when I did fix it I wrote it down on a piece of paper and have saved it.

John T. Harrop—For Complainants—Recalled, Cross.

Q. When did you last look at that piece of paper?

A. I have seen it on and off since this suit was started.

Q. When was the last time, as near as you can recall?

A. Three or four days ago.

Q. Where is the memorandum?

A. It is lying on my desk.

Q. Where?

A. In Garfield.

Q. Why didn't you bring it?

A. I didn't think it was necessary. It might be in here (examining papers in pocket). I know it was on a brown piece of paper.

Q. Well look and see.

A. (After examining papers) No, it isn't here.

Q. Did you ever mention that date to anybody else. Mr. Harrop, in connection with this suit?

A. The doctor and I talked it over.

Q. Did you show him that memorandum?

A. No, I don't believe he ever saw that memorandum.

Q. Did you, just before coming here to testify, go over the dates with him?

A. It was mentioned in a casual way and he questioned some of my dates and I showed him that I was right according to my memorandum. He said he thought one or two was wrong, but I said, "I can't help it, doctor; that is according to my records."

Q. Have you any records of any other events in connection with this property?

A. No.

Q. Why did you single out June 22?

A. Because that is the date in my mind as being the true date, to the best of my knowledge, and

I might say that I am almost positive that that was the date.

Q. Date of what?

A. The date I went into Mr. Cole's store and first presented this proposition, after having talked with him there.

Q. (By the Court) Did you know that the doctor had been in and had substantially the same talk with him?

A. No, at the time the doctor had not been in.

Q. Well, you made a complete bargain with Mr. Cole on that day?

A. I did.

Q. Then there was no necessity of any other meeting between Mr. Cole and Dr. Davenport?

A. No, sir.

Q. And I understood you to say this morning that you instructed Mr. Cole to go as high as $85. a lot?

A. $75.

Q. That is $900, is it not, for the 12 lots?

A. Yes.

Q. Do you know how it was, then, shortly afterwards Dr. Davenport went in to see Mr. Cole and made substantially the same arrangement that you had already made and told Mr. Cole to offer $500 and if he couldn't obtain them for that be could then offer $600, and if he then failed to come back and report? Do you know how that arrangement came to be made between your partner Dr. Davenport and Mr. Cole if you a few days before had made a complete arrangement with Mr. Cole, authoriz-

ing him to buy the property for as much as $900?

A. Well, I can't answer for the doctor, but I know that the transaction that the doctor and I had that morning was to fix a price and get it for $50 and he agreed that I should tell Mr. Cole that he could go as high as $75. and the doctor, a day or two afterwards, called me up and he said he knew nothing about it.

Q. Did you tell the doctor that you had authorized Mr. Cole to go as high as $75. a lot?

A. That was the understanding with the doctor, and I cannot recall reporting back to him and saying that I had told Mr. Cole that. I couldn't say positively that I made that report to the doctor.

GEORGE S. DAVENPORT, recalled for further examination in his own behalf, in rebuttal, testified as follows:

Direct Examination by Mr. Watson:

Q. Doctor, can you fix the date that you took the ride with Mr. Cole when his little boy was along?

A. Yes.

Q. What date was that?

A. July 9, Sunday.

Q. How are you able to fix that date?

A. By the visit I went to make on Burges Place, and that was the only visit I made, the child was sick. That was the controversy he referred to.

George S. Davenport—For Complainants—Recalled, Direct.

Q. (By the Court) Referred to where?

A. In my visiting list.

Q. What is that list?

A. Visiting list that I carried of my day's work.

Q. It is a little book in which you write down your calls?

A. Yes, and it is transferred to the ledger.

Q. Did you, write down the calls?

A. Yes.

Q. Can you fix the date of the first conversation?

A. Yes.

Q. What date was that?

A. June 26.

Q. How can you fix that date?

A. It was on Monday, 1905, preceding the 4th of July. It was the week his brother was married. I remember his brother came back from his trip and spent the 4th of July with him; at least he told me he had.

Q. Well, I understand that you made the first visit to see Mr. Cole in reference to this property, and then Mr. Harrop went?

A. No sir, Mr. Harrop went down first. Mr. Cole runs a grocery store and he will go out and deliver a few goods and close the door, and thinking Mr. Harrop might not see him and I being better acquainted than Mr. Harrop—

Q. You went and notified him on the same day?

A. Yes, same day.

Q. Before or after Mr. Harrop had seen him?

George S. Davenport—For Complainants—
Recalled, Cross.

A. After Mr. Harrop had seen him.

Q. Did you talk with Mr. Coles about the visit which Mr. Harrop had made?

A. Yes, I asked him if Mr. Harrop had been in to see him about purchasing the lots, and he said yes.

Q. Did he tell you what the terms were to be?

A. No, Mr. Harrop didn't give him any terms; that was his reply to me after he was berating Mr. Harrop, about being a mean man. I think he then asked me what the terms were and the discrepancy in your figures came out but I felt so well acquainted with him that I felt Mr. Harrop would follow the offer with a report about the lowest instead of the highest figures.

Q. Did you then know Mr. Harrop had told him he could go up to $75 a lot?

A. No sir; Mr. Cole said Mr. Harrop didn't give him any figures. I thought it was quite odd, because he said he had authorized him to purchase it for him.

Q. Did you afterwards learn the terms that he had stated to Mr. Cole?

A. Later on, after we had the trouble about it, I asked Mr. Harrop if he had stated any figures and he told me he had.

Cross Examination by Mr. Doremus:

Q. You say that you recently refreshed your recollection as to the date being the 9th of July when you and Mr. Cole took that ride; is that the only ride that you and Mr. Cole had taken during that spring together?

A. During this transaction.

George S. Davenport—For Complainants—
Recalled, Cross.

Q. Well, I mean, since the first of May, for example.

A. Yes, the only ride that I recollect.

Q. So that you are quite clear that that is the date when you had this conversation?

A. I am.

Q. I suppose you didn't put down in your visiting book the fact that this conversation took place?

A. No.

Q. So that your testimony with reference to the conversation is a pure question of memory, while the date is fixed by your book?

A. Yes.

Q. (By the Court) Did he go all the way to the Burgess house?

A. Burgess place, yes. It was a man by the name of Jake Johnson that lived there.

Q. And he sat in the carriage while you made the call?

A. Yes, sir.

Q. Now, one other question, doctor, about this conversation. I take it it must have been July 22 when you and Mr. Harrop both came to Mr. Cole's place?

A. O no, singly.

Q. I mean the first time.

A. I don't know what time Mr. Harrop came in.

Q. I know, but you testified you came later in the day.

A. That was the first visit, June 26, and that time I fix by being the last week in June.

Q. And that is the time you fix by his brother going on a wedding trip?

A. Yes.

George S. Davenport—For Complainants—
Recalled, Cross.

Q. Now, do you recall the hour in the morning or afternoon when you went to Mr. Cole's store?

A. I think it was before I went out making visits. It was shortly after Mr. Harrop went down.

Q. Did you see Mr. Harrop entering Mr. Cole's place?

A. No, I was in my office.

Q. Then all you know is what he told you?

A. Only what he told me. I can't testify as to Mr. Harrop's being in.

Q. So that when you had your conversation with Mr. Cole you didn't know that Mr. Harrop had been there previously, except from what Mr. Cole told you?

A. That is all.

Q. Do you know what time Mr. Harrop was there?

A. It must have been eight and nine o'clock in the morning when he was in, and I was in probably an hour or two after that—probably no more than an hour.

Q. And you had had no conversation at all with Mr. Cole or with Mr. Harrop with reference to the price until you entered at about 10 o'clock, after Mr. Harrop had been there at 9 o'clock, so that it was a new proposition to you about the price that you and Mr. Cole were agreeing upon?

A. Won't you repeat that?

Q. You had had no conversation with either Mr. Harrop or Mr. Cole as to the price on that day, prior to the time you called upon Mr. Cole?

A. O yes, Mr. Harrop and I talked of that.

Q. That day?

A. Yes, before I left my office.

Q. After you had seen Mr. Cole?

A. No, before going to see Mr. Cole.

Q. And then you had an arrangement that the price would be what?

A. I don't remember the exact limit fixed. It was either $70 a lot or $700 for the whole. My opinion is that it was $700 for the whole.

Q. Then did you ask Mr. Cole, or did he say to you what limit Mr. Harrop had fixed?

A. He told me that Mr. Harrop didn't give him any figure at all.

Q. And you fixed $600 as the outside limit.

A. No sir, I said if he had to go over that he must report back to us, since he didn't want to take a share and seemed rather indefinite about the matter and so much feeling against Mr. Harrop I thought perhaps the price would be shoved up to the highest figure and Mr. Harrop might blame me for it.

Q. (By the Court) Doctor, did you on that occasion distinctly say to Mr. Cole that you and Mr. Harrop were together in this business?

A. Yes, sir.

Q. Are you sure of that?

A. O yes.

Mr. Doremus: I would like to call Mr. Cole on that subject. I want to ask him what did actually take place on that 26th day of June, between himself and Dr. Davenport and between himself and Mr. Harrop, as to price.

The Court: I will allow him to state.

LEWIS E. COLE recalled in his own behalf, testified as follows:

Direct Examination by Mr. Doremus:

Q. Mr. Cole, do you remember Mr. Harrop calling upon you June 26, in relation to fixing the price upon this property?

A. I do not.

Q. Did he or not call upon you upon that day?

A. I don't think he did.

Q. Did Dr. Davenport call upon you on that day?

A. I can't swear to that.

Q. I am asking you the question, as to whether or not Mr. Harrop called to see you on the morning of the 26th of June and after he was gone Dr. Davenport talked with you on the same day?

A. I don't remember that they both called on me the same day.

Q. (By the Court) Ever?

A. No, sir.

Q. Can you say whether or not, at the commencement of this business, these two men called on you successively on the same day?

A. I don't remember that they did. I couldn't say whether it was the same day or the next day.

Q. Do you remember at the beginning of these proceedings whether it was in May or June, the occasion in which Mr. Harrop called on you and had a talk with you about your getting an option or making a purchase of these lots from Mr. Isaacs?

A. I think it was the last of May.

Q. And on that same day do you recollect whether Dr. Davenport called on the same errand?

A. No, sir.

Q. Did they ever call on the same errand, substantially, on the same day?

A. I don't think they did.

Q. You don't think they did; are you sure?

A. I am quite positive.

Q. Do you recollect any occasion when Dr. Davenport called and had a talk with you about going to see Mr. Isaacs and negotiating the purchase or getting an option upon this property, when you had a conversation with him and you spoke in a derogative way against Mr. Harrop?

A. When the doctor and I first talked about it I didn't know that Mr. Harrop had anything to do with it. He came in later.

Q. When you went down to Mr. Isaacs to negotiate for the property, whatever the contract was, you didn't know that Mr. Harrop had anything to do with it?

A. I wasn't positive about that.

Q. You had no idea that he had anything to do with it?

A. I don't think he had.

Testimony Closed.

The arguments in this cause are set for Monday, November 25, 1907, after 12 o'clock. If not finished on that day they are to be continued on Tuesday, the day following, until finished.

Memorandum of Conclusions.

IN CHANCERY OF NEW JERSEY.

(October 3rd, 1914)

Between JOHN T. HARROP, et al, Complainants, and LEWIS E. COLE, et als., Defendants.	Memorandum of Conclusions.

Final hearing on bill, answer and proofs taken in open court.

MR. WILLIAM W. WATSON, for Complainants.
MR. CORNELIUS DOREMUS, for Defendants.

STEVENSON, V. C.

As to the facts, the weight of evidence and the probabilities are on the side of the complainants. The defendant's story rests upon his uncorroborated testimony, and in many respects his story and his manner of narrating it upon the stand discredited his cause.

I find that the complainants verbally employed the defendant to negotiate on their behalf the purchase of a parcel of land in Passaic County. The defendant thus charged with this business, in which he had the confidence of his employers, violated his duty, purchased the land with his own money and took a deed thereof to himself.

With the view of the evidence which I entertain, the case resolves itself into a well defined question of law about which there has been a remarkable diversity of opinion expressed in decisions of the courts and in the text books.

Mr Perry seems to accept as established law that "parol proof cannot be received to establish a resulting trust in lands purchased by an agent, and paid for by his own funds, no money of the principal being used for the payment." 1 *Perry on Trusts* §135.

Mr. Browne in his authoritative work on the statute of frauds appears to favor the contrary view. *Browne on Statute of Frauds* §96.

In Vol. 15 of the Am. & Eng. Ency of Law, 2nd Ed., at page 1187, cases on both sides of this question are cited, and it is stated that "it seems to be held by the weight of authority that a court of equity cannot grant relief" by holding the agent "a constructive trustee."

We have the Supreme Court of the United States and the English courts, and the courts of several of the States, firmly supporting the rule that the derelict agent can be decreed in equity to hold in trust for his betrayed and defrauded principal. Other courts of various States of high authority have held otherwise.

It is important to note that the whole basis of objection to the granting of relief to the deceived principal rests upon the statute of frauds. The argument as stated by Mr. Perry is that "the relation of principal and agent depends upon the agreement existing between them, and the trust in such a case must arise from the agreement and not from the transaction, and where a trust arises from an agreement it is within the statute of frauds and must be in writing." I think that this view is entirely erroneous and the trend of the decisions is toward its rejection. A trust which is more correctly classifiable as a constructive trust (1 *Pom. Eq.* §155; 1 *Perry on Trusts* §166) than as a resulting trust (1 *Perry on Trusts* §135) is established by proof of the betrayal of confidence, of the vio-

lation of duties arising out of a fiduciary relation. The fiduciary relation may be established in a large number of ways. It is a mere accident that in this particular case, and in large numbers of others, the fiduciary relation grows out of a verbal promise. As the authorities abundantly show, equity will not tolerate the betrayal of confidence and it makes no difference how this confidence has been obtained.

When one man assumes to act as agent for another, as the representative of another, he necessarily establishes a fiduciary relation between himself and the other person who stands as his principal. This is in the very nature of the transaction because the agent undertakes to act not for his own benefit but for the benefit of his principal, and his principal stays out of his own business and confides in the agent to attend to this business for him. It is the assumption by the agent of his representative status and the confidence necessarily reposed in him by the principal which create the agent's peculiar liabilities and cast special limitations and obligations upon him. The agency may be established by a written contract or a verbal contract, or no contract whatever, the assumption and confidence involving a purely gratuitous service for which the agent is to receive no compensation in any form.

In a large class of cases analogous to the one in hand, equity intervenes where a fiduciary relation is found to exist between contracting parties and sets aside or modifies the most solemn written contracts and for that purpose admits parol evidence. 2 *Pom. Eq.* §956. 1 *Perry on Trusts* §210. In the case of Lillis vs. P. Ballentine & Sons, decided by me about three years ago but not reported, I held that "an obligation and a disqualifying fiduciary relation

may be created contemporaneously and the latter may infect the former precisely as if the fiduciary relation had antedated the legal obligation" citing the remarks of Mr. Justice Pitney in his opinion for the Court of Errors and Appeals in *Lynde* vs. *Lynde,* 64 *N. J. Eq.* 756.

It is not worth while, however, in my opinion, for the purposes of this case, to spend much time in the examination of the reasoning of judges and text writers in regard to this much controverted question, because I think the question is settled in New Jersey by the decision of the Court of Errors and Appeals in the case of *Rogers vs. Genung,* 76 *N. J. Eq.* 306 (1909). In this case the Court of Appeals reviewed the decree advised by Vice Chancellor Stevens whose opinion is published in 75 *N. J. Eq. p.* 13. The Vice Chancellor held in that case that the alleged agent, Genung, who the complainant claimed had undertaken by an oral contract to buy the land in question for him, was already the agent of the owner of the farm and bound as such to get the highest possible price, and was therefore incapacitiated to become the agent of or to enter into any confidential relation with a possible purchaser to whose attention he brought the farm and to whom he offered it for sale. The Court of Appeals took a different view of the facts, and notwithstanding that Genung was a real estate agent on whose books the farm in question was listed, and who "offered" it to the complainant for sale, they found that there was nothing in the case upon which to base such an agency on the part of Genung for the owner Conkling

As to the law laid down, Vice Chancellor Stevens recognizing the conflict of authorities, doubted whether he would be "justified in following the more recent English rule even if it were considered to be the better" in view of

the decisions of this court in *Wallace vs. Brown,* 10 *N. J. Eq.* 308 (*Chancellor Williamson* 1855) and several more recent cases which he cites.

The Court of Appeals, however, not being bound by prior decisions of the Court of Chancery, and having found that Genung, the purchaser, was not disqualified from being employed as agent by the complainant, in unmistakeable terms adopted the modern English rule overruling without citing all prior conflicting cases and established a constructive trust in favor of the complainant.

There is a question as to the sufficiency of the defendant's answer to invoke on his behalf the defence of the statute of frauds, and, as we have seen, it is that statute alone which sustains the particular defence we have in view.

It is well settled that if an answer, which does not expressly set up the statute of frauds, denies that the defendant made the contract alleged in the bill, it is a sufficient pleading to give the defendant the benefit of the statute as a defence. The denial of the contract puts the complainant to the proof of a legal contract or of a contract by legal instruments of evidence. The New Jersey cases on this subject may be found cited in *Lozier vs. Hill,* 68 *N. J. Eq. on page* 305.

This well settled rule of pleading is sometimes difficult of application and this present case illustrates the difficulty. The answer of the defendant Cole denies the making of the contract alleged in the complainant's bill, but then, manifestly assuming that an oral contract was made, goes on to set forth the defendant's interpretation of that oral contract or the defendant's understanding of its terms. The bill sets forth a contract whereby the complainants employed the defendant Cole as their agent to buy the land the answer denies that any contract was made under which the defendant was employed to buy the land for complainants, but alleges that there

was a contract made by the terms of which he was employed to endeavor to procure an option on the land for the benefit of the complainants, which option afterwards the owner refused to grant. No reference whatever is made in the answer to the statute of frauds. Under these pleadings the parties were sworn and testified as to what this oral contract was.

After parties have joined issue on their pleadings as to what oral contract they entered into, and each has endeavored in a protracted trial by the production of witnesses, to support his view as to the terms of the contract, I have a very grave doubt whether it is permissible to the defendant, acting upon a suggestion from opposing counsel or from the Court, to say at the end of his argument, or by a supplemental brief: "Well, it does not make any difference what this contract was. I have denied the existence of the contract set forth in the bill of complaint, and I now invoke the statute of frauds as a complete defence even if the Court is satisfied as the result of the trial that the complainant's account of the verbal contract is true and mine untrue."

It is unnecessary for me to decide this question of pleading and possibly an examination of the authorities would show that it is not an open question in this State. The decision will rest upon the views of the law of the case above indicated.

A decree will be advised establishing a constructive trust on behalf of the complainants, and directing the defendants to execute the trust by conveying the land to the defendants upon payment of the price. The rights of the defendant who has purchased a portion of the land will be considered and protected to the extent necessary, and any unconsidered matters will be determined upon settlement of the decree.

On Bill, &c.—Decree.

IN CHANCERY OF NEW JERSEY:

Between, JOHN T. HARROP, et al., Complainants, and LEWIS E. COLE, et als., Defendants.	On Bill &c. Decree.

This cause coming on to be heard at the present regular term of the Court of Chancery, held at the State House, in the City of Trenton, in the presence of William W. Watson, of counsel with the complainants, and Cornelius Doremus, of counsel with the defendants, Lewis E. Cole and Emma Cole, his wife, and the pleadings and proofs having been heard and the arguments of the respective counsel having been heard and considered, and the court having duly considered the said pleadings, proofs and arguments and it appearing to the court that the complainants are entitled to the relief sought and prayed for by them in their bill of complaint:

It is on this twenty-second day of June, nineteen hundred and fifteen, by Edwin Robert Walker, Chancellor of the State of New Jersey, ordered, adjudged and decreed and the said Chancellor, by virtue of the power and authority of this court doth hereby order, adjudge and decree that all that tract or parcel of land, situate, lying and being in the Borough of Garfield, in the County of Bergen and State of New Jersey, and described as follows:

Beginning at a point on the westerly side of Cambridge Avenue distant two hundred and twen-

ty-five feet southerly from the corner formed by the intersection of the westerly side of Cambridge Avenue with the southerly side of Hudson Street and running thence (1) Westerly parallel with Hudson Street two hundred feet to the easterly side of Bloomingdale Avenue; thence (2) Southerly along said side of Bloomingdale Avenue one hundred and fifty feet; thence (3) Easterly parallel with the first course two hundred feet to the westerly side of Cambridge Avenue and thence (4) northerly along said side of Cambridge Avenue one hundred and fifty feet to the place of beginning; was acquired and now is held by the said Lewis E. Cole in trust for the said complainants, and that the said defendants Lewis E. Cole and Emma, his wife are hereby ordered and directed to execute the said trust by conveying the said tract or parcel of land to the complainants upon the payment by the complainants of the sum of Fourteen hundred and fourteen dollars and eighty-four cents, being the purchase price of said land and other disbursements to which the defendant Lewis E. Cole is entitled.

And it is further ordered that the defendant Lewis E. Cole pay a counsel fee to the complainants of One Hundred and Fifty Dollars, to be included in the costs.

And it is further ordered, adjudged and decreed that the said Lewis E. Cole and Emma Cole, his wife, shall within thirty days after service upon them of a copy of this decree and of the taxed bill of costs in this cause, convey said tract of land to the complainants upon the payment by them of the said sum of Fourteen Hundred and Fourteen Dollars and eighty-four cents to the complainants less the amount of said costs

and counsel fee and that in default thereof an execution issue, etc.

E. R. WALKER,
C.

Respectfully advised
EUGENE STEVENSON,
V. C.

The amount set forth in the foregoing order is the correct computation.

June 22, 1915.

CORNELIUS DOREMUS,
Sol'r of defts.

A true copy.

ROBERT H. McADAMS,
Clerk.

Petition of Appeal.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

JOHN T. HARROP, et al.,
Complainants and
Respondents,

and

LEWIS E. COLE, et als.,
Defendants and
Appellants,

Petition of Appeal.

(On appeal of Lewis E. Cole.)

To the Honorable the Court of Errors and Appeals of the last resort in all causes:

The petition of Lewis E. Cole, appellant in the above stated cause, respectfully shows that

your petitioner finds himself aggrieved by a final decree made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of New Jersey, bearing date the twenty-second day of June, one thousand nine hundred and fifteen, in a cause wherein John T. Harrop and another were complainants and the said Lewis E. Cole and another were defendants, in this respect, to wit; whereas the defendant Lewis E. Cole purchased certain lands in the Borough of Garfield in this State and caused a deed thereof to be executed and delivered to him and paid the purchase price thereof and the complainants claimed title thereto as principals, and whereas by said decree of said Court of Chancery it was adjudged that said land was the property of said complainants and was purchased by said Lewis E. Cole as their agent and decreed that said Cole should convey said land to said complainants upon payment by them to him of the purchase price and interest and taxes and interest thereon paid by him and that said Lewis E. Cole should pay certain costs incurred by said complainants.

And your petitioner appeals from so much of said decree of the Chancellor as adjudges said land to be the property of said complainants and as orders said Lewis E. Cole to convey the same to them upon payment of said purchase price, taxes, interest and costs, on the ground that the same is erroneous, because of such ascertainment, determination and adjudication.

Your petitioner therefore prays that the decree of the Chancellor may in the particulars aforesaid be reversed, set aside and for nothing holden; and that your petitioner may have such relief in the premises as to this Honorable Court shall seem meet.

CORNELIUS DOREMUS,
Solicitor of Appellant.

Appeal.

IN CHANCERY OF NEW JERSEY.

Between

JOHN T. HARROP, et al.,
Complainants,

and

LEWIS E. COLE, et al.,
Defendants.

On Bill &c.
Appeal.

The defendant Lewis E. Cole hereby appeals from so much of the final decree made in this Court in the above stated Cause, as adjudged that the land described in the Bill of Complaint belonged to the complainants and was purchased by said Lewis E. Cole as their agent and decreed that said Cole should re-convey the same to complainants upon payment by them to him of the purchase price, taxes and interest and that he should pay certain costs of suit incurred by them—to the Court of Errors and Appeals of the last resort in all causes.

Dated, August 16th, 1915.

CORNELIUS DOREMUS,
Solicitor and of Counsel with
defendant Lewis E. Cole.

I conceive there is good cause for appeal in the above stated cause.

CORNELIUS DOREMUS,
Of counsel with defendant
Lewis E. Cole.

[1149]