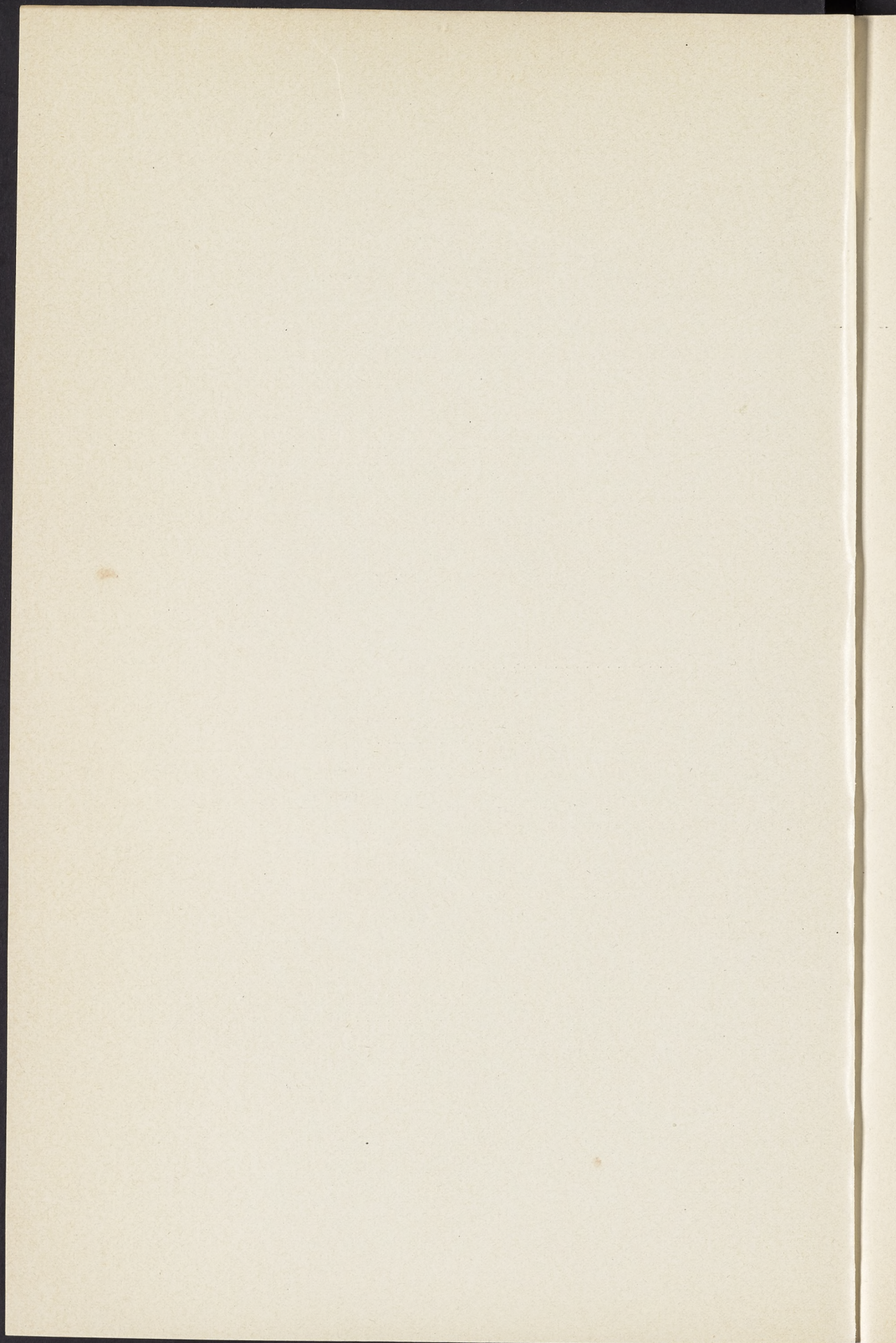


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New Jersey Supreme Court.

CUMBERLAND COUNTY.

AMERICAN FARM AGENCY, INC.,
 Plaintiff,
 vs.
INVESTORS MANAGEMENT COR-
PORATION, INC.,
 Defendant. } Action at Law.

NOTICE OF APPEAL

(Filed December 11, 1930)

To LeRoy W. Loder, Esq., Attorney of Plaintiff:

Take Notice, that the defendant appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause.

10

ALBERT R. McALLISTER,
Attorney for Appellant.

Service of a copy of the within notice is hereby acknowledged, December 9th, 1930.

LEROY W. LODER,
Attorney for Respondent.

20

NEW JERSEY SUPREME COURT.

AMERICAN FARM AGENCY, INC.,	}
<i>Plaintiff,</i>	
<i>vs.</i>	
INVESTORS MANAGEMENT COR- PORATION, INC.,	}
<i>Defendant.</i>	

10

COMPLAINT*(Filed April 5, 1929)*

Investors Management Corporation, Inc., the defendant in this cause, was summoned to answer unto American Agency, Inc., the plaintiff therein, in an action at law upon the following complaint:

(Summons issued April 2, 1929.)

20 The plaintiff, a corporation of the State of New Jersey, having its principal office at Vineland, Cumberland, New Jersey, says:

1. On February 13, 1929, at New York City, in the State of New York, at the request of defendant, plaintiff paid to Del-Bay Farms, Inc., four thousand seven hundred and five dollars and twenty-two cents (\$4,705.22).

2. In consideration thereof, defendant undertook to pay said sum to plaintiff on demand.

30 3. On March 25, 1929, plaintiff demanded payment of said sum of defendant.

4. Defendant has not paid the same.

Plaintiff demands as damages \$4,705.22 with interest from March 25, 1929.

LEROY W. LODER,
Attorney of Plaintiff.

ANSWER

(Filed June 18, 1929)

The defendant, Investors Management Corporation, Inc., a corporation of the State of New Jersey, having its principal office at Bridgeton, Cumberland County, New Jersey, says that:

1. It denies the truth of the matters contained in the complaint.

10

ALBERT R. MCALLISTER,
Attorney for Defendant.

COUNTER CLAIM

(Filed July 25, 1930)

By way of counter claim against the plaintiff and against Solomon L. Beilin, a third party, the defendant says that:

20

1. For all the purposes of this suit, the plaintiff and said Solomon L. Beilin are one and the same party plaintiff, and the defendant and Charles F. Seabrook are one and the same party defendant.

2. On or about November 27, 1928, Charles F. Seabrook and Solomon L. Beilin entered into an agreement that if said Beilin should purchase for said Seabrook or his associates a certain property situate in Cumberland County, New Jersey, known as Del-Bay Farms, said Beilin should receive two-thirds of the brokerage paid by the owner for making such sale, and said Seabrook and/or his associates should receive one-third thereof.

30

3. On or about February 13, 1929, said Beilin effected a sale of said Del-Bay Farms for the sum of \$525,000 and received therefor the brokerage of \$15,750, of which amount the sum of \$5,250 was thereupon immediately due and payable by said Beilin to said Seabrook and his associates.

4. On February 13, 1929, said Beilin paid for and at the request of said Seabrook and his associates, on account of said sum of \$5,250, the sum of \$4,705.22, leaving due the sum of \$544.78, which sum was collected by said Beilin from Del-Bay Farms, Incorporated, on February 13, 1929, as the balance of said brokerage, and which sum said Beilin neglects and refuses to pay over to said Seabrook or his associates.

5. Said Seabrook and his associates having formed
10 the defendant corporation, any and all sums of money due and owing to or from said Seabrook arising out of the transaction hereinabove set forth, are due and owing to or from Investors Management Corporation, Inc.

6. Said Beilin was, on February 13, 1929, and for a long time before that date, and still is, the president and general manager of the plaintiff, American Farm Agency, Inc., and any act done and performed by him in connection with the matters aforesaid was and is binding upon the plaintiff.

20 7. At the time of the commencement of this action, the plaintiff was, and still is, indebted to the defendant in the sum of \$5,250, for the one-third share of brokerage on the sale of the Del-Bay Farms property as above set forth.

Defendant offers to set-off said debt, with interest, against the plaintiff's demand to the extent of the sum found to be due plaintiff, and demands judgment for such balance as may be found to be due defendant from plaintiff on said account.

30 Defendant counter-claims against the plaintiff \$544.78, besides interest from February 13, 1929.

ALBERT R. McALLISTER,
Attorney for Defendant.

REPLY TO COUNTER-CLAIM

(Filed August 1, 1930)

The plaintiff replying to the counter-claim of the defendant, says :

1. Paragraph one is admitted.
2. Paragraph two is denied.
3. Paragraph three is denied. 10
4. Paragraph four is denied.
5. Paragraph five is admitted.
6. Paragraph six is admitted.
7. Paragraph seven is admitted.

FIRST DEFENSE

The plaintiff did not enter into the agreement set out in the above counter-claim.

20

SECOND DEFENSE

The agreement set out in the above counter-claim by the plaintiff and Charles F. Seabrook was rescinded by mutual consent prior to the sale of the Del-Bay property through the plaintiff as a real estate broker.

THIRD DEFENSE

The contract set out in the above counter-claim is illegal and opposed to public policy and void. The said 30
Charles F. Seabrook, knowing that the plaintiff was a real estate broker and obligated to use his best efforts to serve his principal, the owner of the property and any secret agreement to divide his brokerage without his principal's knowledge, with the purchaser of the property is illegal, contrary to public policy and void.

LEROY W. LODER,
Attorney of Plaintiff.

ORDER TO STRIKE OUT

(Filed September 26, 1930)

On motion of LeRoy W. Loder, attorney of plaintiff, and with the consent of Albert R. McAllister, attorney of the defendant, it is ordered that paragraph seven of the answer to the counter-claim be amended to read, "Paragraph seven is denied."

10 Order made in open Court September 23, 1930.

W. F. Sooy,
C. C. J.

On motion of LeRoy W. Loder, *Attorney for plaintiff.*

REJOINDER

20

(Filed September 26, 1930)

The plaintiff denies all of the affirmative allegations contained in the answer to counter-claim.

ALBERT R. McALLISTER,
Attorney of Defendant.

JUDGMENT

30

(Filed September 26, 1930)

This case was tried before Judge William, Frank Sook and a jury at the Cumberland County Circuit Court on September 23 and 24, 1930, and the jury returned a verdict in favor of the plaintiff and against the defendant in the sum of \$5,127.91 and a verdict of No Cause for Action on the defendant's counter-claim.

Whereupon it is adjudged that the plaintiff American Farm Agency, Inc., do recover of the said defendant Investors Management Corporation, Inc., on the complaint the sum of five thousand one hundred twenty-seven dollars and ninety-one cents damages, together with its costs, which have been taxed at the sum of sixty-five dollars and fifty cents, making in the whole the sum of five thousand one hundred ninety-three dollars and forty-one cents, and it is further adjudged that the counter-claim of the defendant be dismissed. 10

\$5,127.91
65.50

\$5,193.41

Judgment signed and entered September 26, 1930.

WM. J. GUMMERE,
C. J.

20

NEW JERSEY SUPREME COURT,
CUMBERLAND COUNTY.

AMERICAN FARM AGENCY, INC.,	} Plaintiff,	} Action at Law.
vs.		
INVESTORS MANAGEMENT CORPORATION, INC.,	} Defendant.	}

30

DEPOSITIONS

Deposition of Charles F. Seabrook, taken before C. W. Myrose, Supreme Court Examiner, at the office of Walter H. Bacon, Esq., Bridgeton, New Jersey, on June 18, 1930, in the presence of LeRoy W. Loder, Esq., attorney for plaintiff, and Hon. Albert R. McAllister, attorney for defendant, and Walter H. Bacon, Esq., of counsel.

EXAMINER'S FEES

1 sitting	\$6.00
Swearing 1 witness25
57 folios, @ 30¢	17.10
	<hr/>
	\$23.35

It is stipulated and agreed by and between counsel for the respective parties that the depositions taken
 10 herein this day may be read and used at the trial of the cause with the same force and effect as if taken after the filing of counter-claim by the defendant and reply thereto by plaintiff.

CHARLES F. SEABROOK, sworn.

Direct Examination—By Mr. Bacon.

Q. Where do you live?

A. Upper Deerfield Township, Cumberland County, New Jersey.

20 Q. In the fall of 1928 did you have any business with Solomon L. Beilin? A. Yes.

Q. What was the nature of that business? State how the matter originated and what the facts were in connection with it, prior to November 27th, 1928, which, for your information, is the date of the letter which you wrote him, a copy of which I show you.

A. May I look at the memorandum to refresh my memory as to the dates before we start?

Q. What memorandum is that?

30 A. Shortly after we discussed this I prepared a memorandum and I haven't seen it, as you know, for several months.

Q. I have no objection, if the other side hasn't.

Mr. Loder—I haven't. All he wants to do is look at it, isn't it?

A. I just want to be able to speak logically. The first time I had any business with Mr. Beilin, he called me on the telephone in my office in New York. I wasn't there that morning. I was in Mr. Alden Smith's office,

of the Atlas Cement Company, at 42nd Street, and the call was transferred to me there. At that time I had never met Mr. Beilin, I didn't know how he looked, even. He said he wanted to see me about something very important, and he said, "I suppose you know what I want to see you about," and I said, "No, I haven't the least idea." Well, he said, "I want to talk to you about the Del-Bay Farms matter; I want to let you know that it is for sale and I think that if you are interested in purchasing it I could probably help you." 10
I answered that, "I know it is for sale, it was offered to me a couple of months ago, but I will be in New York all the week and if you wish to see me I will be glad to see you." He said, "Well, I will be over there on Thursday, could you see me Thursday morning?" I said, "Yes." And he came to my office Thursday morning, I think somewhere about ten o'clock.

Q. Do you know what day of the month of what month it was?

A. To the best of my recollection it was between the middle and the end of November. 20

Q. Was it before the 28th of November?

A. Yes. Yes, I am sure it was.

Q. Now, what happened on the occasion of that visit?

A. Well, Mr. Beilin said, "Now you look like a straight-forward, honest fellow, and I know that is the kind of fellow I am. I am going to put all my cards on the table. I believe you are interested in buying this property. I think I can help you buy it." Then ensued a conversation, a lot of details about Meyer Handleman and Dr. App, that he went over the property with them and studied the apple orchards and estimated the values of the property, and also a lot of conversation about two or three groups of financiers, real estate operators, one group in Atlantic City—I don't recollect their names now—who he had been in touch with and who he thought would buy the property, and another group of which the principal was in Florida, Miami, Florida, possibly he might have gone to Cuba, and another group on Phila- 30

delphia and Camden. At the present time I can't recollect any of their names, although I think I probably have some memorandums in connection with them. Of this group he thought he could probably arrange to get them interested in the property and sell it to them, but, of course, if I was interested, it might be easier to work with me. I told him I was interested, that Mr. Handleman had approached me some time in September or October with a letter asking me about it and I had had
20 several conferences with him and Mr. White, Jr. and we were quite far along on negotiations but had not come to anything definite. I, however, would be glad to discuss the thing further with him, and we arranged to meet again at his office in Vineland on Saturday evening. My recollection is I had to be in Atlantic City that afternoon and as I drove over from Atlantic City I would stop at his office late Saturday evening.

Q. Now, at that time had you already arranged to purchase a part of this property, and did you tell him
20 that?

A. Yes, the upper part of the property, what was originally known as the Seabrook Farms before the National Farming Corporation was formed by the Whites and Edgar Smith and the orchard development had taken place, the upper part, the old Seabrooks Farms part, I did tell him that a definite price had been given me by Handleman and that I had an option on that part and that I had agreed to buy and had made some deposits on several pieces of land on the upper end, which they
30 had planned to sell to some other people, and also had agreed to buy the hotbed sash and the Seely Mill property with all the houses and the village of Seely, all of which I had made or agreed to make and did make shortly afterward, if I hadn't before a deposit of 20 per cent on. At least, I had that—

Q. Those were isolated pieces on which you had made this deposit, were they not?

A. No, they were—they joined the property on the upper end, but Handleman was under, apparently, a

great deal of pressure by the Whites to dispose of the property, and as he hadn't been successful in selling it in a block, he was starting to sell it off by parcels, but all of this that I referred to as being on the upper end of the property towards Deerfield was a part of the main property and all was together. Seely is a separate thing.

Q. Did you see Mr. Beilin on this Saturday night?

A. Yes.

Q. Where?

A. At his office in what was one of the old bank buildings, I think the 'Tradesmen's.

10

Q. In Vineland? A. In Vineland, yes.

Q. Did you reach any definite arrangement at that time?

A. Yes, we discussed the various ways and means of how we might work together, or, rather, he proceeded to tell me how much help he would be to me in buying the property, and he finally convinced me that he could be, and as the result of that we came to an understanding which I said I would confirm by a letter from New York on the following Monday.

20

Q. At that time were you in a position to buy this property yourself or were you to form a syndicate to buy it?

A. Well, I was in a position, with the help of some other people who were in agreement with me to furnish sufficient money to pay for the property at a price that we were willing to offer. That price, of course, had not at that time been definitely discussed with Mr. Beilin or with anyone else in connection with the selling of the farms.

30

Q. Did you after that interview write Mr. Beilin a letter?

A. Yes. We had some conversation subsequent to that.

Q. That is, before this letter was written, you mean?

A. Yes, between Saturday night and the time the letter was written.

Q. State what that was.

A. It happened on Monday. While I had planned to go to New York, I had to stop in Philadelphia and I didn't get over to New York until late Monday.

Q. Don't bother about those details.

A. I wasn't able to write the letter. On Tuesday morning Mr. Beilin called me up on the telephone and said he hadn't received the letter and would I please write it, and we discussed the matter again over the
10 telephone. I asked him some questions on some of the points that weren't quite clear, and as a result of that I sat down and immediately wrote this letter and sent it to him.

Q. I show you what purports to be a copy of that letter addressed by you to Mr. Beilin, dated November 27, 1928. Is that a copy of the letter which you wrote to Mr. Beilin? A. Yes.

Q. Read it into the record, please.

A. "S. L. Beilin, Vineland, N. J. Dear Mr. Beilin:
20 Confirming my conversation with you Saturday evening, November 24th, I wish to advise that it is my understanding with reference to the Del-Bay Farms matter, in case you wish to purchase this property for me or any of my associates, you are to receive two-thirds of the brokerage and I or my associates are to receive one-third, and in case I or my associates purchase the property direct, we are to pay you fifty per cent of the regular brokerage commission for purchasing same. This,
30 however, does not apply to the purchases I have already made, unless they are consolidated into the purchase of the main property. I believe this is in accordance with our understanding, and if so, please acknowledge."

By Mr. Loder.

Q. I note, Mr. Seabrook, that the letter you just read contains the following: "I believe that this is in accordance with our understanding. If so, please acknowledge." Did you receive any acknowledgement from Mr. Beilin?

A. Never received any written acknowledgement.

Q. Any other acknowledgement of it?

A. Oh, yes, he admitted receiving—told me he received the letter and it was satisfactory.

Q. You never received any written acknowledgement from him? A. No.

Mr. Loder—I would like to make an objection to the offering of the letter in evidence.

Mr. Bacon—I ask Judge Loder if he can produce this letter. If so, I ask him to do so, the original letter.

10

Mr. Loder—I can produce it, but I do not have it with me. I will produce it at the trial, and I say now I am satisfied that the letter that has just been read is a true copy.

Mr. Bacon—I ask that this copy be marked for identification, and offer it in evidence.

Mr. Loder—I desire to note an objection to the admission of the letter, on the ground that it does not appear that the receipt of this letter was sufficiently acknowledged to make it evidence.

20

(The letter was marked Exhibit D-1.)

By Mr. Bacon.

Q. What did Mr. Beilin ever say to you as to his receipt of this letter?

A. Well, the next time we met following the letter to discuss the matter further, I asked him if he got my letter and if it was satisfactory, and he said yes, he did and it was all right, "Now, let's do some business".

Q. As the ultimate result of the plan outlined in this letter, was this property purchased by you and your associates, and was it conveyed to the defendant in this suit, the Investor's Management Corporation, Inc.?

30

A. I feel inclined to answer the last part first. It was conveyed to the Investor's Management. It was purchased by my associates and myself, and in general it was purchased along similar lines to what is outlined here, which was the result of what we had planned and discussed before.

Q. What was the price paid?

A. I am afraid I can't give you the exact figure without referring to my memorandum on that.

Q. It was at least five hundred thousand dollars, wasn't it?

A. The price including mortgages. I thought you wanted to separate it from the cash paid and mortgages, and as they were odd figures on dollars and cents—

Q. You don't know what the price was?

10 A. I couldn't give that, but the total price, including us assuming the mortgages they had on the property, was \$525,000.

Q. Do you know what rate of commission was paid by the Del-Bay Farms for this sale?

A. Mr. Beilin told me it was to be three per cent.

Q. According to this letter, Exhibit 1, what was to be your proportion of that commission? A. One-third.

Q. Has Mr. Beilin ever paid to you your one-third of that commission? A. No.

20 Q. I show you what purports to be a statement of account with S. L. Beilin, due to the Investor's Management Corporation, Inc. What is the amount of your one-third of the commission as figured here in accordance with the letter to Mr. Beilin dated November 27, 1928? A. \$5,250.

Q. In the settlement for the Del-Bay property did Mr. Beilin turn over a part of that commission to the Del-Bay Farms, and if so, how much? A. \$4,705.22.

Q. And that leaves due you how much money?

30 A. A balance of \$544.78.

Q. Has that balance ever been paid to you? A. No.

Cross Examination—By Mr. Loder.

Q. At the time the settlement was made for the Del-Bay Farm property, were you acting for the Investor's Management Corporation, or, in other words, is it conceded that your acts and words at that time bound the Investors Management Corporation? A. Yes.

Q. At the time you had the conversation with Beilin which led up to the letter which you wrote to him and which you testified about, what was said about the rate of commission on the sale? My question relates to the rate of commission on the sale. Was there any discussion between you and Mr. Beilin as to rate of commission which he would receive from the Del-Bay Corporation on the sale of this property?

A. Yes. I asked him what the usual commission was. He said that the Real Estate Board or Commission, whatever you call it, allowed a commission not to exceed five per cent, and I asked him if it was usual to pay a commission as large as that on a very large deal. He said well, of course, if it was a large deal and they couldn't get that much, they probably might be willing to accept less. I asked him if he didn't think that a deal of this size might or should be handled for less commission. This part of the discussion at this time then had to do with our discussion as to him buying the property for us in case we decided to do that, or, in other words, in case he was unable to get authority from Mr. White to act as his agent, he then suggested that he might act as our agent and purchase it, and all of this discussion in connection with the commission arose from that, and then we finally agreed that in case he purchased the property for us, that he would be paid half of the regular commission. 10 20

Q. That is, there was some talk about the fact that under certain conditions you and your associates would pay him one-half of the regular commission? 30

A. Yes. You see, at that time Mr. Beilin didn't have any deal. He was just trying to make a deal with me and then going to make a deal with the Whites, and if he couldn't make a deal with the Whites, then make a deal with me and then go and try and buy something from the Whites. He had nothing to offer at that time. He had an idea. He sold me an idea.

Q. But there was some discussion about the fact that under certain conditions you and your associates would pay him a commission in case you bought this property?

A. In case that he was unable to get a contract with the Whites to sell it to us, then we discussed the basis on which he might buy it for us.

Q. He might buy it for you, in which case you and your associates would pay him a commission?

A. A commission to buy it, yes.

10 Q. You know there were some considerable negotiations back and forth between Beilin as agent for the Del-Bay Company and yourselves? A. Yes.

Q. And some considerable discussion as to price?

A. Yes.

Q. During that discussion was there anything said by you to Beilin about the fact that you would pay him a commission or a part of the commission in case he could not get it from the Del-Bay people at the price you offered for the property?

20 A. May I relate to you just my recollection of what was said?

Q. Yes.

A. Toward the end of the negotiations, which was about two or three days before the deal was—just a few days before the deal was finally consummated, I think about three days before—as I understand it, up to that time Mr. Beilin did not have any definite contract with them for the definite commission—he came back and said, “Well, the best price is so and so.” I think
30 five hundred and twenty-five—I am not sure of that—“and the best commission they will offer me is—all I can get is three per cent.” He came to my office in New York. Mr. Alden Smith was in the room at that time. “Is that all right with you?” I, thinking it quite natural that he would consult with me, inasmuch as we were interested in one-third of it, said, “Yes, it is all right with me if it is with you; go ahead.”

Q. While these negotiations were pending and shortly before the agreement was signed, didn't you make an

offer for the property to Beilin and say to him that it he couldn't get the commission out of the Del-Bay Company at that figure, that you would see that he got his commission? A. No.

Q. Or that you would pay him the commission?

A. No, not at that time. Any discussion in that connection was the time we were discussing ways and means of buying it, based on his idea, which resulted in this letter. That was at the beginning. Such a conversation was had at the beginning, but not at that time. 10

Q. And you didn't say to him shortly before this contract was closed to try to get part of the commission from the Del-Bay people and you would pay the balance if they would accept the offer which you made for the property?

A. I am absolutely positive that the last and final discussion on this point was had in my office, Room 476, 50 Church Street, in the afternoon of, I believe, the third day before it was closed, in the presence of Alden Smith. Mr. Beilin came in and said, "I believe I am going to be able to buy the property for \$525,000, but they will only pay me three per cent commission. Is that all right with you?" and I said, "Yes." There was no other discussion about commission until several weeks after the property was bought and settled for, by Mr. Beilin, as to the rate of commission. 20

Now, at the time that you have just testified, when Mr. Beilin came in your office, which you think was about three days before the contract was signed, was Mr. McDonald present? 30

A. Mr. McDonald was with Mr. Beilin that day, was either in our offices or came in with him, was either in a corner of the large room or the adjoining room, and Mr. McDonald told me when we discussed this that he did not hear this conversation.

Q. But he was in your office with Beilin?

A. A pair of doors between. I am not quite sure, but he was nearby, according to my recollection.

Q. You and your associates took the contract for this property in the name of Mr. McDonald, didn't you?

A. Yes.

Q. What conversation did you have with Mr. Beilin in reference to turning back to the Del-Bay Corporation this check for \$4,700 and some odd dollars?

A. Part of the contract, as you may know, was that we were to pay all of the operating charges up to the date of settlement. We attempted to settle three days
10 before the day originally, in order to have time. The charges had been planned and figured for that date. The following day was a holiday, Lincoln's Birthday. We did settle the next day, and on that day they were not able to give us the exact figures. It was necessary for us to furnish a certified or cashier's check for the settle-
20 ment, and, as stated, the day before was a holiday and we couldn't get it that day. We had our check and had tendered it the day before for the full amount of the settlement for the purchase price, but did not have the amount of the adjustment of the operating charges. We knew that they were between—we had understood they were between four and five thousand dollars. We didn't have the exact amount. The agreement which we had drawn for the settlement was not drawn in a very friendly manner toward us, and we had advice that if a flat and complete tender of all funds wasn't made at two-thirty that afternoon we might be in default and lose our hundred thousand dollars already deposited. We
30 were very anxious, of course, to not default in any way. We suggested and discussed the afternoon before, which was a holiday, with Mr. Beilin, Mr. McDonald and Mr. Smith, and also that morning, that the best way to adjust the operating charges, as we might not have time after they gave us the figures to rush down to a bank and get a check and get it certified and bring it back to them and get together the commission, would be to give them back their own check, which they couldn't refuse to take, because they owed Beilin a commission and whatever that figure was they would draw a check for that amount, give

it to Mr. Beilin and Mr. Beilin would give it back to them, and then we would adjust that matter with Mr. Beilin when we settled.

Q. That is, Mr. Beilin would give them back his check for the benefit of the Investors Management Corporation, and on account of the amount due from the Investors Management to the Del-Bay Company?

A. Yes.

Q. And that was done?

A. Mr. Beilin gave back the check they had already given him, in order that we might pay them in funds which they couldn't question at that time. That was the real reason for doing that, and not that we didn't have the money in bank to pay it. 10

Q. This was discussed with Mr. Beilin and also Mr. McDonald?

A. This was discussed the day before. Mr. Beilin, Mr. McAllister, Mr. Smith, and I am sure Mr. McDonald, was in some of the discussions, and also that morning at our office, as being the means of settlement. 20

Q. The Investors Management Corporation has never paid back this sum of money to Mr. Beilin or the American Farm Agency, has it? A. No.

Q. You spoke about some arrangement which you thought you had whereby you were to have a share of Beilin's commissions. Do you hold a real estate broker's license or a real estate agent's license? A. No.

Q. Either in New York or New Jersey? A. No.

Q. Did you at the time you attempted to make this arrangement? A. No. 30

Q. Did Beilin call your attention to the fact that it would be unethical, if not illegal, to make such an arrangement with you? A. No.

Q. Or tell you that he have to submit the matter to an attorney?

A. No, he did not tell me that. Nothing.

Q. You knew at the time, didn't you, that there was some provision in the New Jersey statutes with reference

to having a real estate broker's commission in order to deal in real estate, or didn't you know it at the time?

A. Yes, but this agreement this was based on was not at all for this purpose.

Q. Wasn't for what purpose?

A. A part of the compensation which was to come to me and my associates was not to be a commission. Mr. Beilin said to me, "This is a very large deal, Mr. Seabrook, a much larger deal than I have ever handled, and I can't handle this deal without your assistance. I will attempt to do the bargaining with the Whites, but you will have to assist me, you and your associates, with the other end of it," and we agreed to do that. We spent our time and our money for expenses quite freely in New York, and that was what this was for. It wasn't considered in any way or discussed that this was a part of the real estate commission. Mr. Beilin was really discussing first with us, as I have said, the matter of trying to buy this property for us if he couldn't get the contract to sell it to us, and then when he did get some understanding about a contract to sell it to us, then he solicited our help to assist him in carrying this out.

Q. And you understood that for the help which you were going to render, you were to receive one-third of the brokerage? A. Not me personally.

Q. You and your associates were to receive one-third of the brokerage? A. Yes, that is right.

Q. For the sale of the property? A. Yes.

30 By Mr. Bacon.

Q. Why don't you or the Investors Management Corporation pay to Mr. Beilin the \$4,705.22 which he paid the Del-Bay Farms on account?

A. Late in the afternoon after the settlement, Mr. Beilin and Mr. McDonald met me in the lobby of the Belmont Hotel, and Mr. Beilin then asked me about "giving me back" that money which he advanced in the morning. I said, "Well, you still owe us some money. Our proportion of the commission you received is over

five thousand dollars." He said, "Well, I have got to have the money. I planned on using it. I have given some checks out," and I said to him, "Well, but you got more commission than that, didn't you? You got a total of over fifteen thousand dollars," and he said, "Oh, I got two-thirds of the commission before." I said, "That is the first I knew you received any. I hadn't given it a thought, but I am surprised that the Whites would give you at least more than one-third of it until the property was sold; you are better than I thought you was." Mr. Alden Smith was standing nearby and waiting for me to go to another appointment with some people who were waiting and I said, "It isn't at all in accordance with our agreement and understanding, and I will have to discuss it with you some other time," and we walked over towards Mr. McDonald and I said, "What do you thing about that Mr. McDonald?" and he said, "Well, I think he ought to be satisfied as he is, the amount of money he has got is a hell of a lot of money for anybody in Vineland."

10

20

Q. Then do I understand you to say that the reason you didn't pay this money to Beilin was because you didn't owe it to him and that he owes you money yet?

A. Yes, he owes us money. I said to him, "Well, we will offset it. You owe me four or five hundred dollars, about five hundred dollars."

Q. How do you know what commission was paid by the Del-Bay Farms to Mr. Beilin? Did you ever see the contract between them?

A. I never saw it until you showed it to me after legal proceedings had been—I never asked him for the contract and never saw it. I accepted his statement.

30

Q. Your testimony was, in answer to a question by Judge Loder, that at a certain conversation had about three days before the actual deal was made, Mr. Beilin told you that all that he could get out of these people was three per cent? A. Yes.

Q. When did you first know that Mr. Beilin had made an arrangement to get five per cent, and how did you

know it? You must have known it, apparently, at the time the settlement was made. Who told you?

A. He didn't get five per cent.

Q. All he did get was three per cent?

A. All he did get was three per cent. I don't understand that he ever had any definite arrangement about commissions settled until that day. It was always up in the air. He didn't tell me so.

Q. When he told you, then, that three per cent was
20 all he could get, that was the fact about it?

A. Yes, that turns out to be the fact, and I believe that to be the fact. I haven't any reason to believe otherwise. He asked me if that was satisfactory to me and I told him it was.

Q. Did he tell you he received \$10,500 for two-thirds of the commission?

A. He never told me that until after the settlement in the evening at the Belmont Hotel. I had no idea that there had been any money paid. I hadn't any idea they
20 had paid two-thirds.

Q. And that conversation was after he had given this check for \$4,500? A. Yes.

I hereby certify that the foregoing is a full and accurate transcript of the testimony taken before me in the before entitled cause.

CLAUDE W. MYROSE,
Supreme Court Examiner.

NEW JERSEY SUPREME COURT.
CUMBERLAND COUNTY.

AMERICAN FARM AGENCY, <i>Plaintiff,</i> <i>vs.</i> INVESTORS MANAGEMENT COR- PORATION, INC., <i>Defendant.</i>	}	Action at Law.	10
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Bridgeton, N. J., September 23, 1930.
 Before Hon. William Frank Sooy, Judge, and Jury.
 Appearances—For Plaintiff: Hon. LeRoy W. Loder
 and J. Roy Oliver, Esq. For Defendant: Hon. Albert
 R. McAllister and Walter H. Bacon, Esq.
 (The jury was sworn at 12:10 P. M.)
 (Mr. Loder opened the Plaintiff's case to the jury.)
 (Mr. McAllister opened the Defendant's case to the
 jury.)

20

A recess was taken until 1:30 P. M.

AFTERNOON SESSION

SOLOMON L. BEILIN, sworn.
 Direct examination—By *Mr. Loder*.
 Q. Mr. Beilin, what position do you hold in the
 American Farm Agency? A. President. 30
 Q. You are the president of that company?
 A. Yes, sir.
 Q. What business is the company in?
 A. Selling farm property; real estate.
 Q. Is that company duly licensed by the State of New
 Jersey to conduct a real estate business? A. Yes, sir.
 Q. Was it so licensed in November of 1928?
 A. It was.
 Q. And up to the present time? A. Yes, sir.
 Q. You are also a real estate broker? A. Yes, sir.

Q. Now, in the fall of 1928 did or did you not have the Del-Bay Farms for sale, as a broker? A. I did.

Q. You know Mr. Charles Seabrook? A. I do.

Q. Did you approach Mr. Seabrook in connection with the sale or purchase of these farms? A. Yes, sir.

Q. As a broker? A. Yes, sir.

Q. When was that?

A. During the early part of November, I should say.

Q. 1928? A. 1928.

10 Q. Did you continue your negotiations with Mr. Seabrook for some period of time after that? A. Yes, sir.

Q. Do you know whether or not as a result of these negotiations you brought Mr. Seabrook and the Del-Bay Farms people together— A. I did.

Q. —for the purchase of this property?

A. Yes, sir.

Q. Were you present at the time the settlement for this property was made between the Del-Bay Company and Investors Management Corporation? A. I was.

20 Q. Where did that take place?

A. At the office of Cotton and Franklin, attorneys for the Del-Bay.

Q. As a broker in bringing these people together did you receive any commission from the Del-Bay Company? A. I have.

Q. At the time of the settlement in the office of the New York attorneys was there any commission still due from the Del-Bay Company to you? A. Yes, sir.

Q. How much was it? A. \$5250.

30 Q. And did you receive that commission from the Del-Bay people? A. I have.

Q. What did you do with the money at that time?

A. They were short at the settlement forty-two—
Mr. Bacon—I object to that.

The Court—It is not responsive.

Q. Was the money paid to you in cash or check by the Del-Bay people? A. Check.

Q. One or two checks? A. Two checks.

Q. What were the amounts of the checks?

A. One check was for \$4,705.22. The other check was five hundred and some dollars.

Q. What did you do with the check for \$4,705.22?

A. I endorsed their check and handed it back to Mr. Lloyd Smith, the attorney for the Del-Bay.

Q. How did you come to do that?

A. They were short—

Mr. Bacon—I object. That is a conclusion.

The Court—Yes. I presume what Judge Loder 10
wants is the conversation that occurred.

Q. Did anybody request you to turn back the check of \$4,705.22 to the Del-Bay Company? A. Yes.

Q. Who requested you to do it?

A. Mr. Seabrook and Mr. McDonald, the attorney.

Q. Where were they when they requested you to do it?

A. Mr. Seabrook spoke to me about it at the Belmont Hotel. Mr. McDonald—at that time it was only supposed to be \$2,200. In the morning Mr. McDonald 20
told me that he allowed—

Mr. Bacon—I object to what Mr. McDonald told him, if anything, out of Mr. Seabrook's presence, as the case now stands.

The Court—I assume from the opening that both sides admit that Mr. Seabrook had authority to charge the defendant, but I do not gather from the opening that Mr. McDonald had a right to bind the Investors Management Corporation at all.

Mr. Loder—I don't think that he had. 30

Mr. Bacon—Then I move that the testimony be stricken with regard to what Mr. McDonald said.

The Court—It is too late now.

Mr. Bacon—I objected to it as not responsive to the inquiry. There is nothing here to show that Mr. McDonald had any authority, and Judge Loder now says he admits he had not any authority.

The Court—Insofar as the last question is concerned, what Mr. McDonald told him in response to this question will be stricken.

Q. What was it that Mr. Seabrook said to you in reference to this matter at the Belmont Hotel?

A. They were supposed to pay—

Mr. Bacon—I object to that as not responsive.

The Court—It is not responsive. What did Mr.

Seabrook say to you at the Belmont?

A. Mr. Seabrook told me that they will require approximately \$2,200 in addition to the \$139,000, and that he forgot to raise that, or to have that \$2,200 in the
10 morning of the 13th for settlement, and that if I had an account in a New York bank. I told him that I had and he said will I give them my check and he will give me his. We were going to do that, but my bank would not certify a check on the deposit of another check from out of town. The question came up then between Mr. Seabrook and I, who is going to produce that \$2,200 on a New York bank? In the morning Mr. Seabrook called me up—I was at Cotton and Franklin's—and he said, "It is \$4,705.22; how much balance commission
20 is due?" to pay over to them out of the balance of the commission and he will give me his check at the Hudson Terminal Building.

Q. That was Mr. Seabrook said that?

A. Mr. Seabrook.

Q. After you had this conversation with Mr. Seabrook, then where did you go?

A. Then they were late in settling and I began to look for Mr. McDonald, who had the balance of the money and late for settlement. I found he was at the
30 bonding company's office trying to get the bond.

Mr. Bacon—I object to that as not responsive.

The Court—Yes, it is not responsive.

Mr. Bacon—I move it be stricken.

The Court—Yes, it will be stricken.

Q. After Mr. Seabrook told you to pay over this \$4,705, did you go to the officer of the Del-Bay Farms Company? A. Cotton and Franklin.

Q. Did the settlement then take place?

A. Settlement took place then.

Q. What did you do with this forty-seven hundred and some odd dollars?

A. They made—I received two checks. The \$4,705.22 I turned over back to the Del-Bay attorneys.

Q. The \$4,705 and some odd cents? A. Yes.

Q. Is that what Mr. Seabrook told you to do?

A. That is what he requested.

Q. At the time Mr. Seabrook requested you to do this was anything said by Seabrook to you as to how you were to get this money back, and if so what was said? 10

A. After settlement Mr. Seabrook told me he will give me his check on a Philadelphia bank, that he had the money in a Philadelphia bank.

Q. When did he tell you that?

A. He told me that at the Belmont when the arrangements for the \$2,200 was being made, and he told me that in the morning of the settlement, the final settlement.

Q. That he would give you his check on his Philadelphia bank? A. On a Philadelphia bank. 20

Q. Did he ever give you his check on a Philadelphia bank for the \$4,705.22? A. No, sir.

Q. Or any part thereof? A. No, sir.

Q. Has any part of this money ever been paid to you by Mr. Seabrook or the Investors Management Corporation? A. No, sir.

Q. Or by anyone else? A. No, sir.

Cross-examination—By Mr. Bacon.

Q. Who loaned this money to Mr. Seabrook or the Investors Management Corporation? 30

A. I have.

Q. When you brought this suit you said that the American Farm Agency loaned it ,didn't you?

A. I have.

Q. Well, now, who loaned the money, the American Farm Agency or you, if you loaned it?

Mr. Loder—If your Honor please, I think it is admitted in this case that Beilin and the Farm

Agency, as far as this case is concerned, are one and the same person, and the Investors Management Corporation and Seabrook are one and the same person. I made that statement and I thought counsel acquiesced in what I said.

10 The Court—That was the impression I had, because all through the opening mention was made of Mr. Beilin and Mr. Seabrook, and I had a little trouble trying to find out where I stood, had to keep looking at the complaint to find out whether it was the American Farm Agency you were talking about or the Investors Management Corporation. If I am mistaken about that the record ought to be corrected or I ought to be corrected.

20 Mr. Bacon—Your Honor may recall that this case was moved at the last term. After the opening by Judge Loder there was a conference between the Court and counsel, the result of which was that the defendant was permitted to file a counter-claim for the \$5,250, and in that counter-claim, as the result of that talk we had, it was alleged that Mr. Beilin and the American Farm Agency should for the purpose of this suit be considered one and the same, and that for the purpose of this suit Mr. Seabrook and the Investors Management should be considered one and the same, although the Investors Management Corporation was not formed until some time afterward. I am simply trying to get Mr. Beilin to answer this question as to who made the loan, if anybody made the loan.

30 The Court—But not with the idea that if he says he made it, that therefore the American Farm Agency could not recover? That is not the purpose?

Mr. Bacon—No, that is not the purpose at all.

(The question was repeated.)

A. I was in charge of the settlement and I take it that I loaned it.

Q. The commission contract with the Del-Bay Farms was in your name, was it not? A. I don't recollect.

Q. Have you got the contract? A. I have it here.

Q. Take a look at it and see. A. That is in my name.

Q. What paper is it that you have there?

A. It is a letter from Del-Bay Farms authorizing or permitting me to offer the property at a price and a certain commission.

Q. What is the date of it? A. November 26, 1928.

Q. Did you and Mr. Seabrook have a talk about this 10
matter of your getting a sale of this farm?

A. The selling of the farm to him, yes.

Q. To him or to a syndicate to be formed by him?

A. He led me to believe that there would be a syndicate formed.

Q. Did he write you a letter about that? A. Yes.

Q. Have you got that?

A. Not about that. He wrote me a letter about another matter.

Q. Have you got that letter? A. Yes, sir. 20

Q. Where is it?

(A letter was produced by Mr. Loder.)

Q. I show you a letter dated November 27, 1928, which is handed me by Judge Loder. Is that the letter you got from Mr. Seabrook? A. Yes, sir.

Q. This letter refers to a conversation that you had with Mr. Seabrook on November 24, does it not?

A. Yes, sir.

Q. What was that conversation about?

A. About the sale of the farm to his syndicate, and if 30
a sale was made through me, how much commission I was to receive, and if it was a sale made direct to Mr. Seabrook and his syndicate, how much commission I was to receive then.

(Letter from Mr. Seabrook to Mr. Beilin, dated November 27, 1928, marked D-1 for identification.)

Mr. Bacon—I may say for the record and the information of the Court what counsel all know,

that Mr. Seabrook is in Russia and that we were obliged to take his deposition in anticipation of this trial, which, of course, handicaps us very much in the way we are obliged to prove our case, if it is somewhat crude under the circumstances. I think it is only fair to everybody to say that.

Q. I show you a photostat copy of a check dated February 13, 1929, drawn apparently on the Brooklyn Trust Company to the order of S. L. Beilin for
10 \$4,544.78, signed by Del-Bay Farms, Incorporated, special account, with the facsimile signatures of the officers, endorsed "S. L. Beilin" and then endorsed, "For Deposit Only to Credit of Vineland Farm Agency," and ask you if that is the check you are talking about that represents the loan that you say was made to Mr. Seabrook. A. No, that is not the check.

Q. Look at the facsimile signature on the back of that check and say whether or not that is your signature or a copy of it.

20 A. That is my signature, but it isn't the check that I advanced.

Mr. Bacon—I have read to him the wrong instrument. He is right when he says that is not the check.

Q. I show you the check that I undertook to hand you before, which is endorsed "Pay to the order of Del-Bay Farms, Incorporated, S. L. Beilin. For deposit, Del-Bay Farms, Incorporated." Is that the check that you say represents the loan? A. That's the check.

30 Q. That represents what you say was the loan?

A. Yes, sir.

Q. Now I show you another check or photostat copy of it, dated the same day, apparently drawn to your order by the same concern for \$544.78, with the endorsement on it that I previously erroneously read, and that is, "S. L. Beilin. For Deposit Only to Credit of Vineland Farm Agency," and I ask you if that is the check that you got for the balance of the commission. A. Right.

The Court—When you read \$4,544 before, you were mistaken?

Mr. Bacon—The check is \$4,705.22. The other check is \$544.78.

Q. Those two checks together make \$5,250. Is that right? A. Yes, sir.

Q. And that sum was one-third of the total commission which you were to receive from the Del-Bay Farms for making the sale?

A. It was the balance due me that day. 10

Q. And you had already received \$10,500, had you?

A. Yes, sir.

Q. Do you know what this check for \$4,705.22 was for; that is, what it represented? A. Yes.

Q. What was it?

A. Part of it on accrued insurance premiums on the various insurance policies that was apportioned on account for the Del-Bay, approximately \$2,200. In the morning it was found to be necessary to meet the payroll of the Del-Bay Farms of approximately \$2,500, and instead of sending the money from New York they requested me to put it up out of the balance of the commission. 20

Q. And you did put up that amount of money out of the balance of the commission as a part of the final settlement, did you? A. Yes, sir.

Q. Was this payment made pursuant to the terms of the option which you secured on this property?

Mr. Loder—I object unless it appears that he knows what was in this option. It does not appear that he had any option. He says that he brought the people together. 30

The Court—His answer would be, "I don't know," if he does not know the terms of the option; but I think that would not prevent him from answering if he is able. I will permit it.

(The question was repeated.)

A. As far as the insurance is concerned, I think it mentioned in the option that everything was to be apportioned, but I don't think that the option mentioned of them assuming a pay-roll to be paid that day.

Q. How did you first get in touch with Mr. Seabrook about this matter, if you remember?

A. I have started negotiations with Mr. White and Mr. Handleman, of the Del-Bay Farms, and they told me—young Mr. White—

10 Mr. Bacon—I object to that.

Q. I didn't ask you that. You understood the question, didn't you? A. I called to see Mr. Seabrook.

Q. At his house? A. At his office.

Q. Here or New York? A. In New York City.

Q. Mr. Seabrook had an office 50 Church Street, New York City? A. Yes, sir.

Q. Did you have an office over there? A. Yes, sir.

Q. Do you remember when it was that you had the talk with him?

20 A. The early part of November or latter part of October, I would say.

Q. Did you have more than one talk with him about it? A. Considerably more than one. A good many.

Q. Both in New York and at his home? A. Yes, sir.

Q. And you had a talk with him at his home on Saturday, November 24, 1928, did you not?

A. I think I had.

Q. And at that time you and he reached an agreement, did you, as between yourselves? A. We have.

30 Q. And that agreement was that you would endeavor to get from the Del-Bay Farms the right to sell this property, and if he could he was to get a syndicate together to buy it? Isn't that a fact?

A. I already had the sale of the property. As a matter of fact, I offered it a few weeks before that to other groups, to other buyers. I have learned that Mr. Seabrook was also interested and I called to see him and he asked me to "please lay off, I am trying to buy it," and I told him I can't lay off because I wanted to sell it.

Well, he says, "We will pay you if you do lay off," and that is when I talked to him along the lines of commission, how much and what I am to get if I do lay off.

Q. And that agreement or that understanding was embodied in the letter that Mr. Seabrook wrote you?

A. Yes, sir; it was.

Mr. Bacon—May I have the two checks marked for identification?

(The checks referred to were marked D-2 and 3 for identification.)

10

MORRIS V. McDONALD, SWORN.

Direct Examination—By Mr. Loder.

Q. Mr. McDonald, you are an attorney and counselor at law? A. I am.

Q. Residing and practising in this county?

A. Yes, sir.

Q. Were you present with Mr. Seabrook and Mr. Beilin at some of the negotiations concerning the purchase of the Del-Bay property? A. I was.

Q. Were you present at the time of the final settlement? A. I was.

20

Q. How was the settlement made? Was it made in cash or check? A. Checks.

Q. Whose checks were they, if you know.

Mr. Bacon—I would like to interrupt by asking Mr. McDonald a question.

Mr. Loder—I have no objection.

By Mr. Bacon.

Q. In what capacity were you present at this settlement? A. As the attorney and agent for the purchaser.

30

Q. That is Mr. Seabrook?

A. Mr. Seabrook. And his associates, I suppose.

Mr. Bacon—I object to any testimony being given by Mr. McDonald if he was there as Mr. Seabrook's lawyer. We do not waive privilege.

The Court—This question does not go to a question of advice by counsel given by Mr. McDonald to Mr. Seabrook, does it?

Mr. Loder—I did not so intend it, and I do not see how it could.

(The question was repeated.)

The Court—I will permit it.

A. The check paid in——

Q. In settlement.

A. Was a check of the Guarantee Trust Company, a cashier's check drawn to my order and endorsed by me—

10 Mr. Bacon—We are now disclosing whose checks they were and giving information which he could not possibly obtain in any other way except being there as a lawyer, and he says he was there as Mr. Seabrook's lawyer. I am not speaking about the ethics of it. I am talking about what our right is, and our right is that he should not be allowed to testify.

The Court—What difference does it make what checks were passed, other than the checks for \$4,705.22 and \$544.78?

20 Mr. Loder—That is all there is to it, but if I had asked him the question. Did such and such a check pass? I would immediately have been met with the objection that I was leading the witness.

The Court—I think that would not be leading if you asked him if he saw these two checks pass.

Mr. Bacon—I move to strike out the testimony so far given.

The Court—It will be stricken, whatever answer there was.

30 Q. Mr. McDonald, the contract for the purchase of this property was actually made in your name, as a matter of fact, wasn't it? A. It was.

Q. And at the time of settlement, at your direction the deed was made to the Investors Management Corporation? A. Yes, sir.

Q. Now, at the time of settlement do you know of your own knowledge whether or not Mr. Beilin, for the American Farm Agency, the plaintiff in this case, turned over to the Del-Bay Company for the account of the

Investors Management Corporation a check for \$4,705.22?

Mr. Bacon—I object to that. My objection is that Mr. McDonald cannot testify, according to my notion of the law, about these transactions if he was there as Mr. Seabrook's lawyer.

Mr. Loder—It would not make any difference whether he was Mr. Seabrook's lawyer or whether he was not. The rule prevents the disclosing of any confidential communication made between the attorney and his client. The rule does not prevent a witness being subpoenaed and asked about other things that may have had to do, possibly, with his employment, where there is no breach of confidence, where he is not asked to repeat anything that was said to him in confidence. He is merely being asked to tell what happened.

The Court—I will permit it.

(Exception noted for the defendant.)

(Question repeated.)

A. I do.

Q. Did he turn over such a check? A. He did.

Q. Were you present at any meeting between Mr. Seabrook and Mr. Beilin when Beilin was requested to do that? A. I was.

Q. And where was that meeting?

A. At the Hotel Belmont in New York City.

Q. Who were there?

A. There were several people present. Mr. Seabrook, I think Senator McAllister, Mr. Alden Smith, I believe, Mr. Seabrook and myself.

Q. Did you hear anyone request Mr. Beilin to turn over this money?

Mr. Bacon—That is objected to for the reasons already stated.

The Court—I will permit it.

(Exception noted for the defendant.)

A. I did.

Q. Who requested him to do it? A. Mr. Seabrook.

Q. What did he say?

Mr. Bacon—That is objected to for the reasons already stated.

The Court—I will permit it.

(Exception noted for the defendant.)

The Court—This was in the presence of all of the gentlemen you have named, was it?

The Witness—Yes, sir. He asked Mr. Beilin to use part of his commission in payment of this balance due
10 on the settlement, and stated that he would give his check in return after the settlement was made.

Q. Did he make any statement at that time as to why he didn't give his check direct to the company?

A. Yes. He couldn't be known in the transaction. He didn't want to sign a check, he said, because he didn't want the Del-Bay Farms, Incorporated, to know that he had anything to do with it.

Q. Did Mr. Seabrook himself actually attend this settlement? A. No, he did not.

20 Q. You were there and saw this check actually turned over to Beilin? A. Yes, sir.

Q. I show you a photostatic copy of a check that has been marked Exhibit D-3 for Identification, and ask you if you can say whether or not that was the check that Mr. Beilin turned back to the Del-Bay Company at the request of Mr. Seabrook.

A. I would say that is the check.

30 Q. I show you photostatic copy of another check that has been marked Exhibit D-2 for Identification, and ask you if you saw the original of that check. A. I did.

Q. At the time of the settlement? A. Yes, sir.

Q. And at the time of the settlement did you know what that check was for? A. Yes, sir.

Q. What was that for?

A. That was the balance of the commission. The two checks together made up the \$5,250 balance due for commission.

Q. And this check Mr. Beilin kept? A. Yes, sir.

Cross-examination—By Mr. Bacon.

Q. You were present at these several interviews to which you have testified, as the attorney for Mr. Seabrook, were you? A. Yes.

Q. Where is Mr. Seabrook now?

A. I don't know except from information received through you and Mr. McAllister that he is in Russia.

(Plaintiff rests.)

10

DEFENDANT'S TESTIMONY

Mr. Bacon—I offer in evidence Exhibit D-1 for Identification.

Mr. Loder—I have no objection.

(The paper previously marked D-1 for Identification was marked Exhibit D-1, and Mr. Bacon read the same to the jury.)

Mr. Bacon—I also offer in evidence the two checks which were marked for identification.

20

(The papers which were heretofore marked D-2 and 3 for Identification were marked Exhibits D-2 and 3.)

Mr. Bacon—With your Honor's permission I now desire to read the deposition of Mr. C. F. Seabrook, which was taken before Mr. Myrose as a Supreme Court Examiner on June 18, 1930, in the presence of Judge Loder, attorney for the plaintiff, and Senator McAllister and myself for the defendant. It was taken by consent and because of the fact that Mr. Seabrook was about to leave for Russia.

30

(Mr. Bacon read the direct examination of Seabrook's deposition and Mr. Loder read the cross-examination.)

ALBERT R. McALLISTER, SWORN.

Direct examination—By Mr. Bacon.

Q. Senator, what office, if any, do you hold in the Investors Management Corporation?

A. I am the secretary.

Q. Have you any other interest in it? That is, have you any financial interest in it?

A. I have no financial interest in it.

Q. You have been attorney for Mr. Seabrook and his enterprises for about how many years?

A. Since 1912, with the exception of two or three years.

Q. Did you represent Mr. Seabrook and his associates
10 at the final settlement for the Seabrook Farms in New York about February 13, 1929?

A. I represented Mr. Seabrook and his associates for the purpose of passing upon the deed which was to be given or received for the property and for the purpose of passing upon the title.

Q. Do you remember what days you were in New York in this matter?

A. I was there on February 11, which was Monday, as I recall it—at least, it was the day before Lincoln's
20 Birthday, I recall, because I went back to Trenton that night and we were in session on that day, legal holiday, otherwise legal holiday, and I was in New York again the day after Lincoln's Birthday, which was the 13th of February, which was the day that the deed was passed.

Q. Were you present with Mr. Seabrook and Mr. Beilin and Mr. McDonald and Mr. Smith when there was some talk about this check of \$4,700 being passed over?

A. There was no definite sum discussed. No check
30 for \$4,700 was discussed.

Q. Was there any discussion at any time about the amount of the check until about the instant the check was given?

A. There was no discussion as to the amount other than it was a mooted question as to what the amount might be, whether it would be a few hundred dollars or several thousand dollars.

Q. Why was that?

A. Well, under the terms of the option agreement there were many adjustments to be made, including the operating adjustments. Insurance premiums were to be adjusted, as I recall it, cold storage receipts were to be adjusted, the operating costs—that means money spent for labor or feed or anything else that was needed to operate from December 28 until February 13—and, on the other hand, those sums would be offset by any sales, and I recall particularly that leeks, which some of the ladies on the jury may know, and others, as a form of onion, something they use in soup instead of onions, there was a quantity of that in storage, and there was a question of whether or not that had been sold. If it had been, that would be a credit. 10

Q. Were all of these things taken into consideration in ascertaining what this sum was? A. Yes.

Q. And from what source were you obliged to get those figures, and from what source did you get them?

A. As a matter of fact, in view of the option we almost had to accept their figures without question. 20

Q. Where did the figures come from?

A. The figures were brought to New York that afternoon by a man named Dave Lowry, who was the acting manager for the New York owners at this time.

Q. After those figures were ascertained then was there a request made that this check be drawn for that precise sum?

A. Well, that was at the settlement; yes, sir.

Q. That is what I mean, after you got the figures. 30

A. Yes.

Q. Did Mr. Seabrook or anybody else in your presence agree to rebate the amount of this check to Mr. Beilin?

A. No, that isn't—that wasn't done.

Q. What was said about it?

A. When Mr. Beilin agreed that he would use so much of his commissions as might be necessary to make this adjustment, in view of the difficulty of securing at such short notice either a cashier's check or a certified

check, Mr. Seabrook said, "If you are going to do that we can adjust that later."

Q. Did Mr. Beilin offer any objection to that?

A. Not the slightest. As a matter of fact, if I may be permitted to volunteer an additional answer, the settlement was entirely friendly. There were no objections on the part of anybody. There was a bit of kidding, if I may say it, because Beilin was making so much money out of this deal, and if they couldn't make this sale and
10 couldn't make the contracts, how much money he would lose. There wasn't anything unpleasant about the transaction at all.

Q. At that time it was apparently everybody's understanding that Mr. Beilin had not received any commissions and that the entire amount of \$15,000 was coming to him?

Mr. Loder—I object to that as irrelevant, incompetent and as calling for a conclusion.

The Court—I will sustain the objection.

20 Q. Did you know at that time that Beilin had been paid his commissions?

A. No, I did not know that. In fact, I thought he hadn't been.

Q. Beg pardon?

A. It was my understanding that he hadn't been.

Mr. Loder—I move that be stricken.

The Court—Yes, the latter part, the understanding, will be stricken.

30 Q. Has Mr. Beilin ever paid the Investors Management Corporation the difference between \$5,250, being one-third of the commissions, and the \$4,700 represented by this check, to your knowledge?

A. May I be permitted now to say that I understand not? I don't know.

Q. Well, has he to your knowledge?

A. Not to my knowledge.

The Court—I think you will all agree that he has not, won't you?

Mr. Loder—Whether we have paid it? No we haven't paid it, and they haven't paid us.

Cross-examination—By Mr. Loder.

Q. Mr. McAllister, you were not in New York on this business between the Del-Bay Company and Mr. Seabrook, except on two occasions, were you?

A. That is all.

Q. And the first time that you went to New York in connection with this matter was on February 11, the day before Lincoln's Birthday? A. That is right. 10

Q. And you simply arrived there in the evening?

A. Yes.

Q. You left early enough in the morning to get to Trenton in order to attend a session of the Legislature? Did you meet on Lincoln's holiday?

A. Yes, we met on Lincoln's holiday, and if I may answer your question, Judge, I think I went to New York the evening before, that Sunday evening, and stayed at the Belmont Hotel that evening, and on Monday I was at the office of Mr. Seabrook until late in the afternoon, when I left to go to Trenton. 20

Q. Then you came back to New York, I take it, on the 13th, on the morning of the 13th?

A. On the morning of the 13th is my recollection.

Q. And were present at the settlement for this property which took place in the office of the Del-Bay Company's attorneys?

A. Yes, and at a preliminary discussion at the office of Mr. Seabrook, when Mr. McDonald and Mr. Beilin and Mr. Smith were present. 30

Q. And you just testified a while ago as to what took place there? A. Yes.

Q. And you were there for the purpose of examining the title, did you say, to this property, examining the deed and passing on the title? A. That is right.

Q. Mr. Seabrook himself didn't attend the final settlement when the money was paid over, did he?

A. Not at the final settlement, no.

Q. Wasn't present when the money was passed over?

A. No.

ALDEN SMITH, sworn.

Direct Examination—By Mr. Bacon.

Q. Mr. Smith, where do you reside?

A. At present I live out at Seeley. I just developed the old Moore property out there.

10 Q. You are one of the syndicate formed by Mr. Seabrook for the purchase of this property? A. Yes.

Q. When did you first come in contact with Mr. Beilin in this matter?

A. It was some time in November or December, when Mr. Seabrook and I together were discussing the question of purchasing this property. Just the exact date I can't say.

20 Q. Mr. Seabrook in the testimony which I have read refers to an occasion when you were in his office or he in your office when Mr. Beilin came in and spoke about the rate of commission that he was to receive from the Del-Bay Farms. Do you recall that conversation?

A. Yes.

Q. What was said?

A. The question of how much Mr. Beilin was to receive was discussed, in which we were interested, because from that we were to determine what was coming back to the syndicate.

Q. That is, what was coming back to the syndicate out of the commission?

30 A. Out of Mr. Beilin's commissions.

Q. What attitude did you and Mr. Seabrook assume with respect to the commissions being three per cent instead of five.

A. We took Mr. Beilin's word for it.

Q. Did you or did you not agree to his accepting three per cent commission? A. We agreed to it?

Q. With what understanding as to your share of it?

Mr. Loder—I object to what the understanding was. That calls for a conclusion.

The Court—Yes, I suppose the conversation which resulted in the agreement should be given.

Q. What was said about it?

A. Said in general that that was the best deal Beilin could make. Charlie asked my opinion about it and I said, "Well, if that is the best he can get I suppose we had better go ahead along those lines," that if he got three per cent on the purchase price, which we had discussed, I made in general a mental reckoning of what was coming back to us and it seemed like it was satisfactory, and we said, "Go ahead." 10

Q. Were you present at the time there was an arrangement made with Mr. Beilin to pay this \$4,700 over? A. At the closing of the title?

Q. Yes.

A. Yes. I am vice president of the syndicate which owns it, and I was there as the signing officer.

Q. What was the arrangement made with Mr. Beilin about his advancing this money or turning this money over? 20

A. We went there well prepared with the amount of money which the syndicate was to have in order to pay, because if we didn't conform with the details of our arrangement for pay, we stood to lose \$100,000. That was all in good order and we had a certified check for it. We couldn't determine—we had called on Cotton and Franklin to give us the amount of the operating charges, which I had in mind was a matter of bookkeeping and the bookkeeping of their client was done at the old Seabrook office or the Del-Bay office here at the Farms. It was told to me that that amount could not be determined until the accounting boy or the bookkeeper arrived in New York the morning of the settlement. We made some question about that and we were assured by Handleman, who at that time was in the employ of Del-Bay, as I understood it, that he would be there and would tell us how much it was, that it was a matter of a few thousand dollars, and we all generally agreed if we had all our certified checks which we were called on 30

to pay by the syndicate, the balance would be arranged out of moneys which we understood was coming to Mr. Beilin. That was discussed in enough detail, because we talked about whether or not we should have cash there—

Mr. Loder—I object unless this was in the presence of Mr. Beilin. I can't tell whether it was or not, from the testimony.

Q. Was or was not—

10 A. It was all definitely agreed when Beilin was in the office, and all of us, when we got ready to go over for the settlement. It was definitely agreed how we would take care of the unknown quantity of money which we had to pay, which was designated to us all at that time as operating charges on the farm.

Q. What arrangement did you folks then and there make with Beilin about paying that money?

Mr. Loder—I object to that. It seems to me he should be asked what was said.

20 Q. State the conversation.

A. Naturally, I was the most one interested, because I was signing for the corporation, and I wanted to see whether or not I was ready—

Mr. Loder—I object to that as not responsive.

The Court—What they want is just the conversation had between you gentlemen and Mr. Beilin with reference to the payment of this money, the payment of this check over.

The Witness—My understanding of that—

30 The Court—No. Just what was said. Your understanding may be different from the jury's. They want the conversation so we may draw the conclusion.

A. That amount of money which was due was to be taken care of out of moneys which Del-Bay owed and were to pay that day to Beilin.

Q. Did someone of you suggest that to Beilin, and did Beilin agree to it?

A. Beilin agreed to it. It was all agreed generally before we went over to the settlement.

Q. Was any statement made by you as president or by Mr. Seabrook or by anybody else that Mr. Seabrook should give a check for the—— A. It wasn't.

Q. — on Philadelphia funds? A. No, sir.

Q. Was there any such talk about Seabrook giving him a check for it? A. No, sir.

Q. How did you agree that it was to be handled?

A. We agreed that whatever Beilin got in payment would be handed back to them. It was agreed there would be two checks, one for the amount of the operating charges, which were to be determined that day at the closing by a boy coming from the farm, and the other check was to be the balance due Beilin, and we agreed then that the check which was given to Mr. Beilin in the amount of the operating charge would be handed back and tendered to Del-Bay in settlement. 10

Q. Then how was that matter to be adjusted with Beilin?

A. Out of the commissions. Out of our share of the commissions. 20

Cross Examination—By Mr. Loder.

Q. What did you say to him about your share of the commissions at the time you have just testified about?

A. Nothing said about it particularly that I recall, except that——

Q. You didn't say anything to him about it, did you?

A. Yes.

Q. What did you say to him about it?

A. I asked Beilin if that was all right with him and if he had money coming from Del-Bay. 30

Q. What did you yourself say to him about taking it out of your commissions?

A. I asked him if that was entirely satisfactory.

Q. For him to take this amount of money, whatever it was, out of his commissions and pay it to the Del-Bay Corporation for the account of your syndicate?

A. Out of the money which he owed us.

Q. Did you say that to him? A. Yes.

Q. Who was present?

A. The same number of gentlemen. We were all around the room. The proceeding wasn't so quiet or orderly, because we were all talking among ourselves.

Q. You know who was present, don't you? A. Yes.

Q. There was you, Mr. Beilin and who else?

A. Myself, Mr. Beilin, Mr. Seabrook, Mr. McAllister, Mr. Huyler, of O'Brien, Boardman and Fox was there some; just whether he was there or not when I said
10 those words I don't know; and Mr. McDonald.

Q. Mr. McDonald was present? A. Yes.

Q. Where he could hear the conversation?

A. We were all in one office. Whether or not he could hear it depends upon him.

Q. It wasn't a very large office?

A. No. About as large as this well here where you are sitting.

Q. You are the one who spoke up and said that your syndicate would take it back out of what Beilin owed
20 you? A. What was that question?

Q. You are the one that spoke up and said that your syndicate would take this money out of what Beilin owed you?

A. I don't know as I said just those words.

Q. You don't remember just what you did say, do you?

A. The exact words, no, but I do remember how I was prepared to make the settlement, and I do remember where I was going to get all the money from.

30 Q. You were going to get whatever money was necessary out of Beilin's commissions?

A. Out of our share of Beilin's commissions.

Q. And you were going to use Beilin's commissions to pay the Del-Bay people whatever you were short on making this final settlement, weren't you?

A. In general we knew——

Q. Just answer that.

(The question was repeated.)

A. I didn't consider it as Beilin's commissions. I considered it as our share of Beilin's commission.

Q. Well, what did you understand was coming to you as your share of the commissions?

A. Roughly, a little over \$5,000.

Q. You were actually present when this money was turned over, weren't you, to the Del-Bay Company's attorneys? A. At the settlement?

Q. Yes. A. Yes, sir.

Q. You recall, I suppose, that there were two checks, one for \$4,705.22 and one for five hundred and something, that were turned over to Beilin? A. Yes. 10

Q. Well, if there was something over \$5,000 coming to you from Beilin when this settlement was made, why didn't you take the other check for five hundred and some dollars?

A. The actual arrangements and the actual settlement with Beilin was done by Charlie Seabrook, naturally.

Q. All of the arrangements for the purchase of the property were made with Mr. Seabrook, too, weren't they? A. No, I don't think so.

Q. At what interviews were you present except the two you have just testified about? 20

A. As between whom?

Q. As between Mr. Beilin and Mr. Seabrook.

A. Well, we were together on the day of the 11th all day and we were also together on the 12th.

Q. That was the first interview, wasn't it?

A. No. The first interview is the latter part of the year 1929, some time before Christmas.

Q. Where was that?

A. That was in Seabrook's office. 30

Q. Was Mr. Beilin there? A. Yes.

Q. Did you hear Beilin and Seabrook discuss the rate of this commission? A. Yes.

Q. What was it to be? A. Three per cent.

Q. That is the first that you knew about any rate of commission, when they talked about three per cent?

A. Charlie had told me about it before, but not in the presence of Beilin.

Q. With Mr. Beilin, in the presence of Beilin. And the only thing that you knew about the rate of commission was the time Seabrook and Beilin talked about three per cent?

A. Seabrook asked me at that time if I was satisfied with waiving five per cent and taking three.

Q. I say the only time you were present when Beilin and Seabrook discussed the rate of commission was when they talked about the three per cent commission?

10 A. As far as I can recollect.

Q. And you were not present at any conversation between Beilin and Seabrook when they talked about commission prior to that time, were you? A. No.

Q. You didn't hear any talk between Beilin and Seabrook about the five per cent commission?

A. Except what was brought out that day.

Q. Prior to that you didn't know anything about it?

A. No.

Q. You never saw a letter between the Del-Bay Com-
20 pany and Mr. Beilin where they offered five per cent commission? A. Never did.

Q. You have testified to all you know about it?

A. Yes.

(Defendant rests.)

PLAINTIFF'S TESTIMONY IN REBUTTAL

SOLOMON L. BEILIN, recalled.

Direct examination—By Mr. Loder.

30 Q. Mr. Beilin, you have already testified in this case. I show you the letter dated November 27, 1928, written to you by Mr. C. F. Seabrook and already marked Exhibit D-1 for Identification, and ask you if that is the letter you got from Mr. Seabrook. A. Yes, sir.

Q. I show you another letter on the stationery of the Del-Bay Farms, addressed to Mr. S. L. Beilin, under date of November 26, 1928, and ask you if you received that letter from the Del-Bay Company. A. Yes, sir.

Q. Did or did you not take that letter to Mr. Charles Seabrook. A. I showed it to Mr. Seabrook.

Q. Did you go over it with him? A. Yes, sir.

Q. I ask you to take a look at it. Does that letter state the rate of commission? A. Yes, sir.

Q. Did you call Mr. Seabrook's attention to that?

A. Yes, sir.

Q. At the time you first called on Mr. Seabrook in the latter part of October or the first part of November, 1928, did you have that same arrangement with the Del- 10
Bay people that they recite in that letter?

A. As to the commission?

Q. Yes. A. Yes, sir.

Mr. Loder—I offer this letter in evidence.

Mr. Bacon—I cannot see that it has any evidential force in this case. My information is that this is not the final commission agreement. This one calls for five per cent, and it is not the one that was carried out, and my information is that that is not the final agreement. It certainly does not fit 20
any testimony we have had here, and I therefore object to it.

Mr. Loder—It is offered for this purpose: Under the counter-claim which the defendant files and the testimony which they offer thereunder, it is sought to show that there was an arrangement between Mr. Beilin and Mr. Seabrook whereby Mr. Seabrook and his associates under certain conditions were to receive one-third of the commission. That letter is dated the 27th of November, 1928. There 30
is nothing in that letter of Seabrook's which says anything about the rate of commission which he was to receive. It is our contention that whatever arrangement might be said to have been made in that letter from Seabrook to Beilin was waived and changed and was not in existence at the time this settlement took place. The letter which I have offered in evidence, and which is dated November 26, 1928, which refers to the prior negotiations be-

tween Beilin and the Del-Bay Company specifies that the rate of commission is five per cent. Mr. Beilin testifies that at the time he had his conversation with Seabrook, out of which that letter grew and where the rate of commission is silent, that he showed Mr. Seabrook that letter and called his attention to the fact that the rate of commission he was going to receive was five per cent. After that Seabrook wrote his letter leaving the rate of commission blank.

10

The Court—Yes, but you all agree that the final commission paid was three per cent.

Mr. Loder—Yes, we agree that the final commission paid was three per cent, but we also contend that at the time Mr. Seabrook wrote this letter Exhibit D-1 to Beilin, which left the rate of commission blank, that he knew at that time that the rate of commission was five per cent, that when this alleged arrangement between Beilin and Seabrook took place, as contained in that letter, they were talking about a five per cent commission.

20

The Court—I do not see the materiality of the letter at all. There is no reservation of amount of commissions in this letter of November 27. They are to receive one-third of the brokerage, and in case they purchase the property themselves, they are to pay fifty per cent of the regular brokerage commission. I cannot see that the letter of November 26 has anything to do with that at all.

30

Q. Now, Mr. Beilin, at the time you called on Mr. Seabrook and endeavored to interest him in the purchase of this property, did Mr. Seabrook broach to you the subject of receiving back from you in case the sale was made a part of your regular commission? A. He did.

Q. What did he say about it?

A. He asked me to tell him what the commission would amount to on the total sale. The price was to be around five hundred to five hundred and fifty thousand dollars. I figured it out and it amounted to about

\$26,250, at the regular five per cent. Well, he says, "It's a lot of money for you, isn't it?" I says, "Yes, but I have others that are talking about buying it and I am going to try to sell it." I told him that the property—

Mr. Bacon—I object to this. It is hardly rebuttal, and not an answer to the counter-claim. He was examined about this before.

The Court—On his original examination he testified as to the conversation he had with Seabrook as to the amount of money he was to receive and the amount of commission he was to receive. In support of that counter-claim you have introduced testimony which you say goes to prove that that was to be divided one-third and two-thirds. I understand Judge Loder's question of this witness to be as to whether he had any conversation with Seabrook to that effect, and the probabilities are that the witness is going over the same testimony he gave before, in an attempt to deny. 10

Mr. Loder—I did not go into that talk on the commission. Mr. Bacon brought that out on cross-examination. 20

The Court—And you have asked him whether or not there was such a conversation with reference to the division, and his answer is yes, and he goes on to recite the conversation again.

Mr. Loder—Then it stands as "Yes"?

The Court—Yes.

Q. What, if anything, did Mr. Seabrook say to you about dividing the commission with him? 30

Mr. Bacon—I object to that because I showed Beilin a letter and asked him if that was the deal that he and Seabrook made and he said yes. How is he going to contradict that by rebuttal?

The Court—He says that was a deal that they talked about, but I do not remember him admitting that the final deal was as stated in the letter from Seabrook to this witness. As a matter of fact I

understand that he denies that that was the final—
he is now going to try to deny it.

(Question repeated.)

The Court—I will permit it.

A. Mr. Seabrook asked me if it wouldn't be satisfactory for me to retain two-thirds of the commission and one-third to go to him. He didn't say to the syndicate, but to him. I told him that that would be satisfactory to me. "On the other hand," he said, "I may
10 want you to stay out of the picture entirely." Well, I told him that I didn't like to do that. He says, "Wouldn't you be willing to stay out of this and I will pay you half of the regular commission," which was five per cent. That amounted to about \$13,750, figuring the price of the property at around half a million dollars. Later on—
nothing was done for two or three weeks. I kept after Mr. Seabrook and nothing was done. I heard he made an offer direct.

Mr. Bacon—I ask that be stricken.

20 Mr. Loder—I consent to it.

Q. In the letter marked Exhibit D-1 there is this clause: "If I or my associates purchase the property direct, we are to pay you fifty per cent of the regular brokerage commission for the purpose of sale."

A. That's right.

Q. Does that refer to the testimony you have just given about him buying direct? A. Yes.

Q. What was and is the regular brokerage commission on the sale of farms in this locality?

30 A. Five per cent.

Mr. Bacon—I object to that as having no relevancy, no bearing on this issue whatever. It is agreed that there was not five per cent commission paid, but the commission was three per cent, and we acquiesced in it when Beilin came to our office and said to Mr. Smith and Mr. Seabrook, "All I can get is three per cent."

The Court—And fifty per cent of the regular was not finally adopted because the sale was not made

by a direct purchase. Therefore, it has no bearing.
(Adjournment taken until Wednesday, September 24, 1930.)

Bridgeton, N. J., September 24, 1930.
Trial of the cause resumed at 10 A. M.

SOLOMON L. BEILIN, resumed.

Direct examination (continued)—By Mr. Loder. 10

Q. Mr. Beilin, I now direct your attention to the letter from Seabrook to you, which is Exhibit D-1, and call your attention to the fact that in that letter it states, "If the above is satisfactory to you, please acknowledge." Did you acknowledge the letter? A. No, sir.

Q. That is, you did not write any letter in answer to that? A. No, sir.

Q. Did Mr. Seabrook speak to you about the letter personally after you received it? A. Yes, sir.

Q. About how long was that after it was written? 20
It is dated November 27. A. A couple of days or so.

Q. After you had received it? A. Yes.

Q. What did he say about the proposition contained in the letter, and what did you say to him?

A. He told me that it may be best for me not to interview the Whites any longer, that Handleman told him that there was another group of buyers from Burlington County that I represented, "You better stay away and let me close the deal with them and you will get the two and a half—half of the commission." I followed his instruction and I told him, "All right." He said that, "I have bought two or three outlying places." So I stayed away for a few days and I didn't hear anything from Mr. Seabrook, so I called again on him, "What's being done?" In the meantime young Mr. White kept calling me every other day. 30

Mr. Bacon—I object to that.

The Court—Yes.

Q. Just what you said to Seabrook about the matter contained in the letter that he wanted you to acknowledge.

A. I told him that that would be satisfactory, that I would take two and a half—half of the commission if I don't have anything to do with it and not to try to sell it to other groups. If I did become interested, if it was necessary for me to do the buying, then I told him I would agree to give him one-third of the five per cent, leaving me three and a third—

10 Q. Per cent?

A. And I would give him that one-third that he wrote to me in his letter.

Q. At that time, at the time you talked to Seabrook about this matter, what commission had the Del-Bay people agreed to pay you if you procured a purchaser at a satisfactory price?

A. Five per cent; the usual commission.

Q. And you told Seabrook that? A. He knew that.

20 Q. Well, did you tell him? A. Yes, I did.

Q. Had you discussed any other commission with Mr. Seabrook in reference to this deal except five per cent commission at that time? A. At that time, no.

Q. After you had this conversation with Seabrook about the commission in case you received five per cent commission, did you then endeavor to bring these parties together and effect a sale of the property?

A. After it was decided that I was to be the broker and I was to do the buying. That was agreed upon on 30 Christmas Day at Mr. Seabrook's house.

Q. After that was agreed upon at Mr. Seabrook's house, what did you do then?

A. He told me in the morning—he said, "You go to New York tomorrow and I will have the money ready." I had \$5,000 before that I returned. I told him that they would have to have \$50,000 deposit.

Q. Did you go to New York?

A. On the 26th in the morning I went to New York. Twenty-sixth of December.

Q. And saw the Del-Bay people?

A. I immediately got in touch with—well, first, Mr. Seabrook, and made arrangements to go down and make the offer. Mr. McDonald was to be the buyer.

Q. Did you make an offer for Mr. Seabrook and his associates to the Del-Bay Company? A. Yes, sir.

Q. What offer did you make?

A. One-half million dollars, the first offer.

Q. Half a million dollars? A. Yes, sir.

Q. Did they accept that offer? A. No, sir. 10

Q. What price did they give you?

A. They came down from one million to \$750,000 that morning.

Q. Did you report these negotiations back to Seabrook? A. Off and on; every few minutes.

Q. As a result of these negotiations back and forth, what price did you finally get from the Del-Bay people to submit to Mr. Seabrook and his associates?

A. The very last figure they told me, the very last they would accept, was \$600,000. 20

Q. Did you report that back?

A. I reported that and Mr. Seabrook said, "It looks as though they might have to split, offer them a split," but before I made that offer of a split, Mr. White, the young Mr. White, called up his father at New Rochelle, and they submitted to me an offer that they would take, the very best they would take would be \$525,000 net to them.

Q. What did they say about your commissions?

A. No commission out of that. That would have to be net to them. 30

Q. Did you report that price to Mr. Seabrook?

A. I left Mr. Handleman and Mr. White at Mr. White's office on Wall Street, and I went to Mr. Seabrook's office and I told him, and when I came he was very anxious. He said, "I just heard Senator—certain buyers are really trying to buy the property; we have been playing too long. Close; close at once; get them down on a contract."

Q. At what price?

A. At 525. I told him, "We can get it for that." I said, "All right, but how about the commission?" He said, "Don't worry about that, we will take care of you."

Q. Did you tell him they wouldn't pay you the commission?

A. I said, "That 525 is net, no commission out of that." He said, "You close and we will pay you the commission," and then he started figuring on what my
10 commission amounted to. It amounted to seventeen thousand and some dollars, my two-thirds, or three and one-third.

Q. Who calculated this commission?

A. Mr. Seabrook did in his office at the Hudson Terminal Building. Well, I wanted to have the price of the contract such a price that would pay my commission as the seller, as I never collected from a buyer, and he figured up and he says, "Wouldn't you be satisfied with three per cent for yourself?" Well, it was only one-
20 third of one per cent reduction, and I said yes, and at the rate of \$525,000 the commission should have been \$15,750.

Q. At three per cent? A. At three per cent.

Q. Did he also figure it at five per cent?

A. At five per cent my share would have amounted to seventeen hundred and some dollars more than three per cent.

Q. You mean when it was calculated at five per cent on \$525,000 and then Mr. Seabrook took one-third off,
30 your share would have been——

A. About seventeen hundred dollars and around fifty more, something like that.

Q. What did he say to you after that?

A. He said, "Would you be satisfied with an even three per cent?" I said, "Certainly; I will be glad to." He said, "You go down there and tell them you will take less, you will take three per cent, and get whatever you can out of them. Whatever you can't, I will pay you the difference. I will pay you the difference between

what you can get from them and that three per cent," so I said, "That will be satisfactory," and I was willing to close. Then Mr. McDonald and I went down to the office of Cotton and Franklin to meet Mr. Handleman and young Mr. White. We stayed there from four until about eight or eight-thirty in the evening, thrashing out the various deals. One bad feature there was that they wanted a bond to assure Mr. White——

Mr. Bacon—I object to that. These details have nothing to do with it. 10

The Court—Not a thing.

Q. Now, Mr. Beilin, did you go back to the Del-Bay people and close this deal?

A. We did not close that night, because it was eight o'clock——

The Court—You did not close that night?

A. No.

Q. Did you close the next day?

A. The next morning we met Mr. Seabrook, and that evening Mr. Andre from Fall River, Massachusetts, brought some money and we met him late at night and we got the money. 20

Q. You closed the deal up?

A. We went to the office of Cotton and Franklin in the morning with the \$50,000.

The Court—Did you close the deal, is all he wants to know.

A. Yes, we closed the deal.

Q. At the time you closed the deal with them did you take up with the Del-Bay people further whether they would pay you three per cent commission instead of five on this reduced price? 30

A. Mr. Lloyd Smith knew that already——

The Court—No.

A. Yes, I did.

Q. Did they pay you the three per cent?

A. They paid me one-third of my commission that day.

Q. As the deal proceeded and Seabrook produced the balance of the purchase price, did they eventually pay you the other two-thirds? A. Yes, sir.

Q. So that the Del-Bay people finally paid you three per cent commission? A. Yes, sir.

Q. And was it a part of your commission that you paid back to the Del-Bay people at Mr. Seabrook's request? A. A part of the third payment; yes, sir.

Q. They never paid you this money back, did they?
A. No, sir.

Q. You testified yesterday to what Mr. Seabrook said about giving you a check for it? A. Yes, sir.

10 Q. Did Mr. Seabrook ever say to you prior to the time that you commenced this suit that you owed him any money? A. No, sir.

Q. When he did not draw you the check on the Philadelphia bank did you take it up with him again?

A. Immediately after the settlement I said, "Mr. Seabrook, how about the \$4,705.22?" He says, "Let's have lunch. Mr. McDonald and I are in a hurry; let's get some lunch." I remember remarking that I would eat better if I got my check. He said, "Well, I will see
20 you Saturday in Bridgeton and I will give it to you," and I didn't like it. I didn't think because——

Q. Did you see him Saturday?

A. I seen him Saturday in Bridgeton. That is, I came to his office and Miss Smith told me I couldn't see him that day, and it was several Saturdays later that I finally seen him, about three or four weeks after January 3, the final settlement.

Q. What did he say about it?

A. I told him—he says, "We want your presence in
30 this company; we want you to own some stock here and I am not going to see you out of this; I want you in here. You have saved us a little money." Tried to make me feel as though everything was satisfactory. I says, "Well"——

Q. Did he say he didn't owe it to you?

A. No, not the first Saturday. He says he wants my presence and everybody in the company wants me in it. Well, I told him that would be another matter but I didn't like the way that payment was delayed, and I

took it up with Mr. McDonald. I says, "He isn't paying me my money."

(Objected to.)

Q. Only what Mr. Seabrook said about paying or not paying.

A. He said, "I will see you. I want to talk to the boys to give you some stock in the company." Well, I didn't want any stock in the company and I kept after him. Finally I got to New York one day and said we would like to get to a head on this. He said, "Don't you remember a letter written to you? I have got a copy of it. Have you got that letter in your files?" He said, "You must." I said, "What letter are you referring to?" He said, "Don't you remember we were supposed to have one-third of the commission?" 10

Q. Is that the first he said about it?

A. That's the first time. I told him, I said, "Yes, Mr. Seabrook, you were to get one-third. I agreed to do that, but don't you remember before we closed the deal that I told you they won't pay a commission and how much I would be satisfied to have myself? My commission then was to be three and one-third"—— 20

Mr. Bacon—I object to this. Here is a mere lecture on a subject.

The Court—All we want is what you told Mr. Seabrook. If you told Mr. Seabrook this, you may tell it.

A. I told Mr. Seabrook, and he says, "Well, no," he says, "I think in any event we ought to have one-third." I said, "Not at the time that we made the agreement in your office and Mr. McDonald and I were there. Mr. McDonald was waiting to go." He says, "Let's leave it to Mr. McDonald." I says, "I am perfectly willing," because I talked to—because I knew—— 30

The Court—Not what you knew.

A. Well, I said, "All right, I will talk to Mr. McDonald," so another two or three months went by and I began to get uneasy, so I told Mr. McDonald——

The Court—No.

A. So I started in again to see Mr. Seabrook, and I couldn't catch him. At last I got him on the phone and he says, "Let McDonald and McAllister straighten it out, but you show them that letter," so I showed the letter to Mr. McDonald, and Mr. McDonald—

The Court—Not what he said.

Q. You couldn't tell what Mr. McDonald said.

A. Well, then I proceeded to get the money and I didn't get it yet. Up to this date I haven't got it.

10 Q. You finally were forced to bring suit, were you?

A. Yes.

Q. Was any demand ever made on you for any money, for the amount of money contained in this counter-claim until after you brought this suit? A. No, sir, but I told Mr. Seabrook, I said, "If you think that that letter applies here," I says, "you either owe me \$4,705.22, or if you are right, I ought to give you \$544, and why don't you want that \$544?" He says, "Well, that's all right,"

20 he used when I finally had a talk with him out and out about this letter.

Q. Then you brought the suit?

A. Yes, then I brought suit.

Cross-examination—By Mr. Bacon.

Q. When you brought suit you didn't bring it in your own name, did you?

30 Mr. Loder—I object to that. It has been admitted by counsel on both sides that the American Farm Agency is Beilin and the Investors Management is Seabrook.

The Court—Under the admissions in this case it does not seem to me to make a bit of difference.

Mr. Bacon—It makes this difference: It appears, as is known to everybody on the other side, that Mr. Seabrook is in Russia. He therefore cannot deny these alleged conversations. We have a right at this time, it seems to me, to look a little bit into the credibility of this witness, to find out and judge

to some extent his credibility, by what he did. Is it not a fair subject of inquiry as to whether or not he brought the suit in somebody else's name?

The Court—I think not. Under the admissions in this case, whatever Seabrook did was the act of the Investors Management Corporation, and you both admit that whatever Mr. Beilin did was the act of the American Farm Agency.

Mr. Bacon—Of course, that is not denied. That is an admission on the record. 10

The Court—I do not think you are affecting the witness' credibility at all by a cross-examination as to his bringing suit in that name, when you admit by your stipulation that it was proper so to do. I will sustain the objection.

(Exception noted for defendant.)

Q. You know that Mr. Seabrook isn't here, don't you? You know he isn't in this country?

Q. Well, you believe that, don't you?

A. Only from what you said. 20

A. I certainly do.

Q. Now, the last conversation that you had with Mr. Seabrook on this subject, he suggested that you have a talk with Senator McAllister, did he not?

A. With Mr. McDonald.

Q. He didn't say anything about your having a talk with Senator McAllister?

A. Told me to tell Mr. McDonald to see Mr. McAllister.

Q. Did you ever see Senator McAllister about the matter. A. No, sir. 30

Q. Never had any talk with him on the subject?

A. No, sir.

Q. Did you ever have any talk with Mr. Smith about the matter? A. Mr. Alden Smith?

Q. Yes. A. No, sir.

Q. You knew he was president of the company, didn't you? A. I did not.

Q. Vice president of the company? A. Yes, sir.

Q. But you never talked with him about it at all?

A. I did not know he was vice president until yesterday when he testified.

Q. You knew, did you not, that Mr. Smith was one of the associates with Mr. Seabrook in this matter?

A. Yes, I did.

Q. You saw Mr. Smith on various occasions in New York, did you not? A. Yes, sir.

Q. Where?

10 A. I met him at the Hotel Belmont on several occasions with Mr. Seabrook and I also met him once or twice at Mr. Seabrook's office at the Hudson Terminal Building.

Q. And he was present at some of these conversations you had with Mr. Seabrook that you have referred to, was he?

A. Present as to the buying of the property, but never present, as I can remember, when we talked about commissions or the final settlement.

20 Q. Was he present the day that you stated to Mr. Seabrook that three per cent was all you could get?

A. He was not.

MORRIS V. McDONALD, recalled.

Direct Examination—By Mr. Loder.

Q. Mr. McDonald, you testified yesterday in this case. Did you go to Mr. Seabrook's home on Christmas Day, 1928, at Mr. Seabrook's direction and request?

A. I did.

30 Q. Did you see Mr. Beilin there? A. Yes, sir.

Q. Did you hear any conversation at that time between Mr. Beilin and Mr. Seabrook in reference to the rate of commission if this sale was effected?

Mr. Bacon—I interpose the same objection that I did yesterday to Mr. McDonald testifying.

The Court—The answer to this question would be yes or no, and I will permit that, and then I will wait until the next question.

A. Yes.

Q. What rate of commission did Mr. Seabrook and Mr. Beilin discuss?

Mr. Bacon—That is objected to for the reasons already stated.

The Court—How can this be said to be a confidential communication between a client and an attorney? As I understand it, it calls for his testimony as to what he heard Mr. Beilin and Mr. Seabrook say, a conversation directed to Mr. Beilin and not to Mr. McDonald. 10

Mr. Bacon—My objection I stated fully yesterday. Mr. McDonald admitted that he was the attorney for Mr. Seabrook, and if he still says so, it seems to me, as I said yesterday, that aside from the ethics, he debarred from testifying to what his client said to him—

The Court—It is not what he said to him.

Mr. Bacon—or said to another man in his presence.

The Court—It is not what his client said to him, but what his client said to someone else when he happened to be present. It does not seem to me to come within the confidential communication rule. I will permit it. 20

(Exception noted for defendant.)

(Question repeated.)

A. Five per cent.

Q. Did they at that time in your presence discuss any other rate of commission except five per cent?

A. No other. 30

Q. At that time was there anything said by Seabrook to Beilin about Seabrook wanting a part of the five per cent commission if the sale went through? A. Yes.

Q. What did he say to Beilin?

A. He wanted one-third, leaving two-thirds for Mr. Beilin.

Q. Of the five per cent commission? A. Yes.

Q. As the result of your conference with Mr. Seabrook you went to New York to look after certain matters in connection with this property?

A. The following morning.

Q. And the result was that the contract for the sale of this property or the option was taken in your name?

A. It was.

Q. You were present at most of the negotiations between Seabrook and Beilin in reference to this property?

A. Practically all of them; yes, sir.

Q. When did you actually procure this option? What date? A. The 28th of December.

10 Q. 1928? A. 1928.

Q. Were you present when Mr. Beilin came in and reported the lowest price that he could obtain this property for? A. I was.

Q. Was Mr. Seabrook there? A. Yes, sir.

Q. Where did it take place?

A. In Mr. Seabrook's office in the Hudson Terminal Building, New York City.

Q. What did Beilin say to Seabrook in reference to this deal?

20 A. Mr. Beilin came in. I was there with Mr. Seabrook at the time, waiting for him. He said that they were willing to sell the property for \$525,000 net, but they would pay no commission on that basis.

Q. What did Mr. Seabrook say to that?

A. Mr. Seabrook said, "Go ahead and close, if that is the best you can do, and we will pay your commission."

30 Q. "We will pay you the commission"? Was anything said by Seabrook to Beilin or Beilin to Seabrook at that time what Beilin's commission would amount to?

A. Mr. Beilin says—no. Mr. Seabrook said, "Try and get a part of it from them." He said, "How much do you want?" and they did some figuring. They were discussing it between them and figuring out the amount at the table, and he finally says to Mr. Beilin, "How much will you be satisfied with? Wouldn't you be satisfied if you got three per cent?" and Beilin says, "Yes, I would be satisfied with three per cent." He says, "All right, go ahead and close with them and if they will pay you

no commission we will pay you three per cent; if you can secure any part of it from them, do so and we will pay you the difference up to three per cent."

Q. Was anything said between Beilin and Seabrook at that time about five per cent and about three and one-third per cent and three per cent?

A. There was discussion about the division on the basis of five per cent would be three and one-third per cent to Mr. Beilin, which would be more than the three per cent, and the one-third on the basis of five per cent 10 would be given to Mr. Seabrook under his arrangement.

Q. That was mentioned, was it?

A. That was mentioned.

Q. Then Mr. Seabrook asked him if he would be satisfied with three per cent?

A. He asked him if he would be satisfied to accept three per cent.

Q. For himself? A. For himself.

Q. What did Beilin say?

A. He said yes. After that I went with Mr. Beilin 20 to the office of Cotton and Franklin and there met Mr. White—

Mr. Bacon—I object to that.

The Court—It is not responsive.

Q. Do you know of your own knowledge whether or not the Del-Bay people finally did pay Mr. Beilin three per cent commission on this deal? A. They did.

Q. Were you present when Mr. Beilin reported that fact to Seabrook? A. I reported the amount myself.

Q. You reported it to Mr. Seabrook? 30

A. Yes, after the settlement.

Q. Did you tell him that you had been successful in getting the entire three per cent commission paid by the Del-Bay people?

Mr. Bacon—That is objected to for the reasons already stated.

The Court—I will sustain the objection.

Q. When the arrangement was made that you testified about, that Mr. Beilin was to have three per cent commission for his share, where did this meeting take place?

A. You mean the talk between Mr. Beilin and Mr. Seabrook?

Q. Yes, the talk that Beilin and Seabrook had about Beilin getting three per cent for his share.

A. In Mr. Seabrook's office in the Hudson Terminal Building in New York.

10 Q. That was on what day?

A. On the 27th day of December.

Q. Do you recall who was present at that time besides you three?

A. Nobody else. Mr. Seabrook, myself and Mr. Beilin.

Q. Was Mr. Alden Smith present at that time?

A. He was not. Mr. Smith was present later in the afternoon, after the arrangement had been made.

Q. After the option had been signed?

20 A. Not after it had been signed, but after we had made the tentative agreement.

Q. But he was not present when Seabrook and Beilin had this conversation about the three per cent commission?

A. Not at that time, no, sir, he was not. Mr. Smith was present at the Hotel Belmont that evening when we returned about eight o'clock, and then told Mr. Seabrook that we had arranged to get a three per cent commission.

Q. That was told Mr. Seabrook? A. Yes, sir.

30 Q. I think you testified yesterday that you were present when Mr. Beilin paid this money to the Del-Bay for Seabrook? A. Yes, I was.

Q. What did Mr. Seabrook say to Mr. Beilin in your presence about returning this money, if he said anything?

The Court—I think you went into that yesterday. He testified to that.

Q. After this settlement was effected and the deed went through, were you ever present on any other occasion with Mr. Beilin when Seabrook discussed the matter with him, said anything about the money?

A. Immediately following the settlement, on the same day, yes.

Q. That was after the settlement had all gone through?

A. Yes.

Q. What was said then?

A. After the settlement was concluded, about two 10
c'clock or two-thirty in the afternoon, I believe, we all returned to Mr. Seabrook's office. He was not present at the settlement. I had the deed and I presented it to him in his office and informed him that Mr. Beilin had advanced the sum of \$4,605.22 in payment of the adjustments due, and Mr. Beilin spoke up and said he would like to have a check for the amount, and Mr. Seabrook said, "Everybody is hungry and it is late; come on, let's have some luncheon," and Beilin said, "I would eat better if I had my check first," and he said, "Come on," 20
and he hurried us out and took us up to the Hardware Club and treated us all to lunch, and as soon as lunch was over we went uptown to the hotel and we went up and got our baggage and went home.

Q. In the testimony of Mr. Seabrook which was read yesterday, referring to this, he said, "We walked over toward Mr. McDonald and said, 'What do you think about that, Mr. McDonald?' and he said, 'Well, I think he ought to be satisfied as he is. The amount of money he has got is a hell of a lot of money for anybody in 30
Vineland.'" Did you say that?

A. No such conversation.

Cross Examination—By Mr. Bacon.

Q. During all of these conversations or alleged conversations which you have repeated here this morning, you were present at each and every one of them as Charlie Seabrook's lawyer, were you not?

A. I suppose I was.

Q. Well, don't you know whose lawyer you were?

A. I was retained by Mr. Seabrook.

Q. And were there honestly serving him, or were you not? A. Certainly.

Q. And you have here testified against his interest, haven't you?

A. I don't think so. I am telling the truth.

Q. And you have testified against his interest in favor of a man who has brought this suit against your
10 absent client; isn't that so?

A. I am telling the truth.

Q. Are you here under subpoena? A. No, sir.
By Mr. Loder.

Q. You are here at my request, Mr. McDonald?

A. Yes, sir.

(Plaintiff rests.)

DEFENDANT'S TESTIMONY IN SUR-
REBUTTAL

20

ALDEN SMITH, recalled.

Direct Examination—By Mr. Bacon.

Q. Are you associated with Mr. Seabrook in any enterprise other than the Investors Management?

A. I am a director and stockholder in Koster Nurseries and I am vice president of the Seabrook Engineering Corporation.

Q. Where is Mr. Seabrook now?

30 Mr. Loder—That is objected to. This testimony was taken because he said he could not be here.

The Court—Yes, the testimony was taken before trial because Mr. Seabrook was going to Russia.

Mr. Bacon—He might have gotten back. It seems to me in good faith we ought to be permitted to show that he is not here.

The Court—I will permit it.

Q. Where is he?

A. He is in Berlin this morning on his way back to Russia, having come out to London on some business for the corporation, and is on his way back to Russia.

Q. Are you in constant cablegram communication with him? A. Received one this morning.

Q. Since you came to the court house? A. Yes, sir.

Q. You said yesterday you were present when Mr. Beilin reported to you and Mr. Seabrook that he was unable to get more than three per cent commission. Was there any talk at that time about your paying him any additional commission? When I say you, I mean your syndicate or Mr. Seabrook.

Mr. Loder—I object. I think he went into it 10
yesterday.

The Court—It is not rebuttal of anything, because their testimony is that Mr. Smith was not present when that conversation with reference to the payment either by the Del-Bay or the Seabrook interests was had, that the only people present were Mr. McDonald, Mr. Beilin and Mr. Seabrook. As I understand it, the only testimony with reference to Mr. Smith, in so far as the plaintiff is concerned, is that Mr. Smith was present when it was announced that the Del-Bay people would pay the three per cent. If that is so, if I am not mistaken about that testimony, this question is not directed towards a rebuttal of anything they said. 20

Mr. Bacon—My recollection of the testimony given by Mr. Seabrook in the depositions that were read, and the testimony given by Mr. Smith was that when Beilin came in and stated that three per cent was all he could get, that Beilin asked Mr. Smith and Mr. Seabrook whether that was satisfactory. Mr. Seabrook testified that he said to Beilin, “Is that satisfactory to you?” and Beilin said yes, and Mr. Smith testified yesterday that his reply to the question was, “Yes, because we get one-third of that, anyway.” The testimony this morning by Mr. McDonald and Mr. Beilin is that at this conversation, which does not appear in Mr. Seabrook’s testimony, there was a statement made to him, “If you cannot get three per cent, we will 30

make it up." I am asking Mr. Smith if any such conversation as that took place in his presence.

The Court—I do not understand that they so testified. I will permit the question, however.

(Question repeated.)

A. No.

Cross-examination—By Mr. Loder.

Q. What day was this? A. The exact day?

10 Q. Yes. Do you know? A. Right after Christmas.

Q. What day? What was the date?

A. The exact date is not clear in my mind.

Q. You don't know when it took place, except it was after Christmas?

A. The exact date isn't clear in my memory.

Q. Then you don't know, do you?

A. The exact date, no.

Q. What office do you hold in this defendant corporation? A. Vice-president.

20 Q. How long have been vice-president?

A. I think since the day it was formed.

Q. What? A. I think since the day it was formed.

Q. And you say you have been in constant touch with Mr. Seabrook? Didn't you testify a while ago in constant touch with Mr. Seabrook? A. Yes.

Q. About this case and other matters?

A. No. About other matters.

Q. And that you heard from his this morning by cablegram?

30 A. I received a cable from him on other extraneous business.

Q. By cablegram? A. Yes.

Testimony closed.

COURT'S CHARGE TO THE JURY

Sooy, J.: Ladies and gentlemen—You and I each have distinct and separate functions to perform in the trial of these cases that come before us during the course of a term of court. Your function is to determine the facts which arise from the testimony given by the witnesses in each case. You are the sole judges of the facts. It is my duty to deal with the law as applied to those facts and to charge you with respect to the law as applied to the facts. 10

In this case there is very little law that it is necessary to charge. It is almost exclusively a factual question for your determination. You will have with you when you go out the pleadings in the case, which are the papers filed by the attorneys, setting forth the claims and demands of their respective clients.

You may be a little confused, as I was in the opening, in that the plaintiff in the case is designated as the American Farm Agency and the defendant as the Investors Management Corporation. However, you have observed that all of the testimony deals not with those corporations by name, but with Beilin and with Seabrook; so that you will consider, under the stipulation of counsel, that for the purpose of considering the testimony in this case, Beilin is the plaintiff and Seabrook is the defendant. 20

Beilin says that on February 13, 1929, in New York City, at the request of Seabrook, he paid to the Del-Bay Farms Company \$4,705.22, and that Seabrook agreed that that money would be repaid to Beilin by Seabrook; that that money was not repaid and is still due and owing. 30

The defendant denies that any such transaction ever took place, and in addition to the denial that such transaction took place, the defendant sets up an entirely different transaction, and says that on that date, to wit, February 13, Mr. Beilin received from the Del-Bay

Farms Company the balance of a \$15,750 commission; that one-third of that commission was due to the Seabrook syndicate; that out of that one-third Beilin paid for the Seabrook syndicate the sum of \$4,705.22; and that there is due to Seabrook the balance, to wit, the sum of \$544.78.

So that you have the original claim of the plaintiff, wherein it seeks to recover \$4,705.22, and the claim of the defendant under its counter-claim, wherein it seeks
10 to recover a money judgment in the sum of \$544.78.

In the natural order of things you would take up the claim of the plaintiff, the original claim, first. A scrutiny of the testimony will show that it is undisputed that prior to February, some time in November, Mr. Beilin was interested in endeavoring a sale as a real estate agent of the Del-Bay Farms. That is not disputed. It is also not disputed that Mr. Seabrook was interested in purchasing the Del-Bay Farms, and that as a result of that situation the two men came together. It seems to
20 be undisputed that as a result of their conference, an agreement was reached wherein Seabrook promised to pay to Mr. Beilin fifty per cent of the regular commission if the purchase of the Del-Bay Farms was secured through Mr. Seabrook directly, and not through Mr. Beilin; that if the purchase was made through Beilin, he was to have two-thirds of the regular commission, and that Seabrook was to have one-third.

That was the situation that was agreed upon some time, I think, in November. You will have a letter, and
30 that letter will clearly set forth what the admitted understanding was as between the two parties as of that date.

It appears from the testimony of Mr. Beilin that thereafter a different arrangement was entered into between Beilin and Seabrook. Beilin says that after the writing of that letter and after its receipt by him, he entered into a new arrangement with Seabrook, and that that was caused by virtue of the fact that he could not get a five per cent commission, and because of the fact that he had been told by the Del-Bay people that they

would sell for \$525,000 net, with no commission to him. He says that he went to Seabrook, explained that situation, and that Seabrook and he agreed that he, Beilin, was to get three per cent commission on \$525,000, and that he was to endeavor to get that commission from the Del-Bay people; that if he could not get that commission from the Del-Bay people, Seabrook would pay it.

That is the contention of Mr. Beilin. In that contention he says he is supported by the other testimony in the case, so that you should give him a recovery in the amount he seeks. 10

The defendant says that conversation never took place, that there was never any agreement whereby Seabrook agreed to pay any part of the commission at all, and that Seabrook's agreement with Beilin was that Beilin was to pay Seabrook one-third of his commission of three per cent.

That is the issue of fact that is presented for your consideration and for your determination. Did Seabrook agree with Beilin that Beilin should have the three per cent commission, all of it; or did Beilin agree with Seabrook that he would divide the commission, two-thirds and one-third? 20

It is admitted that the commission was paid by the Del-Bay people to Beilin. There is no question about that. There is no question but what it was a three per cent commission. But the question is did Beilin and Seabrook agree that there was to be a split of that commission, one-third to Seabrook and two-thirds to Beilin? 30

There is just one principle of law involved in your determination, and that is this: In order for the plaintiff to recover the moneys that he paid over at the time of the settlement, the \$4,705.22, he must establish by the greater weight of the believable evidence that he paid that over at the request of the defendant and under a promise of the defendant to repay it. He must establish that by the greater weight of the believable evidence.

By the greater weight of the believable evidence you are not to get the impression that that necessarily means

the greater number of witnesses. It means that you take the testimony of all of the witnesses for the plaintiff, you take the just inferences that arise from that evidence, and you weigh the believable testimony and you discard the unbelievable. You consider the probabilities of the truthfulness of the stories of the witnesses, how they told them, the interest they had, and you weight that testimony on behalf of the plaintiff, and if it tips the scales ever so slightly in favor of the plaintiff, then he has carried the burden of proof, he has convinced you by the greater weight of the believable evidence. If, on the other hand, in the weighing of that believable testimony you find that the scales are in equipoise, that is, even balance, do not tip in favor of the plaintiff, then he has not carried the burden of proof and cannot recover.

So that the question is, from the evidence as you get it, do you find that the plaintiff paid over for Seabrook \$4,705.22, which Seabrook agreed to repay him? If you do, then your verdict must be for the plaintiff in the sum sued for, together with interest as claimed, about which I will speak a little further.

If you do not find that the plaintiff has carried the burden of proof, you turn to the counter-claim, and you consider that in exactly the same manner as you have the original complaint, and you find that the burden of proving the counter-claim is on the defendant, and if it has established by the greater weight of the evidence the allegations of its counter-claim, it would be entitled to recover the amount sued for, to wit, \$544.78, with interest.

So that you see you have two possible verdicts to render: One for the plaintiff in the amount sued for with interest and no cause of action on the counter-claim; or you have a verdict for the defendant on the counter-claim for the amount sued for with interest, with no cause of action as against the plaintiff. In other words, if you find for the plaintiff, you necessarily find no cause of action against the defendant's counter-claim. If you

find for the defendant, you necessarily find no cause of action on the plaintiff's original claim.

Whichever way you find, the party in whose favor you find a verdict is entitled to the amount sued for—there is no dispute as to the amounts—plus six per cent interest figured on that amount from the date mentioned in the complaint, March 25, 1929, to date. You add that six per cent interest to the sum of \$4,705.22. For example, say that the interest you figure amounts to \$100. The claim sued for is \$4,705.22. Your verdict would be \$4,805.22, which would include the interest item. The same way with the defendant's counter-claim of \$544.78. 10

You will have with you when you go out the original complaint and the counter-claim, and you will notice in the last paragraph of the complaint and the counter-claim the exact amount of money sued for, together with the date on which interest starts.

You may retire and take with you the pleadings.

20

NEW JERSEY COURT OF ERRORS AND APPEALS.

AMERICAN FARM AGENCY, INC., <i>Plaintiff and Respondent,</i> <i>vs.</i> INVESTORS MANAGEMENT COR- PORATION, INC., <i>Defendant and Appellant.</i>	}	Action at Law. On Appeal from Supreme Court.
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GROUNDS OF APPEAL

(Filed January 9, 1931)

The appellant states the following grounds of appeal:

1. The Trial Court overruled appellant's objections to the following questions propounded to Morris V. McDonald, a witness called by plaintiff, and permitted such questions to be answered by the witness, viz.:

(a) "Q. Now, at the time of the settlement, do you know of your own knowledge whether or not Mr. Beilin, for the American Farm Agency, the plaintiff in this case, turned over to the Del-Bay Company for the account of the Investors Management Corporation a check for \$4,705.22?"

(b) "Q. Did you hear anyone request Mr. Bielin to turn over this money?"

(c) "Q. What did he (Mr. Seabrook) say?"

10 (d) "Q. What rate of commission did Mr. Seabrook and Mr. Beilin discuss?"

2. The Trial Court refused to permit the following question to be propounded to the witness Solomon L. Beilin, on cross-examination, and overruled the same, viz.:

(a) "Q. When you brought this suit, you didn't bring it in your own name, did you?"

3. The judgment of the Supreme Court should have been in favor of the appellant and not in favor of the
20 respondent.

ALBERT R. McALLISTER,
Attorney of and Counsel with Appellant.

Due and legal service of the within is hereby acknowledged.

LEROY W. LODER,
Attorney of Plaintiff.

EXHIBITS

November 27, 1928.

Mr. S. L. Beilin,
628 Landis Avenue,
Vineland, N. J.
Dear Mr. Beilin:

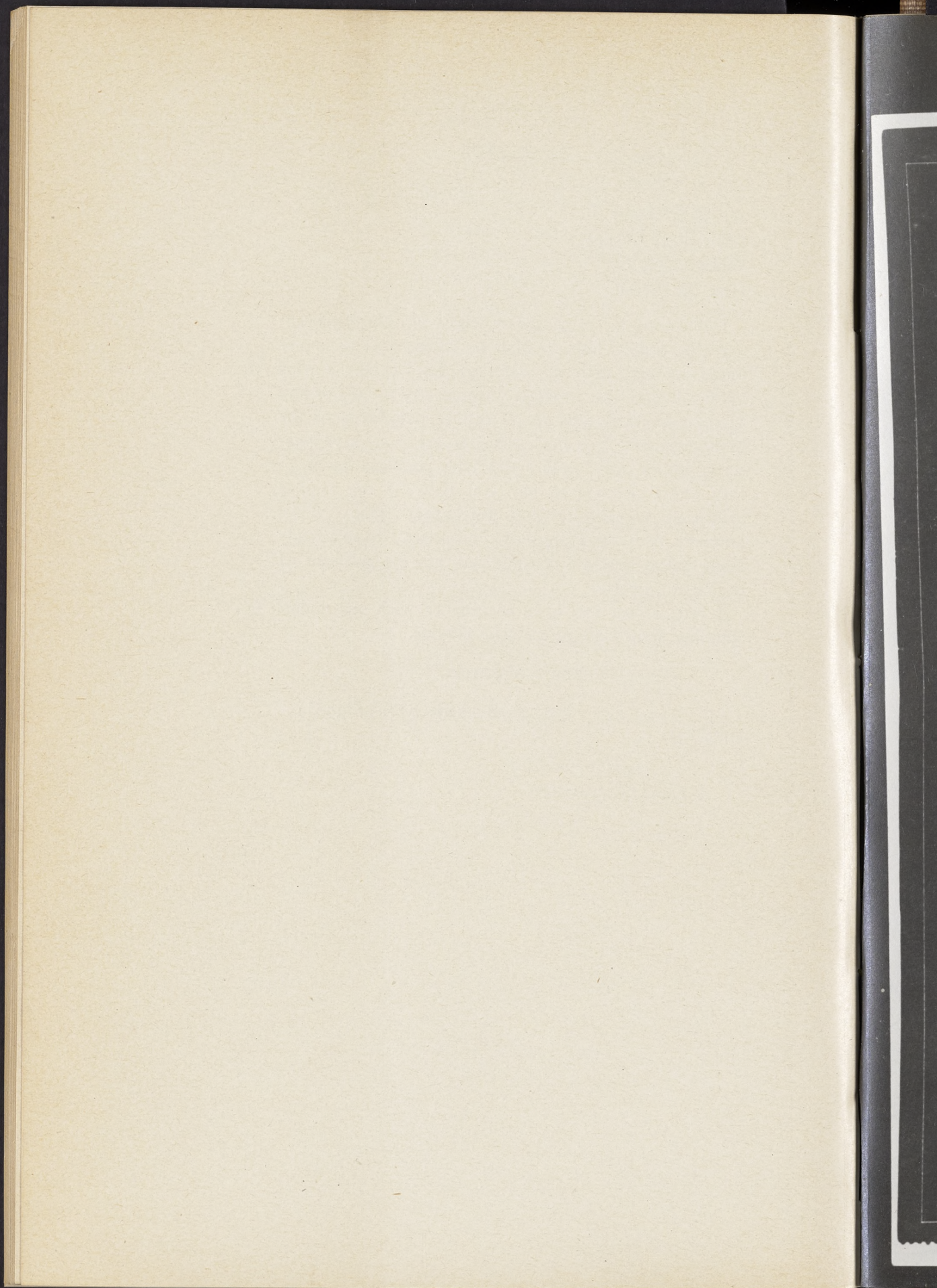
Confirming my conversation with you Saturday evening, November 24th, I wish to advise that it is my understanding, with reference to the Del-Bay Farms matter, in case you purchase this property for me or any of my associates, you are to receive two-thirds of the brokerage and I or my associates are to receive one-third, and in case I or my associates purchase the property direct, we are to pay you 50% of the regular brokerage commission for purchasing same. This, however, does not apply to the purchases I have already made unless they are consolidated into the purchase of the main property. 10

I believe that this is in accordance with our understanding and, if so, please acknowledge. 20

Yours very truly,

C. F. SEABROOK (Signed)

CFS:RS



February 13, 1929

No.



BROOKLYN TRUST COMPANY, 28 Broad St., N.Y.C.

\$ 4,705.22

Pay to the order of

S. L. PELLIN

FOUR THOUSAND SEVEN HUNDRED FIVE and 22/100 --- Dollars
DEL-BAY FARMS, INCORPORATED, SPECIAL ACCOUNT

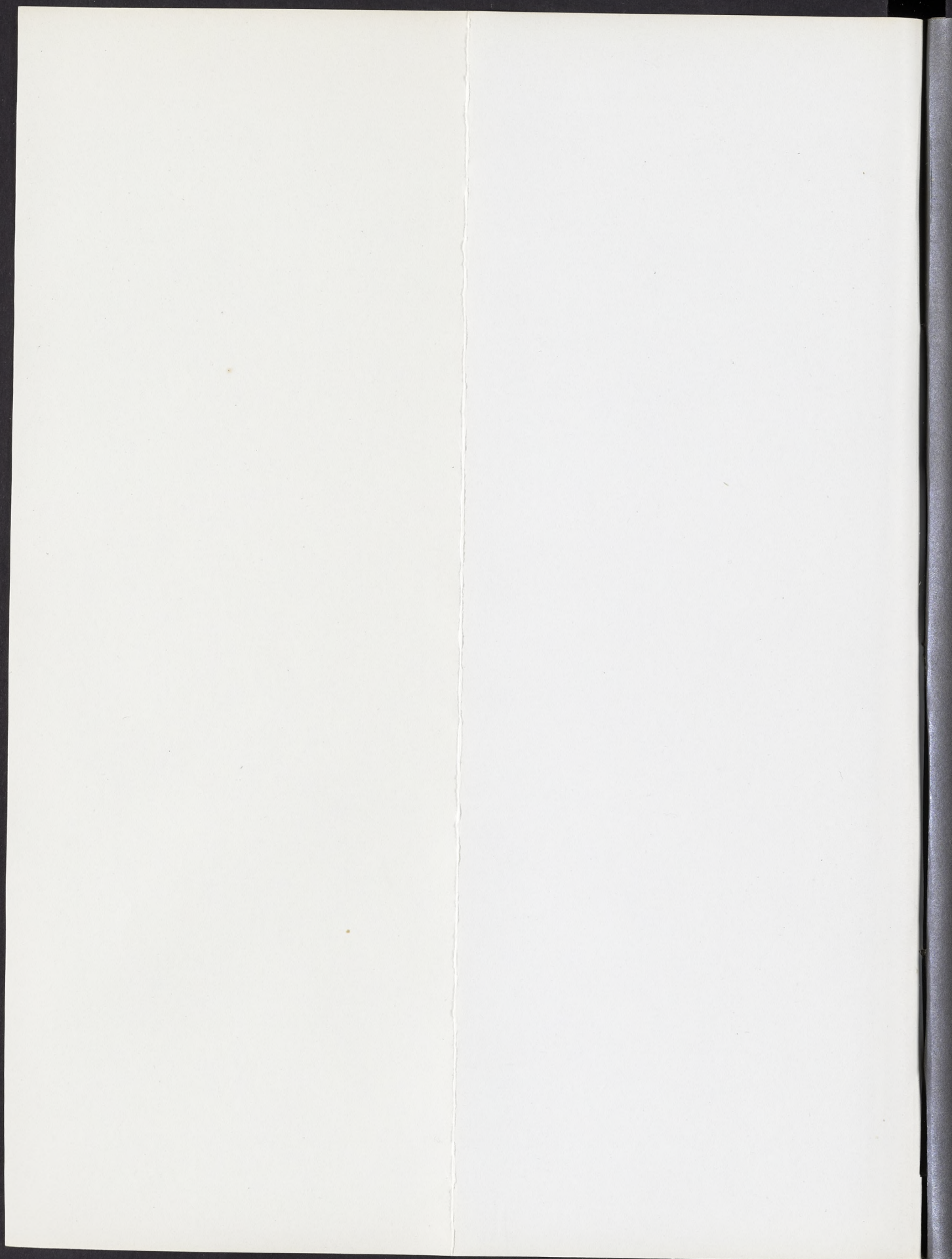
Meyers Handman AM white T. P.

U.S. Bond

U.S. Government Securities, 42 Dime or Five Cent, Maturity on 1st Jan 1930

Pay to the order of
Del-Bay Farms, Incorporated
For account
of Del-Bay Farms, Incorporated

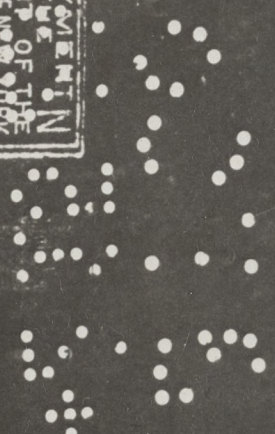
BROOKLYN TRUST CO
NEW YORK OFFICE
FEB 13 1929
SECOND FLOOR



S. L. Berlin

FOR DEPOSIT ONLY
TO CREDIT OF
VINELAND FARM AGENCY.

RECEIVED PAYMENT
THROUGH THE
CHECK DEPARTMENT OF THE
FEDERAL RESERVE BANK OF NEW YORK
FEB 15 1929
PRIOR ENDORSEMENTS GUARANTEED
THE CHASE NATIONAL BANK
OF THE CITY OF NEW YORK



February 13,

1929 No.

BROOKLYN TRUST COMPANY, 26 Broad St., N.Y.C.

Pay to the order of

S. L. BERLIN

\$ 544.78

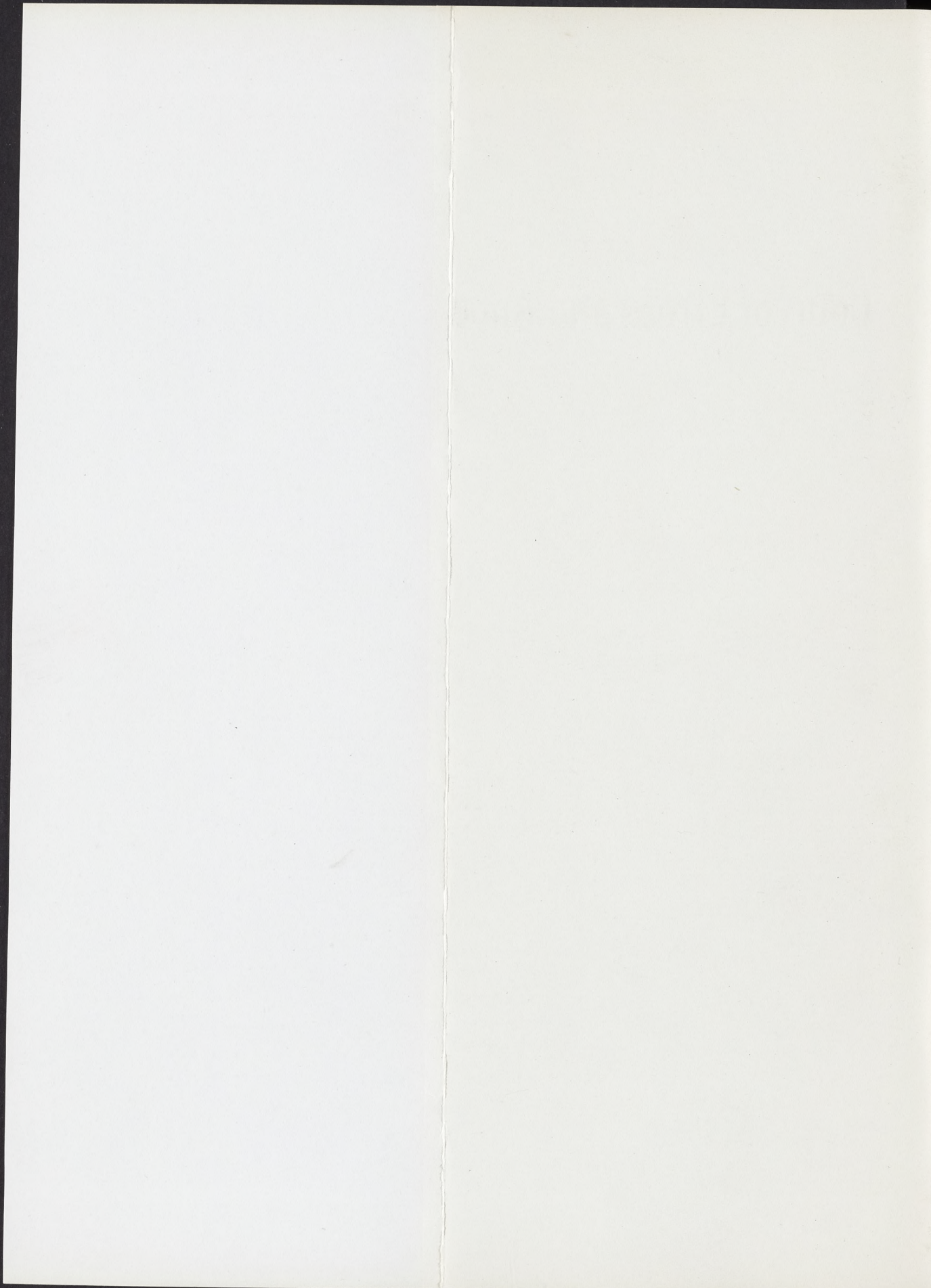
FIVE HUNDRED FORTY-FOUR and 78/100

DEL-BAY FARMS, INCORPORATED, SPECIAL ACCOUNT

Mrs. Hanselman *VP*
AM White Jr.
Vice.

U.S. Bond

U.S. Government Securities, 42 Building, New York, N.Y.



CASE No. 53

NEW JERSEY
Court of Errors and Appeals

AMERICAN FARM AGENCY, INC.
Plaintiff-Respondent,

vs.

INVESTORS MANAGEMENT CORPORATION, INC.,
Defendant-Appellant.

} On Appeal
from
Supreme
Court.

**BRIEF FOR DEFENDANT-
APPELLANT**

STATEMENT

Plaintiff-respondent will be styled, Solomon L. Beilin, and Defendant-appellant will be styled, Charles F. Seabrook. (See page 71 of Case Charge of Judge Sooy.)

Plaintiff Solomon L. Beilin, President of American Farm Agency, approached defendant Charles F. Seabrook, who represented Investors Management Corporation, Inc., first by telephone (page 9 Case); later, he personally got in touch with Seabrook (page 9 Case). Beilin's claim to Seabrook was that he, Beilin, could assist in purchasing the Del-Bay Farms in Cumberland County, for Seabrook and his associates. Two meetings in which the various ways and means of working together for this purpose, were discussed, and an understanding was reached between Beilin and Seabrook

(page 11 of Case), looking toward the purchase of the Del-Bay Farms for Seabrook and his associates. This understanding was confirmed by letter from Seabrook to Beilin (Exhibit page 77 of Case).

In this letter, it will be noticed Beilin was to receive two-thirds of the commissions, and Seabrook and his associates one-third in case Beilin was able to purchase the Del-Bay Farms for Seabrook.

Beilin had expected to receive five per cent commission from the Del-Bay Farms, for making this sale; but a few days before the sale was completed, informed Seabrook that three per cent was all the commission that would be paid by the seller. He submitted this change in the rate of commission, to Seabrook, who informed him it was satisfactory to him (pages 16-17 Case).

The property was purchased from the Del-Bay Farms Company for Seabrook and his associates, for the sum of \$525,000.00. Commissions on this sum at three per cent amounted to \$15,750.00, and one-third of this amount, \$5,250.00 was claimed by Seabrook as his share in the same, pursuant to the agreement between him and Beilin (page 77 Case).

At the consummation of the sale, certain adjustments were to be made amounting to \$4,705.22, which amount was to be paid the seller (Del-Bay Farms Company). It was at this time discovered that Beilin had drawn down from the seller two-thirds of the commissions amounting to \$10,500, leaving still due from the seller for commissions, \$5,250, which amount Seabrook maintains was due him as part or share of the commissions.

Beilin advanced to the seller \$4,705.22 of the commission of \$5,250.00 due from seller, to make up the adjustments claimed by seller as due from purchaser; the balance of \$544.78 he received and kept.

In the present suit, Beilin sues to recover the \$4,705.22 advanced by him to the seller, maintaining he advanced this sum for the purchaser, and that it is a part of the balance of commissions of \$5,250.00, all of which was

due him, and none due Seabrook. Seabrook claims that the \$5,250.00 was due to him from Beilin, for his one-third of the commissions, and that there is still due him \$544.78 from Beilin.

Beilin sues to recover \$4,705.22 with interest. Seabrook counter-claims, setting up as an offset that this amount was all due him from Beilin, together with the additional sum of \$544.78 with interest.

Verdict was in favor of Beilin, and judgment entered for plaintiff-respondent for \$5,193.41, in New Jersey Supreme Court (page 7 Case). Defendant-appellant appeals from said judgment to this Court.

GROUNDS OF APPEAL

(Page 75-76 Case)

(Filed January 9, 1931)

The appellant states the following grounds of appeal:

1. The Trial Court overruled appellant's objections to the following questions propounded to Morris V. McDonald, a witness called by plaintiff, and permitted such questions to be answered by the witness, viz.:

(a) "Q. Now, at the time of the settlement, do you know of your own knowledge whether or not Mr. Beilin, for the American Farm Agency, the plaintiff in this case, turned over to the Del-Bay Company for the account of the Investors Management Corporation a check for \$4,705.22?"

(b) "Q. Did you hear anyone request Mr. Beilin to turn over this money?"

(c) "Q. What did he (Mr. Seabrook) say?"

(d) "Q. What rate of commission did Mr. Seabrook and Mr. Beilin discuss?"

2. The Trial Court refused to permit the following question to be propounded to the witness Solomon L. Beilin, on cross-examination, and overruled the same, viz.:

(a) "Q. When you brought this suit, you didn't bring it in your own name, did you?"

3. The judgment of the Supreme Court should have been in favor of the appellant and not in favor of the respondent.

ARGUMENT

Defendant-appellant maintains that the answers to the questions propounded to Mr. M. V. McDonald should not have been permitted, and his testimony rejected for the reason that McDonald was attorney of Seabrook, and the statements to him, or in his presence to Beilin (who was the agent of Seabrook), were confidential and privileged.

The effect of receiving the testimony of McDonald, as set out on pages 34, 35, 36 and 63 of the case, was to change the entire contract as testified to by Seabrook, who was not present at the trial, and could not go on the stand to deny or be heard on this testimony.

The testimony was objected to by counsel for defendant-appellant, but was allowed over his objection—exceptions were duly taken and noted. (Pages 34, 35, 36, and 63, Case.)

"It has been held that no reason of necessity requires that any witness save an interpreter should be present at a consultation between client and his attorney, but it seems that such a rule is too narrow. *It would exclude presence of client's agents who in some instances must be present at conferences between attorney and client, in order that counsel may obtain accurate information of the facts.*" (28 Ruling Case Law, page 562.)

The conversation between Seabrook and his attorney, McDonald, took place in the presence of his agent, Beilin.

There is no question but that the relation of attorney and client existed between Seabrook and McDonald. (Page 33, Case.)

“Whether the question of lawyer and client exists, is a question of law. Sometimes it is a mixed question of law and fact. For example, where there exists a controversy in the testimony as to the relation in which the parties stood to each other, it is solely whether the province of the Court to decide the question of fact, and its finding of fact becomes the basic ground for a further determination by the Court as to the admissibility of the preferred testimony.”

State vs. Snook, 94 N. J. Law 274.

It may be claimed because the statements of Seabrook were made to Beilin in the presence of McDonald, that they were not privileged communications; but Beilin was the confidential agent of Seabrook in securing the purchase of Del-Bay Farms, and thus the question of a privileged statement was not removed.

“The presence of a confidential agent at a conference between attorney and client, has been held not to destroy the privilege; and a clerk or amanuensis of an attorney, cannot testify as to confidential communications in his presence, between attorney and client.”

40 *Cyc.* p. 2378.

The privilege as to confidential communications between attorney and client, may be claimed in any action or proceeding in which the disclosure is sought, even though the client is not a party.

40 *Cyc.* p. 2380.

This case does not come within the cases of *Carr vs. Weld*, 19 N. J. Equity 319, or *Roper vs. State*, 58 N. J. Law 420, where statements made between clients and third persons in the presence of the attorney, no privilege

bars the attorney from testifying for the reason that Beilin stood in the position of an agent of Seabrook.

The privilege is personal to the client, and only he can waive it.

Sayre vs. Sayre, 14 N. J. Law, p. 487.

State vs. Laponio, 85 N. J. Law, p. 359.

It is respectfully submitted that the judgment below should be reversed, and a new trial granted.

HERBERT C. BARTLETT,
Of Counsel with Defendant-Appellant.

NEW JERSEY COURT OF ERRORS AND APPEALS

AMERICAN FARM AGENCY, INC.,
Plaintiff and Respondent,

vs.

INVESTORS MANAGEMENT
CORPORATION, INC.,
Defendant and Appellant.

BRIEF OF PLAINTIFF-RESPONDENT

Statement of Facts.

The plaintiff instituted an action in the Supreme Court to recover from the defendant the sum of \$4705.22 paid by the plaintiff to Del Bay Farms, Inc. at the request of the defendant and which the defendant promised to pay to the plaintiff upon demand. (2)

In support of its action the plaintiff called Solomon L. Beilin, the president of the American Farm Agency and Morris V. McDonald. Mr. Beilin testified that the sale of Del Bay Farms was made by his company and that out of the commission paid to him at the time of settlement he paid to Del Bay Farms Inc. at the request of the defendant the sum of \$4705.22 and that the defendant promised to pay it back to him.

Morris V. McDonald testified that he was present as attorney for Charles H. Seabrook and that the money was paid by Beilin at the request of the defendant and that the defendant promised to pay it back to him.

The defendant admitted that Beilin paid the money to Del Bay Farms but claimed that it was paid in accordance with an agreement that Seabrook and his associate should share in the real estate brokers commission.

The jury rendered a verdict in favor of the plaintiff.

The defendant appeals and specifies as the grounds of appeal the overruling of defendant's objection to certain questions propounded to Morris V. McDonald and the refusal to permit a certain question to be asked Solomon L. Beilin.

Points.

I.

It was not error to overrule the objection to the questions propounded to Morris V. McDonald.

II.

It was not error to sustain the objection to the questions put to Solomon L. Beilin.

Argument.

1. The witness Morris V. McDonald had testified that he was an attorney and counsellor at law (33); that he was present at the time of settlement as attorney and agent of the purchaser (33). He was asked the following questions (34):

A. "Now, at the time of settlement do you know of your own knowledge whether or not Mr. Beilin, for the American Farm Agency, the plaintiff in this case, turned over to the Del Bay Company for the account of the Investors Management Corporation a check for \$4705.22?"

The defendant objected on the ground that McDonald could not testify if he were there as Mr. Seabrook's lawyer (35).

Objection was also made to the following questions put to Mr. McDonald:

B. "Did you hear anyone request Mr. Beilin to turn over this money?" (35 line 31).

C. "What did he say?" (36 line 1)

D. "What rate of commission did Mr. Seabrook and Mr. Beilin discuss?" (63 line 1)

The objection to all of these questions was on the ground that Mr. McDonald was Mr. Seabrook's attorney and therefor could not testify.

Mr. McDonald was not permitted to disclose any confidential communication. He testified to transactions between Seabrook and Beilin in his presence.

In answer to the first question he testified that he had personal knowledge; that he was present at a meeting between Seabrook and Beilin and that Seabrook requested Beilin to turn over the check (35 line 1-30).

In answer to the second question he testified that he heard Mr. Seabrook request Beilin to do this (35 line 35).

In answer to the third question he testified as to what Seabrook said to Beilin (36 line 1).

In answer to the fourth question he testified as to a conversation between Seabrook and Beilin in his presence (63 line 1-30).

An agreement made in the presence of an attorney between his client and a third person is not a privileged communication—Carr vs. Weld 19 N. J. E. 319.

In the case of Roper vs. State 58 N. J. L, page 420 the Supreme Court held that a counsellor at law, who was present at conversation between his client and a third person, is a competent witness in behalf of the latter to prove what was said. The court said "The subject is too plain for discussion".

The defendant complained that the court sustained the plaintiff's objection to the following ques-

tion:—"When you brought this suit you didn't bring it in your own name, did you?"

It has been set out in the counterclaim of the defendant "For all the purposes of this suit the plaintiff and said Solomon L. Beilin are one and the same party plaintiff and the defendant and Charles F. Seabrook are one and the same party defendant" (3). The plaintiff in its reply (5) admitted this.

On page 27 and 28 State of the Case this is also admitted by counsel.

On page 61 it is again admitted by counsel.

It is respectfully submitted the judgment should be affirmed.

LEROY W. LODER

Of Counsel with Plaintiff.

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time—"When you brought this suit you didn't bring it in your own name, did you?"

It has been set out in the recitals of the defendant. For all the purposes of this suit the plaintiff and said Solomon L. Bellie are one and the same party plaintiff and the defendant and Charles F. Westbrook are one and the same party defendant" (3). The plaintiff in its reply (5) admitted this.

On page 27 and 28 State of the Case this is also admitted by counsel.

On page 41 it is again admitted by counsel.

It is respectfully submitted the judgment should be affirmed.

LEROT W. LODER

Of Counsel with Plaintiff