

6

I N D E X

	PAGE
Complaint	1
Answer	7
Reply	10
Testimony	11
Defendant's Opening to the Jury.....	12
PLAINTIFF'S TESTIMONY:	
Simon Weil—Direct	16
Cross	18
Re-direct	21
Re-cross	22
Robert Bright—Direct	22
Cross	28
Re-direct	35
Daniel Dileo—Direct	40
Samuel M. Garfinkle—Direct	44
Cross	48
Solomon Fuld—Direct	54
Cross	58
Motion to Direct Verdict for Plaintiffs.....	51, 82
Motion to Non-suit	52

	PAGE
DEFENDANT'S TESTIMONY:	
John D. McMullin—Direct	62
Robert Bright—Direct	68
Elizabeth B. Adams—Direct	76
Cross	77
Plaintiff's Testimony in Rebuttal	81
Court's Charge to Jury	83
Defendants' Exceptions	96
Exhibit P1, Agreement	99
Exhibit P2, Letter	101
Exhibit D1, Letter	102
Judgment	103
Notice of Appeal	105
Grounds of Appeal	106

COMPLAINT.

(Filed Nov., 1927.)

NEW JERSEY SUPREME COURT.

CAPE MAY COUNTY.

10

SOLOMON FULD, SIMON
WEIL, EDWIN MAYER,
MARY J. MELGIN, MRS.
EDWARD WHITEHILL and
WILLIAM SANDBERG, ex-
ecutors of the Estate of
EDWARD WHITEHILL, de-
ceased,

Plaintiffs,

v.

MRS. ELIZABETH B. ADAMS
and HARRY ADAMS, ex-
ecutors of the Estate of
RURIC N. ADAMS, de-
ceased,

Defendants.

On Contract.
Complaint.

20

30

Plaintiffs, Solomon Fuld, Simon Weil, Edwin Mayer, Mary J. Melgin, Mrs. Edward Whitehill and William Sandberg, executors of the estate of Edward Whitehill, deceased, complaining, say:

FIRST COUNT.

1. That on or prior to the 17th day of August, 1925, defendants, being the executors of the estate of Ruric N. Adams, deceased, with power of sale, placed in the hands of John A. Ackley & Son, auc-
10 tioneers, four (4) lots, numbered 14, 15, 29 and 30, in Block 128 of the Second Ward of Wildwood, New Jersey, of which the said Ruric N. Adams died seized, having a frontage of 200 feet on the westerly side of Atlantic Avenue, with a depth of 90 feet between Spencer and Spicer Avenues, for sale at public vendue.

2. That on the 17th day of August, 1925, the said John A. Ackley & Son did expose said lots for sale
20 at public vendue, and plaintiffs purchased the same for the sum of \$23,000.00.

3. That the conditions of said sale required the payment of 10% of the purchase price in cash upon the day of the sale, 40% in cash on or before October 1st, 1925, at the office of Robert Bright, and a mortgage for one-half of the purchase price, or balance, for a period of one (1) year, bearing interest at 6% per annum, payable semi-annually; said lots or
30 parcels of land to be free and clear of encumbrance, except subject to any mortgage accepted in settlement, and unpaid municipal assessments, if any, due after October 1st, 1925, and subject to the usual restrictions running with the land, a copy of which agreement is hereto annexed, made a part hereof and marked "Exhibit 1."

4. That after the purchase of said property by plaintiffs, as above set forth, an agreement of sale to plaintiffs for said lands was prepared and executed by John A. Ackley & Son, in writing, duly authorized agent for the sale of said land; and on the 4th day of September, 1925, was delivered by the said John A. Ackley & Son to plaintiffs, and thereupon a check was delivered by plaintiffs to the order of R. N. Adams Estate for the sum of \$2,300.00, being 10% of the purchase price of said lots, which said check was later deposited and cashed by defendants. 10

5. That on the 30th day of September, 1925, and prior to the date of settlement for said lots, defendants, by their agent, Robert Bright, notified plaintiffs that said sale would not go through, because of a pending Chancery proceeding. 20

6. That after receiving the notice from defendants, that they would not complete said sale, and after defendants had received in cash plaintiffs' check for \$2,300.00, aforesaid plaintiffs demanded the return of said sum of \$2,300.00 from the said defendants, which demand was refused.

Plaintiffs say that defendants are indebted to them in the sum of \$2,300.00, together with interest thereon from the 4th day of September, 1925, for which sum judgment will be claimed under this count. 30

SECOND COUNT.

1. Paragraphs 1, 2, 3, 4, 5 and 6 of the first count are repeated as paragraphs of this second count.

10 2. That defendants were the owners only of an undivided two-thirds interest in said lands, and were unable to convey the lands mentioned in said agreement so by them, through their agent, agreed to be conveyed.

3. That afterwards, plaintiffs demanded the return of said moneys of \$2,300.00 from the defendants, which demand was by the said defendants refused.

20 Plaintiffs say that defendants are indebted to them in the sum of \$2,300.00, together with lawful interest thereon from the 4th day of September, 1925, for which judgment will be claimed under this count.

SAMUEL M. GARFINKLE,
Attorney for Plaintiffs.

30

EXHIBIT 1.

DESCRIPTION

Being four lots Nos. 14, 15, 29 and 30, Block 128, Second Ward, City of Wildwood, N. J. Having a combined frontage of 200 ft. on the Westerly side

of Atlantic Avenue with a length or depth of 90 ft. between Spencer and Spicer Aves. Sold by the lineal front foot (200 feet) on Atlantic Ave.

TERMS:

10% of the purchase price to be paid in cash on this day. 40% of the purchase price to be paid in cash on or before October 1, 1925 at the office of Robt. Bright, Cor. 1st & New Jersey Avenues, North Wildwood, N. J. when a deed will be given for the same and a mortgage for one-half or the balance of the purchase price will be accepted in settlement for the same. Said mortgage to be for a period of one year, bearing interest at the rate of 6% per annum, payable semi-annually. 10

CONDITIONS

20

To be free and clear of encumbrances, except and subject to any mortgage accepted in settlement and the unpaid municipal assessments, if any, that may be due after October 1, 1925. The same to be adjusted as per day of settlement. Sold subject to usual restrictions running with the land.

We, Edwin Mayer, Simon Weil, Sol. Fuld, Ed. Whitehill and Mary Melgin of 518 E. Allegheny Ave., Phila., Pa. have this day bid at public auction on the above described property the sum of \$115.00 per foot, 200 feet or the sum of Twenty-three thousand dollars (\$23,000.00) dollars, and do hereby agree to comply with the above terms, and failing to do the same I hereby agree to forfeit as liquidated damages any and all monies paid, and do 30

hereby agree to release any claim that I may have
acquired upon the aforesaid property.

(Signed) EDWIN MAYER

(Signed) SIMON WEIL

(Signed) SOL FULD

(Signed) EDWARD WHITEHILL

(Signed) MARY J. MELGIN Per JEL.

10 Witness:

V. W. Ackley

Received of Edwin Mayer, et al. \$2300.00 on ac-
count of the above bid.

Dated, August 17, 1925.

JOHN A. ACKLEY & SON, AGENTS,
By V. W. A.

20

30

ANSWER.

(Filed Feb. 26, 1928.)

NEW JERSEY SUPREME COURT.

CAPE MAY COUNTY.

10

SOLOMON FULD, <i>et al.</i> , <i>Plaintiffs,</i> v. ELIZABETH B. ADAMS, <i>et al.</i> , <i>Defendants.</i>	}	Action at Law. Answer.
--	---	---------------------------

20

Defendants, Elizabeth B. Adams and Harry Adams, executors of the estate of Ruric N. Adams, deceased, answering the plaintiffs' complaint, say that:

ANSWER TO FIRST COUNT.

30

1. They admit paragraph 1 thereof.
2. They admit paragraph 2 thereof, except as hereinafter denied and modified.
3. They admit paragraph 3 thereof.

4. They admit paragraph 4 thereof.
5. They deny paragraph 5 thereof.
6. They deny paragraph 6 thereof.

10

ANSWER TO SECOND COUNT.

1. They make the same answer to paragraph 1 of the second count as they made to paragraphs 1, 2, 3, 4, 5 and 6 of the first count.
2. They deny paragraph 2 thereof.
3. They deny paragraph 3 thereof.

20

AFFIRMATIVE DEFENSES.

Defendants, by way of affirmative defense, say that:

1. Defendants were at all times, and still are, ready, willing and able to settle for the property in question, but plaintiffs were not ready or willing for settlement at the time fixed in said agreement of sale, nor did they ever make any tender, nor were they ever thereafter ready, willing or able to settle.
2. The failure of the settlement was due to the negligence of the plaintiffs.

3. Plaintiffs were at no time ready or willing to settle, and never at any time advised defendants that they were desirous, able or willing to settle.

4. By reason of the foregoing, and the conditions of the agreement referred to in the plaintiffs' complaint, the plaintiffs have forfeited their right to the return of the money referred to in the plaintiffs' 10
complaint.

THOMPSON & HANSTEIN,
Attys. of Defts.

20

30

TESTIMONY.

NEW JERSEY SUPREME COURT.

CAPE MAY COUNTY.

10

SOLOMON FULD, SIMON
WEIL, EDWIN MAYER and
WILLIAM SANDBERG, ex-
ecutors of the Estate of
EDWARD WHITEHILL, de-
ceased,

Plaintiffs,

v.

MRS. ELIZABETH B. ADAMS
and HARRY ADAMS, ex-
ecutors of the Estate of
RURIC N. ADAMS, de-
ceased,

Defendants.

Action at Law.

20

Cape May Court House, N. J., September 11, 1930. 30

Before HON. WILLIAM FRANK SOOY, Judge, and a
jury.

APPEARANCES:

For plaintiffs: SAMUEL M. GARFINKLE, Esq.,
GEORGE A. BOURGEOIS, Esq., of counsel.

For defendants: MESSRS. THOMPSON & HANSTEIN,
by WALTER HANSTEIN, Esq.

10

(The jury was sworn at 10.35 A. M.)

(Mr. Bourgeois opened the plaintiffs' case to the jury.)

DEFENDANT'S OPENING TO THE JURY.

20

Mr. Hanstein: May it please the Court, ladies and gentlemen of the jury: I do not suppose there would be any need for courts if there were not two sides to every story, and there is a different side to this story than the side that has just been told you.

30

Mrs. Adams and Mr. Adams, both of whom are here in court, were the executors of the estate of Ruric Adams, who was the owner of a two-thirds interest in the very property in question, and a man named Shetzline was the owner of the other one-third. These parties determined first that the best thing to do would be to divide the land between them, and a suit, as we call it, in partition, was brought, which was a suit brought by Mr. Shetzline to have the land divided between all the parties who were interested in it. That suit was started and then the parties concluded, "It may be to our

advantage—instead of dividing this property up between us, it may be to our advantage to have the property sold,” so instead of Shetzline and the Adams Estate having any controversy such as would be entailed by the litigation that I just talked about, those parties had the property put into this sale, and it was sold by the consent of all of the parties, and when the time for settlement came, these parties, all of them—that is, Mr. and Mrs. Adams, the executors of this estate, and Mr. Shetzline—were all entirely willing to join in a deed for this property, but the plaintiffs were not at all interested in getting the title to this property. 10

In the first place, the time for settlement was fixed for October 1, 1925. They had bought it at an auction on August 17, 1925, and they had ordered through an attorney a search of the property to see what kind of a title they were going to get, and you folks will remember that at that time there was a great real estate boom and everybody thought that there was gold in all the lots, and they were paying all sorts of prices for them and there was a great rush to get land, and the title companies were very busy, and our friends, the plaintiffs, did not have any title search when the first of October came, when they were to get title, and they did not come down to a settlement. They say that Mr. Bright told them, Mr. Bright, the lawyer for Mrs. Adams, that Mr. Bright said that he did not think there would be any settlement. I think we are going to show you that we were in a position to settle at any time, and that the plaintiffs did not want any settlement at that time because they did not have title papers. They say that it was because of 20 30

that that they did not come down. We were ready at all times to settle.

Then the matter dragged along, and in 1927, two years after 1925, when they bought the property, and when all interest in real estate had dwindled, they came into Cape May County and they engaged another lawyer and they wanted to get their money
10 back, and we were ready to give them the land, we were at all times ready to give them the land, and they then, more than two years after the date fixed for settlement, brought a suit in 1927 to get their money back; not to get the land.

Mr. Bourgeois has referred to a partition proceeding that was started, and we are going to be in a position to show you that this partition proceeding was held up. Although it was started before this property was put into the sale, nothing was done
20 in it, waiting for the plaintiffs to settle.

It is our contention in this case that unless these plaintiffs show you that they were ready and willing to settle, and that we were unwilling, then they are not entitled to their money back, and if you find that, we will ask for a verdict in our favor.

Mr. Bourgeois: I move that that defense be stricken out. There is no part of that defense that is an answer to our suit, unless the law has changed
30 so that the title to real estate may be controlled by verbal statements. He says that there was some verbal arrangement between these parties. He admits that the title was not in Mrs. Adams at the time.

The Court: That does not make any difference,

whether the title was there or not. The question is whether they were able to convey on the day in question.

Mr. Bourgeois: The record shows that the title was not in Mrs. Adams.

The Court: That does not make any difference. 10
The record could have been in my name and yet they may have been in a position to have conveyed.

Mr. Bourgeois: They have to have it in writing. They cannot be in a position to convey unless it is in writing.

The Court: Your motion is overruled.

(Exception noted for plaintiff.) 20

Mr. Bourgeois: I offer in evidence the agreement made by Mr. Ackley for the conveyance of this property.

(The paper was marked Exhibit P1.)

Mr. Bourgeois: If your Honor please, since the last trial Mr. Weil, who was a witness who was sworn, has died, and I want to read into evidence 30
his testimony. I will ask Mr. Garfinkle to read it.

(Mr. Garfinkle read to the jury the testimony given at the previous trial of Simon Weil.)

SIMON WEIL, one of the plaintiffs, being called as a witness in his own behalf, having been duly sworn, was examined and testified as follows:

Direct examination.

10 By Mr. Bourgeois:

Mr. Bourgeois: I offer in evidence the agreement.

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

20 Q. Mr. Weil, you live where?

A. Philadelphia.

Q. You were one of the purchasers of this property that Mr. Ackley sold?

A. Yes, sir.

Q. On the 17th of August, 1925?

A. Yes, sir.

Q. Now, after that time and before the date of the settlement—proposed settlement, did you have a conversation with Mr. Bright?

A. No, afterwards. After October.

30 Q. After October?

A. After October.

Q. How long after?

A. Why, quite some time. I had written to him about October first to find out about the settlement and I was informed that he had —

Mr. Hanstein: You can't tell what you were informed.

The Witness: Well, he was not there.

Q. How is that?

A. He was not in his office at that time. He had gone away.

Q. At the time when you —

10

A. Tried to get in touch with him.

Q. Oh, I see. I see. Now, tell me whether or not you were prepared to make this settlement on the first day of October, 1925?

A. I was.

Q. Can you tell me why no tender was made? Why you didn't go down to make the settlement on that date?

A. We had a letter from Mr. Bright that there wasn't going to be any settlement.

20

Q. And did you rely on that statement?

A. Yes.

Q. That is the reason you didn't go?

Mr. Hanstein: Oh, don't lead the witness. He probably can tell you all about it without that.

Q. After the first of October, 1925—up until the fourth of November, 1927, when your suit was started to get this money back, did Mrs. Adams ever tender to you any deed for the property?

30

A. No.

Q. Ever offer you your money back?

A. Never.

Mr. Bourgeois: Cross-examine.

Cross-examination.

By Mr. Hanstein:

Q. Did you ever ask Mrs. Adams after that, October first, to fix a time for settlement?

A. Mr. Bright—my dealings were with Mr. Bright.

Q. I am asking you if you ever asked Mrs. Adams to fix a time for settlement?

A. No.

Q. Did you have a lawyer representing you or your syndicate from the date of this sale on?

A. Mr. Sooy was to get insurance and attend to it.

Q. And he advised you people that the title companies were very busy and that it was impossible to get the search through in time, didn't he?

A. Well, he saw Mr. Fuld and there was some delay. They were very busy.

Q. Well, it was due to the pressure of work in the title companies?

A. Yes.

Q. And the result was that you didn't get those searches through until September, 1926, wasn't it?

A. Well, they were delayed quite a lot, quite a bit.

Q. Delayed considerably beyond October first?

A. Yes.

Q. You didn't have them at the time of settlement?

Mr. Bourgeois: I object to that. What is the relevancy of that?

Mr. Hanstein: This is a party to the suit.

Q. (Repeated by the stenographer.) You didn't have them at the time of settlement?

A. No.

Mr. Bourgeois: What difference does it make?

The Court: It may be an effort to show that that is an indication that they didn't want to settle. 10

Mr. Bourgeois: But even then they would have to tender the deed, wouldn't they?

Mr. Hanstein: No. I don't know why we would have to tender a deed any more than —

The Court: The question is answered. Proceed.

Q. After those searches were received you then undertook to make the settlement, didn't you? 20

A. Yes.

Q. But you never fixed a time for settlement, did you?

A. I could not.

Q. Well, your lawyer didn't either, did he?

A. At that time I had no lawyer. I came to see Mr. Bright without a lawyer. I didn't want any lawyers.

Q. Didn't Mr. Sindberg represent you? 30

A. He is a lawyer.

Q. Well, didn't he represent your syndicate?

A. Mr. Whitely was the chairman and at his death Mr. Sindberg, his brother-in-law, assumed that duty, but he was not our attorney.

Q. Well, did he act for you?

A. As chairman, yes.

Q. I mean Sindberg.

A. As a chairman of the five.

Q. I say was Sindberg there acting for you people?

A. For five of us, yes.

Q. Which you knew?

10 A. Yes.

Q. And you knew that—do you know whether or not he or you or any of you ever fixed a time for this settlement?

A. No, I don't know.

Q. You don't know that any of you did?

A. We were all trying to get a time.

Q. Well, did you ever say, "On such and such a day we will be prepared to get our money and deliver a mortgage?"

20 A. We couldn't find any time to make that arrangement—we couldn't find anyone to make that arrangement with.

Q. Did you ever come to Wildwood about it?

A. I made a special trip to see Mr. Bright.

Q. And he was not there?

A. Oh, no. He was there when I came up after the first of October, when he returned.

Q. You said when who came down he was not here?

30 A. I wrote to him around October first. I wanted to see him but he had gone away. But when he returned I made an engagement and made a special trip to Wildwood to see about getting this matter adjusted, whether we could get the property settled without any lawsuit.

Q. Did you ever sign a mortgage?

A. I don't think so.

Re-direct examination.

By Mr. Bourgeois:

Q. What was the result of your trip to see Mr. Bright? What did you do there? 10

A. Why, from the information —

Mr. Hanstein: I object. I do not see that that is in any sense binding upon us.

Mr. Bourgeois: Mr. Hanstein has brought that out and I have a right to cross-examine on it.

Mr. Hanstein: No, I did not aim for any such answer. I asked him what he had ever done. 20

The Court: He said he went down to see Mr. Bright.

Mr. Bourgeois: Special trip down there.

A. Yes, but I assume Mrs. Adams is not bound by what Mr. Bright may have said after October 1, 1925.

Q. Well, did they ever tender you a deed for that property? 30

A. No.

Re-cross examination.

By Mr. Hanstein:

Q. And you never tendered them the money?

A. I was ready when I went to Mr. Bright's office.

10 Q. You never tendered it?

A. Well, there was no one there to take it.

Q. I see. Did you ever know Mrs. Adams before?

A. Not to know her until here.

Q. You knew she lived in ——

A. I knew there was a Mrs. Adams and knew her
by reputation, and her husband for years.

Q. You never went to see her about it?

A. No.

20 (Witness excused.)

ROBERT BRIGHT, SWORN.

Direct examination.

By Mr. Bourgeois:

30 Q. Mr. Bright, you are a practicing lawyer?

A. I am.

Q. Of how many years' standing?

A. 20.

Q. And you practice in what city?

A. Wildwood; North Wildwood.

Q. And have for how long?

A. 18 years.

Q. You knew Ruric Adams in his lifetime?

A. Very well.

Q. Do business for him?

A. I did.

Q. After his death do you know who was appointed the executors?

A. I do.

Q. Who?

10

A. Elizabeth B. Adams and Harry L. Adams.

Q. Do business for them?

A. I do.

Q. In what capacity?

A. As attorney.

Q. For the estate?

A. For the estate.

Q. Ever attend any sales of real estate for them?

Mr. Hanstein: I object. I do not see how that is material, competent or relevant. 20

The Court: I will permit the question to be answered.

(Exception noted for defendants.)

(Question repeated.)

A. I did one.

30

Q. I show you a letter bearing date September 30, 1925, written by you, and ask you if you wrote that letter.

A. Yes, sir, I did.

Q. That had reference to what transaction?

Mr. Hanstein: I object to that. If the letter is competent it will speak for itself, and if it is not, the question is improper.

The Court: I suppose the letter will speak for itself.

10 Q. Mr. Bright, did you know of Mrs. Adams putting real estate in the hands of John A. Ackley and Sons for sale?

A. I did.

Q. At the sale of August 17, 1925?

A. Yes, sir.

Q. Lots 14, 15, 29 and 30, in Section 128?

A. I did.

Q. Did you know that under the agreement that Mr. Ackley made with the purchasers, the settlement
20 was to be made at your office on the first of October?

A. Yes, sir.

Q. How did you get that information?

A. Senator Ackley told me, as also did Mrs. Adams.

Q. Both of them told you?

A. Yes.

Q. Did you then do such acts as you were called upon as attorney to do in connection with that?

A. I prepared the deed.

30 Q. Prepared the deed?

A. Yes.

Q. When the first of October came, who was there?

A. No one was there.

Q. Neither the purchasers nor Mrs. Adams?

A. No.

Q. Nor Mr. Adams, the other executor?

A. No.

Q. This letter of September 30, 1925, you sent to Mr. Whitehill, did you?

A. Yes, sir.

Q. Was that letter in connection with the settlement of these lots that I have just asked you about?

A. Yes, sir.

Q. It was?

10

A. Yes, sir.

Mr. Bourgeois: I offer the letter in evidence.

Mr. Hanstein: I object to the letter. My objection is that there is no proof of any authority on the part of Mr. Bright to send that letter, and the letter is purely an expression of opinion on the part of Mr. Bright. It is not a statement of anything as a fact, and there is no proof that it was authorized to be written by the defendants.

20

The Court: I will sustain the objection.

(Exception noted for plaintiffs.)

Q. Mr. Bright, what conversation did you have with Mrs. Adams when she told you that this settlement was to be made at your office?

30

Mr. Hanstein: I think a conversation between attorney and client is privileged. I do not see how they are entitled to go into that.

Mr. Bourgeois: Not when you are contesting his

authority as attorney. They are denying he was the attorney now.

Mr. Hanstein: Oh, no, we are not called on to deny anything until you prove something.

The Court: I will permit the question.

10

(Exception noted for defendants.)

A. I asked her if she wanted me to prepare the papers, inasmuch as the settlement had been scheduled at my office, and she said yes.

Q. Did she say anything about your taking care of the settlement?

A. Yes, sir.

Q. Wanted you to take care of the settlement?

20

A. Yes, sir.

Q. And your actions were along that line?

Mr. Hanstein: I object to that.

The Court: That calls for a conclusion. I think it is sufficient for the admission of the letter now.

Mr. Hanstein: Your Honor, I would like to say this: I feel before that letter can be offered in
30 evidence I should be permitted to cross-examine as to that phase of the case.

Mr. Bourgeois: I object to that.

The Court: No. I think the letter is admissible at this time, under the testimony of Mr. Bright as

to the things he had in charge in connection with the settlement for this particular piece of property, and I will admit the letter. Of course, you will have a right to cross-examine at the proper time.

Mr. Hanstein: Of course, the difficulty with the situation created by that is that if cross-examination showed that there was no authority to write the letter, the letter is still in evidence. 10

The Court: Yes. It should still be in evidence. If Mr. Bright was clothed with authority it would be admissible.

Mr. Hanstein: Yes, but if I showed by cross-examination that he was not, then there is no way of getting the letter out of evidence.

20

The Court: I will admit the letter.

(Exception noted for defendants.)

(The letter was marked Exhibit P2.)

Q. I understood you to say that on the first of October Mrs. Adams did not attend your office for the purpose of making settlement?

A. That is right.

30

Mr. Bourgeois: Mr. Hanstein, will you admit that Mrs. Adams and Mr. Adams were the owners as executors—that is, the estate of Ruric Adams was the owner of only a two-thirds interest in that real estate?

Mr. Hanstein: Yes; that the legal title stood two-thirds in the estate of Adams and one-third in the estate of Shetzline.

Mr. Bourgeois: Will you also admit that at that time proceedings in Chancery were pending for the partition of that land by the executors of Shetzline, that estate being owner of a one-third interest in it?

Mr. Hanstein: Yes, I will admit that at that time partition proceedings were pending. I think it was started before. Mr. Bright would know whether it was before the date of the agreement or not.

Mr. Bourgeois: I have the file right here. This bill appears to have been filed on the 17th of July, 20 1925.

Mr. Hanstein: All right.

Mr. Bourgeois: Will you admit that this property was sold in those partition proceedings by Judge Eldredge as Special Master at public sale —

Mr. Hanstein: No, I won't admit that.

30 Cross-examination.

By Mr. Hanstein:

Q. Mr. Bright, in connection with this settlement you were to do what? Make up the figures and draw the papers?

A. I had authority to prepare the deed and effect settlement, yes, sir.

Q. Make up the figures for the settlement?

A. Yes.

Q. Had you been authorized by Mrs. Adams to write this letter?

A. I was not.

Q. Did you tell Mrs. Adams that you had written 10 the letter?

A. Not until long afterward.

Q. Then, so far as you know, Mrs. Adams never knew anything about your writing this letter until long afterward?

A. That is correct.

Q. Did these buyers come down to your place and make a tender of the money they owed?

Mr. Bourgeois: I object. That is irrelevant and 20 immaterial.

The Court: That is cross-examination. You asked him whether anyone was present at the time of the settlement on October first.

Mr. Bourgeois: I will withdraw the objection.

Q. Did these buyers, these plaintiffs in this suit, who were the buyers of this property, ever come 30 down and offer you the money and the mortgage that was due on the date called for settlement?

Mr. Bourgeois: That is objected to. I did not ask that question. The only question I asked was limited to the first day of October, 1925.

(Question repeated.)

The Court: I will sustain the objection on the ground that the question is so ambiguous that I do not understand whether you mean to confine it to the day of the settlement or whether you mean to confine it to "ever."

10

Q. On the day of settlement these plaintiffs didn't come down with any money, did they?

A. They did not.

Q. And they didn't come down with any mortgage, did they?

A. They did not.

Q. Did they ever after that tender you any money as a settlement?

20 Mr. Bourgeois: That is objected to as not cross-examination.

The Court: It is not cross-examination.

(Exception noted for defendants.)

30 Q. Mr. Bright, in your letter you say that you don't believe the sale will go through, for the reason that the property is in litigation in the Court of Chancery?

A. Yes.

Q. Didn't you know at the time that you wrote this letter that Mr. Shetzline and the Adams Estate were both willing to settle on this property?

Mr. Bourgeois: I object. That is not cross-

examination at all, and it is not legal, because you cannot convey property or bind somebody with regard to real estate verbally.

The Court: I sustain the objection to the question in its present form.

Q. You had prepared a deed, you say, for the conveyance of this property? 10

A. I did.

Q. To these plaintiffs?

A. Yes.

Q. Do you have that deed with you?

A. I do not, no.

Q. Whom did you name as the grantors in that deed?

A. Elizabeth B. Adams and Harry L. Adams, executors of the estate of Ruric N. Adams, and Charles A. Shetzline and his wife, whose name I don't just now recall. 20

Q. So you had prepared a deed for settlement here, to be signed by Mr. and Mrs. Adams as executors and Mr. Shetzline and his wife?

A. That is right.

Q. Did you have any conversation with—do you know if Mr. Shetzline was represented by an attorney? 30

A. I do.

Q. Who was that attorney?

Mr. Bourgeois: I object.

The Court: It is not cross-examination.

Q. Did you know that Shetzline was unwilling to sign that deed?

Mr. Bourgeois: I object to that.

The Court: Where in the letter is there any reference to Mr. Shetzline's unwillingness or willingness to sign? It simply says at the bottom that he is the owner of a one-third interest, and that is all.

Mr. Hanstein: No, it says more than that. It says: "I do not believe the sale will go through, for the reason that the property is in litigation in the Court of Chancery. Mr. Shetzline filed a bill for partition and the court proceedings have priority over the sale. Mr. Shetzline, the one-third owner, is not bound by the listing or sale, not having signed up or agreed thereto."

The Court: I sustain the objection on the ground that you are not cross-examining on anything introduced in the direct testimony or in that letter.

(Exception noted for defendants.)

Q. Did Mr. Shetzline ever refuse to sign a deed?

Mr. Bourgeois: I object.

The Court: It is not cross-examination.

(Exception noted for defendants.)

Q. Did Mrs. Adams ever refuse to sign a deed?

A. No.

Q. Did Mr. Adams?

A. No.

Q. And they hadn't authorized you to send this letter?

A. They didn't authorize me to send the letter.

Q. Did you know that the sale could not go through? 10

A. No, I didn't know that.

Q. You didn't know that?

A. No.

Q. Do you know if Mr. Shetzline had authorized this property to be put into the sale?

Mr. Bourgeois: I object to that.

The Court: That is not cross-examination.

20

(Exception noted for defendants.)

Q. Did you have any reasons to say that, "Mr. Shetzline is not bound by the listing or sale?"

A. I had no authority to say that. That was my impression at that time.

Q. You have seen the agreement of sale, haven't you?

A. Yes, I have.

Q. It is not signed by Mrs. Adams, is it? 30

A. The listing?

Q. I am not talking about the listing. I am talking about the agreement of sale.

A. No.

Q. Not signed by Mr. Adams nor Mrs. Adams?

A. No.

Q. Nor by Shetzline, either?

A. Signed by Senator Ackley.

Q. He is the only one who signed it?

A. Yes.

Q. Wasn't Mr. Shetzline as much bound by the listing as Mrs. Adams?

10 Mr. Bourgeois: I object.

The Court: I sustain the objection.

(Exception noted for defendants.)

Q. Do you know who represented the plaintiffs as an attorney in this matter?

Mr. Bourgeois: I object to that. What difference
20 does that make?

The Court: I do not think that he testified to anything of that kind, and I do not see how it would be material whether he knows or not. I will sustain the objection.

Q. Who did represent the plaintiffs as an attorney in this matter?

A. Mark R. Sooy.

30 Q. Do you know who was subsequently their lawyer?

A. William Sandberg, of Philadelphia.

Mr. Bourgeois: Whose lawyer?

The Witness: The plaintiffs'.

Mr. Bourgeois: I move that be stricken out. How does he know that?

The Court: I do not know. The question was asked and answered.

Q. I ask you if you received this letter?

A. I did.

10

Q. Through the mail?

A. Through the mail.

(The letter referred to was marked D1 for identification.)

Q. Did you tell Mrs. Adams to come to your office, or Mr. Adams, on the date of the settlement?

A. No.

Q. Did Mr. Shetzline ever tell you whether or not he would sign a deed for this property?

20

Mr. Bourgeois: I object. That is not cross-examination, and it is immaterial and irrelevant.

The Court: I sustain the objection. It is not cross-examination.

(Exception noted for defendants.)

30

Re-direct examination.

By Mr. Bourgeois:

Q. Mr. Bright, you say you saw the listing. Was that listing signed—I mean the listing of this prop-

erty with Ackley and Sons for sale. Was that signed by anybody except Mrs. Adams herself?

Mr. Hanstein: I object to that. It seems to me he kept everything out about this listing, for one thing, and for another thing it is immaterial, irrelevant and incompetent. It all ante-dated the agree-
10 ment.

The Court: I do not see what relevancy the listing could have in this case.

Mr. Bourgeois: In view of the fact that Mr. Ackley's agreement does not specifically state who the party was, it shows who was the party who was bound by the listing. The agreement itself is not complete. Mr. Bright said on cross-examination that
20 he saw the listing. Mr. Hanstein having brought that out, I have the right to find out what the listing was.

The Court: The only question that I remember that Mr. Hanstein asked was whether or not Mr. Bright had seen the listing.

Mr. Bourgeois: And he said he had.

30 The Court: And he said he had, and that is all there was to it.

Mr. Bourgeois: Well, I have a right to cross-examine on that, haven't I, as long as he opened it up?

The Court: He did not ask him what the listing was or anything else. He simply asked him if he had seen the listing and he said he had.

Q. Have you a copy of the listing?

A. I have not.

Mr. Bourgeois: Mr. Ackley, have you the listing with you, the copy of that listing for sale, where somebody came and signed a paper and authorized you to sell it? 10

Mr. Ackley: Yes.

Q. You say you saw a listing. I show you what purports to be a listing and ask you if that is what you saw.

A. Yes, sir.

20

Mr. Bourgeois: I will offer this in evidence.

Mr. Hanstein: I object to that. I do not see that it is competent, material or relevant. It all antedates the agreement.

Q. Do you know Mrs. Adams' signature?

A. I do.

Q. I ask if that is Mrs. Adams' signature.

A. It is.

30

Mr. Bourgeois: Now, I offer it in evidence for the purpose of showing that nobody authorized that property to be sold but Mrs. Adams herself.

Mr. Hanstein: I object to it on the further ground that it could be authorized just as well verbally as in writing, and this would not tend to prove that no one else authorized it. It would only tend to prove that some particular person or persons signed a writing, which would not tend to prove what Mr. Bourgeois offers it for, and it all antedates the agreement and is irrelevant and incompetent.

The Court: I will sustain the objection.

(Exception noted for plaintiffs.)

(The listing referred to was marked P3 for identification.)

20 Q. Now, Mr. Bright, I will ask you a question: Did you see Mr. Shetzline on the first of October, 1925?

A. I did not.

Q. Did you see him on the 30th of September, 1925?

A. I did not.

Q. Then, at the time you wrote this letter, where you said you didn't know whether title could be made or not, he had not signed any deed?

30 A. I didn't say that.

Q. I know, but I say he did not?

A. I didn't say that title couldn't be —

Q. Had he at that time signed any deed for that property?

A. He had not.

Q. And hadn't signed any deed on the first of October?

A. He had not.

By Mr. Hanstein:

Q. Had he said that he would not sign a deed?

Mr. Bourgeois: I object. That is not relevant or material. 10

Mr. Hanstein: I think it is cross-examination on this very question Mr. Bourgeois has just asked: "Had he signed a deed?" I think we are entitled to show why it was that it was not signed.

The Court: I think you are entitled to show that on your affirmative proof, but you are not entitled 20 to show it by way of cross-examination. I think it is affirmative proof on your part. I will sustain the objection.

(Exception noted for defendants.)

Q. Had you asked him to sign a deed?

Mr. Bourgeois: I object to that. It is irrelevant and immaterial, and it is not cross-examination. 30

The Court: I think that is affirmative proof that you have a right to go into later on, but I think it is not cross-examination. The only question is whether he had signed a deed, and the answer is that he had not. If you want to test the witness'

credibility on that one point, you have a right to cross-examine, but you are trying to prove affirmatively something outside of the direct examination and I will sustain the objection.

(Exception noted for defendants.)

10 Mr. Hanstein: I want to make a motion at this time that the letter of Mr. Bright, Exhibit P2, be stricken from the record, as having been written without any authority on the part of the defendants.

The Court: The motion will be denied on the ground that the defendants may or may not be bound by that letter, they being responsible for the acts of their agent, not only within the authority actually given, but within the apparent authority.

20

(Exception noted for defendants.)

DANIEL DILEO, SWORN.

Direct examination.

By Mr. Bourgeois:

30

Q. Mr. Dileo, you are an employee or clerk in the Court of Chancery of New Jersey, the office?

A. Yes, sir.

Q. Did you bring with you here today the file in the partition suit in that court of Charles A. Shetzline against Harry Ogle?

A. Yes, sir.

Q. I hand you what purports to be said file and ask you if that is the file.

A. They are the original files.

Q. From where did you get it?

A. Clerk in Chancery.

Q. From the clerk in Chancery's office.

A. Yes.

10

Mr. Bourgeois: I want to offer in evidence this file. I want to call your Honor's attention to the dates. I am not going to attempt to read it all, but first I want to call your Honor's attention to the fact that the bill in partition in this case, which is for the land described in this suit, was filed on the 17th day of July, 1925.

Mr. Hanstein: Without going any further into it, 20
no doubt there is a complete file there, but I want to object to it as irrelevant, immaterial and incompetent. It has no bearing on whether or not the defendants in this case refused to perform, as the complaint alleges.

The Court: No, but it shows a condition that existed at the time of settlement, and in view of the letter of Mr. Bright and their allegation that they could not and would not settle, it is material, 30
it seems to me.

Mr. Hanstein: I want to call your Honor's attention to the fact that anything that happened after the first day of October, which was the date of settlement, would certainly be incompetent in this

case, as not having any bearing whatever on an ability to settle on the first day of October.

The Court: That may well be, but my understanding from the opening of counsel is that after October first there were efforts made to get a settlement. Whether that is followed up by proof or
10 not I do not know. I assume it is going to be.

Mr. Hanstein: It does not seem to me that this file ought to be offered until the relevancy of it has been established as the foundation.

The Court: I do not see, Mr. Bourgeois, what difference it makes what the owners of the property may have done with it after October first.

20 Mr. Bourgeois: Well, it may be it does not make any difference what they did with it after October first, but it does make some difference who the parties to that suit were and whether a condition existed on October first such as existed on the 17th day of July, when this bill was filed.

The Court: That is true, but then I understand you want to go further and show that two years afterwards something happened.

30

Mr. Bourgeois: I have to do that. I am going to show for another reason what happened afterwards, but I do not have to show it by this file, but there certainly will be no harm in this file going in. It certainly is not irrelevant for the whole file to go in.

Mr. Hanstein: The mere fact that there was one partition suit or ten partition suits filed would not make any difference to our ability to perform. It does not affect our title. It is admitted here that we owned two-thirds and somebody else owned one-third.

The Court: It is also admitted that on October 1, 1925, the date fixed for settlement, the partition proceedings were still alive in the Court of Chancery? 10

Mr. Hanstein: Yes; which does not prove that we were not able to perform our contract, because all it took was a deed from the parties alone, so I do not see that there is any relevancy to this. It does not prove we were not able to perform.

The Court: It seems to me that inasmuch as the admission is that the bill that was filed on July 17, 1925, was still a live issue in the Court of Chancery and pending therein, that that is all you are entitled to prove under the partition proceedings. 20

Mr. Bourgeois: They have not admitted that. They admitted that there was a bill for partition filed on the 17th of July, 1925, and then when I wanted to show further about the conclusion of that suit at a later date, they said they would not admit that. 30

The Court: The conclusion at a later date is immaterial. If it is admitted—and it is admitted—that that was a live issue pending in the Court of

Chancery on July 17, 1925, then that is all the proof that you are entitled to offer.

Mr. Bourgeois: But has that been admitted?

The Court: Is it admitted?

10 Mr. Hanstein: That there was a partition suit filed on July 17, 1925, and was still filed and still pending at the date of the sale? No doubt about that. I admitted it.

Mr. Bourgeois: And you also admit that Shetzline was the complainant in that suit?

Mr. Hanstein: Yes.

20 The Court: That is all that is competent for.

Mr. Bourgeois: That will be all that the witness will be required to testify to, then, and he can take the file back again.

(No cross-examination.)

30 SAMUEL M. GARFINKLE, SWORN.

Direct examination.

By Mr. Bourgeois:

Q. Mr. Garfinkle, you are a practicing attorney?

A. I am.

Q. And you are the attorney of record in this case?

A. I am.

Q. Representing the plaintiffs?

A. The plaintiffs.

Q. After this matter was placed in your hands did you go to see Mrs. Adams about a settlement of it?

10

A. I did.

Q. When did you go?

A. Well, it was shortly after this matter was handed to me for my attention. I can't just recall the date. It was sometime in 1927, I believe.

Q. 1927?

A. Yes; it has been a long time ago.

Q. Do you recall the conversation you had with her?

A. Yes; I went there and asked—told her who I represented and I told her the circumstances of the case, that the plaintiffs had paid the deposit of ten per cent —

Mr. Hanstein: I object to what he said. I do not see how we can be bound by something he said.

The Court: I will take the testimony.

(Exception noted for defendants.)

.30

(The answer was repeated.)

A. —ten per cent of the purchase price, which was \$2,300, the plaintiffs had paid at the sale for this property. She said she was familiar with that,

and I asked her if she was willing and ready to either give a deed for this property under the terms of the original agreement as prepared by the auctioneer, Mr. Ackley, or was she willing—if she didn't care to do that, was she willing to return the ten per cent deposit, and to that she replied that she absolutely would not return the deposit, that she
10 considered the money forfeited. She said she wouldn't convey the property and she wouldn't return the money. She said, "What do they think this is, a horse race? They lose the race and then they want their money back." From that I think we had very few words and we parted.

Mr. Bourgeois: Mr. Hanstein, I made demand on you for the production of a couple of letters that were afterwards written to her.

20

Mr. Hanstein: When was the demand made?

Mr. Bourgeois: Yesterday.

(A paper was handed to Mr. Hanstein by Mr. Bourgeois.)

Mr. Hanstein: It seems to have been acknowledged by my office. I don't have them.

30.

Q. Mr. Garfinkle, I show you a letter bearing date September 2, 1927, a copy of a letter, and ask you is that a copy of a letter of yours that you wrote and signed.

A. This is my letter.

Q. Was it signed by you?

A. It was.

Q. The original was sent to whom?

A. To Mrs. Adams.

Mr. Hanstein: I ask that be stricken. That is a mere conclusion, unless he is going to prove that he mailed it.

10

The Court: I assume he is going ahead with the proof.

Q. Did you mail it?

A. I did mail it personally in the post-office at Wildwood.

Mr. Bourgeois: I offer this in evidence. I do not offer that notation on the back of it.

20

Mr. Hanstein: I object to this. It is purely a self-serving declaration which cannot be binding upon us.

The Court: I sustain the objection.

(Exception noted for plaintiffs.)

(The letter was marked P4 for identification.)

30

Mr. Bourgeois: I ask you to produce a letter from Mr. Ackley to Mrs. Adams dated the 21st of August, 1925.

Mr. Hanstein: Have you a copy of it?

Mr. Bourgeois: Yes. (Handing paper to Mr. Hanstein.)

Mr. Hanstein: I object to that. I do not see that it is competent or material.

The Court: I sustain the objection at this time
10 on the ground this letter is not competent or relevant at the present time.

(Exception noted for plaintiffs.)

(The paper was marked P5 for identification.)

Cross-examination.

By Mr. Hanstein:

20

Q. Who was present at the time you had the conversation with Mrs. Adams?

A. No one, if I recall it, other than Mrs. Adams and myself.

Q. Did you offer Mrs. Adams the money due under the contract?

A. You mean the balance of the moneys?

Q. Yes.

A. No, I didn't.

30

Q. Didn't make any tender?

A. I didn't make any tender.

Q. You were the attorney for these plaintiffs?

A. Yes, that is right.

Q. And you say you went there and said you wanted your money back?

A. No, I didn't say—that wasn't all I said.

Q. That was part of what you said, wasn't it?

A. I said that if she couldn't convey us a deed, execute us a deed to the property, would she be willing to refund us the money which we had paid under the agreement.

Q. Well, you never offered as a lawyer to make a tender for your clients, did you?

A. I told her we were prepared so to do. 10

Q. You never offered one, I say?

A. Not at that time. I didn't offer it there. I told her we could.

Mr. Bourgeois: Mr. Hanstein, will you admit the question about the administration, about the will?

Mr. Hanstein: That you have filed one?

Mr. Bourgeois: In the State? 20

Mr. Hanstein: Yes.

Mr. Bourgeois: I think it has been.

Mr. Hanstein: If you say so, I will admit it. What will are you talking about?

Mr. Bourgeois: I am talking about Mr. Whitehill's will. The suit is by an executor. 30

Mr. Hanstein: I don't care anything about that.

Mr. Bourgeois: Mr. Weil has also died.

Mr. Hanstein: That is perfectly all right.

Mr. Bourgeois: I am waiting to get a deed.

Mr. Hanstein: Maybe I will admit it. What is it?

Mr. Bourgeois: A deed made in 1929 by Judge Eldredge as special Master, conveying this property to one of the executors.

10

Mr. Hanstein: If there was such a deed I am willing to say there was such a deed, but I do not see that it is at all competent.

The Court: What is the relevancy of this deed, made long after October 1, 1925?

Mr. Bourgeois: I think the relevancy is this: This deed is made to one of the executors, one of the people who are resisting this on the theory that either there was a chance to make the title or not a chance to make the title. I think if I show that this property was sold to one of these executors afterwards and put him on the stand and he says, "Yes, I got the deed but after that I did not tender it to them," it has quite some relevancy in this case.

20

The Court: They were not bound to accept tender at any time after there was a default.

30

Mr. Bourgeois: Assume that is true, but on the other hand, if he wants to claim they should not have the money back, it was up to him to offer—when he got the title so he could offer it, it was up to him to offer to convey the property to him.

The Court: I will overrule the offer.

Mr. Bourgeois: I offer in evidence the record of a conveyance made on the 31st day of January, 1929, from Henry H. Eldredge, one of the special Masters of the State of New Jersey, to Harry L. Adams for property mentioned in the partition proceedings in this suit, which is all of the property. 10

The Court: The offer is overruled at this time because it is incompetent and immaterial.

Mr. Bourgeois: We rest.

PLAINTIFFS REST.

20

(The following motions were made in Chambers.)

MOTION TO DIRECT VERDICT FOR
PLAINTIFFS.

Mr. Bourgeois: If your Honor please, I make a motion for a direction that we are entitled to have the money back, with interest on it until the present time, and the motion is based on the case of Bernstein v. Coombs, 96 N. J. L. 223. My proposition is that the evidence shows that my people paid \$2,300, and it shows that when the time came for 30

the performance of that contract, the vendors were not in a position to perform.

(Motion refused.)

(Exception noted for plaintiffs.)

10

MOTION TO NON-SUIT.

Mr. Hanstein: I move for a non-suit, if your Honor please, all of this being predicated on the fact that the plaintiffs are not going to show by their additional witnesses anything different than per-
20 haps a corroboration of what is already in.

Mr. Bourgeois: I think that is what it will be, but I want to put it in.

Mr. Hanstein: My theory is that we are entitled to a non-suit, and the reason I make my motion is because Mr. Bourgeois and I apparently do not agree on the theory of this case. My theory of this case is that unless the plaintiffs either make a tender or give us a reasonable time within which to
30 perform, that they must fail in their case. On the date set for settlement the plaintiffs were bound, if they wanted to hold us to a liability to return the money, to make a tender or were bound to show that they were relieved of making a tender by something that we did. There is certainly no proof in

this case that Mr. Bright was authorized to write this letter. In fact, he says he had not been authorized to do it.

The Court: He testified he was authorized to draw the deed and attend to the details of settlement. He testifies that he never had specific authority for the writing of that letter. The same question comes up as to whether or not he was clothed with apparent authority, and that is a jury question and not a Court question. 10

Mr. Hanstein: May I have an exception on both grounds?

The Court: Yes.

Mr. Hanstein: An exception to your refusal to non-suit? 20

The Court: Yes.

(Exception noted for defendants.)

(Recess taken until 1:30 P. M.)

AFTERNOON SESSION.

SOLOMON FULD, SWORN.

Direct examination.

10 By Mr. Bourgeois:

Q. Mr. Fuld, you live where?

A. Philadelphia.

Q. And you are one of the plaintiffs in this suit?

A. Yes, sir.

Q. You were one of the purchasers of the property?

A. Yes, sir.

20 Q. And you are one of the persons who put up the \$2,300?

A. Yes, sir.

Q. Did you make any inquiry to ascertain whether a settlement was to be made on the day set for settlement?

A. Yes, sir.

Q. Of whom did you make the inquiry?

A. Mr. Bright. Mr. Whitehill and myself.

Q. With what result?

A. Mr. Bright informed us that he wasn't sure

30 —

Mr. Hanstein: I object to a conversation with Mr. Bright as not being binding on the defendant.

The Court: I will permit it. Mr. Bright testified he was employed by the defendants for the purpose

of attending to the details of the settlement, and for the purpose of being at the settlement at the time fixed in the contract.

Q. You may proceed.

A. Mr. Whitehill and myself, shortly before the 15th of September—I think it was the 13th or 14th—we left on the 15th of September from Philadelphia and went to see Mr. Bright and ascertain when settlement—that everything was in shape to go through—we had to get our finances together—and Mr. Bright at that time stated to Mr. Whitehill that he wasn't quite sure whether the matter would go through, stating that there was a case pending, a partition suit pending in court, in Chancery. 10

Q. What did you do with relation to your preparation? Were you prepared when the day of settlement came along, to make settlement? 20

A. We made all preparation and had all arrangements made to leave on October 1, on the 8.59 train.

Q. Did you leave?

A. We did not.

Q. Why not?

A. Mr. Whitehill about six o'clock called up my office —

Mr. Hanstein: Don't tell what Mr. Whitehill said. 30

Q. Tell what happened to you.

A. He called me. I don't mean to say what he said. What was the question you asked me?

(Question repeated.)

A. Mr. Whitehill on the 30th of August, about 5:30 or 6 o'clock —

Q. 30th of August?

A. September. Called me up, saying if I was able to get Mr. Weil —

10 Mr. Hanstein: Don't tell what he said.

Q. He called you up?

A. He called me up.

Q. As a result of it did you get a paper, a letter?

A. I didn't get it, but he told me —

Mr. Hanstein: I object to him telling what he said.

20 Q. As a result of that letter what did you do? I mean as a result of what Mr. Whitehill said what did you do?

A. We didn't go down to Wildwood to the settlement.

Q. Was Mr. Whitehill, Mr. Edward Whitehill?

A. Yes, sir.

Q. I show you Exhibit P2 and ask you if you ever saw that letter before?

A. I saw that letter after October 1.

30 Q. How soon after October 1?

A. Around the 6th or 7th.

Q. Where did you see it?

A. At Mr. Whitehill's place of business on Market Street, 530 something.

Q. How did you happen to see it?

Mr. Hanstein: I object to that. I do not see how that is material.

Q. Did Mr. Whitehill show it to you?

A. Oh, yes.

Q. Now, Mr. Fuld, it has been testified here that Mr. Sandberg, I guess it was, was attorney for you and the other persons in this suit?

10

A. He was not.

Q. Who was the attorney?

A. Mr. Sandberg is the brother-in-law—he is an attorney in Philadelphia, Pennsylvania, and brother-in-law to Mr. Whitehill.

Q. What happened to Mr. Whitehill?

A. Mr. Whitehill died.

Q. After that time, what —

A. Mr. Sandberg was one of the executors and he took care of the Whitehill interests, and consequently he took care of that part of his interest in this combination.

20

Q. Did Mr. Sandberg ever represent the purchasers as a body?

A. He did not.

Q. Was there any reason in particular why you were anxious to have this settlement made?

Mr. Hanstein: I object to that.

30

(Question withdrawn.)

Q. Were you anxious to have this settlement made?

Mr. Hanstein: I object to that. I do not think

it makes any difference whether he was anxious or not.

The Court: The question is whether he was able, ready and willing to make the settlement.

10 Mr. Bourgeois: Yes, that is right, but they are saying they did not want to make settlement and I have a right to show that he was anxious to make the settlement.

The Court: I think you may show that he was able to make settlement.

Q. Were you ready, willing and able to make the settlement?

A. Yes, sir.

20 Q. Were you anxious to make the settlement?

Mr. Hanstein: I object to that.

The Court: I think his anxiety makes no difference. If he was ready, able and willing to make the settlement, that is all there is to it.

Cross-examination.

30 By Mr. Hanstein:

Q. You had a lawyer representing you in Cape May County when this matter started, didn't you?

A. We applied for title insurance by Mr. Sooy, the attorney.

Q. You people employed a lawyer down here and told him to order title insurance?

A. Yes, sir.

Q. And the lawyer was Mr. Sooy? Why didn't you, when you wanted to find out if this settlement was going to be made, go to see Mr. Sooy instead of the other side's lawyer?

Mr. Bourgeois: I object to that as irrelevant and immaterial. 10

The Court: I do not see that it makes any difference why he did not. He had a perfect right to go to Mr. Bright.

Q. Did you know whether or not Mr. Sooy had your title insurance ready for you at the time of the settlement? 20

Mr. Bourgeois: I object to that as irrelevant and immaterial. There is nothing in this agreement calling for title insurance.

The Court: I will permit it.

(Exception noted for plaintiffs.)

(Question repeated.) 30

A. No, I don't. I do not.

Q. You don't know whether the title insurance was ready or not?

A. I don't. I don't believe it was.

Q. You don't think it was? Now, subsequently

you employed a lawyer in Cape May County, didn't you?

Mr. Bourgeois: I object to that as irrelevant and immaterial.

The Court: I will permit it. It has already been
10 testified that Mr. Garfinkle was employed, and this man is a party to the suit and I will permit it.

(Exception noted for plaintiffs.)

A. We did after the settlement couldn't go through.

Q. You employed a lawyer to get your money back?

A. Correct.

20 Q. And Mr. Sandberg represented you folks, didn't he?

A. He did not.

Q. He did not?

A. No, sir.

Q. Did you ever make any tender of the moneys due in this matter?

A. We did not.

Q. Do you remember testifying in this case before?

30 A. I believe I do.

Q. Do you remember being asked this question: "Mr. Sandberg represented you people on September of 1926, did he not?" to which you gave the answer, "I believe so?"

A. I don't recollect. He couldn't represent us on September, because —

Q. 1926?

A. 1926. He couldn't because he only entered into the field after Mr. Whitehill died. That was in 1927.

Q. All I asked you was whether or not you remember giving that answer.

A. I don't remember giving it.

Q. You don't remember that?

10

A. In fact, at the last trial I wasn't quite sure of my dates, which I afterwards looked over.

Q. I didn't hear that last.

A. I say I wasn't so sure of the dates. I made quite a few statements conflicting in regards to dates. I never expected this case to come up, so I didn't memorize the dates.

PLAINTIFFS REST.

20

Mr. Hanstein: May my motion be considered as being made now?

The Court: Both motions may be considered as being made at this time.

30

JOHN D. McMULLIN, SWORN.

Direct examination.

By Mr. Hanstein:

10 Q. Mr. McMullin, you are a practicing attorney of the State of New Jersey?

A. I am.

Q. And have been for quite a few years, have you not?

A. Yes, sir.

Q. Did you represent Mr. Shetzline in connection with the property in question here?

A. I did, and still do.

20 Q. Where is Mr. Shetzline?

Mr. Bourgeois: I object. It is irrelevant and immaterial.

The Court: The only materiality it would have would be to account for his absence.

Mr. Hanstein: That is all I want to show by him, why he is not here.

30 Mr. Bourgeois: I had no intention of commenting on the fact that he is not here.

The Court: I will permit the question.

(Exception noted for plaintiffs.)

A. He is in a sanitarium for nervous diseases near Wilkes-Barre, Pennsylvania.

Mr. Bourgeois: I move that be stricken out, because I do not know what sympathy they expect to get from that or how they expect it to affect us, but it certainly is not relevant in this case.

10

Mr. Hanstein: I did not ask the question for any sympathy. I asked it to account for the absence of a proper party.

The Court: I will permit it to stand.

(Exception noted for plaintiffs.)

Q. What did you know of the holding of the sale of this real estate to these plaintiffs at the Ackley sale?

20

Mr. Bourgeois: I object to that as irrelevant and immaterial.

Mr. Hanstein: It is a preliminary question.

The Court: Then I will permit it.

(Exception noted for plaintiffs.)

30

A. Yes.

Q. You knew of it? Do you know whether or not your client, Mr. Shetzline, was willing to sign a deed for this property?

Mr. Bourgeois: I object to that as irrelevant and immaterial. He did not sign it.

The Court: You cannot show by this witness the state of mind of Mr. Shetzline, and that is the form of this question, and that is the only interpretation that is to be given to the answer. I will sustain
10 the objection.

Q. Had you knowledge of the Shetzline interest in this property?

Mr. Bourgeois: I object to that as irrelevant and immaterial.

The Court: As a preliminary question that may lead to something, I will permit it, but it makes no
20 difference.

(Exception noted for plaintiffs.)

A. I had.

Q. Did you handle any matter for him in connection with the sale of this property?

Mr. Bourgeois: I object to that as irrelevant and immaterial.
30

The Court: I sustain the objection.

Q. Did you know that a deed had been prepared for this settlement, making Mr. Shetzline a party grantor?

Mr. Bourgeois: I object to that as irrelevant and immaterial.

The Court: I sustain the objection.

(Exception noted for defendants.)

Q. What were you to do in connection with Mr. Shetzline's interest in this property? 10

Mr. Bourgeois: I object to that as irrelevant and immaterial.

The Court: I sustain the objection.

Q. What did you do in connection with the Shetzline property in connection with this sale? 20

Mr. Bourgeois: I object to that.

The Court: I sustain the objection. I presume you mean the auction sale?

Mr. Hanstein: Yes.

The Court: There is no question in this case but what the property was sold at the auction sale, as I understand it, and that these plaintiffs were bidders and it was knocked down to them. At the time of settlement their contention is that you did not deliver and your contention is that they were in default. What Mr. McMullin may have done at the sale would seem to make no difference. 30

Q. Were you Mr. Shetzline's attorney in the partition suit that has been referred to?

A. I was.

Q. Did you prosecute those proceedings for Mr. Shetzline?

A. I did.

10 Q. After the filing of the bill on July 17, 1925, what steps did you take in the proceedings?

Mr. Bourgeois: I object. The proceedings show for themselves. They are here in court. They were objected to, but they are still here and they will show.

20 Mr. Hanstein: I want to explain to your Honor what I have in mind. I have in mind showing by this witness that these proceedings were held up for a long period of time waiting for a settlement.

Mr. Bourgeois: I object to that. That is not relevant at all. They were pending and they show what was done. If they show they were held up, that is a different thing.

The Court: I think the pleadings may speak for themselves, and this witness cannot testify as to something he was told by Mr. Shetzline, of course.

30 Mr. Hanstein: It seems to me he ought to be permitted to show how diligently he prosecuted these proceedings or whether he held them up.

The Court: The proceedings are in court and have been offered in evidence and were objected to.

They may be offered now for the purpose of showing what was done in those proceedings. They are the original records.

(Exception noted for defendants.)

Q. What reason was there for delaying the prosecution of those proceedings? 10

Mr. Bourgeois: I object. It is irrelevant and immaterial and it does not appear they were delayed.

The Court: I sustain the objection. That is a conclusion that the witness must arrive at, and that is all.

(Exception noted for defendants.)

Q. Did your client, to your knowledge, ever refuse to permit a settlement under this agreement? 20

Mr. Bourgeois: I object to that.

The Court: I sustain the objection. He may not have known of any refusal and yet there may have been one.

Q. Did you have charge of this matter for Mr. Shetzline? 30

A. I did.

Q. Were the papers in connection with it in your hands?

A. I don't know that I understand what you mean by—how broad the scope of your question is. Some

papers of his were in my hands in connection with the property.

Q. In connection with this very property?

A. Yes.

Q. What I want to know is did he refuse to sign a deed for this property?

10 Mr. Bourgeois: I object. That is irrelevant and immaterial. He did not sign it and there is nothing that would show his consent except his signature.

The Court: I do not know how this witness can testify whether or not Mr. Shetzline refused to do something. He might testify that insofar as his knowledge is concerned he did or did not refuse, but he certainly cannot testify for Mr. Shetzline.

20 (No cross-examination.)

ROBERT BRIGHT, recalled.

Direct examination.

30 By Mr. Hanstein:

Q. Mr. Bright, do you know Mr. Shetzline?

A. I do.

Q. Prior to the Ackley sale at which this property was sold, did Mr. Shetzline ever authorize the putting of this property into the sale?

Mr. Bourgeois: I object. It is irrelevant and immaterial.

Mr. Hanstein: These people came into court, these plaintiffs, and said the defendants were not able to settle for this property because Mr. Shetzline had an outstanding one-third interest and therefore there could not be any conveyance, and my purpose here is to meet their contention. I propose to show that Shetzline agreed to the sale, that he attended the sale, participated in it, and that he was ready to sign a deed. 10

The Court: If you are going to show that —

Mr. Hanstein: I expect to show all that.

The Court: I will permit you to show that. 20

Mr. Bourgeois: But he did not sign the deed. If that is so, then the application by Mrs. Adams to Mr. Ackley becomes relevant. If that were in, as I think it should have gone in, then all this would be irrelevant.

The Court: That is not in at this time. It may be that it will go in, but it is not in and I will allow counsel to proceed under the offer of proof. 30

(Exception noted for plaintiffs.)

(Question repeated.)

A. As soon as the property was listed —

Q. Did he authorize this property to go into the sale?

Mr. Bourgeois: I object to that because that is hearsay, in addition to the other objections. Mr. Shetzline is the person to testify to that, if it is so, and here they are trying to bind real estate by a verbal statement. I submit that cannot be done.

Mr. Hanstein: We are not trying to bind real estate.

The Court: No, you are not, but you are asking this witness to draw a conclusion as to what Shetzline may have done. He has no right to draw a conclusion as to whether or not Shetzline authorized the property to go in, nor can he testify and bind the plaintiffs by that testimony as to the conversations he had with Mr. Shetzline which might tend to make this witness believe that he did so authorize it.

Q. Mr. Bright, did Mr. Shetzline attend the sale?

A. He did.

Q. Was he present when the property was sold?

A. He was.

Q. Were the plaintiffs there?

A. They were.

Q. Did you hear Mr. Shetzline make any statement at the sale?

A. I heard him.

Q. What statement did he make at the sale?

Mr. Bourgeois: I object. That statement does not bind us at all unless the plaintiffs heard it. The

fact that he heard it is not binding on these plaintiffs at all.

Mr. Hanstein: He says the plaintiffs were there.

The Court: At the present time I will sustain the objection to the present question.

(Exception noted for defendants.)

10

Q. In the presence of the plaintiffs did you hear Mr. Shetzline give any directions with regard to this sale?

Mr. Bourgeois: I object to that for the same reason, that it is hearsay as to these plaintiffs.

The Court: I will sustain the objection unless you bring the plaintiffs within earshot or something else. As it is now, it is in the presence of the plaintiffs. They may have been five blocks away and still been in his presence.

20

(Exception noted for defendants.)

Q. Where was this sale held?

A. At Wildwood on the beach front.

Q. Out in the open?

A. In the open. That is, under a tent.

30

Q. Were the plaintiffs under the tent?

A. They were.

Q. How near to Mr. Ackley were you?

A. About 15 feet.

Q. How near to Mr. Ackley was Mr. Shetzline?

A. About the same. He sat right across the aisle from me.

Q. Where were the plaintiffs?

A. Directly back of Mr. Shetzline.

Q. Directly back of him?

A. Yes.

Q. At the time something was said by Mr. Shetzline was the sale of this property in progress?

A. It was.

Q. What did Mr. Shetzline say?

Mr. Bourgeois: I object. It makes no difference whether the plaintiffs were directly back of him or not. They might not have heard it, and even though they sat right alongside of him, if they did not hear it this is hearsay as to them and it cannot be binding on these people. Not only that, but Mr. Shetzline's statement would not be binding on them. If Mr. Shetzline had said what they would infer or want to put in that he said, it would not be binding on them, because Mr. Ackley could not enforce anybody to sell except the person who had signed that request for him to make the sale, and that was Mrs. Adams. You cannot hold an auctioneer in the sale of real estate by a man who does not sign the authorization. I mean you cannot make them convey through the auctioneer. Unless the auctioneer's authority is in writing you cannot compel the owners of the property to convey when it is sold by an auctioneer.

Mr. Hanstein: I conceive the law in this situation to be simply this: If I make a verbal contract to sell some real estate and take a deposit, and if a

suit for specific performance is brought on that contract and I come in and plead the statute of frauds, which says that all contracts with regard to real estate must be in writing, that is a perfectly legal defense to it, but the minute I interpose that defense I subject myself to the obligation of returning the money, and the theory is that if there is a verbal contract, unenforceable by virtue of the statute of frauds, and someone takes refuge behind it, he cannot take refuge behind it and keep the money. They are suing for the money back. If we were coming in and pleading we did not sign a contract in writing and they have no right to sue us, then they would have a perfect case on that. 10

The Court: I will sustain the objection.

(Exception noted for defendants.) 20

Q. Mr. Shetzline was present at the sale, was he not?

A. He was.

Q. Did you hear Mr. Shetzline protest against the sale?

Mr. Bourgeois: I object to that as irrelevant and immaterial.

The Court: It does not make any difference. 30

(Exception noted for defendants.)

Q. Subsequently, Mr. Bright, you prepared a deed for this property, didn't you?

A. I did.

Q. And I believe you told Mr. Bourgeois you included in it the names of Adams and Shetzline as the grantors?

A. Yes.

Q. Do you know if Mr. Shetzline was willing to sign that deed?

10

Mr. Bourgeois: I object.

The Court: I sustain the objection.

(Exception noted for defendants.)

Q. Did the plaintiffs ever make a tender of any money or mortgage to you?

A. They did not.

20

Q. Mr. Bright, at the time you wrote this letter, P2, you knew—are you familiar with the contents of this letter?

A. Yes.

Q. You knew, of course, of the existence of a partition suit, did you not?

A. Yes, I did.

Q. And you also knew that if Mr. Shetzline would join in a deed with the Adams that that would clear the title?

30

A. I knew that.

Q. You knew that?

A. I did.

Q. Did you know whether or not Mr. Shetzline was willing to join in a deed?

Mr. Bourgeois: I object.

The Court: I sustain the objection. You cannot prove the state of mind of Mr. Shetzline by this witness.

(Exception noted for defendants.)

Q. Did Mr. Shetzline tell you to write this letter?

A. He did not.

10

Q. Did either Mr. Adams or Mrs. Adams?

A. They did not.

Q. None of them ever authorized you to send it?

A. No, sir.

Q. Did you ever tell Mr. Shetzline that you had sent this letter?

Mr. Bourgeois: Objected to as irrelevant and immaterial.

20

The Court: I will permit that.

(Exception noted for plaintiffs.)

A. I never notified Mr. Shetzline, but I did Mr. John D. McMullin, his attorney.

Q. How long afterwards?

A. Shortly after.

Q. You notified Mr. McMullin of that?

A. Mr. McMullin.

30

(No cross-examination.)

ELIZABETH B. ADAMS, SWORN.

Direct examination.

By Mr. Hanstein:

10 Q. Mrs. Adams, you are one of the defendants in this suit?

A. I am.

Q. Where do you live?

A. Wildwood, New Jersey.

Q. Is Mr. Adams the other defendant?

A. Yes.

Q. Where does he live?

A. In Fishing Creek.

Q. Where is that?

20 A. New Jersey.

Q. And you two are the co-executors of the estate of your husband?

A. Yes.

Q. Mr. Garfinkle has testified that he came to see you some time in 1927 and asked you if you were willing to convey this property to his clients. Did he ask you if you were willing to convey the property to his clients?

30 A. He didn't say so much about conveying the property as he did the return of the money.

Q. Did he ever make any tender to you of the money that they owed you for this property?

A. No.

Q. Were you willing to convey this property?

A. At all times.

Q. Did you know anything about this letter that Mr. Bright wrote until long afterwards?

A. No.

Q. Did you ever authorize it?

A. No.

Cross-examination.

10

By Mr. Bourgeois:

Q. You did authorize Mr. Bright to act as your attorney, however, in the matter, didn't you?

A. He is the attorney for the estate.

Q. Certainly, but you were the executor of the estate?

A. Yes.

Q. And he had the general powers of an attorney, did he not?

20

Mr. Hanstein: I object to that. That is a conclusion.

The Court: I will permit it.

(Exception noted for defendants.)

(Question repeated.)

30

A. I guess he did, yes.

Q. In other words, you didn't go up to him and say, "Now you may write this letter," or, "You may write that letter," in connection with the business of the estate? You simply employed him as a lawyer and depended on his judgment, didn't you?

A. Not altogether.

Q. In what did you not depend upon his judgment?

A. Well, there were things I did that I took on my own accord.

Q. Some things you did that you didn't depend on him for?

10 A. No.

Q. But the things he did you depended on him to do it for you, didn't you? Mrs. Adams, you say that Mr. Garfinkle talked to you most of the time about returning the money?

A. Yes.

Q. He wanted it, did he? He wanted it back again?

A. Yes.

Q. Did you tell him you would pay it back to him?

20 A. I told him I would take the matter up with Mr. Bright and the others, it wasn't altogether up to me.

Q. Did you take it up with them?

A. Yes.

Q. Did you pay it back to him then after you took it up with them?

A. I believe not, no.

Q. Don't you know whether you did or not?

A. No.

Q. What?

30 A. No, we did not.

Q. Did you tell Mr. Garfinkle when he talked to you about it that this wasn't a horse-race, you were entitled to the money?

A. I don't know about the horse-race, but I told him I never heard of anybody returning after two years time.

Q. And did you tell him that you considered the money had been forfeited?

A. I might have said that. It is a long time.

Q. After a time did you become the owner of the property?

A. Not entirely.

Q. Did you with your co-executor?

A. And Mr. Shetzline.

10

Q. And Mr. Shetzline?

A. He is a third owner.

Q. Still?

A. Yes.

Q. Then you still don't own the property?

A. Well, I believe it has been sold now, but —

Mr. Hanstein: I object to this. I think it is all immaterial.

20

The Court: The situation as it now stands shows that they, together with Mr. Shetzline, own the property. Whether it has been sold subsequently makes no difference.

Q. Now, Mrs. Adams, I show you a paper that is marked P3 for identification, which is the authorization to sell this land to Mr. Ackley and Sons.

A. Yes.

Q. Is that your signature?

30

A. Yes.

Q. Any other signatures on that besides yours?

Mr. Hanstein: I object to that. If the paper is evidential it will speak for itself, and if it is not, the question is improper.

The Court: Of course, the question is not cross-examination.

Mr. Hanstein: I offer in evidence D1 for identification.

(The paper heretofore marked D1 for identification was marked Exhibit D1.)

Mr. Hanstein: We rest.

DEFENDANTS REST.

20

30

PLAINTIFF'S TESTIMONY IN REBUTTAL.

Mr. Bourgeois: I offer in evidence the authorization to Mr. Ackley of the sale of this property by Mrs. Adams. When it was offered before there was no evidence touching it. Since that time Mr. Bright has testified that Mr. Shetzline was present at the time the property was being sold. 10

The Court: The first count of the complaint alleges that the executor of the estate placed in the hands of Ackley for sale this property. The answer says that they admit paragraph one. Therefore, it seems to me that the sole question in the case, the authority for the sale being admitted as stated in paragraph one, is whether or not the settlement as of October first was carried out or whether there was a breach on the part of the defendants. 20

Mr. Bourgeois: Well, if Mr. Hanstein had not admitted that in his pleadings, then we would have been obliged to prove it, and we would have had to prove this authorization. I submit, even while he has admitted it, we have the right to offer the testimony to show that which we desire.

The Court: No, I think it is immaterial, inasmuch as the pleadings admit that the authorization was by the executors of the estate of Adams and the sale was held under that authorization. 30

(Exception noted for plaintiffs.)

TESTIMONY CLOSED.

(In Chambers.)

MOTION TO DIRECT VERDICT FOR
PLAINTIFFS.

10 Mr. Bourgeois: If your Honor please, our conten-
tion is that we are entitled to have this money back
because they did not give us anything for it, and the
testimony shows first, the sale by Ackley, the author-
ization for that sale by the executors, the payment of
our money, and the failure to make settlement on
the day fixed. On that day the owners were not in
position to convey title. That being so, the plain-
tiffs were under no obligation to attend that settle-
ment. They were not in default by reason of that
20 fact. Then we have a visit by Mr. Garfinkle to Mrs.
Adams to demand the return of the money or the
property. She does not deny what he said about
the property but says he talked mostly about the
money. They would not convey, would not return
the money, and Mrs. Adams says the title is still
outstanding.

The Court: I refuse the motion to direct a ver-
dict.

30 (Exception noted for plaintiffs.)

(Counsel argued the case to the jury.)

(The case was adjourned to September 12, 1930,
10.15 A. M.)

Cape May Court House, N. J., September 12, 1930.

The trial of the cause was resumed at 10:15 A. M.

10

COURT'S CHARGE TO JURY.

SOOY, J.:

Ladies and gentlemen of the jury: You have been summoned to try an issue that has been raised as between the parties plaintiff and defendant. That issue is determined by the pleadings filed in the case and confined to those pleadings.

20

The plaintiffs say that in August, 1925, they purchased certain property situate in Wildwood at a public auction, and that prior to the purchase the defendants, executors of the estate of one Adams, had placed that property in the hands of one Ackley for the purpose of selling at auction.

The answering pleading filed by the defendants admits that that situation exists and existed from the date of the sale up to the present time. In other words, the defendants admit that as executors of the estate of Mr. Adams they authorized Mr. Ackley to sell this property at public sale. They also admit that the plaintiffs purchased the property and that they paid on account of the purchase price the sum of \$2300.

It is also, I think, not denied that after the pur-

chase the plaintiffs signed what might be called conditions of sale, but which amounted to an agreement on their part to purchase the property under the conditions therein named. One of the conditions was that the balance of the purchase price should be paid in a certain manner, and that settlement should take place on the first day of October then
10 next, which would have been October, 1925.

The plaintiffs say that from the time of that sale on up to the time of the bringing of the suit, or a period shortly before that time, they were ready, willing and able to purchase the property in accordance with the conditions under which they had bought the property.

The defendants file an answer in which they say that the plaintiffs were not ready, willing and able to buy the property on the first day of October, 1925,
20 or at any other time, and that they, the defendants, were at all times and still are ready, willing and able to settle for the property, and the defendants say that the failure of the plaintiffs to settle was their own fault, through their own negligence, and by reason of no fault on the part of the defendants.

That, generally, is the issue between the parties, and when you go out you will have with you the pleadings in the case, to which you may refer for a more detailed statement of that issue, although I
30 think the statement I have just made is sufficient for this charge.

All you are concerned with in this case is the question of fact or facts that may arise out of the testimony which you have heard. You are the sole judges of the facts in the case. It is for you to determine those facts on your recollection, and it

makes no difference what someone else's recollection may be, you are the sole judges of the facts. For instance, the attorneys for the respective parties in their arguments have said to you that their recollection of the testimony was so and so, and in my charge I may say to you that my recollection of the testimony is so and so. That is all right, but you are not bound either by their recollection or my 10
recollection of the evidence, the facts in the case, when your recollection differs. You are the sole judges of the facts. So that if I refer to any testimony and your recollection is different, your recollection governs and not mine.

It seems to me that the first question of fact that presents itself is this: The parties agreed that settlement should be on the first day of October, 1925. By so agreeing they made time the essence of that contract. That is to say, both parties must perform 20
on that date, unless either party was excused therefrom by the act of the other party or by mutual agreement of the parties changing the date of the settlement. It clearly appears from the evidence that on the first day of October neither the plaintiffs nor the defendants were present at the office of Robert Bright, the place fixed for the purpose of settlement. As I remember the testimony, the plaintiffs admit that they were not there, and as I remember the testimony of Mr. Bright, he says that neither 30
of the defendants was there.

That being the situation, we find that the plaintiffs say that they were excused from being there and were not in default by reason of not having been there. They say that prior to the first day of October they had had a conversation with Mr. Bright,

and that Mr. Bright had advised them that there might not be a settlement. As I remember, there was such a conversation, but if I am wrong as to that, the plaintiffs further say that there was mailed to them a letter, which letter has been offered in evidence, and in which letter Robert Bright said to them that he feared there would be no settlement,
10 or words to that effect—you will have the letter—and he gave his reasons for so stating.

The plaintiffs say that prior to the receipt of that letter they had made all necessary arrangements for the purpose of carrying out their agreement, and that they did not attend that settlement because of that letter.

If as a result of some act on the part of the defendants or their authorized agent, the plaintiffs did not attend that settlement, that is, having been led
20 to believe by the defendants or the authorized agent of the defendants that it would be futile to attend that settlement, then they would be excused for not having attended. In other words, they did not have to attend the settlement on the first day of October, if by reason of the acts or actions of the defendants, they had been reasonably led to believe that it would be futile to attend because the defendants were not ready to make settlement.

The plaintiffs say that they were led so to believe
30 by reason of the letter of Robert Bright, and if my recollection is correct, also by reason of a conversation. You will remember whether that is correct or not.

Did Robert Bright have a right to bind the defendants by that letter? The defendants say that he

was not authorized to write the letter. Bright says that he had no specific authority to write the letter. But I charge you that the defendants may be bound by that letter, irrespective of whether or not Bright had vested in him the actual authority to write that letter. That is to say, irrespective of whether or not the defendants told Bright to write that letter, still the defendants may be bound by his action if the defendants clothed him with the apparent authority to write that letter. In other words, a principal is bound by the acts of his agent which are within the authority particularly vested in him, as well as by those acts of that agent which are within the scope of his apparent authority. 10

On the question as to whether or not Bright had the apparent authority to write that letter, that is, whether these people had a right to believe that he had that authority, the law is that in every case depending on apparent authority of the agent, the question is whether the principal has, that is, whether the defendants had by their voluntary act placed the agent in such a situation that a person of ordinary prudence, conversant with business usages and the nature of the particular business in question, is justified in presuming that such agent has authority to perform the act in question. Had the defendants placed Robert Bright in such a position with reference to this particular transaction that these defendants were justified in presuming that Robert Bright had the authority to write that letter? Bright testifies, and I think the defendants' witness corroborates him, that he was appointed by the defendants for the purpose of attending to the details of the settlement. 20 30

His name was placed in the agreement of sale or the conditions of sale, whatever you might want to call them, as the person in whose office the settlement should be made. The plaintiffs say that they had discussed the matter with him.

Did the defendants, by choosing him, Mr. Bright, to act with reference to the details of the settlement,
10 to be present at the settlement, to draw the deed, place him in such a position that these plaintiffs had a right to believe that he was clothed with the apparent authority to write that letter? If he was so placed, then the plaintiffs had a right to rely on that letter insofar as that letter would justify them in not attending on the day of settlement.

That is a question of fact for your determination, and if you determine that Bright was clothed with the apparent authority, and that the plaintiffs were
20 therefore justified by that letter in not attending, then I charge you that the plaintiffs were not in default in not attending on the first day of October.

Now, leaving that question for your determination, if from the evidence you find that on the first day of October, 1925, the defendants were unable and would have been unable to convey the title they agreed to convey, then the plaintiffs were justified in not attending the settlement on that day and there
30 would be no default on their part by reason of not attending, irrespective of the letter of Robert Bright.

So the next question is, could the defendants have given good title in accordance with their agreement on the first day of October, irrespective of the non-attendance of the plaintiffs?

The plaintiffs say that the defendants could not have given good title on that day, and that there never was a day up until the time of the bringing of this suit when good title could have been given, because they say that a one-third interest in this property was outstanding in the name of one Shetzline. It is admitted that that was the condition of the record title, one-third interest was in the name of Shetzline. There is no testimony in the case that I know of from which you would have a right to conclude that Shetzline had ever signed a deed to the defendants for his one-third interest. There is testimony that prior to the day of settlement Mr. Bright had prepared a deed in which he named as grantors the two executors of Adams and Mr. Shetzline; but there is no testimony that I remember that would justify you in finding that Shetzline ever signed that deed. If my recollection of the testimony in that respect is wrong, yours will govern; but I remember no testimony other than that which shows that the deed had been prepared but not signed.

So do you find from the evidence that on the first day of October these defendants could have delivered that title as per their agreement, remembering, as you have a right to remember, that at that time there was on file a Chancery proceeding wherein Shetzline was trying to secure a division of this property. Could the defendants on the first day of October have delivered title, even if the plaintiffs had been in attendance? If they could not, plaintiffs, of course, were not in default. That is a question for your determination.

Assuming, just for the purposes of this charge, and not knowing at all how you are going to decide the previous questions, that both parties agreed that on the first day of October there should be no settlement, that is, that on that day neither party attended, by mutual agreement and understanding. If neither party attended on that day, and no fixed
10 date in the future was set when a settlement could be made (this is for the purposes of the charge) the plaintiffs, in order to put the defendants in a position where they would have to repay the moneys that the plaintiffs had already paid, would be compelled to put the defendants in default, that is, compelled to put the defendants in position where they refuse to carry out the terms of their contract. Assuming, for the purpose of this charge, I say, that
20 no definite time was fixed and they did not attend on October first by mutual understanding. It is, I think, undisputed that if there was a mutual arrangement for non-attendance on October first, there was no future day fixed for settlement. The defendants say that you are justified in finding that there was no default on the part of the defendants, at least on October first, because thereafter there was a letter written by some lawyer whose name I forget—you will remember and the letter is in evidence—in which that lawyer said that the searches had come down
30 and that the plaintiffs were then ready for settlement. The plaintiffs deny that the lawyer had any authority so to write. That, again, is a question for your determination with reference to the authority under the same rule I have given you.

But assuming that there had been a postponement

of the settlement, and no definite date fixed, the defendants say the plaintiffs never put them in default. The plaintiffs say they did put defendants in default, and that they did it in this manner: That sometime in 1927—I do not remember the exact date; perhaps later than that—Mr. Garfinkle says that, representing the plaintiffs, he went to Mrs. Adams and said to her, “Are you willing to convey the property to my clients, or will you return the money?” Mr. Garfinkle says that she refused either to return the money or deed the property; that she said the plaintiffs were in default, that it was not a horse-race, and that they could not get back their money. The plaintiffs say that that constituted on the part of the defendants a default and that it excused the plaintiffs from doing that which the law requires them to do under certain circumstances; that is to say, the plaintiffs say that relieved them from tendering the balance of the purchase price, the mortgage, etc., to the defendants; because they say it would have been futile to have done it. 10 20

The defendants deny some of the conversation, at least, with Mr. Garfinkle, and a question of veracity is raised. The question is what did actually happen on that day that Mr. Garfinkle came to see Mrs. Adams. Mrs. Adams says that she said, “I will talk it over with my people.” I think you will remember her testimony as to what Garfinkle had said. As I recollect it, she says that Garfinkle talked more about the return of the money than he did the conveyance of the property. It is a question of veracity between these two witnesses which you must 30

determine. Is Mr. Garfinkle right in his recollection of what happened, or is Mrs. Adams right in her recollection?

If Mr. Garfinkle is correct in his recollection, and on that day Mrs. Adams, for the executors, refused to convey and refused to return the money, then it may be that the plaintiffs were excused from making a tender of the balance of the purchase price and delivering the mortgage. Did Mrs. Adams so refuse, is the first question for you to determine; and the second question to determine is, If she did so refuse, does that excuse the plaintiffs from a tender?

The proposition of law which you must apply there is this: Where there are concurrent covenants—that is the condition in this case, the covenant on the part of one person to convey and the covenant on the part of the other person to receive the conveyance and pay for it—where there are concurrent covenants to be performed by the vendor—in this case the defendants—and the vendee—in this case the plaintiffs—the universal legal rule is that before the latter is enabled to rescind—that is, throw up his contract—and sue for the breach of the contract—sue for the money back—he must show that he tendered performance of such concurrent covenant on his part, and that he had demanded performance by the vendor—in this case the defendants—of the concurrent covenants on his part; but an equally well recognized exception to this general rule is that in case a vendor is unable to perform at the time agreed upon for the passing of the title, tender of performance by the vendee is not required

in order to enable him to rescind and to sue for the breach of the contract.

If at the time Mr. Garfinkle had this conversation, these parties were unable to convey because they did not have title and could not convey, then the plaintiffs were excused from tendering the balance of the purchase price, because it would have been futile to have tendered it if the defendants were un- 10
able to make conveyance of the title agreed upon. And if the defendants said to the plaintiffs, "No matter whether you give us the money or not, we will not convey," or words to that effect, then the plaintiffs were excused from tendering the money, because it would have been futile, the defendants having said, "We will not take it even though you tender it."

That again is a question of fact for your determination, as all other facts are for your considera- 20
tion and determination.

There has been something said about other remedies that the plaintiffs in this suit might have pursued. I think something has been said about they might have gone into Chancery. You are not concerned with that at all. The question for your determination in this case is the question raised by these pleadings, and that is the sole question, irrespective of what other remedies the plaintiffs or defendants might have had in some other forum. 30

The plaintiffs, in order to recover, have the burden of proving by the preponderance of the evidence, that is, by the greater weight of the believable evidence, the allegations of their complaint. If the plaintiffs do recover, they are entitled to recover the moneys that they paid to the defendants, to wit, the

sum of \$2300, and they are entitled to recover, in addition to that, interest at six percent on \$2300 from the 17th day of August, 1925, until today; and that interest at six percent you yourselves will have to compute. That is, you would give a verdict in favor of the plaintiffs for the \$2300, plus six percent interest on that sum from August 17, 1925, to
10 date. Assuming, just for the purpose of the charge, that the interest was \$100, which, of course, is ridiculous, your verdict would be \$2400 in favor of the plaintiffs. I think you understand that. You have to figure the interest, and it has to be figured at six per cent, and it has to be added to the principal sum.

If your verdict, on the other hand, is for the defendants, it would be for no cause of action.

20 I am requested to charge by the defendants:
“The plaintiffs are not entitled to recover unless you find they were not in default and that the defendants were.”

Number 2 I refuse to charge.

Number 3 I refuse to charge.

30 Numer 4 I charge: “For the plaintiffs to recover they must satisfy you by a preponderance of the evidence that they made a tender or were legally excused from so doing.” I have already so charged you and I charge you that again.

Number 5 I refuse to charge.

I am requested to charge for the plaintiffs:

Number 1 I have already charged and refused to charge further.

Number 2 I refuse to charge except as a general proposition. I do not know of its application here. It is quite true that a purchaser is not compelled to take a doubtful title, but in this case the issue is whether or not the defendants could give the title they agreed to give in their agreement of sale. 10

Number 3: "If the defendants did not have title to the premises on the date set for settlement, plaintiffs were not obliged to attend and offer payment, and were not in default because of their non-attendance." I have already so charged.

20

Number 4 I refuse to charge.

Number 5 I refuse to charge.

I call counsel's attention to the fact that I charged number 3 just a little differently than they requested it to be charged.

The jury may retire with the exhibits and the pleadings.

30

DEFENDANTS' EXCEPTIONS.

Defendants, by their counsel, excepted to the refusal of the Court to charge defendants' second request, in the language following: "Unless you find
10 that Mr. Bright was authorized to call off the settlement, the defendants were not bound by his letter dated September 30, 1925."

(Which exception is hereby noted).

Defendants, by their counsel, excepted to the refusal of the Court to charge defendants' third request, in the language following: If you believe that the plaintiffs after receiving Mr. Bright's letter,
20 still considered the contract in force, as evidenced by their subsequently demanding a settlement, they cannot hold that any default of the defendants on October 1, 1925, entitled them to a refund of their money."

(Which exception is hereby noted).

Defendants, by their counsel, excepted to the refusal of the Court to charge defendants' fifth request, in the language following: "It was not neces-
30 sary, in order for the plaintiffs to be in default, for the defendants to tender a deed."

(Which exception is hereby noted).

Defendants, by their counsel, excepted to that part

of the Court's charge to the jury wherein the Court said: "Did Robert Bright have a right to bind the defendants by that letter? The defendants say that he was not authorized to write the letter. Bright says that he had no specific authority to write the letter. But I charge you that the defendants may be bound by that letter, irrespective of whether or not Bright had vested in him the actual authority to write that 10 letter. That is to say, irrespective of whether or not the defendants told Bright to write the letter, still the defendants may be bound by his action if the defendants clothed him with the apparent authority to write that letter."

(Which exception is hereby noted).

Defendants, by their counsel, excepted to that part of the Court's charge to the jury wherein the 20 Court said: "If from the evidence you find that on the first day of October, 1925, the defendants were unable and would have been unable to convey the title they agreed to convey, then the plaintiffs were justified in not attending the settlement on that day and there would be no default on their part by reason of not attending, irrespective of the letter of Robert Bright."

(Which exception is hereby noted).

30

Defendants, by their counsel, excepted to that part of the Court's charge to the jury wherein the Court said: "Could the defendants on the first day of October have delivered title, even if the plaintiffs

had been in attendance? If they could not, plaintiffs, of course, were not in default."

(Which exception is hereby noted).

10 Defendants, by their counsel, except to that part of the Court's charge to the jury wherein the Court said: "If at the time Mr. Garfinkle had this conversation, these parties were unable to convey because they did not have title and could not convey, then the plaintiffs were excused from tendering the balance of the purchase price, because it would have been futile to have tendered it if the defendants were unable to make conveyance of the title agreed upon. And if the defendants said to the plaintiffs, 'No matter whether you give us the money or not, we will not convey,' or words to that effect, then the plaintiffs
20 were excused from tendering the money, because it would have been futile, the defendants having said, 'We will not take it even though you tender it.'"

(Which exception is hereby noted).

30 Defendants, by their counsel, excepted to that part of the Court's charge to the jury wherein the Court said: "There has been something said about other remedies that the plaintiffs in this suit might have pursued, I think something has been said about they might have gone into Chancery. You are not concerned with that at all."

(Which exception is hereby noted).

Defendants, by their counsel, excepted to the Court's charging to the jury plaintiffs' request number 3, in the language following: "If the defendants did not have title to the premises on the date set for settlement, plaintiffs were not obliged to attend and offer payment, and were not in default because of their non-attendance."

(Which exception is hereby noted).

10

EXHIBIT P1.

V.

DESCRIPTION

Being four lots Nos. 14, 15, 29 and 30, Block 128, 20
Second Ward, City of Wildwood, N. J. Having a
combined frontage of 200 ft. on the Westerly side of
Atlantic Avenue with a length or depth of 90 ft.
between Spencer and Spicer Aves. Sold by the lin-
eal front foot (200 feet) on Atlantic Ave.

TERMS:

10% of the purchase price to be paid in cash on this
day. 40% of the purchase price to be paid in cash 30
on or before October 1, 1925 at the office of Robt.
Bright, Cor. 1st & New Jersey Avenues, North
Wildwood, N. J. when a deed will be given for the
same and a mortgage for one half or the balance
of the purchase price will be accepted in settlement
for the same. Said mortgage to be for a period of

one year, bearing interest at the rate of 6% per annum, payable semi-annually.

CONDITIONS:

To be free and clear of encumbrances, except and subject to any mortgage accepted in settlement and the unpaid municipal assessments, if any, that may
 10 be due after October 1, 1925. The same to be adjusted as per day of settlement. Sold subject to usual restrictions running with the land.

We, Edwin Mayer, Simon Weil, Sol. Fuld, Ed. Mary

Whitehill and Maria Melgin of xxxxxxxxxx 518 E. Allegheny Ave., Phila., Pa. have this day bid at public auction on the above described property the sum of \$115.00 per foot, 200 feet or the sume of
 20 Twenty-three thousand Dollars (\$23,000.00) dollars, and do hereby agree to comply with the above terms, and failing to do the same I hereby agree to forfeit as liquidated damages any and all monies paid, and do hereby agree to release any claim that I may have acquired upon the aforesaid property.

EDWIN MAYER

SIMON WEIL

SOL. FULD

EDWARD WHITEHILL

MARY J. MELGIN Per J. E. L.

30 Witness

V. W. ACKLEY

Received of Edwin Mayer, et al

\$2300.00

on account of the above bid.

JOHN A. ACKLEY & SON, AGENTS

Dated, August 17, 1925

By F. W. A.

EXHIBIT P2.
V.

ROBERT BRIGHT.
Counselor-at-Law

N. W. Cor. 1st and New Jersey Aves. 10
NORTH WILDWOOD, N. J.
Sept 30/25

MR EDWARD WHITEHILL

DEAR SIR: In reply to your inquiry as to whether we are ready for settlement on premises Atlantic Ave between Spencer and Spicer Avenue, Wildwood, N. J. would say that I do not believe the sale will go through for the reason that the property is in litigation in the Court of Chancery.

Mr. Chas. H. Shetzline, one third owner therein, 20
filed a bill some time in June for the partition thereof: Mrs. Adams, one of the executors, listed it for sale with Senator Ackley, but naturally the Court proceedings have priority over the sale: I have advised Senator Ackley the facts therein.

I do not see anything but what the return of the money to you would be the best method out for you and your associates. Mrs. Adams did not have the sanction of her co executor in listing the property.

Mr Shetzline the 1/3 owner is not bound by the list- 30
ing or sale, not having signed up nor agreed thereto. I am Yours truly

Robert Bright
E.

EXHIBIT D1.

V.

10

Law Offices
WILLIAM SANDBERG
312-13 Otis Building
N. W. Cor. 16th and Sansom Streets
Philadelphia

September 20, 1926.

Robert Bright, Esq.,
Attorney for Estate of
Ruric N. Adams, Deceased,
Wildwood, N. J.

20 Dear Sir:—

I represent the purchasers of Lots Nos. 14, 15, 29 and 30, Block 128, Wildwood, N. J., and beg to inform you that the searches have just come through, and that my clients are now ready to make settlement.

Please advise me promptly what time your clients would like to fix for that purpose.

Yours very truly,

Wm. Sandberg

30 WS/M

JUDGMENT.

(Filed Sept. 16, 1930.)

NEW JERSEY SUPREME COURT.

10

SOLOMON FULD, EDWIN
MAYER, MARY J. MELGIN,
MRS. EDWARD WHITEHILL
and WILLIAM SANDBERG,
Execrs., etc., of EDWARD
WHITEHILL, deceased,
and LEWIS P. WEIL, LES-
TER H. WEIL and LESTER
S. HECHT, executors of
the Estate of SIMON
WEIL, deceased,

Plaintiffs,

v.

ELIZABETH V. (O R B.)
ADAMS and HARRY ADAMS,
EXRS., etc., of RURIC N.
ADAMS, dec.,

Defendants.

Action at Law.
On Postea.

20

30

It is ordered that judgment be and hereby is
entered in favor of plaintiffs and against the defen-

dants for the sum of three thousand and nine dollars, besides costs to be taxed *nisi*.

Entered September 16, 1930.

On motion of

SAMUEL M. GARFINKLE, *Atty.*

Damages \$3,009.00

Costs 293.07

10

\$3,302.07

20

30

NOTICE OF APPEAL.

(Filed Sept. 25, 1930.)

NEW JERSEY SUPREME COURT.

CAPE MAY COUNTY.

10

SOLOMON FULD, *et al.*,

Plaintiffs,

v.

ELIZABETH B. ADAMS, *et al.*,

Defendants.

Action at Law.
Notice of Appeal.

20

To Samuel M. Garfinkle, Esquire, Attorney of Plaintiffs, or to Whom It May Concern:

Please take notice that the defendants, Elizabeth B. Adams and Harry Adams, executors of the estate of Ruric N. Adams, deceased, in the above-entitled cause, appeal to the Court of Errors and Appeals in the last resort in all causes in New Jersey, from the whole of the judgment entered in this cause. 30

THOMPSON & HANSTEIN,
Attys. of Defts.

GROUNDS OF APPEAL.

(Filed Jan. 9, 1931.)

NEW JERSEY COURT OF ERRORS AND
APPEALS.

10

20	<p>SOLOMON FULD, SIMON WEIL, EDWIN MAYER, MARY J. MELGIN, MRS. EDWARD WHITEHILL and WILLIAM SANDBERG, ex- ecutors of the Estate of EDWARD WHITEHILL, de- ceased,</p> <p style="text-align: center;"><i>Plaintiffs-Respondents,</i></p> <p style="text-align: center;">v.</p> <p>ELIZABETH B. ADAMS and HARRY ADAMS, executors of the Estate of RURIC N. ADAMS, deceased,</p> <p style="text-align: center;"><i>Defendants-Appellants.</i></p>	<p>On Appeal. Grounds of Appeal.</p>
----	---	--

30

To Samuel M. Garfinkle, Attorney for Plaintiffs-Respondents:

Take notice that the defendants-appellants in the above-entitled cause hereby assign the following reasons for the appeal in the said above-entitled cause:

1. Because the Court admitted in evidence letter of Robert Bright to Edward Whitehill, dated September 30th, 1925, marked Exhibit P2, over defendants' objection.

2. Because the Court permitted the witness, Robert Bright, to answer the following question propounded by plaintiffs: 10

“Mr. Bright, what conversation did you have with Mrs. Adams when she told you that this settlement was to be made at your office?”

3. Because the Court refused to permit the witness, Robert Bright, to answer the following question propounded by defendants:

“Did you know that Shetzline was unwilling to sign that deed?” 20

4. Because the Court refused to permit the witness, Robert Bright, to answer the following question propounded by defendants:

“Did Mr. Shetzline ever refuse to sign a deed?”

5. Because the Court refused to permit the witness, Robert Bright, to answer the following question propounded by defendants:

“Do you know if Mr. Shetzline had authorized this property to be put into the sale?” 30

6. Because the Court refused to permit the witness, Robert Bright, to answer the following question propounded by defendants:

“Wasn’t Mr. Shetzline as much bound by the listing as Mrs. Adams?”

7. Because the Court refused to permit the witness, Robert Bright, to answer the following question, propounded by defendants:

10 “Did Mr. Shetzline ever tell you whether or not he would sign a deed for this property?”

8. Because the Court refused to permit the witness, Robert Bright, to answer the following question, propounded by defendants:

“Had he (Shetzline) said that he would not sign a deed?”

9. Because the Court denied the motion of the defendants to strike Exhibit P2 from the record as having been written without any authority on the part of the defendants.

10. Because the Court refused defendants’ motion for a non-suit.

11. Because the Court refused to permit the witness, John McMullin, to answer the following question propounded by defendants:

30 “Do you know whether or not your client, Mr. Shetzline, was willing to sign a deed for this property?”

12. Because the Court refused to permit the witness, John McMullin, to answer the following question propounded by defendants:

“Did you know a deed had been prepared

for this property, making Mr. Shetzline a party grantor?"

13. Because the Court refused to permit the witness, John McMullin, to answer the following question propounded by defendants:

"After the filing of the bill on July 17, 1925, what steps did you take in the proceedings?" 10

14. Because the Court refused to permit the witness, John McMullin, to answer the following question propounded by defendants:

"What reason was there for delaying the prosecution of those proceedings?"

15. Because the Court refused to permit the witness, John McMullin, to answer the following question propounded by defendants: 20

"What I want to know is did he refuse to sign a deed for this property?"

16. Because the Court refused to permit the witness, Robert Bright, to answer the following question propounded by defendants:

"Did he (Shetzline) authorize this property to go into the sale?"

17. Because the Court refused to permit the witness, Robert Bright, to answer the following question propounded by defendants: 30

"Q. What did Mr. Shetzline say?"

18. Because the Court refused to permit the wit-

ness, Robert Bright, to answer the following question propounded by defendants:

“Do you know if Mr. Shetzline was willing to sign that deed?”

19. Because the Court refused to charge defendants' second request in the language following:

10 “Unless you find that Mr. Bright was authorized to call off the settlement, the defendants were not bound by his letter dated September 30, 1925.”

20. Because the Court refused to charge defendants' third request in the language following:

20 “If you believe that the plaintiffs, after receiving Mr. Bright's letter, still considered the contract in force, as evidenced by their subsequently demanding a settlement, they cannot hold that any default of the defendants on October 1, 1925, entitled them to a refund of their money.”

21. Because the Court refused to charge defendants' fifth request in the language following:

“It was not necessary, in order for the plaintiffs to be in default, for the defendants to tender a deed.”

30

22. Because the Court charged the jury as follows:

“Did Robert Bright have a right to bind the defendants by that letter? The defendants say that he was not authorized to write the letter. Bright says that he had no specific authority

to write the letter. But I charge you that the defendants may be bound by that letter, irrespective of whether or not Bright had vested in him the actual authority to write that letter. That is to say, irrespective of whether or not the defendants told Bright to write the letter, still the defendants may be bound by his action if the defendants clothed him with the apparent authority to write that letter.” 10

22. Because the Court charged the jury as follows:

“If, from the evidence, you find that on the first day of October, 1925, the defendants were unable and would have been unable to convey the title they agreed to convey, then the plaintiffs were justified in not attending the settlement on that day and there would be no default on their part by reason of not attending, irrespective of the letter of Robert Bright.” 20

23. Because the Court charged the jury as follows:

“Could the defendants, on the first day of October, have delivered title, even if the plaintiffs had been in attendance? If they could not, plaintiffs, of course, were not in default.”

30

24. Because the Court charged the jury as follows:

“If, at the time Mr. Garfinkle had this conversation, these parties were unable to convey because they did not have title and could not convey, then the plaintiffs were excused from

tending the balance of the purchase price, because it would have been futile to have tendered it if the defendants were unable to make conveyance of the title agreed upon. And if the defendants said to the plaintiffs, 'No matter whether you give us the money or not, we will not convey,' or words to that effect, then the
10 plaintiffs were excused from tendering the money, because it would have been futile, the defendants having said, 'We will not take it even though you tender it.' "

25. Because the Court charged the jury as follows:

20 "There has been something said about other remedies that the plaintiffs in this suit might have pursued. I think something has been said about they might have gone into Chancery. You are not concerned with that at all."

26. Because the Court charged the jury as follows:

30 "If the defendants did not have title to the premises on the date set for settlement, plaintiffs were not obliged to attend and offer payment, and were not in default because of their non-attendance."

THOMPSON & HANSTEIN,
*Attys. for and of Counsel
with Defts.-Appellants.*

NEW JERSEY COURT OF ERRORS
AND APPEALS.

SOLOMON FULD, SIMON WEIL, EDWIN MAYER, MARY J.
MELGIN, MRS. EDWARD WHITEHILL and
WILLIAM SANDBERG, executors of
the estate of EDWARD
WHITEHILL, deceased,
Plaintiffs-Respondents,

v.

ELIZABETH V. ADAMS and HARRY ADAMS, executors of
the estate of RURIC N. ADAMS, deceased,
Defendants-Appellants.

ON APPEAL.

BRIEF OF DEFENDANTS-APPELLANTS.

This is a suit by certain vendees for the return of their deposit money paid on account of the purchase of certain land in Wildwood, New Jersey.

The complaint alleges that the premises in question were put up by Ackley & Sons, auctioneers, at public sale and bought in by the plaintiffs for the

sum of \$23,000, upon conditions requiring the payment of 10% in cash on the date of the sale, and 40% in cash on or before October 1st, 1925, at the office of Robert Bright, with the giving of a mortgage by the vendees for one-half of the purchase price, for a term of one year.

The complaint further alleges that on the 30th of September, 1925, the defendants, through their agent, Robert Bright, notified plaintiffs that the sale would not go through, because of a pending Chancery proceeding.

The complaint further alleges, in the second count thereof, that the defendants were the owners only of an undivided two-thirds interest in the land, and were unable to convey.

The answer admits the making of the sale, and the agreement aforesaid; denies that Bright notified the plaintiffs that the sale would not go through, and as to the second count denies that the defendants were unable to convey, and by way of affirmative defense, sets up that the defendants were at all times ready and willing to settle, and that the plaintiffs were not ready or willing to settle, nor did the plaintiffs ever make any tender, and further sets up that the failure of the settlement was due to the negligence of the plaintiffs, and that the plaintiffs at no time advised defendants that they were desirous, able or willing to settle, and that the plaintiffs had forfeited their right to the return of the money referred to in the complaint.

The contract upon which the suit is brought appears on pages 99-100 of the State of the Case, and makes no reference whatever to the names of the owners of the property, and is signed only by the

plaintiffs and by the auctioneer, as agent, without disclosing for whom the auctioneer was agent.

The testimony offered on behalf of some of the plaintiffs' witnesses was that they were prepared to go to the office of Mr. Bright on the day fixed by the contract for settlement, when they received the letter from Mr. Bright, which is marked Exhibit P2, which reads as follows:

“ROBERT BRIGHT

Counselor-at-Law

N. W. Cor. 1st and New Jersey Aves.

NORTH WILDWOOD, N. J.

Sept. 30/25

MR. EDWARD WHITEHILL

DEAR SIR:

In reply to your inquiry as to whether we are ready for settlement on premises Atlantic Ave. between Spencer and Spicer Avenue, Wildwood, N. J. would say that I do not believe the sale will go through for the reason that the property is in litigation in the Court of Chancery.

Mr. Chas. H. Shetzline, one third owner therein, filed a bill some time in June for the partition thereof; Mrs. Adams, one of the executors, listed it for sale with Senator Ackley, but naturally the Court proceedings have priority over the sale; I have advised Senator Ackley the facts therein.

I do not see anything but what the return of the money to you would be the best method out for you and your associates. Mrs. Adams did not have the sanction of her co executor in listing the property. Mr. Shetzline the 1/3 owner

is not bound by the listing or sale, not having signed up nor agreed thereto.

I am

Yours truly

Robert Bright

E.”

Said letter was offered in evidence despite the defendants' objection that the same was written without any authority from the defendants, which objection to said letter will be hereinafter referred to. It is the plaintiffs' contention that their reason for not attending at the time and place fixed for settlement was because of that letter.

The testimony on behalf of the defendants, however, shows that about one year later, namely, on September 20, 1926, the attorney for plaintiffs wrote Mr. Bright a letter (Exhibit D1), which reads as follows:

“Law Offices
WILLIAM SANDBERG
312-13 Otis Building
N. W. Cor. 16th and Sansom Streets
Philadelphia

September 20, 1926.

Robert Bright, Esq.,
Attorney for Estate of
Ruric N. Adams, Deceased,
Wildwood, N. J.

Dear Sir:—

I represent the purchasers of Lots Nos. 14, 15, 29, and 30, block 128, Wildwood, N. J., and beg to inform you that the searches have just come through, and that my clients are now ready to make settlement.

Please advise me promptly what time your clients would like to fix for that purpose.

Yours very truly,
Wm. Sandberg

WS/M''

And which the defendants contend was evidence that the plaintiffs did not rely upon the aforesaid letter from Mr. Bright.

The testimony on the part of the plaintiffs also shows that another lawyer employed by the plaintiffs a year after the Sandberg letter, sometime in 1927, called upon one of the defendants and asked her if she was willing to settle. There is a dispute in the testimony as to what was said at that time. The purpose in pointing out that visit is to show that the plaintiffs were still talking about settling in 1927.

The contention of the defendants was that they were at all times ready, willing and able to settle, but that no tender was ever made by the plaintiffs.

ARGUMENT.

It is our contention that the plaintiffs are not entitled to recover deposit money paid by them, unless they show that they made a tender of settlement, or were legally excused from making such a tender.

The rule on this subject was stated by the Court of Errors and Appeals in the case of *Bernstein v. Kohn*, 96 N. J. L. 223, at p. 226, in these terms:

“The universally recognized legal rule is, where there are concurrent covenants to be performed by vendor and vendee, that before the latter is enabled to rescind and sue for a breach of the contract, he must show tendered performance of such concurrent covenants on his part and that he has demanded performance by the vendor of concurrent covenants on his part.”

A qualification to the rule, by which the vendee may be excused, from making tender, under certain circumstances, is stated in the same case (p. 226) in these terms:

“There is an equally well recognized exception to this general rule, and that is, in case a vendor is unable to perform at the time agreed upon for the passing of the title, tender of performance by the vendee is not required, in order to enable him to rescind and to sue his vendor for a breach of the contract. *Reutler v. Ramsin*, 91 N. J. L. 262 (at pp. 264, 265); *Caporale v. Rubine*, 92 Id. 463; 39 Cyc. 1422.”

The plaintiffs concede that they never made a tender of settlement. They contend that they came within the rule above cited, because of the receipt of the letter of Mr. Robert Bright aforesaid, which went into evidence. They also contend that they were relieved from making a tender by reason of the fact that the two defendants, who are being sued, did not have the legal title to the property in question.

The defendants contend that the plaintiffs' proofs

were not sufficient to bring them within the exception to the general rule. It will be noted that the exception stated is a case where "a vendor is unable to perform." It is submitted that the plaintiffs' proofs in the present case were entirely inadequate to establish an *inability* on the part of the vendors to deliver title on the day of settlement. Those proofs consisted merely of (1) the letter of Robert Bright above referred to, which, even if it were properly admitted in evidence, cannot possibly be said to establish the essential facts, containing, as it does, merely an expression of personal opinion, and (2) proof that title to one-third of the premises stood in the name of one Shetzline. There was no proof by plaintiffs, that Shetzline was unwilling or unable to convey on the settlement date, and the offer of proof by defendants intended to show that Shetzline was willing to convey, was excluded. Under the decision of this Court in *Naugle v. McVoy*, 98 N. J. L. 137, the plaintiffs were not excused from tendering the performance if the defendants could have caused a conveyance to be made on the settlement day, whether or not defendants actually had title in their own names on or before that day. The plaintiffs' proofs did not exclude the possibility of such a conveyance being made. The defendants' offers of proofs were calculated to show that such a conveyance could have been made. These are the fundamental facts underlying the exceptions hereinafter discussed and this statement is made here for the purpose of clarifying the argument on those exceptions.

THE LETTER OF ROBERT BRIGHT WAS NOT
ADMISSIBLE IN EVIDENCE.

The admission of that letter was objected to on the ground that there was no proof of any authority on the part of Mr. Bright to send the letter, and that the letter was purely an expression of opinion on the part of Mr. Bright, which could not be binding upon the defendants.

The proof upon which the letter was admitted in evidence appears on pages 25-26. That testimony shows that Mr. Bright was asked what conversation he had with his client, Mrs. Adams, when she told him that the settlement was to be made at his office. The question was objected to on the ground that it was a privilege communication between attorney and client, but Mr. Bright was, nevertheless, permitted to answer the question, and testified that Mrs. Adams asked him to prepare the papers, inasmuch as the settlement had been scheduled at his office, and she wanted him to take care of the settlement. After the letter was admitted in evidence, Mr. Bright, on cross-examination, admitted that he had not been authorized by Mrs. Adams to write the letter (p. 29), and that he did not tell her about it until long afterwards.

“Making a contract as agent, at a fixed price, and the approval of such contract by the defendants, does not hold him out to the world as an agent to sell at any other price, or to vary the terms of sale. It is every day’s practice for an owner of real estate, to authorize an

agent to sell it at a certain price, a given part in cash and the rest on credit. The agent cannot bind the principal to a sale on any other terms. The purchaser must ascertain, at his own peril, the power of the agent. And if the agent's contract on these terms is approved, and adopted by the principal, the purchaser has no right to infer from that fact, that the agent has power to alter the terms of the contract." *The National Iron Armor Company v. Bruner and Baxter*, 19 N. J. Equity 331, at page 335.

Further than that, it is quite apparent from a reading of the letter that it only represents the opinion of the attorney, for all he says is: "I do not believe the sale will go through, for the reason * * *." There was no proof whatever that the defendants had held out Mr. Bright to the plaintiffs as their lawyer, and even though the defendants may have known that he was, in fact, the lawyer, there is nothing in the authority that a client gives to a lawyer to effectuate a settlement that permits him to call it off.

Beyond that, the letter, if it amounts to anything, is important only because it is an expression of opinion on the possibility of conveyance of the Shetzline interest in the property. There is not even a contention that Bright was authorized to speak for Shetzline. Therefore, in any event, the letter cannot be said to be evidence on the question of the conveyance of Shetzline's interest in the property.

Thereafter a motion was made by the defendants to strike the letter (Exhibit P2) as having been writ-

ten without any authority on the part of the defendants, which motion was refused and an exception granted, and which refusal is the ninth ground of appeal.

We are not unmindful of the fact that at a previous trial of this same cause, a verdict was rendered in favor of the defendants, which was set aside by the Supreme Court on rule to show cause on the ground that it was against the weight of the evidence, and in that case the Court held that it was reasonable for the plaintiffs to assume that the general employment of Mr. Bright as counsel carried with it the authority to write such a letter. However the proof at the second trial, which is now being reviewed, merely showed that Mrs. Adams told Mr. Bright to prepare the papers, and take care of the settlement. That testimony was, as pointed out above, clearly privileged, and we think erroneously admitted, and if it was, there was no testimony whatever to show any authority whatever in Mr. Bright.

THE BRIGHT LETTER BEING IN EVIDENCE
IT WAS ERROR TO EXCLUDE DEFEN-
DANTS' QUESTIONS TO WITNESSES
TENDING TO SHOW THAT TITLE COULD
HAVE BEEN CONVEYED IN ACCOR-
DANCE WITH THE REQUIREMENTS OF
PLAINTIFFS' CONTRACT.

As pointed out above, part of the plaintiffs' contention with regard to the fact that the plaintiffs were not obliged to make a tender, was based upon

the fact that the Adams, as executors of the estate, did not have the legal title to the property. It was admitted, in the course of the trial, that the Adams Estate had a two-thirds interest, and that one, Shetzline, had a one-third interest. The legal situation in the case turns, to a large extent, upon that fact, the Court having charged that if the defendants did not have title on the day set for settlement, plaintiffs were not obliged to attend and offer payment and were not in default because of their non-attendance.

That legal rule was clearly not applicable in this case, because the suit was not based upon a contract signed by any of the owners of the property, but was based upon an auctioneer's contract, as agent for the vendors. Clearly it was permissible, under the circumstances, for the defendants to show that all the vendors were bound by the listing in order to relieve the defendants from the rule of law which provides that if the defendant does not have the legal title, tender need not be made by the vendee.

The plaintiffs opened the door for that testimony on the part of the defendants, by offering in evidence Mr. Bright's letter, in which, as will be observed, Mr. Bright sets out that Mr. Shetzline is a one-third owner of the property, and that he had filed partition proceedings, and that he was not bound by the listing, or sale, since he had not signed up, or agreed thereto. The letter being in evidence, that fact was in evidence. The statements of the letter were before the jury. The defendant was, thereupon, entitled to show that those statements were not true, and to that end the defendants asked

of the witness, Mr. Bright, the following questions, which constitute grounds of appeal numbers 3 to 8, inclusive, and which may be here considered together:

3. "Did you know that Shetzline was unwilling to sign that deed?" (p. 32)

4. "Did Mr. Shetzline ever refuse to sign a deed?" (p. 32)

5. "Do you know if Mr. Shetzline had authorized this property to be put into the sale?" (p. 33)

6. "Wasn't Mr. Shetzline as much bound by the listing as Mrs. Adams?" (p. 34)

7. "Did Mr. Shetzline ever tell you whether or not he would sign a deed for this property?" (35)

8. "Had he (Shetzline) said that he would not sign a deed?" (p. 39)

All of these questions were refused by the Court, chiefly on the ground that they were not cross-examination of anything introduced in the direct testimony, or in the letter. We submit that when the plaintiffs introduced in evidence Mr. Bright's letter, saying that the sale would not go through because the property was in litigation under a partition proceeding, and that Mr. Shetzline had not agreed to the sale, we were then entitled to show that Mr. Shetzline had authorized the property to go into the sale, and that he was willing to sign a deed, and we contend that it was clearly prejudicial error to exclude that testimony. Had the answers to those questions been that Shetzline had consented to the

sale, and was willing to sign a deed, then, clearly, it would have appeared before the jury that there was no foundation for Mr. Bright's letter, and in addition to that, it would have appeared that even though the Adams did not have the legal title in themselves, they were, nevertheless, prepared to deliver a legal title and the rule of law charged by the Court, as above set forth, would have had no application to this case.

Similarly, as part of the defendants' case, the following questions were asked of Mr. Bright, and overruled by the Court, which constitute grounds of appeal numbers 16 and 17:

16. "Did he (Shetzline) authorize this property to go into the sale?" (p. 70)

17. "What did Mr. Shetzline say?" (p. 72)

This question developed from the following question asked of Mr. Bright:

"In the presence of plaintiffs, did you hear Mr. Shetzline give any directions with regard to this sale?" (p. 71),

which question was objected to by the plaintiffs' attorney, with the Court ruling that it could not be answered unless it was shown that the plaintiffs were in ear-shot of Mr. Shetzline. Immediately thereafter testimony was adduced to show that the sale was taking place in a tent, and that Mr. Shetzline was about 15 feet from Mr. Ackley, the auctioneer, with the plaintiffs directly behind Mr. Shetzline. During the progress of the sale, Mr. Shetzline gave some direction to Mr. Ackley, who was 15

feet away, and the defendants then undertook to show what it was that Mr. Shetzline said to Mr. Ackley at that distance, while the plaintiffs were directly behind. The purpose of this question was, obviously, to develop that Mr. Shetzline was in favor of the sale and was actually participating in it by giving directions to the auctioneer, with regard to the manner of selling. It was clearly competent in rebuttal of the plaintiffs' contention that they were relieved of making a tender because there was no legal title in the Adams.

THE COURT ERRED IN REFUSING TO NON-SUIT THE PLAINTIFF.

The plaintiffs' testimony did not disclose any tender, nor did it show any valid excuse for refusing to tender. The Bright letter was clearly written without any authority, and was purely an expression of an opinion on the part of Mr. Bright, and, therefore, no sufficient reason for the plaintiffs failing to make a tender. Plaintiffs' proofs fell far short of satisfying the requirements of the legal rule.

The defendants' contention on this point is based upon the law as declared in *Naugle v. McVoy, supra*. In that case it was held that the plaintiff, vendee, who had not appeared at the time fixed for settlement, and who alleged as an excuse for non-appearance the defendants' lack of title, was not entitled to the return of his money, since the defendant-vendor, was able to make good title on the settlement day. The defendants in the present case contend

that the same situation exists in their case as in the Naugle case. The plaintiffs did not show that defendants were *unable* to deliver title so as to bring them within the exception to the general rule, as stated in *Bernstein v. Kohn, supra*. They only showed in addition to the Bright letter, that title stood, one-third in the name of Shetzline, and two-thirds in the name of defendants. This is not the equivalent of showing an inability on the part of the vendors to deliver good title, particularly since plaintiffs contracted simply with an auctioneer for the delivery of title, and not alone with these defendants.

IT WAS ERROR TO EXCLUDE DEFENDANTS'
OFFER TO SHOW THAT SHETZLINE WAS
WILLING TO CONVEY.

The plaintiffs' case, as shown by the pleadings, and as shown by the testimony of the plaintiffs, was predicated, to some extent, upon the fact that the plaintiffs were not obliged to make a tender because the defendants did not have the legal title to the property. They established that one-third of the legal title was in Mr. Shetzline, and that he had filed a bill for the partition of that property in Court, prior to the sale.

The defendants undertook to show that Shetzline had joined in the sale, and was entirely willing to join in a deed for the property. The testimony shows that Shetzline was, at the time of the trial, in a sanitarium for nervous diseases near Wilkes-Barre, Pennsylvania (p. 63), and the defendants

called John D. McMullin, Esquire, the attorney for Mr. Shetzline, who represented Shetzline in connection with the very property in question, and in connection with the sale of the same.

Mr. McMullin was asked the following questions for the purpose of showing that his client, Shetzline, was willing to join in a conveyance of the property:

“Do you know whether or not Mr. Shetzline was willing to sign a deed for this property?” (p. 63) Ground of Appeal No. 11.

“Did you know that a deed had been prepared for this settlement, making Mr. Shetzline a party grantor?” (p. 64) Ground of Appeal No. 12.

“What I want to know is did he refuse to sign a deed for this property?” (p. 68) Ground of Appeal No. 15.

All of these questions were asked with the idea of eliciting proof that Shetzline was willing to join in the sale, and the Court refused to permit any of them to be answered.

Along the same line, the defendants undertook to show by Mr. McMullin that although Mr. Shetzline had instituted partition proceedings, as referred to in Mr. Bright's letter, prior to the sale of the property, still the partition proceedings were held up pending the sale, and the settlement to be made thereunder, because, obviously, a sale of the property to a third party would make unnecessary the further prosecution of the partition proceedings. The holding up of the partition proceeding for that purpose would be evidence of Mr. Shetzline's will-

ingness to join in the sale and besides that, the plaintiffs had undertaken to show, in connection with the partition proceedings, that they were pending, and were, therefore, an impediment in the way of the settlement. To meet that situation Mr. McMullin was asked the following questions, which constitute grounds of appeal No. 13 and No. 14, respectively:

“After the filing of the bill on July 15, 1925, what steps did you take in the proceedings?” (p. 66)

“What reason was there for delaying the prosecution of these proceedings?” (p. 67)

Both of these questions were overruled by the Court, and we contend the action of the Court in that respect was reversible error.

Similarly, the question asked of Mr. Bright on the defendants' direct examination, Ground of Appeal No. 18:

“Do you know if Mr. Shetzline was willing to sign that deed?” (p. 74),

related to the same question, and is controlled by the same principles of law.

The questions asked by the defendants and excluded by the Court as above set forth were calculated to establish that Shetzline, the owner of a one-third interest in the property, was willing to join in the conveyance and make settlement in accordance with the contract held by the plaintiffs. Defendants endeavored to show the state of mind or intent of Shetzline on that subject. It is submitted that the

defendants' offer of testimony was improperly excluded under the well-established doctrine that, where a person's state of mind is relevant to a judicial inquiry, testimony to show that person's words or conduct, tending to prove that state of mind, are admissible in evidence. At the trial of this case, part of the testimony excluded was excluded on objections that it was irrelevant and immaterial (State of the Case, pp. 64, 65), and a part was excluded on the ground that it was hearsay (pp. 70, 71). Under the doctrine above referred to, the offered testimony was neither irrelevant nor was it hearsay. The principal question in issue was whether, in view of the outstanding interest in Shetzline, title could be conveyed in accordance with the contract, and Shetzline's willingness or unwillingness to convey was, therefore, a thing to be proved. Shetzline's words and actions were certainly evidential of his willingness or unwillingness. In fact, it has been said that testimony such as was offered in this case is more valuable than Shetzline's own statements on the stand would have been. 3 *Wigmore, On Evidence*, page 2204, at which it is said:

“It is indeed possible to obtain by circumstantial evidence (chiefly of conduct), some knowledge of a human being's internal state of pain, emotion, motive, design, and the like; but in directness, amount and value, this source of evidence must usually be decidedly inferior to the person's own contemporary assertions of those conditions. It might be argued, however, that the person's own statements on the stand would amply satisfy the need for his testimonial

evidence. *The answer is, that statements of this sort on the stand where there is ample opportunity for deliberate misrepresentation and small means for checking by other evidence or testing it by cross-examination, are comparatively inferior to statements made at times when no inducement to misrepresentation existed and the probability of trustworthiness was greater.*"

The doctrine relied on by defendants for the admissibility of the excluded evidence is set forth in Wigmore, above cited, at page 2218, *et seq.* As will be observed from the citations in Wigmore, the doctrine has been expounded and followed by the Courts of New Jersey.

In *Hunter v. State*, 40 N. J. L. 495 (cited in Wigmore, *supra*), evidence was admitted of a deceased person's declarations of an intention to make a certain trip and there was also admitted in evidence a letter written by the deceased at about the same time in which it was stated that he would make said trip. The admission of this evidence was complained of on writ of error and the Court of Errors and Appeals held that the evidence was admissible. Chief Justice Beasley, speaking for the Court put its decision in this respect, upon two grounds. The first was, that the declarations and letter of the deceased were a part of the *res gestae*, but secondly, he said (p. 541):

"In this aspect of the evidence the case seems to be brought fully within that other exception to the rule excluding hearsay which legalizes declarations which are explanatory of a state

of mind, such mental condition being the subject of inquiry.”

In *Schlemmer v. State*, 51 N. J. L. 23, the same eminent jurist, speaking for the Supreme Court, expounded the subject further. In that case testimony had been offered on behalf of the defendant, charged with the murder of his wife, to show certain conduct on his part as negating the State's contention that the defendant was guilty of planning and premeditating the crime. The trial Court excluded the offered testimony. On writ of error it was held that the exclusion of the evidence was improper and the judgment of the trial Court was reversed. At page 28, Chief Justice Beasley said:

“The question touching the intention of the defendant in seeking to meet the deceased was plainly part of the *res gestae*, and neither the State nor the defense could manifest what such intention was except by showing what the conduct of the defendant had been. As a state of mind is inscrutable to the direct perception of the senses, resort must, of necessity, be had, when it is in question, to its manifestations as exhibited in words and acts; and consequently the legal rule is, that all conduct that is reasonably evincive of such mental condition is admissible in evidence. * * * The rule exemplified by the authorities is this; that whenever the existence of a purpose, or state of mind, is the subject of inquiry, explanatory conduct and accompanying expressions of the party himself, or of other persons to him or in his presence, may be shown by proof.”

The above two cases were cases involving persons charged with crime, but as Dean Wigmore says (pages 2219-2220):

“The principle has no narrow limitations * * * it is obvious, yet it needs to be emphasized that the nature of the act to be evidenced by the design has nothing whatever to do with the admissibility of declarations of design. The latter are absolutely admissible as statements of a mental condition under the present exception to prove the design. What the design evidenced, or whether it is relevant at all does not affect the broad scope of this exception.”

The doctrine has been applied in civil actions in this State. In the comparatively recent case of *Kelly v. Pitney*, 98 N. J. L. 773, a question arose concerning the admissibility of certain writings of a deceased person which were offered in evidence as showing his state of mind. The trial Court held and the Court of Errors affirmed the holding, that the writing was admissible. At page 776, the Court of Errors said:

“The written declaration was made five years later than the Will and in no sense partakes of the nature of the Will or even of a supplement to the Will * * * It is not to be regarded as direct proof of the termination of the plaintiff’s employment but as characterizing and making plain testator’s state of mind and purpose at the time he closed his house.”

Apparently a similar question was raised in the case of *Naugle v. McVoy*, above cited, a case which

is similar to the present case in that it was a suit by a vendee for the return of money and in that the vendee's contention was that the defendant had no title to the property to be conveyed. It appeared in that case that title stood in the name of Bauman. At page 139, Chancellor Walker, who wrote the opinion for the Court of Errors, said:

“It is objected that testimony of transactions between defendant and Bauman were incompetent. Not so, they related to defendant's ability to perform and were consequently relevant.”

So in the present case. The defendants contend that it was relevant and proper for the defendants to show by proof of Shetzline's words and conduct that Shetzline was willing to convey his interest in the property in order to make title over to the plaintiffs in accordance with the plaintiffs' contract.

This subject should not be passed without reference to the celebrated case of *Mutual Life Insurance Company v. Hillman*, 145 U. S. 285, 36 L. Ed. 706, in which the doctrine here relied on by defendants is also followed. In that case the United States Supreme Court said:

“But upon another ground suggested they should have been admitted. A man's state of mind can only be manifested to others by countenance, attitude or gesture, or by sounds or words, spoken or written. The nature of the fact to be proved is the same, and evidence of its proper tokens is equally competent to prove it, whether expressed by aspect or conduct, by

voice or pen. When the intention to be proved is important only as qualifying an act, its connection with that act must be shown, in order to warrant the admission of declarations of intention. But, whenever the intention is of itself a distinct and material fact in a chain of circumstances, it may be proved by contemporaneous oral or written declarations of the party.

The existence of a particular intention in a certain person at a certain time being a material fact to be proved, evidence that he expressed that intention at that time is as direct evidence of the fact, as his own testimony that he then had that intention would be. After his death, there can hardly be any other way of proving it; and while he is still alive, his own memory of his state of mind at a former time is no more likely to be clear and true than a bystander's recollection of what he then said, and is less trustworthy than letters written by him at the very time and under circumstances precluding a suspicion of misrepresentation."

Upon the authorities above cited it is submitted that the rulings of the trial Court in the present case, excluding testimony of witnesses which would have tended to show the state of mind or intent of Shetzline with reference to the conveyance of his one-third interest in the land to the plaintiffs, was error, and that for that error the judgment should be reversed.

CHARGE OF THE COURT.

The Court charged the jury, Ground of Appeal #22, with regard to the Bright letter, that irrespective of whether or not defendants told Mr. Bright to write the letter, the defendants may be bound by his action, if the defendants clothed him with the apparent authority to write that letter.

This was in the face of the defendants' request to charge, Ground of Appeal #19, which was as follows:

“Unless you find that Mr. Bright was authorized to call off the settlement, the defendants were not bound by his letter dated September 30, 1925.”

We contend that the charge, as made, and the refusal of the requested charge were both error, as pointed out above, there was no proof whatever that the defendants had ever told the plaintiffs that Mr. Bright was their lawyer, and certainly there was nothing in any part of the situation from which the plaintiffs could infer that a lawyer had a right to call off a settlement, when his sole employment was to consummate it. Besides that, the letter was, of course, nothing but the opinion of Mr. Bright, and in no sense did it purport to be anything else. The plaintiffs were necessarily put on inquiry as to the authority of Mr. Bright. Had they made inquiry they could easily have ascertained that Mr. Bright had no authority to call off the settlement. Furthermore, there was no proof that Mr. Bright represented anyone other than the Adams, whereas, the

property was owned by the Adams and Shetzline, and since this suit is not based on a contract signed by the Adams, the plaintiffs were bound to look to all of the owners of the property, and not just to the Adams. We, therefore, submit that this was error.

The defendants' third request, Ground of Appeal #20 (p. 110), was in the following language:

“If you believe that the plaintiffs, after receiving Mr. Bright's letter, still considered the contract in force, as evidenced by their subsequently demanding a settlement, they cannot hold that any default of the defendants on October 1, 1925, entitled them to a refund of their money.”

This was refused. Under any aspect of this case it must certainly be that, even though the Bright letter had been written by the specific authority of the Adams, if the plaintiffs did not rely upon that letter and did not say, upon the receipt of it: “Very well, the entire transaction is closed,” then, that letter had nothing to do with any default on the part of the defendants on the day fixed for settlement.

A year after the receipt of that letter by the plaintiffs, their lawyer, Mr. Sandberg, wrote the letter marked Exhibit D1 advising that now that his clients had received their searches they are now ready to make settlement, and requesting to be advised at what time the defendants would be ready to settle, and again, a year later than that, they sent their lawyer to undertake to secure a settlement.

“There is, however, another course open to the promisee. He may, if he pleases, treat the

notice of intended breach as inoperative, and await the time when the contract is to be performed, and then hold the other party responsible for all the consequences of non-performance. But in that case he keeps the contract alive for the benefit of the other party as well as for himself, and remains subject to all his own obligations and liabilities under the contract, and enables the other party not only to complete the contract, notwithstanding his previous repudiation of it; but also to take advantage of any intervening circumstances which would justify him in declining to complete it." 13 Corpus Juris, p. 701, par. 804.

These circumstances show that the plaintiffs kept the contract alive. They did not, in fact, rely upon the alleged repudiation set out in the Bright letter, and, therefore, could not thereafter be entitled to the return of their money, unless they showed that they thereafter made a tender, which put the defendants in default, or were legally excused from making such tender by something that thereafter occurred. It was, therefore, error, for the Court to refuse to charge the defendants' third request above.

It is fundamental that a person who is a party to a contract and who, by reason of the acts or defaults of the other party to the contract, may have a right to rescind, must exercise that right with reasonable promptness. A mere delay on his part will result in the right of rescission being lost. The rule is rested not on estoppel by lapse of time but is said to rest on a rule of "conduct-evidence," by which the person's conduct in failing to rescind within a

reasonable time is held to be conclusive evidence of an election not to rescind. *Faulkner v. Wassmer*, 77 N. J. E., 537 at 543. If mere delay is such evidence of an election not to rescind, how much more so was the evidence offered in the present case, by which it appeared that the plaintiffs after the alleged default of the defendants wrote a letter and sent their lawyer for the purpose of obtaining not a rescission but a performance of defendants' contract, and that not months, but years after the alleged default. It is submitted that the defendants' third request was entirely proper and that it was error for the trial Court to refuse to charge it.

The Court charged the plaintiffs' third request, which was in the following language:

“If the defendants did not have title to the premises on the date set for settlement, plaintiffs were not obliged to attend and offer payment, and were not in default because of their non-attendance.” Ground of Appeal #26 (p. 112.)

As pointed out above, a large part of the plaintiffs' effort was directed towards showing that the legal title to the entire premises did not stand in the names of the defendants, Adams. It is true enough that if the vendor is unable to perform at the time agreed upon for the passing of title, the tender of performance by the vendee is not required in order to enable him to rescind, and sue for the return of the money. However, in order for a purchaser to rescind for that reason, he must act promptly on discovering the fact or his right to rescind for that

reason will be waived. 39 Cyc., 1429. *Faulkner v. Wassmer, supra.*

In this case the Bright letter, which, it was alleged, was received on the date fixed for settlement, advised the purchaser that Shetzline was a one-third owner.

If the purchaser desired to rescind upon that ground, then he should have done so within a reasonable length of time. The first evidence of rescission in this case was the institution of suit, which was about 2 years after the information was received, which the plaintiffs now contend is their basis for rescission. Clearly the plaintiffs waited too long to set up lack of title as a ground for rescission.

The mere fact that the Adams did not have the full legal title was no proof whatever that the contract could not be performed. The contract, as has been repeatedly said in this brief, was made by the auctioneer on behalf of the sellers. The defendants undertook throughout to show that Shetzline was willing to join in the conveyance, but was prevented from doing so by the rulings of the Court.

This particular charge complained of flatly directed the jury that if the Adams did not have the full legal title, the plaintiffs were entitled to a verdict without showing a tender. This was clearly erroneous because, even assuming that the Adams had entered into the contract of sale, without having the legal title, still that would be no proof that they were unable to perform. It is common knowledge that people having merely an agreement to purchase land enter into agreements to sell, and frequently fix the time for settlement on the same day fixed for the conveyance to them, contemplating the

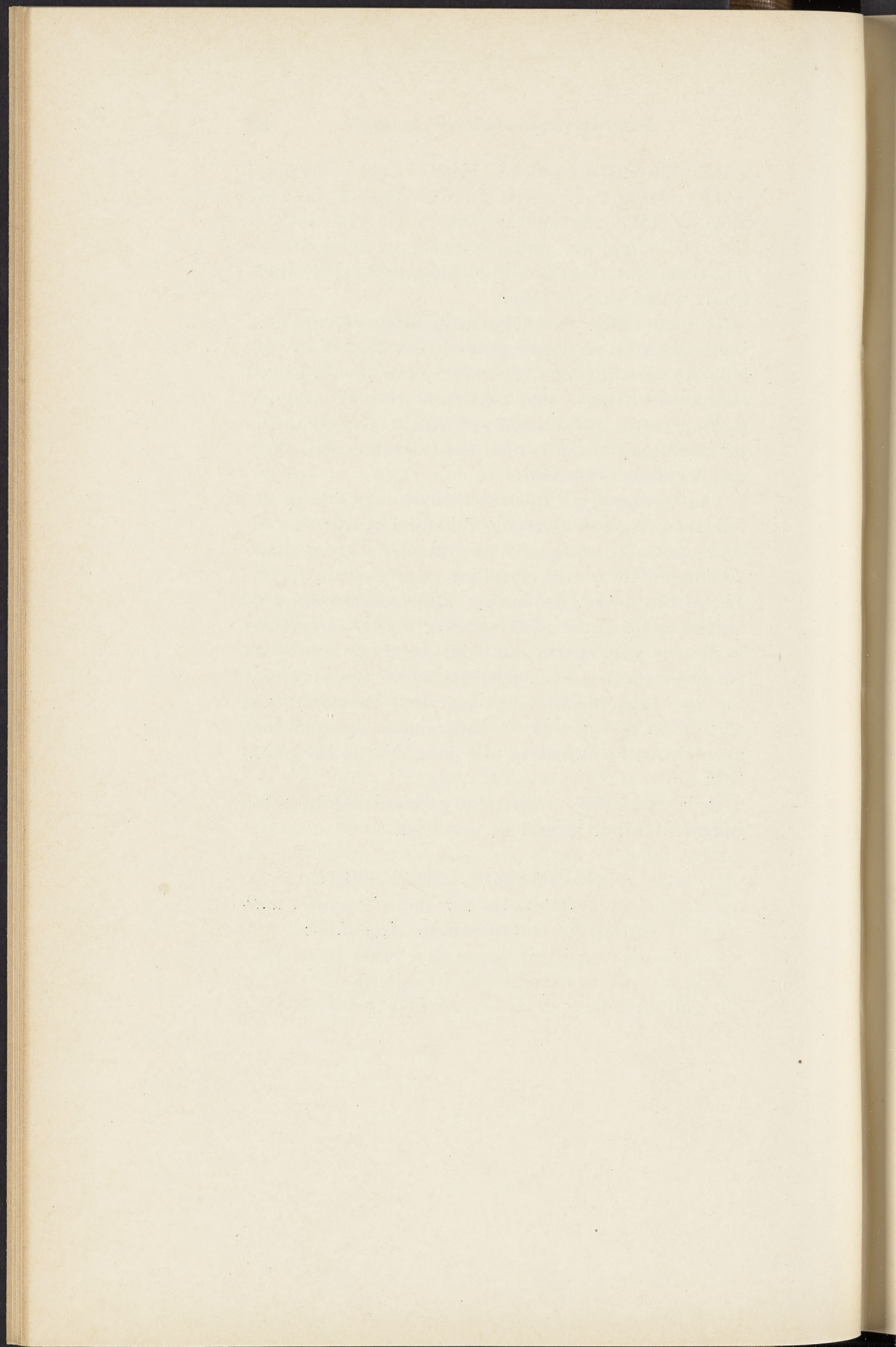
making of both settlements at one time. Certainly, if the vendees under such circumstances, should walk into the settlement and announce that, inasmuch as the vendor had not actually taken the legal title at that time, that, therefore, they intended to rescind, no Court would sustain them.

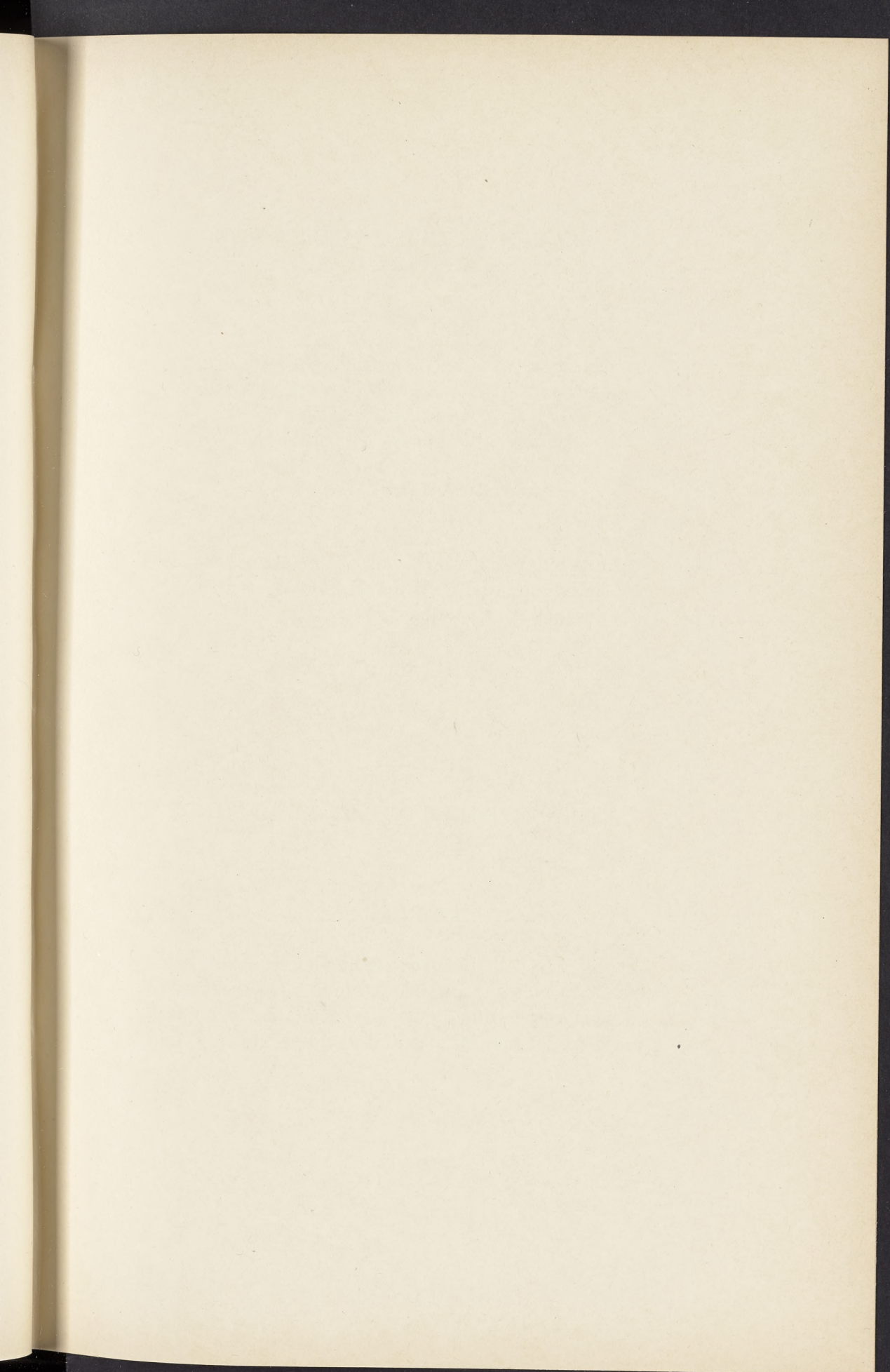
The mere fact that legal title was not vested in the Adams in no sense proved that they were unable to perform, and, therefore, for the Court to charge as he did in that particular respect was misleading to the jury, and necessarily resulted in the jury bringing in the verdict for the plaintiffs, which was certainly erroneous.

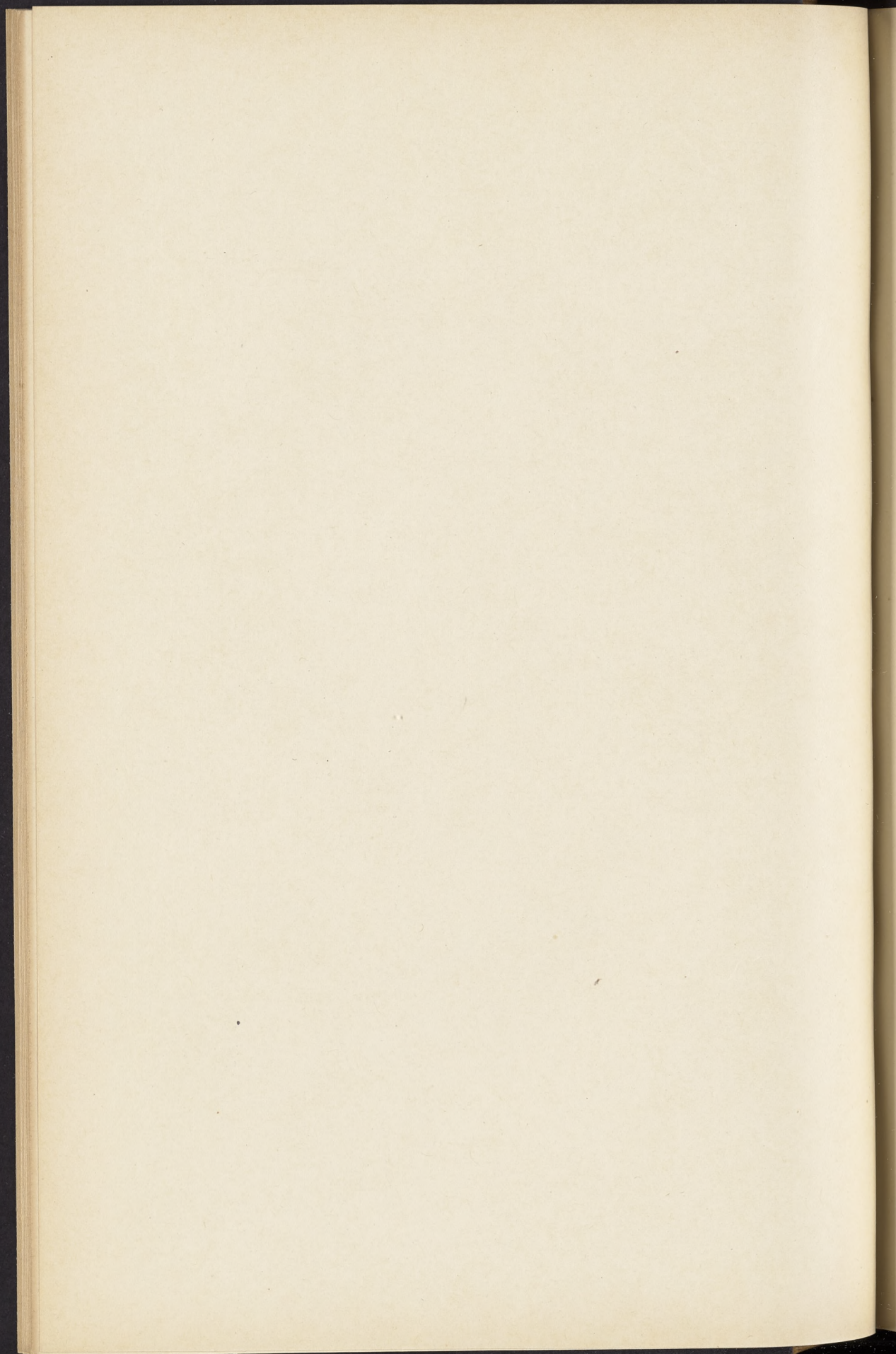
The testimony in this cause, on behalf of the defendants, showed that the defendants were at all times ready to settle, but the plaintiffs never made a tender. They were clearly not entitled to recover. The errors in the trial in this case excluded from the testimony all proof of the ability of the defendants to deliver a good title, and the charge of the Court put the case in such a posture before the jury that the jury was bound to believe that the mere lack of title on the part of the defendants was sufficient ground for the awarding of a judgment to the plaintiffs.

It is, therefore, respectfully submitted that the judgment below should be reversed.

THOMPSON & HANSTEIN,
Attorneys for and of Counsel with
Defendants-Appellants.







NEW JERSEY COURT OF ERRORS
AND APPEALS.

SOLOMON FULD, SIMON WEIL, EDWIN MAYER,
MARY J. MELGIN, MRS. EDWARD WHITEHILL
AND WILLIAM SANDBERG, executors of
the estate of EDWARD WHITEHILL,
deceased,
Plaintiffs-Respondents,

v.

ELIZABETH B. ADAMS and HARRY ADAMS, executors
of the estate of RURIC N. ADAMS, deceased,
Defendants-Appellants.

ON APPEAL.

BRIEF OF PLAINTIFFS-RESPONDENTS.

STATEMENT.

In this suit, plaintiffs-respondents seek to recover from defendants-appellants the sum of \$2,300 first payment made on account of the purchase of four (4) lots numbered 14, 15, 29 and 30, in block

128, in Wildwood, N. J., listed for sale by Elizabeth B. Adams, executrix, and exposed to public auction sale by John A. Ackley & Son, Auctioneers, Agents, on the 17th day of August, 1925, settlement to be made October 1st, 1925, at the office of Robert Bright, corner First and New Jersey Avenues, North Wildwood, N. J. (Exhibit P1, p. 99).

At the time of the sale, the lots in question were owned by the estate of Ruric N. Adams and Chas. H. Shetzline, as tenants in common, the estate of Ruric N. Adams being the owner of a two-thirds undivided interest, and Chas. H. Shetzline of a one-third undivided interest.

On the 1st of October, 1925, plaintiffs-respondents were prepared and ready to make settlement, but early in the morning of that day, they received a letter from Robert Bright, Attorney of the Adams Estate, in which he stated (p. 101 Exhibit P2).

“In reply to your inquiry as to whether we are ready for settlement on premises Atlantic Ave, between Spencer and Spicer Avenue, Wildwood, N. J., would say that I do not believe the sale will go through for the reason that the property is in litigation in the Court of Chancery.

Mr. Chas. H. Shetzline, one-third owner therein, filed a bill sometime in June for the partition thereof: Mrs. Adams, one of the executors, listed it for sale with Senator Ackley, but naturally the Court proceedings have priority over the sale: I have advised Senator Ackley the facts therein.

I do not see anything but what the return of the money to you would be the best method out

for you and your associates. Mrs. Adams did not have the sanction of her co-executor in listing the property. Mr. Shetzline, the 1/3 owner, is not bound by the listing or sale, not having signed up nor agreed thereto.”

The letter was dated September 30th, 1925, and was received by the purchasers on the morning of October 1st, 1925.

After receipt of this letter, plaintiffs-respondents did not attend Mr. Bright's office and tender themselves ready to settle, and defendants-appellants likewise did not attend for the purpose of making the settlement.

Finally, in 1927, plaintiffs-respondents handed the matter to Samuel M. Garfinkle, Esq., for attention, and he called upon Elizabeth V. Adams and made demand for the return of the deposit money. The testimony of Mr. Garfinkle (p. 45, l. 20), touching this incident, is as follows:

“Q. Do you recall the conversation you had with her?

A. Yes. I went there and asked —told her who I represented and I told her the circumstances of the case, that the plaintiffs had paid the deposit of ten per cent—”

* * * * *

“A. —ten per cent of the purchase price which was \$2,300, the plaintiffs had paid at the sale for this property. She said she was familiar with that, and I asked her if she was willing

and ready to either give a deed for this property under the terms of the original agreement as prepared by the auctioneer, Mr. Ackley, or was she willing—if she didn't care to do that, was she willing to return the ten per cent deposit, and to that she replied that she absolutely would not return the deposit, that she considered the money forfeited. She said she wouldn't convey the property and she wouldn't return the money. She said, 'What do they think this is, a horse race? They lose the race and then they want their money back.' From that I think we had very few words and we parted."

Suit was thereupon brought and resulted in a verdict in favor of the defendants-appellants. A rule to show cause was allowed, and this verdict set aside, as contrary to the evidence. The opinion in that case is found in 147 Atl. Rep., 787. In that case, the point most strenuously urged on the part of the defendants-appellants was that the letter of Robert Bright had been improperly received in evidence. The Supreme Court held that it had been properly admitted in evidence.

At the re-trial, the verdict was in favor of the plaintiffs-respondents, and to reverse the judgment entered thereon, this appeal is taken.

LAW.

The first ground of appeal urged by the defendants-appellants is that the Court erred in admitting

in evidence the letter of Robert Bright, addressed to Edward Whitehill, dated September 30th, 1925, and marked Exhibit P2. The testimony preceding the admission of that letter was as follows: (p. 23, l. 1).

“Q. You knew Ruric Adams in his lifetime?

A. Very well.

Q. Do business for him?

A. I did.

Q. After his death do you know who was appointed the executors?

A. I do.

Q. Who?

A. Elizabeth B. Adams and Harry L. Adams.

Q. Do business for them?

A. I do.

Q. In what capacity?

A. As attorney.

Q. For the estate?

A. For the estate.

Q. Ever attend any sales of real estate for them?

A. I did one.”

* * * * *

“Q. I show you a letter bearing date September 30, 1925, written by you, and ask you if you wrote that letter?

A. Yes, sir, I did.

Q. That had reference to what transaction?”

* * * * *

“Q. Mr. Bright, did you know of Mrs. Adams putting real estate in the hands of John A. Ackley and Sons for sale?

A. I did.

Q. At the sale of August 17, 1925?

A. Yes, sir.

Q. Lots 14, 15, 28 and 30, in Section 128?

A. I did.

Q. Did you know that under the agreement that Mr. Ackley made with the purchasers, the settlement was to be made at your office on the first of October?

A. Yes, sir.

Q. How did you get that information?

A. Senator Ackley told me, as also did Mrs. Adams.

Q. Both of them told you?

A. Yes.

Q. Did you then do such acts as you were called upon as attorney to do in connection with that?

A. I prepared the deed.

Q. Prepared the deed?

A. Yes.

Q. When the first of October came, who was there?

A. No one was there.

Q. Neither the purchasers nor Mrs. Adams?

A. No.

Q. Nor Mr. Adams, the other executor?

A. No.

Q. This letter of September 30, 1925, you sent to Mr. Whitehill, did you?

A. Yes, sir.

Q. Was that letter in connection with the settlement of these lots that I have just asked you about?

A. Yes, sir.

Q. It was?

A. Yes, sir."

On p. 25, at l. 25, he further testified:

"Q. Mr. Bright, what conversation did you have with Mrs. Adams when she told you that this settlement was to be made at your office?"

* * * * *

"A. I asked her if she wanted me to prepare the papers, inasmuch as the settlement had been scheduled at my office, and she said yes.

Q. Did she say anything about your taking care of the settlement?

A. Yes, sir.

Q. Wanted you to take care of the settlement?

A. Yes, sir.

Q. And your actions were along that line?"

* * * * *

"(Letter admitted in evidence.)

Q. I understood you to say that on the first of October Mrs. Adams did not attend your office for the purpose of making settlement?

A. That is right."

On p. 28, l. 35, on cross-examination, Mr. Bright, in connection with this settlement testified as follows:

“Q. Mr. Bright, in connection with this settlement you were to do what? Make up the figures and draw the papers?”

A. I had authority to prepare the deed and effect settlement, yes, sir.”

(p. 27, l. 30):

“Mr. Bourgeois: Mr. Hanstein, will you admit that Mrs. Adams and Mr. Adams were the owners as executors—that is, the estate of Ruric Adams was the owner of only a two-thirds interest in that real estate?”

Mr. Hanstein: Yes; that the legal title stood two-thirds in the estate of Adams and one-third in the estate of Shetzline.

Mr. Bourgeois: Will you also admit that at that time proceedings in Chancery were pending for the partition of that land by the executors of Shetzline, that estate being owner of a one-third interest in it?

Mr. Hanstein: Yes, I will admit that at that time partition proceedings were pending. I think it was started before. Mr. Bright would know whether it was before the date of the agreement or not.”

On pp. 4 and 5 of appellants' brief is set forth objections to the admission of this letter. Whether these objections are set forth in the nature of argument or simply as a statement of fact, does not ap-

pear. If, however, they are set forth as argument, respondents' answer is that the matters thus raised are questions for the jury which should have been raised on a rule to show cause, and not on an appeal.

The question of Bright's letter, however, is more fully discussed on p. 8 of appellants' brief. The objection is that there was no proof of any authority on the part of Mr. Bright to send the letter, and that the letter was purely an expression of opinion on the part of Mr. Bright which could not be binding upon the defendants-appellants.

Mr. Bright, on cross-examination, (p. 29) testified:

“Q. Had you been authorized by Mrs. Adams to write this letter?

A. I was not.”

On p. 86, l. 35, the trial judge submitted the question of authority to write the letter to the jury in the following language:

“Did Robert Bright have a right to bind the defendants by that letter? The defendants say that he was not authorized to write the letter. Bright says that he had no special authority to write the letter. But I charge you that the defendants may be bound by that letter, irrespective of whether or not Bright had vested in him the actual authority to write that letter. That is to say, irrespective of whether or not the defendants told Bright to write that letter, still the defendants may be bound by his action if the defendants clothed him with the apparent authority to write that letter. In other words,

a principal is bound by the acts of his agent which are within the authority particularly vested in him, as well as by those acts of that agent which are within the scope of his apparent authority.”

On p. 87, l. 15, the Judge further commented upon Bright's authority to bind the appellants by the letter, and the question of Bright's authority was squarely left to the jury, and the jury found that question in favor of the plaintiffs-respondents. Whether the finding of the jury was or was not against the clear weight of the evidence cannot be considered here, and there was no exception taken to the Judge's charge on this point. It is submitted that the admission of the letter and its binding force upon the defendants-appellants is established. It is submitted that the case of *The National Iron Armor Company v. Bruner and Baxter*, (19 N. J. Eq., 331) cited by defendants-appellants is not in point, and that the letter was properly admitted, and the finding of the jury that Bright had authority to write it is not for this Court, if it was properly admitted.

The argument of defendants-appellants, further touching the Bright letter (p. 9) is purely a question of fact for the jury, and not for this Court on appeal. They contend that the Court erred in not striking out the letter, Exhibit P2. Defendant-appellants' argument is that Mrs. Adams told Mr. Bright only that he should prepare the papers and take care of the settlement, and that that testimony was clearly privileged, and, therefore, the letter erroneously admitted.

It is submitted that where an agent deals with a third party for his principal, the extent of the authority conferred upon him by such principal is not a privileged communication, but is always subject to inquiry when the scope of the agent's authority is in question before a Court.

In 40 *Cyc.*, p. 2392, it is stated:

“No privilege arises out of the relation of principal and agent.”

In the case of *Holmes v. Comegys* (1 Dall., 439—U. S. Supreme Reports—1 L. Ed. 213), the Court held:

“It would be a very dangerous consequence if it was established that a commercial agent was not amenable as a witness in a court of justice in a cause against his constituent. It is straining the matter of privilege too far, and if the law makes him a witness, we are too fond of getting at the truth to permit him to excuse himself from declaring it because he conceives that in point of delicacy it would be a breach of confidence.”

Sundheim v. Schmidt (66 N. Y. Supp. 1034);
2 *C. J.*, p. 942, Sec. 702.

It is next argued that the Court erred in not permitting Bright to give testimony to show that the Adams and Shetzline were bound by the listing, in order to relieve the defendants from the rule of law which provides that where the defendant cannot make title, then a tender is not necessary, which

questions are set forth on p. 12 of the brief. The first one, marked No. 3, inquires if Bright knew that Shetzline was unwilling to sign the deed. The testimony had already appeared that the deed had not been signed; and it also appeared by stipulation that Mrs. Adams had listed the property, even her son not joining in that listing. There is no claim that Shetzline ever listed the property, and Bright's letter showed that Shetzline was not bound by the listing. Therefore, this question was clearly irrelevant; whether Shetzline was willing or unwilling, so long as he did not sign the deed or authorize some other person to sign it for him, his state of mind would be unavailing in this suit. The same is true with regard to the next question, to wit: "Did Mr. Shetzline ever refuse to sign a deed?" Whether he refused or did not refuse, would not be sufficient to give title to the purchasers, only his signature or his signature by some other person lawfully authorized would be binding on him under our statute of frauds. The same is true with the question numbered 5: "Do you know if Mr. Shetzline had authorized this property to be put into the sale?" It was purely hearsay, and if it had been authorized to be put in the sale and he was to be bound by it, then either he or the auctioneer would have been obliged to sign his name to make his authorization binding on him, neither of which was done or offered.

The next question is numbered 6, and is as follows: "Wasn't Mr. Shetzline as much bound by the listing as Mrs. Adams?" and simply asked for a conclusion; and the next question, numbered 7, as follows: "Did Mr. Shetzline ever tell you whether or

not he would sign a deed for this property?" was hearsay. The question numbered 8, as follows: "Had he (Shetzline) said that he would not sign a deed?" was answered above.

None of the questions were cross-examination, as the plaintiffs-respondents had not gone into this phase of the case at all.

On p. 13 of appellants' brief, it is alleged that the Court erred in permitting Bright to answer question numbered 16, as follows: "Did he (Shetzline) authorize this property to go into the sale?" The question was objected to on the ground that it was hearsay, and that they were trying to bind real estate by a verbal statement, and the Court held that they were attempting to have the witness draw a conclusion from something that Shetzline may have told him; and it is submitted that the question was properly rejected.

The next question, numbered 17, is as follows: "What did Mr. Shetzline say?" and is clearly hearsay and properly objected to.

The next question, to wit: "In the presence of plaintiffs, did you hear Mr. Shetzline give any directions with regard to this sale?" was objected to on the ground that it was not binding upon plaintiffs-respondents unless they heard, and then it would not be binding because contrary to the statute of frauds, as Shetzline did not sign personally or by authorized agent.

The next point is that the Court erred in refusing to non-suit the plaintiffs. When the motion for non-suit was made, it appeared either in testimony or by admissions of the pleadings or admissions of the parties that the property had been listed for sale

with Ackley & Son by Mrs. Adams, the property had been sold, \$2,300 had been paid as the first payment, the agreement of sale had been signed by Adams which provided for a conveyance of the property, free and clear of all encumbrances, except any mortgage accepted in settlement, and usual restrictions running with the land. It appeared by Mr. Bright's letter and his testimony and the admission of counsel that the Adams owned only an undivided two-thirds interest in the land; that the defendants did not appear at the place of settlement on the day appointed for settlement, and the purchasers being apprised of the inability of the defendants to make title likewise did not appear at the time and place; that a demand was made on Mrs. Adams, either for a conveyance of the land or a return of the down money paid; that she refused to convey the land and refused to pay the moneys. Under these circumstances, it is submitted that the non-suit was properly denied.

The next point raised is that the Court erred in refusing to permit Mr. McMullin to testify touching Shetzline's willingness to sign a deed for the property. The first question was: "Do you know whether or not Mr. Shetzline was willing to sign a deed for this property?" which was objected to as being irrelevant and immaterial, in view of the fact that he did not sign, and the objection was sustained. In addition to the reason assigned, the answer would have been purely hearsay and not binding upon Shetzline. Even Shetzline's own statement that he would sign would have been unavailing under the statute of frauds. He had not signed, and his written signature was necessary to bind him.

The next question is: "Did you know that a deed had been prepared for this settlement, making Mr. Shetzline a party grantor?" and is objectionable for the same reason. If Shetzline had signed the deed and the Adams had signed the deed, and they had given plaintiffs-respondents notice of their willingness to convey, it would have presented a different situation; but what Mr. Shetzline's state of mind was regarding this sale, where he was in no manner bound under the statute of frauds, was of no moment between the parties to this suit, and even if Mr. Shetzline had been willing, in view of the fact that the Adams refused to convey, it could not have affected this suit.

The next question was: "What I want to know is did he refuse to sign a deed for this property?" That was objected to as irrelevant and immaterial, and in view of the fact that Mr. Shetzline was not a party to the agreement, and he did not actually sign the deed, it is submitted that it was immaterial whether he did or did not refuse to sign the deed.

The next question objected to was because the Court would not permit the answer to the question to Mr. McMullin, to wit: "After the filing of the bill on July 15, 1925, what steps did you take in the proceedings?" Also: "What reason was there for delaying the prosecution of these proceedings?" They were objected to upon the ground that the proceedings were in court, and that it was wholly immaterial as between plaintiffs-respondents and defendants-appellants what the proceedings had been in the Court of Chancery between the defendants-appellants and Mr. Shetzline. At the time of the sale, plaintiffs-respondents knew nothing, whatever, of

the Chancery proceedings, and those proceedings, it is submitted, were wholly foreign to this case, except only to show the fact that the Adams could not convey a marketable title.

The next question objected to was that the Court erred in refusing to permit Mr. Bright to answer the following question: "Q. Do you know if Mr. Shetzline was willing to sign that deed?" That question is similar to the one in like language put to Mr. Shetzline, and the argument above applies to this question.

Then, a number of cases are cited for the purpose of showing Mr. Shetzline's state of mind. It is submitted that these cases have no bearing, whatever, on this case. The state of mind of Mr. Shetzline was not material, and was not relevant in this cause; the suit was for the return of the purchase moneys by the Adams, who received it, after the Adams could not convey a marketable title, because of Mr. Shetzline's outstanding one-third interest, and later because Mrs. Adams refused to convey, and Mr. Shetzline's state of mind could in no manner be a bar to plaintiffs-respondents recovering the down money from the Adams who received it, in view of the refusal of the Adams to make a deed immediately prior to the instituting of this suit.

Defendants-appellants argue that plaintiffs-respondents were not entitled to have the money back unless they show that they made a tender of settlement or were legally excused from making such tender, and cite the case of *Bernstein v. Kohn* (96 N. J. L. 223). That case holds that the universally recognized legal rule is that where there are concurrent covenants to be performed by vendor and vendee,

that before the latter is enabled to rescind and sue for the breach of the contract, he must show tendered performance of such concurrent covenants on his part, and that he has demanded performance by the vendor of concurrent covenants on his part. The Court then proceeds:

“There is an equally well recognized exception to this general rule, and that is in case a vendor is unable to perform at the time agreed upon for the passing of the title, tender of performance by the vendee is not required in order to enable him to rescind and to sue his vendor for the breach of the contract.”

Under the law, as thus stated, when the Adams were unable to perform, because of the outstanding one-third interest on the 1st of October, 1925, suit might have been instituted forthwith to recover the deposit. However, it was not instituted forthwith, and before being instituted a demand was made upon Mrs. Adams, the vendor, either to convey or to repay the money. She refused to do either, and the suit was thereupon brought.

As stated in 39 *Cyc.*, p. 1562, Sec. (e):

“A formal tender of the purchase money by the purchaser is excused or waived if the vendor fails to perform a covenant which is precedent to the purchaser’s obligation to pay, or if the vendor is wholly unable to give a good title to the property sold, as where the property is encumbered at the time fixed for performance or where the vendor fails to keep his appointment as to the time and place for performance.”

In the case of *Doutney v. Lambie* (78 Eq. 277), the Court held:

“Specific performance of a contract to purchase real estate will not be decreed if the marketability of the title depends on the establishment of a fact, and that fact is in reasonable doubt.”

In the same case, at p. 279, the Court, quoting from the case of *Tillotson v. Gesner* (33 N. J. Eq.—6 Stew.—313), said:

“The purchaser should have a title which shall enable him not only to hold his land, but to hold it in peace; and if he wishes to sell it, be reasonably sure that no flaw or doubt will come up to disturb its marketable value. The Court cannot satisfactorily or conclusively settle a title in the absence of parties who are not before them in the suit to assert their estate or interest in the lands.”

It is then contended that the Court erred touching Bright's letter, as it was not an authority but only an expression of opinion, and cites the case of *Naugle v. McVoy* (98 N. J. L. 137). That case is not in point because in that case when the demand was made, a perfect title was tendered. If a deed signed by the Adams and Shetzline on the 1st day of October, 1925, or upon the date that Mr. Garfinkle requested performance of the contract, in 1927, had been tendered, or, in the absence of a refusal by Mrs. Adams, if it had been tendered within a reasonable time thereafter, it would have been sufficient,

but no such deed ever was tendered, and, therefore, the *Naugle v. McVoy* case is not in point.

Objection was made to the refusal of the Court to charge requests of defendants-appellants. The Court had charged the law touching the apparent authority of an agent, and was asked to charge (p. 24 of brief):

“Unless you find that Mr. Bright was authorized to call off the settlement, the defendants were not bound by his letter dated September 30, 1925.”

This request was a nullification of the law of apparent authority of an agent, and the trial Judge under the facts in this case was justified in its refusal.

The next request was (p. 25 of brief):

“If you believe that the plaintiffs, after receiving Mr. Bright’s letter, still considered the contract in force, as evidenced by their subsequently demanding a settlement, they cannot hold that any default of the defendants on October 1, 1925, entitled them to a refund of their money.”

That request in effect asks the Judge to charge the jury that by making demand for the conveyance of the property or for the money back in 1927, was a waiver of defendants-appellants’ default in 1925. It is submitted that such is not the law. Further, it entirely overlooks the testimony of Mr. Garfinkle that when he called on Mrs. Adams and demanded a conveyance, she refused to make the conveyance.

The next objection is that the Court erred in charging plaintiffs-respondents' third request, to wit (p. 27 of brief):

“If the defendants did not have title to the premises on the date set for settlement, plaintiffs were not obliged to attend and offer payment, and were not in default because of their non-attendance.”

This request was taken from the case of *Bernstein v. Kohn* (ibid), and it is submitted that it was properly requested in this suit, and properly charged by the trial Judge. Defendants-appellants cite the case of *Faulkner v. Wassmer* (77 N. J. Eq. 537), at p. 543. That case was a real estate agreement founded in fraud, and the question of laches was considered in it. It is submitted, however, that that case has no bearing upon the case in question, in view of the flat refusal of Mrs. Adams to make the conveyance.

On p. 29 of the brief, defendants-appellants then argue that the mere fact that title was not vested in the Adams in no sense proved that they were unable to perform. It is submitted that the mere fact that the title was not vested in the Adams, coupled with the fact that on the day of settlement an undivided one-third interest was outstanding in Mr. Shetzline, who had pending a partition proceeding to divide the properties, with no evidence that Mr. Shetzline had ever executed a deed for his interest in the properties to the plaintiffs-respondents, and the proof that the Adams never had executed a deed for their two-thirds interest in the property, plus the testimony that Mrs. Adams refused to make the con-

veyance, shows that plaintiffs-respondents are entitled to have the deposit moneys returned.

It is respectfully submitted that no reason has been shown by defendants-appellants for the reversal of the judgment in this cause.

Respectfully submitted,

SAMUEL M. GARFINKLE,
BOURGEOIS & COULOMB,
Attorneys for Plaintiffs-Respondents.

