

## NEW JERSEY

# Court of Errors and Appeals

---

THE S. E. CROWLEY CO., <i>Deft. in Error,</i> <i>v.</i>	} On Error.
CHARLES R. MYERS, <i>Pl'tff in Error.</i>	

---

### Brief of Plaintiff in Error.

This action is to recover commission for alleged sale of real estate of plaintiff in error. The declaration contains two counts, one on a writing, the other the common counts. As the statute of frauds obliges a writing in the case of a claim for common issue on sale of real estate, the common counts will avail nothing. Two pleas are interposed, the general issue to the common counts and a special plea concluding with a verification in answer to the count on the writing. To the special plea there was no reply, so that legally defendant in error is concluded. *McGlade v. McCormick*, 28 *Vroom* 430. But plaintiff in error proceeded to trial supposing issue had been made to the special plea, and it may be said the case was tried on that theory. The contract offered in evidence, and which was the basis of plaintiff's claim, authorized plaintiff to sell a property of defendant for \$70,000, and then these words: "On

which amount I agree to pay to you a commission of two per cent., or on any selling price which may be agreed upon," &c. The declaration alleged performance, and at the trial there was no amendment. By the terms of the agreement it was to be void after ten days.

## I.

It was error not to have granted the motion to nonsuit. The agreement clearly contemplated a sale for cash. By the proof, the sale was partly in cash and partly in exchange. It appears that after the agreement was made plaintiff sought Mr. Myers and urged a sale on a basis different from that set up in the agreement, and upon terms alleged in the special plea Myers consented. Since the proof was materially different from the allegation no judgment can legally be entered.

## II.

It was also error to refuse a direction for the defendant. What is said relative to the nonsuit applies with equal force to this motion. In addition, however, it is to be noticed that Myers' testimony supports the special plea.

## III.

As the agreement between Myers and Bechtel (*Exhibit P 2*) was not in accordance with the agreement sued upon nor in support of the declaration it was manifest error to admit it, at least without any amendment of the pleadings.

## IV.

There is nothing in the deed (*Exhibit P 3*) to identify the property as that referred to in the agreement, nor was there proof *aliunde*, so that it was error to admit the deed without such proof.

## V.

The seventh, eighth and ninth assignments of error to the charge of the Court wherein he leaves to the jury the question of whether defendant waived the terms of the original agreement and entered into a new agreement as to how the \$70,000 was to be paid. We submit this was error. No waiver was pleaded and nowhere a suggestion that defendant had made a new agreement. On the contrary, as above indicated, the pleadings assert a sale for \$70,000 in accordance with the agreement. The Court's attention was several times called to this departure, but without effect. By the charge the jury was permitted to find a contract not declared on.

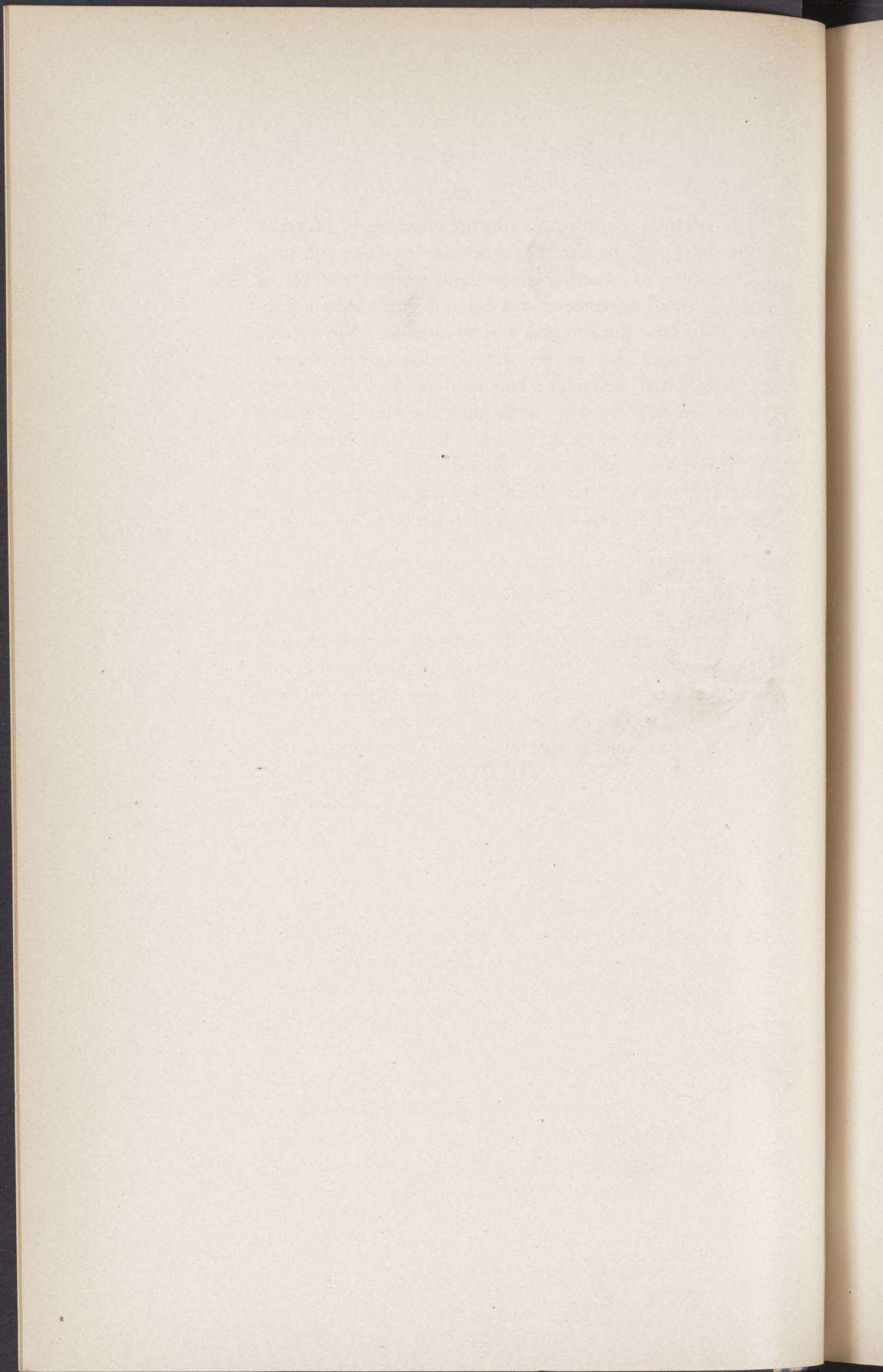
## VI.

It was error in denying defendant's second request. If the jury believed Myers' version respecting the consideration of the transfer, then a new agreement was made, which made new pleadings necessary.

For these reasons a new trial should be granted.

THOMPSON & COLE,

*Sol'rs.*



# New Jersey Court of Errors and Appeals.

---

THE S. E. CROWLEY CO.,  
*Pltff., Defendant in Error,* }  
vs. } On Error.  
CHARLES R. MYERS,  
*Def., Plaintiff in Error.* }

---

## Brief of Defendant in Error.

---

*As to the First Cause Assigned for Reversal :*

First, Refusal to non-suit.

Defendant's attorney alleges the following propositions to entitle him to a non-suit :

(a) That the agreement sued on is not an assignable agreement.

This contention is not supportable.

Rev. Stats. Sec. 117, p. 1237.

Rev. Stats. Sec. 340, p. 2591.

(b) That there is no proof that the defendant has not paid the money.

This contention is refuted by the testimony.

Printed Book, lines 1 to 20, p. 18.

" " " 32 " 39 " 28

(c) That the agreement sued upon is an agreement for cash, and the agreement offered in evidence is an agreement to sell for other than cash.

The evidence sustains the charge of the Court that the defendant accepted the terms of the contract, Ex. p. 2, and waived the requirement that the sale should be for all cash. This is further corroborated by the fact that the total selling price of the "Pierrepont" was seventy thousand dollars; that the value of the "Brookhurst," taken in part settlement of this price, was thirty thousand dollars; and that defendant paid plaintiff one thousand dollars on account of the commissions of fourteen hundred dollars agreed upon. Defendant's action in paying one thousand dollars when otherwise, according to his contention, he was obliged for a payment of but eight hundred dollars, negatives the theory that he did not accept the purchaser and contract procured by the plaintiffs, and the jury so decided.

That no variance between the allegation in a pleading and the proof shall be deemed material, unless it shall have actually mislead the adverse party to his prejudice in maintaining his action or defense upon the merits; whenever it shall be alleged that a party has been so misled, that fact shall be established to the satisfaction of the Court trying the cause, and thereupon the Court may order the pleading to be amended

upon such terms as shall be just. See Gen. Stat. "Amendment and Variance," Sec. 136, p. 2555.

A variance between the pleading and proof is immaterial unless the party is misled and prejudiced by it. *Hallock vs. Commercial Ins. Co.*, 2 Dutcher 268; *Ashman vs. Evans*, 3 Stock 151; *Bunting Ads. Allen*, 3 Har. 299; *Stothoff vs. Dunham*, 4 Har. 181.

(d) That the agreement sued upon was void after ten days, and that while the contract of purchase and sale was executed within three days after the date of the agreement sued upon, the deed from the defendant to the purchaser was not executed and delivered until sixteen days after the date of said agreement.

The agreement sued upon contains this clause (Printed Book, p. 4, lines 36 and 37, p. 5, lines 1 and 2): "On which amount I agree to pay you a commission of two per cent. <sup>or</sup> on any selling price which may be agreed upon between myself and the purchaser in case you procure a purchaser for the same." The right of a broker to his commissions is complete when he has procured a purchaser able and willing to conclude a bargain on the terms on which the broker was authorized to sell.

*Huids vs. Henry*, 7 Vr. 328.

The rule of law is, that if the broker brings the parties together and they agree to the terms of the sale, and in consequence thereof a conveyance is made, the broker is held to have done his part and to have made the sale.

*Shepherd ads. Hedden*, 3 Dutch 341.

*Vreeland vs. Vellerlein*, 4 Vr. 249.

*Derickson vs. Quimby*, 14 Vr. 373.

*As to the Second Cause Assigned for Reversal:*

Second, Refusal to direct a verdict.

Defendant requests a direction for a verdict "Substantially upon the same grounds that the motion was made for a non-suit."

No new grounds have been advanced, and those offered in support of the motion for a non-suit have been fully considered above.

*As to the Third Cause Assigned for Reversal:*

Third, Admission of paper, Exhibit p. 2.

Under the charge of the Court as charged (Printed Book, p. 38, lines 14 to 38, and p. 39, lines 1 to 17) and under the evidence therein reviewed it was not error to admit Exhibit p. 2 in evidence.

*As to the Fourth Cause Assigned for Reversal:*

Fourth, Overruling testimony of defendant as to how he came to execute contract.

This cause is assigned because the Court declined to admit verbal testimony to go to alter or vary a written agreement. Printed Book, lines 6 to 10, p. 24.

Parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument.

1 Phil. & Am. on Evid. 753.

2 Phil. on Evid. 350.

2 Stark. on Evid. 544.

1 Green. on Evid. Sect. 275.

*As to the Fifth Assignment of Error:*

Fifth, Error in submitting to the jury the question of whether the property in deed offered was same as referred to in agreement.

No objection was made to the introduction of the deed, Exhibit p. 3, by the counsel for the defendant when the same was offered and admitted in evidence. Printed Book, p. 12, lines 8 and 9.

*As to the Sixth Cause Assigned for Reversal:*

Sixth, "Refusal to charge the defendant's second request."

Under the charge of the Court as charged and under the evidence therein reviewed, it was not error to refuse to charge defendant's second request. Printed Book, p. 38, lines 14 to 38; p. 39, lines 1 to 17.

*As to the Seventh Cause Assigned for Reversal:*

Seventh, Statement of Court to jury that they might find for plaintiff if they found that subsequent to making of contract defendant agreed to accept something other than cash.

*As so agreed. P. BOOK P 78. Lines 32 &c.*

The statement of the Court in the form presented was not error.

*Ondersoor v Gray, 4 C S Gr. 765; Beuy on Sales, P 224; 2 R.A. 7*

It is always the province of the jury, after the evidence is in, to determine its sufficiency.

1 Greenleaf on Ev., part 2, Sect. 49.

*As to the Eighth Cause Assigned for Reversal:*

Eighth, Statement to jury as to their right to look at subsequent conduct of parties to see whether there was a waiver of right to insist upon cash.

The question as to whether subsequent conduct of parties could result in a waiver of the right to insist upon cash as set forth in the written contract was a question of law, which when once determined by the Court affirmatively placed the Court in a position to submit to the jury the question of fact as to whether or not there was such conduct or acts from which they, the jury, could infer such intention to waive.

Greenleaf on Ev., Book 1, part 2, Sec. 49.

*Pace v. Laugdon 99 U.S. 578.  
Seabody v. Mazumi. 57 Eng Rep 699.*

*As to the Ninth Cause Assigned for Reversal:*

Ninth, Statement of Court as to conduct of Meyers and acceptance by him of property in exchange as it might affect the question of waiver.

The statement of the Court in the form presented was not error.

It is always the province of the jury, after the evidence is in, to determine its sufficiency.

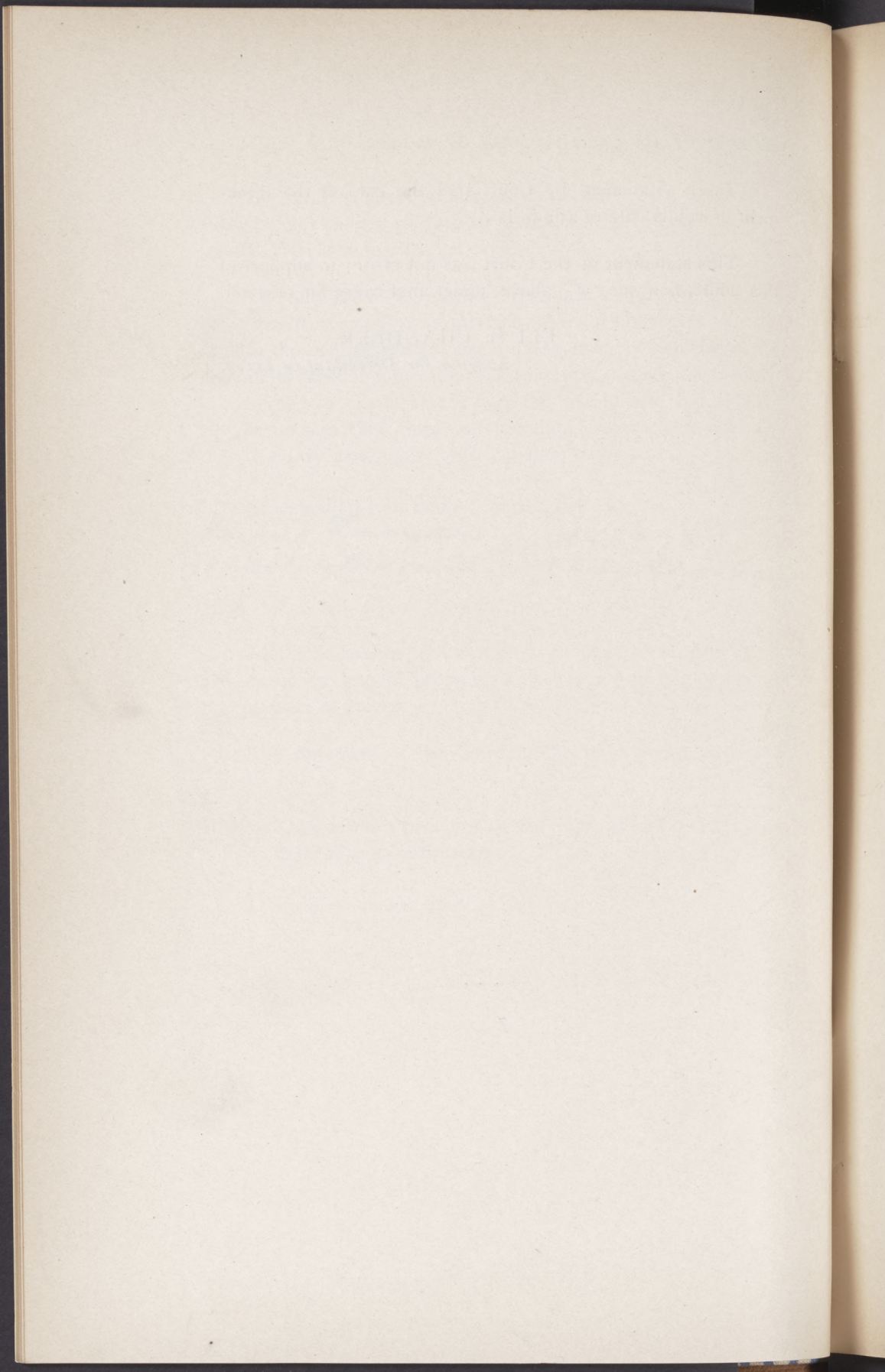
1 Greenleaf on Ev., part 2, Sec. 49.

*As to the Tenth Cause Assigned for Reversal:*

Tenth, Statement by Court that the date of the agreement of sale is date of sale in law.

This statement of the Court was not error; in support of this contention see "d" above, under first cause for reversal.

ELI H. CHANDLER,  
*Solicitor for Defendant in Error.*



## NEW JERSEY

# Court of Errors and Appeals

THE S. E. CROWLEY COMPANY,  
*Pltff., Def't in Error,*  
*v.*  
CHARLES R. MYERS,  
*Def't, Pltff. in Error.* } Error.

---

### WRIT OF ERROR.

(Returnable December 17, 1902.)

(Filed November 19, 1902.)

NEW JERSEY, ss.—The State of New Jersey to the Justices of our Supreme Court, Greeting: 10  
[L. s.] Forasmuch as in the record and proceedings, and also in the giving of judgment in a certain plaint which was in our said Supreme Court of Judicature before you between the S. E. Crowley Company, plaintiff, and Charles R. Myers, defendant, in an action upon contract, manifest error hath intervened to the great damage of the said defendant, as it is said, we being willing that the error, if any there be, should, in due manner, be corrected,

and full and speedy justice done to the parties aforesaid in this behalf, do command you that if judgment be thereupon given and affirmed, then you, distinctly and openly, send, under your seal, the record and proceedings aforesaid, with all things touching the same, to our Judge of our Court of Errors and Appeals in the last resort in all causes, at Trenton, on the seventh day of December next, together with this writ, that the record and proceedings aforesaid being inspected we  
10 may cause to be further done thereupon for correcting that error what of right and according to the law and custom of the State of New Jersey ought to be done.

Witness our Chancellor and President Judge of our said Court of Errors and Appeals at Trenton aforesaid the seventeenth day of November, A. D. 1902.

S. D. DICKINSON,

THOMPSON & COLE,

*Clerk.*

*Attorneys of Defendant.*

—  
The record and proceedings of the plea within named,  
20 with all things concerning the same, to the Court of Errors and Appeals in the last resort in all causes within specified, at the day and place within contained, we certify in a certain schedule to this writ annexed, as within commanded.

WM. S. GUMMERE, [L. S.]

*C. J.*

NEW JERSEY SUPREME COURT.

THE S. E. CROWLEY COMPANY, A	}	On Contract.
NEW JERSEY CORPORATION,		
<i>v.</i>		On Postea.
CHARLES R. MYERS.		

James B. Adams and Eli H. Chandler, Attorneys.

As yet of the eighth day of July, A. D. nineteen hundred and one.

Witness, DAVID A. DEPUE, Esq.,

*Chief Justice,*

10

WILLIAM RIKER, JR.,

*Clerk.*

ATLANTIC COUNTY, ss.

CHARLES R. MYERS, the defendant in this suit, is summoned to answer unto The S. E. Crowley Company, a New Jersey corporation, the plaintiff therein, in an action upon contract; and thereupon the said plaintiff, by James B. Adams and Eli H. Chandler, its attorneys, complains for that whereas, the said defendant, Charles R. Myers, on the twenty-fifth day of August, 20 in the year of our Lord one thousand nine hundred, at Atlantic City, in the county of Atlantic aforesaid, entered into a certain written agreement with the said plaintiff, whereby he promised to pay the said plaintiff the sum of fourteen hundred dollars as commissions for the sale of property valued at seventy thousand dollars, as per a copy of said agreement hereto attached, and made a part hereof, will more fully and at large appear, and that in pursuance of said agreement the said plaintiff sold said property, and thereby the de- 30 fendant became and was indebted to the plaintiff in the sum of four hundred dollars for the price and value of goods sold and delivered by the plaintiff to the defendant at his request; and in the like sum of money for the price and value of goods bargained and sold by the

plaintiff to the defendant at his request; and in the like sum of money for the price and value of work done and materials for the same provided by the plaintiff for the defendant at his request; and in the like sum of money for money lent by the plaintiff to the defendant at his request; and in the like sum of money for money received by the defendant for the use of the plaintiff; and in the like sum of money for money paid by the plaintiff for the use of the defendant at his re-  
 10 quest; and in the like sum of money for interest due from the defendant to the plaintiff for the plaintiff having forborne moneys due from the defendant to the plaintiff at the defendant's request for a long time then elapsed; and in the like sum of money for money found to be due from the defendant to the plaintiff on an account then and there stated between them; and the defendant afterwards, to wit, on the day and year last aforesaid, in the county aforesaid, in consideration of the premises, respectively promised to pay the said  
 20 several last-mentioned moneys respectively to the plaintiff on request; yet the defendant disregarded his promises, and has not paid any of the said moneys, or any part thereof, to the plaintiff's damage eight hundred dollars, and thereupon it brings its suit, &c.

ATLANTIC CITY, N. J., August 25, 1900.

*Messrs. S. E. Crowley & Co.:*

GENTLEMEN—I hereby empower and outhorize you to sell all that certain propeerty now owned by me in the city of Atlantic City, county of Atlantic and State of  
 30 New Jersey, No. . . . . Pierrepont Hotel, N. J. avenue, described as follows:

The price for which I authorize you to sell the above-described property is \$70,000.00 (seventy thousand dollars). I will accept \$            in cash and allow \$            to remain on first mortgage at rate of 6 per cent. per annum. On which amount, I agree to pay to you a commission of 2 per cent. or on any selling price

which may be agreed upon between myself and the purchaser, in case you procure a purchaser for the same.

Should I, or any agent, sell the said property, I will notify you immediately of such sale.

Signed, CHAS. R. MYERS.

Witness: W. J. MIDDLETON.

P. S.—This agreement is void after ten days from date.

CHAS. R. MYERS.

And further, that whereas, the said defendant entered into a certain written agreement with Messrs. S. E. Crowley & Co., whereby he promised to pay to said Messrs. S. E. Crowley & Co. the sum of fourteen hundred dollars as commissions for the sale of property valued at seventy thousand dollars; that afterwards, to wit, on the twenty-fifth day of August, nineteen hundred, Messrs. S. E. Crowley & Co. assigned the said agreement to the plaintiff herein as per copy of said agreement hereto attached and made a part hereof, as will more fully and at large appear, and that in pursuance of said agreement and on the twenty-eighth day of August, nineteen hundred, the said plaintiff sold the said property for the sum of seventy thousand dollars, and thereby the said defendant became and was indebted to the said plaintiff in the sum of fourteen hundred dollars; that the defendant afterwards paid the plaintiff the sum of one thousand dollars, thereby the defendant became and was indebted to the said plaintiff in the sum of four hundred dollars; yet the defendant has not paid said moneys or any part thereof, and has neglected and refused and still doth neglect and refuse to carry out his said agreement, contrary to the promise and undertaking of the said defendant, to the damage of the said plaintiff eight hundred dollars.

ATLANTIC CITY, N. J., August 25th, 1900.

*Messrs. S. E. Crowley & Co.:*

GETLEMEN—I hereby empower and authorize you to sell all that certain property now owned by me in the city of Atlantic City, county of Atlantic and State of New Jersey, No. Pierrepont Hotel, N. J. avenue, described as follows:

The price for which I authorize you to sell the above-described property is \$70,000.00 (seventy thousand  
10 dollars). I will accept \$ in cash and allow  
\$ to remain on first mortgage at rate of 6 per  
cent. per annum. On which amount I agree to pay you a commission of 2 per cent., or on any selling price which may be agreed upon between myself and the purchaser, in case you procure a purchaser for the same.

Should I, or any agent, sell the said property, I will notify you immediately of such sale.

Signed, CHARLES R. MYERS.

Witness: W. J. MIDDLETON.

20 P. S.—This agreement is void after ten days from date. CHAS. R. MYERS.

(Endorsed)—

“For one dollar and other valuable considerations we hereby sell, assign, transfer and set over unto the S. E. Crowley & Co. all of our right, title and interest in and to the within contract and agreement.”

Dated August 25th, 1900.

S. E. CROWLEY & Co.

Notice to Defendant—

30 The following is a bill of the particulars of the demand and copy of the contract whereupon the annexed declaration is founded:

CHARLES R. MYERS

To THE S. E. CROWLEY COMPANY, *Dr.*

Aug. 28,	To Commission on Sale of Hotel		
	Pierrepoint, .....	\$1,400	
Oct. 9,	By Cash, .....	\$500.00	
17,	“ “ .....	\$500.00	
		<hr/>	\$1,000
	Balance due, .....		<hr/> \$400

Together with interest thereon from the seventeenth day of October, 1900, to date of judgment final, besides costs of suit to be taxed.

And now comes the defendant, by Thompson & Cole, his attorneys, and says that he did not undertake or promise in manner or form as is alleged in the declaration of the plaintiff, and that the supposed paper writing referred to in the declaration of the plaintiff is not his writing or obligation, and of this he puts himself upon the country, and the plaintiff doth the like.

And for a further plea in this behalf, by leave of the Court here for this purpose first had and obtained, defendant says that after the making of the said supposed writing or obligation plaintiff represented that it was unable to sell the Pierrepoint Hotel for seventy thousand dollars cash, but that it could be sold if defendant would accept, among other things, a certain hotel in Atlantic City, New Jersey, known as the Brookhurst, for an agreed price of thirty thousand dollars, whereupon defendant stated to plaintiff that he would sell said Pierrepoint Hotel for said sum of seventy thousand dollars and accept in part payment a transfer of said Brookhurst Hotel at a price of thirty thousand dollars, provided plaintiff would not demand payment of commission of two per cent. on said sum of thirty thousand dollars until it has succeeded in selling for him said Brookhurst at said sum of thirty thousand dollars, to

which proposition the plaintiff assented and agreed to waive all commission on said sum of thirty thousand dollars, and defendant avers that he has paid to plaintiff all commission due save on said sum of thirty thousand dollars, and that plaintiff has not yet sold said Brookhurst Hotel; all of which he is ready to verify and prove; wherefore he prays judgment.

March 14th, 1902.

Therefore, let a jury thereupon come before our  
10 Chief Justice or some other Justice of the Supreme Court of the State of New Jersey, at a Circuit Court to be holden at May's Landing, in and for the county of Atlantic, on the second Tuesday of April, in the year of our Lord, one thousand nine hundred and two, by whom, etc., and the same day is given to the parties aforesaid there, etc.

And now at this day, to wit, the third day of June, A. D. nineteen hundred and two, before our said Supreme Court at Trenton comes the said plaintiff, by  
20 its attorneys aforesaid, and the Justice before whom, etc., having first sent hither his record had before him in these words, to wit:

Afterwards, to wit, at a Circuit Court holden at May's Landing, in and for the county of Atlantic, before his Honor Charles E. Hendrickson, one of the Justices of the Supreme Court, on the fourteenth day of April, in the year of our Lord one thousand nine hundred and two, according to the form of the statute in such case made and provided, comes as well the said  
30 plaintiff as the said defendant, by their respective attorneys within mentioned, and the jurors of the jury, between the parties aforesaid, in the plea aforesaid, being summoned, also came, who, to speak the truth of the matters and things within contained, being chosen, tried and sworn, say, upon their oath, that the said defendant, Charles R. Myers, did undertake and promise, in manner and form as the said plaintiff, The S. E. Crowley Company, hath in its said declaration

alleged; and they assess the damages of the said plaintiff, by reason of the not performing said promises and undertakings, over and above the costs and charges by it about its suit in this behalf expended, at the sum of four hundred and forty-three dollars and fifty cents (\$443.50), and for those costs and charges, &c.

Therefore, it is considered that the said plaintiff do recover against the said defendant its said damages by the jury in form aforesaid found to four hundred and forty-three dollars and fifty cents, and also 10

, for its costs and charges aforesaid by the Court now here adjudged to the said plaintiff, and with its assent, which said damages, costs and charges in the whole amount to

Judgment signed the third day of June, A. D. nineteen hundred and two.

WM. S. GUMMERE, C. J.

I, WILLIAM RIKER, JR., Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the judgment entered in the 20 above stated cause as the same remains of record in my office.

[L. s.] In testimony whereof I have set my hand and the seal of said court at Trenton this eighteenth day of November, A. D. nineteen hundred and two.

WM. RIKER, JR.,  
*Clerk.*

NEW JERSEY SUPREME COURT. ATLANTIC CIRCUIT.

THE S. E. CROWLEY COMPANY,	} On Contract.
<i>Plaintiff,</i>	
<i>v.</i>	
CHARLES R. MYERS,	}
<i>Defendant.</i>	

TESTIMONY.

Before Hon. Charles E. Hendrickson, Judge, and a jury.

10 MAYS LANDING, N. J., April 14th, 1902.

Appearances—For plaintiff, Eli H. Chandler and James B. Adams, Esqs.; for defendant, Messrs. Thompson & Cole.

Mr. Chandler—The contract between Mr. Myers and S. E. Crowley & Company, dated August 25th, 1900, afterwards and on the same date assigned by S. E. Crowley & Company to the S. E. Crowley Company, is offered in evidence and without formal proof of the signature.

20 Mr. Cole—There is no objection to the offer of the paper, but I do not want the offer to preclude the defendant from his right to argue that this contract is not assignable.

The Court—It is admitted, of course, subject to the opportunity on the other side to question the legal effect of the assignment. But as a paper execution is admitted?

Mr. Cole—Yes, sir.

Paper marked *Exhibit P 1*.

30 Mr. Chandler reads agreement.

Mr. Chandler—I desire to offer in evidence an agreement for the sale of land between Charles R. Myers and John L. Bechtel, dated August 28th, 1899.

Mr. Cole—Now, I ask the purpose of the offer.

Mr. Chandler—The purpose of the offer is to establish the fact that the property was sold within the ten-day limit specified in the agreement for the sum agreed upon in the agreement, namely, \$70,000.

Mr. Cole—I object to the offer for that purpose: first, because upon inspection of the paper it cannot be said to be such a sale as is contemplated by the agreement, and, secondly, that the agreement, in legal contemplation, is an agreement for sale for cash, while the agreement offered in evidence, which it is claimed is evidence of the sale, is an agreement to sell not for cash but for part cash and part mortgage, and that, consequently, the paper now proposed to be offered is a paper that does not support the declaration, but, rather, contradicts it.

Mr. Chandler—The agreement does not purport to be an agreement for sale for cash in full. The agreement states (reads). It is strictly an agreement for cash, and nothing else.

Mr. Cole—If your Honor cares to hear me on that, I will argue it. 20

The Court—I will hear the objection which counsel presents.

Mr. Cole argues and Mr. Chandler replies.

The Court—I will admit the paper as a part of the evidence in the cause, as the plaintiff may supplement by other testimony, and the legal effect I will determine later, and whether it shall be finally admitted to go to the jury, but there is no objection to the matter of execution of this paper, as I understand it? 30

Mr. Cole—No, sir.

Whereupon the defendant, by his counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.

CHARLES E. HENDRICKSON, [L. S.]

J. S. C.

Paper marked *Exhibit P 2*, and read by Mr. Chandler.

Mr. Chandler—We desire to offer in evidence the record of a deed from Charles R. Myers to John L. Bechtel, dated the 15th day of September, 1900, signed by Charles R. Myers, acknowledged before Mr. Cole, and recorded September 20th, 1900, in Deed Book 251, page 35, etc.

Mr. Cole—There is no objection to the offer of the deed to show the fact that there is a deed of the property.

10 Mr. Chandler reads consideration, etc., from deed.

*Samuel E. Crowley* sworn.

Direct examination, by Mr. Chandler.

Q. Where do you reside?

A. Atlantic City.

Q. What is your business?

A. Real estate agent.

Q. What connection, if any, did you have with the firm of S. E. Crowley & Company?

A. I guess I was the whole company.

20 Q. What connection, if any, have you with the S. E. Crowley Company?

A. I am president of the S. E. Crowley Company.

Q. Do you know Mr. Myers, the defendant?

A. Yes, sir.

Q. Did you have anything to do as an officer of the S. E. Crowley Company toward making a sale of this property mentioned in this agreement between Mr. Myers and Mr. Bechtel?

A. Yes, sir; I made the sale as a broker.

30 Q. Will you just state, please, what you did in connection with that sale?

A. From the beginning of it, do you mean?

Q. Well, did you procure the purchaser?

A. I did.

Q. Had Mr. Myers ever seen Mr. Bechtel up to the time that you procured this agreement of same?

A. I don't think he ever seen him up until after the deed was signed, not to my knowledge.

Cross-examination, by Mr. Cole.

Q. Mr. Crowley, whose writing is on the back of this assignment; that is, S. E. Crowley & Company?

A. One, I think, is mine.

Q. Which one is yours? (Paper shown witness.)

A. That top one.

Q. When did you sign that?

A. Some time after that; not just that date.

Q. When was it signed?

A. Which one? 10

Q. The one you signed.

A. I can't just remember the day when it was signed, Mr. Cole.

Q. How long ago was it?

A. Well, I say I can't tell how long ago.

Q. Well, haven't you any idea how long ago it was?

A. Well, I don't know that you want ideas, do you? You want facts, don't you?

Q. Well, I want facts, but sometimes facts are based upon ideas. I don't ask you to testify to the very day. I don't expect you to do that unless you made a memorandum of it. But you say you did not sign it on August 25th, 1900? 20

A. No; I didn't sign it on that day.

Q. How long was it after August 25th, 1900, that you signed it?

A. Well, I can't remember exactly.

Q. Well, was it about six months ago that you signed it?

A. No; I can't say that it was. 30

Q. It was not as long ago as that, was it?

A. No.

Q. About four months ago?

A. I don't know exactly; that is, I won't say just how many months.

Q. You don't think it was six months ago? Well, you signed it, as a matter of fact, after this suit was begun, didn't you?

*A.* Yes, sir.

*Q.* And when you signed it was this signature there, the lower one?

*A.* Yes, sir.

*Q.* Do you know when that was signed?

*A.* Yes, sir; that was signed whenever the date is. Mr. Middleton signed it.

*Q.* On August 25th, 1900?

*A.* I can't swear to it, but I think about that time.

10 *Q.* When was the S. E. Crowley Company incorporated?

*A.* The company was incorporated, I think, in December, 1899.

*Q.* Was that corporation in existence on August 25th, 1900?

*A.* It must have been.

*Q.* Well, I ask you whether it was or not?

*A.* Yes, sir; it must have been if it was incorporated in 1899.

20 *Q.* When was it first suggested to Mr. Myers that the Brookhurst property was to be taken as part consideration for the sale of the Pierrepont Hotel?

Mr. Chandler—I object because it is irrelevant, incompetent and has nothing to do with the question of the obligation on this contract for the payment of this commission. We have proven our contract, the sale, the execution and delivery of the deeds, and we have admitted the payment of \$1,000 on account of this contract, and anything  
30 extraneous to that, which has nothing whatever to do with it, is not proper evidence, and certainly this is not proper evidence, and is not cross-examination either.

The Court—Mr. Cole, how is it cross-examination?

Question withdrawn.

Plaintiff rests.

Mr. Cole—I ask your Honor to nonsuit the plaintiff. My first proposition is that this agreement signed by the defendant is not an assignable agreement. It is not such an agreement as can be assigned. My second proposition is that there is no proof that the defendant has not paid the money. My third proposition is that the agreement, that is, the agreement sued upon, is an agreement to sell for cash, and the agreement offered in evidence, P 2, is an agreement to sell for other than cash; and there being no proof in evidence of a change 10 of the original agreement from cash, that in legal contemplation the new agreement must be regarded as varied from the first, and that in consequence the plaintiff has not shown a sale of this property for \$70,000 cash, as he has alleged in his declaration, on a special contract.

The Court—Does the declaration allege cash?

Mr. Cole—No; the declaration alleges this agreement, that is, I mean the first agreement, to sell for \$70,000, which I say is cash. My next proposition is 20 that the agreement upon which they have sued is without legal force for the reason that by its very terms it was to be void after ten days. Now, that raises, to me, an interesting question, as to when this property was sold. Observe, “I hereby empower and authorize to sell all that certain property now owned by me in the city of Atlantic City,” and the provision is, “This agreement is void after ten days from date.” The defendant assumes that the sale was made within the contemplation of this agreement on the 28th day of August, 30 when Mr. Bechtel agreed to buy. Now, if the sale was not made on the date of this agreement to sell, then the agreement upon which they sue is void, because the ten days had elapsed. The sale was not actually made, by the deed, until the 13th day of September. They have offered the deed in evidence. So we have this question, Under this phase of the case, when was this property sold? Was it sold when the agreement was

made by somebody to buy, or was it sold when the deed was made? I submit that a mere offer by somebody to buy is not a sale. They may have retreated from the proposition to buy. The allegation is the sale was made on the 28th day of August. Now, I say the sale was not made on that day; the sale was made when the deed was delivered.

And again, I think, in the absence of proof, that this agreement to sell for \$70,000 in cash was varied in the  
10 offer made to sell this property for \$70,000, cash or no cash, that the plaintiff would only be entitled to recover two per cent. commission on whatever this agreement shows was the cash sale, assuming that the date of the sale is to be regarded as the time when the agreement was entered into, and that if he can only recover a commission on the cash sale, then there is no right of recovery of anything more against this defendant, because he has been given credit for \$1,000, which would be in excess of the amount to which they would be  
20 entitled.

Now, as it seems to me, the presumption in this case must be, in the absence of proof, and they have offered no proof, and stopped me from an examination which I concede perhaps was not a proper cross-examination, stopped me from proving the real transaction; now, since they have proved by the offer of this second agreement a condition different from that contemplated by the first agreement, the legal presumption is that they were acting under the new agreement. In other words,  
30 where in law an agreement is made to sell for cash and the parties come in and do not show a sale for cash, but show an agreement and a sale other than for cash, the presumption is that they have entered into a new agreement, and that they are not relying upon the first. We have here, then, on one side an agreement to sell for \$70,000 in cash, if I am right in asserting that every sale means cash unless otherwise stated; and then we have another agreement opposed to that which is an

agreement to sell, not for cash, but for part cash and part mortgage and part exchange of property. Now, I submit the plaintiff cannot recover. He has made an entirely different case from that made by his declaration. His allegation is that Mr. Myers was to pay him two per cent. for selling his property for \$70,000, and he has shown his case not for \$70,000 in cash, but for so much cash and so much mortgage and so much property. Now, I submit that in such a case the plaintiff is entitled to be called.

The Court—Do you make any point as to the assignment? Do you mean to? 10

Mr. Cole—Yes; I had an authority, but I find I haven't it here with me, as to the right to assign. Now, I say to your Honor frankly, from my personal view, that I do not think that is a very strong point; that the Courts have been so liberal of late in giving the right to make assignments that they only hold in rare cases that it is a personal contract; that every contract is, perhaps, assignable except where some personal contract—for instance, if a man wanted a painting and wanted some artist to do it, he could not assign that to somebody else. I doubt if there is very much in the point, but I am not entirely satisfied there is, and I should want to avail myself of it in the higher court. I don't know whether that right exists or not; this contract was made with S. E. Crowley & Company, and they have turned that over to the corporation. I want the benefit, if necessary, that there is no right of assignment, although I say to your Honor frankly that 20 I do not think there is very much in it. 30

(Mr. Chandler replies.)

(The Court ordered the case re-opened to permit testimony to be introduced as to non-performance of the contract.)

*Samuel E. Crowley* recalled.

Direct examination, by Mr. Chandler.

Q. Mr. Crowley, have you received any payment from Mr. Myers on account of this contract?

A. Yes, sir.

Q. What have you received?

A. \$1,000.

Q. What does he still owe you?

A. \$400.

10 Q. Have you demanded it?

A. Yes, sir.

Q. And has he declined to pay it?

A. Not declined. He put it off, put the payment off until some later time.

Q. And have you since received it?

A. No, sir.

Q. It is still due you?

A. Still due me.

Cross-examination, by Mr. Cole.

20 Q. State, Mr. Crowley, what Mr. Myers said when you asked payment of this money.

A. He says to me, "Mr. Crowley, I am not getting any money out of this Brookhurst deal," and tried to get me to accept \$1,000. "Now," I says, "Mr. Myers"—he was sick in his room at the time—I says, "Mr. Myers, when I have got your agreement for \$1,400 why should I throw away \$400?" and he says, "I am not getting any money," and he says, "Will you take \$1,000 and take the \$400 after I get some money out  
30 of this Brookhurst, either rent it or sell it?" I says, "Certainly, Charlie; I am no hog." And he was very sick then, and I met him after he recovered partially from his illness down at the market, and then he gave me \$1,000, and said he would pay me the balance after he got something out of his other property.

Q. How many times did you ask him for the payment of this money?

A. Which money?

Q. This \$400.

A. I asked him then and several other times.

Q. Tell us what he said each time you asked him for the money.

A. I can't tell you what he said each time.

Q. You have just told us what he said the first time?

A. Yes, sir.

Q. Now, Mr. Crowley, do you remember that when you asked him for the payment of this \$400 that he told you—

Mr. Chandler—I object to putting the testimony in the witness' mouth.

Q. That you were not entitled to receive the balance of the commission for the sale of the Pierrepont until you had sold for him the Brookhurst?

Mr. Chandler—I object to the form of the question. If the Court please, how can Mr. Cole presuppose what Mr. Myers told Mr. Crowley, and then put the question in that form: "Mr. Crowley, do you remember that Mr. Myers told you so and so?" It is a conclusion of the counsel. If he wants to know what Mr. Myers said to him, let him ask him the question, but not ask him whether Mr. Myers said so and so, or did so and so.

The Court—I think on cross-examination it is admissible in that form. He knows what his client knows, and he is now asking your witness if such a conversation did not take place. I think that is admissible. I admit the question. 30

(Question repeated.)

Mr. Chandler—I object to it on another ground. Anything that Mr. Myers might have told Mr. Crowley would not be admissible to alter the terms of this agreement. This is a written agreement to pay so much money at a certain time.

Mr. Cole—That is what I have been contending for all the time.

Mr. Chandler—And the time has passed long ago, and any conversation Mr. Myers might have had with Mr. Crowley would not serve to alter the terms of an agreement unless in writing, and it was made a part of the agreement.

The Court—The way it comes now is it was a part of the conversation which you introduced and offered to prove, asking this witness as to what Mr. Myers said with reference to owing the balance.  
10 You tried to prove that Mr. Myers admitted owing the balance of \$400 that was not paid, as I understood the effect of your examination, and now counsel wants to know what else was said by Mr. Myers on that occasion, as to whether he did owe this \$400 or not. That is my impression. It is merely asking the whole conversation, which is usually admissible. I will admit the question.

A. No, sir; he didn't tell me it, not in that many words, or anything like that, because I had my contract  
20 there.

Q. Never mind because; what did he say to you about that?

A. He said he would give me all over a certain amount, which was \$30,000, I could get for the hotel. He would not pay the commission on the sale of it, but would give me, if I could get anything over the \$30,000, he would give that to me as a commission, and he put it down in writing on one of these agreements, and after he wrote it he put on the bottom, as he did on any agree-  
30 ment, "This agreement is only good for fifteen days." He extended it five days.

Q. On this occasion when you went to get one of the payments from Mr. Myers didn't you give Mr. Myers a paper to the effect that you were not entitled to have the commission on the price for which the Brookhurst was put in the deal until you sold the Brookhurst?

A. No, sir.

Q. You didn't?

*A.* No, sir.

*Q.* You never signed, on either of these occasions that you went to get commission, a paper to the effect that you were not entitled to have your commission on the Brookhurst until you sold it?

*A.* No, sir.

Mr. Chandler—I object. If there is any such paper in existence, you should produce it.

The Court—Haven't you gone beyond the interview, Mr. Cole, the interview that the witness testified to?

Mr. Cole—No, sir. I suppose he is talking about that. That is what I am talking about, the interview at which he asked for the money.

Mr. Chandler—He only admitted one interview with Mr. Myers, in his sick room.

Mr. Cole—I am confining my cross-examination to that time, that he said he made this admission.

The Court—That is all right.

20

Re-direct examination, by Mr. Chandler.

*Q.* Mr. Crowley, you said in answer to a question of Mr. Cole that Mr. Myers produced an agreement for the sale of the Brookhurst, and offered you \$50 commission—or you said that the hotel, you didn't say the Brookhurst. Now, I want you to explain to the jury what hotel you referred to when you said he produced an agreement, whether the Brookhurst or the Pierrepont.

*A.* That was the Brookhurst. After the Pierrepont was sold, and at the time of this settlement he wanted to get rid of this little hotel he took in exchange. He said he would not pay any commission on the sale of that. He read the agreement that if I would get over \$30,000, I could have all over \$30,000 for the hotel.

*Q.* That is for the Brookhurst?

*A.* Yes. Then we did get a party who was willing to take the property at that price and paid us in bonds—

30

Mr. Cole—I object. That is not proper.

Mr. Chandler—We rest again.

Mr. Cole—Now, I ask for a nonsuit, if your Honor please, upon the grounds already asked, other than the one for the question of payment, and upon the further ground now that there is no proof that the property described in the deed from Myers to Bechtel of the date of September 15th is the property referred to in the agreement, and there  
10 is nothing in the deed from which the conclusion could be drawn that it is the same property.

Mr. Chandler replies.

The Court—I think I will not grant the motion to nonsuit.

Whereupon the defendant, by his counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.

CHARLES E. HENDRICKSON, [L. S.]  
J. S. C.

20

## DEFENDANT'S TESTIMONY.

*Charles R. Myers* sworn.

Direct examination, by Mr. Cole.

Q. Mr. Myers, are you still the owner of the Brookhurst property, which is referred to in the agreement between yourself and Bechtel, which has been offered in evidence?

A. I am, yes, sir.

Q. Will you state, please, the circumstances that led up to the making of this agreement for the sale of the  
30 Pierrepont? How came you to sign that paper?

Objected to.

The Court—Is that the original paper?

Mr. Cole—Yes, sir.

Mr. Chandler—I object to the agreement.

The Court—Of course we can't nullify or contradict the writing, Mr. Cole.

Mr. Cole—I understand that, if your Honor please. It is just why I think we are entitled to a nonsuit. But we have passed that, and I want the benefit of how he came to sign that, or the benefit of an exception.

The Court—There has been no ground laid to give parol evidence. I suppose that must stand as the agreement between the parties unless you think in that agreement there were any blanks left that you think should be explained by parol. 10

Mr. Cole—No; I do not.

The Court—You ask him how he came to sign it, and that means to introduce the conversations of the parties.

Mr. Cole—Exactly. Now, that gets right to the point that we have in this case. My proposition is, according to my opening, that this agreement was a sale for cash; that the sale was not for cash. 20

The Court—The question is now, can you contradict the written agreement or vary it by what this witness may say as to how he came to sign it. Can you introduce matters between the parties that are put in writing?

Mr. Cole—That will depend, if your Honor please, upon what your view may be as to what this \$70,000 means. My contention is that that means cash, and that is one purpose of the offer, to show what was meant, and that there was not anything said at the time this agreement was made respecting anything but cash. Your Honor will notice that I have pleaded in this case a new contract as the one under which we say there is a right of recovery, which is an entirely different case from that made by the plaintiff. Now to that plea there has not been any reply, but I did not take advantage 30

of that. Of course I would be entitled, as the plea stands, to a judgment.

The Court—This plea sets out about what you have stated, a modified agreement made afterwards.

Mr. Cole—Exactly.

The Court—The question is objected to upon the ground that what he says might go to alter or vary a written agreement, and of course I sustain that objection. If there is anything that does not do that in the witness' testimony that you want, I will  
10 hear it.

Whereupon the defendant, by his counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.

CHARLES E. HENDRICKSON, [L. S.]

J. S. C.

Q. Now, Mr. Myers, how long was it after you had signed the paper you hold in your hand, Exhibit P 1, when you next saw Mr. Crowley?

20 A. I done most of the business with Mr. Middleton.

Q. How long was it after you signed Exhibit P 1 that you saw Mr. Middleton?

A. Well, it was a very short time, it wasn't very long. I don't just exactly remember.

Q. Did you then have any conversation about the sale of the Pierrepont?

A. After I signed this?

Q. Yes.

A. Oh, yes.

30 Q. Where was the conversation?

A. At the Hotel Rudolf.

Q. Will you state what that conversation was?

A. Well, that was after I signed this, you know, he came to me. "Well," he says, "I have been to see my parties and I can sell them that property providing that you will take the Brookhurst in trade for \$35,000, and take a first mortgage and second mortgage—" I don't know what it was now. "Well," I says, "how much is

there against that house?" He said there was a first—

*Q.* You mean the Brookhurst?

*A.* Yes, he said there was a first mortgage against it of \$12,000, a second mortgage of \$4,000, and "she wants \$35,000, my party does." Mrs. Bechtel, I think he said, owned it. "Well," I says, "no, I wouldn't be getting any money out of the thing at all on that basis." And we went over the thing, talked around it, and finally I told him no, but he said it was a good property; he said it could be easy sold, and so forth, like that; and after <sup>10</sup> he showed me those things I finally said, "Well, if I took it in for \$30,000 do you think you would have any trouble selling it for me again?" He says, "No, we will sell that for you in a week for \$30,000." I says, "Well, I will give you fifteen days to sell it if I take it." But we finally made a deal again and I said there again at that time that "I will not give you commission on the Brookhurst until you sell it. If you sell the Brookhurst for \$30,000 I will pay you commission"; and the hotel is there and I haven't sold it, and just as soon as they sell it <sup>20</sup> I am willing to carry out my agreement.

Objected to.

*Q.* Never mind that. After you said to him that you would not pay him the commission on the \$30,000 for the Brookhurst which you had taken in exchange, what did he say?

*A.* He said it was all right; he would sell it in a week.

*Q.* Did you at that time take a paper from him?

*A.* A little later.

*Q.* When was the agreement taken from Mr. Crow- <sup>30</sup> ley?

*A.* When we had the trouble about the Brookhurst.

*Q.* What did you do about that paper?

*A.* I mislaid it somewhere around.

*Q.* Have you hunted for it?

*A.* Yes, sir, I hunted for it.

*Q.* By whom was that paper signed?

*A.* By Mr. Crowley personally. He wrote it out and signed it right there and then.

*Q.* Have you been able to find that paper?

*A.* I haven't yet.

*Q.* Have you looked for it?

*A.* Yes, sir.

*Q.* Have you looked in every place that the paper was likely to be?

*A.* Yes.

10 *Q.* Now, what was that agreement? What did it state?

*A.* It was an agreement—when I paid the \$1,000 money, all the money, the balance of it—it was an agreement that when he sold it, or myself, that I was to pay him the commission on it.

*Q.* And you say he gave you that paper?

*A.* Yes, he gave me the paper himself.

*Q.* And that paper that he gave you, that you have not been able to find, is the agreement that followed up  
20 the one Mr. Middleton said he would make at the time he came with this offer to put the Brookhurst as part consideration of the \$70,000?

*A.* Yes. I didn't want to pay commission on that, because it was an exchange, and when they sold it at the price that I took it at—

The Court—What you wanted to do is not evidence, Mr. Myers; just what you said.

*A.* Well, that is what I said at that time.

*Q.* When you signed this agreement did Mr. Middleton or Mr. Crowley tell you that you were to take in exchange  
30 this Brookhurst?

*A.* No, not the first agreement.

*Q.* Did they at that time tell you that any property was to be taken in exchange?

*A.* Not at that time. He wouldn't even tell me who the purchaser was, only they said if they got a customer to take the house would I pay them a commission, and I told them the regular commission; and then they came

with this proposition to me of taking the Brookhurst in trade, and then I said if I took that I wouldn't pay any commission on it.

*Q.* That is, you wouldn't pay any commission on the value for which the Brookhurst was put in?

*A.* No, not until they sold it.

*Q.* And you say Mr. Middleton made that agreement with you?

*A.* Yes, sir.

*Q.* Was he a member of the firm of Crowley & Company?

*A.* He came first, yes, sir. He was the one that came first and saw me about it. He got the first agreement.

*Q.* Mr. Crowley says that when he came to demand this money you admitted that you wrote it. What was the conversation about that?

*A.* I admitted I owed it this way: when they sold the Brookhurst for \$30,000, then I owed it to him.

*Q.* Has he ever found you a purchaser for the Brookhurst?

*A.* Well, he had one at one time for \$27,500, but the terms were not satisfactory, wasn't enough money to pay down.

*Q.* Did he ever find you a purchaser for \$30,000?

*A.* He never did. In fact, I have offered to sell it for less money than that since.

*Q.* When you told him that you would not pay this commission until he sold the Brookhurst according to the agreement, what did he say?

*A.* Well, he said he had several after it, and that is what he kept telling me all the time.

*Q.* Did he ever deny that you were not obliged to pay this money until he had sold it, when you made these demands for payment?

*A.* No, everything seemed to be all right until a year passed around, about.

It is admitted that this suit was begun on the 8th day of July, 1901.

*Q.* Now, did you at any time after you had signed the first agreement, or the one to pay two per cent., did you at any time after that agree to pay two per cent. on \$70,000, as though this property had been sold for cash?

*A.* I never did; no, sir.

Cross-examination, by Mr. Chandler.

*Q.* This is the only agreement you ever made, is it, with the Crowley Company, the only one you ever signed?

10 *A.* That is the only one. Well, the other one there.

*Q.* Well, this is not with the Crowley Company?

*A.* Yes, that was the agreement that was first made. But then there was a personal agreement made after this, about the conditions of sale of the agreements, and so forth.

*Q.* What do you mean by a personal agreement made afterwards?

*A.* Well, a verbal agreement. After this was signed he came to me and got me to sign this agreement. He said  
20 if he would get me a customer for the Brookhurst, he wanted to know what I would sell it for. I said \$30,000. He says, "All right. Will you pay the commission on it?" I says, "Certainly, I will pay the regular commission on it." Then he came up with this paper, got me to sign a paper, and then he comes back after he gets the paper signed with a proposition to trade the Brookhurst for the Pierrepoint, and we made a swap trade, but Mr. Crowley and Mr. Middleton both said that it was a good property, it could be sold very readily, and he thought  
30 he could sell it within a week for \$30,000. I says, "Well, of course, if I take that thing I ain't going to pay commission on that thing." And finally they were so sure of selling the property that I didn't think I would have it on my hands long and I finally agreed to make the deal there and then, came to his office and we made a deal; and I had been waiting and asking Mr. Crowley a lot of times after the deal was made when he was going

to sell the Brookhurst, and he said he had several after it, and he hasn't never made a deal up to this time, and I have kept that much out of the commission until he sold it.

*Q.* What rate did you keep out, Mr. Myers?

*A.* What rate?

*Q.* Yes.

*A.* I ought to have kept more out than what I did keep out, but I thought we would make a settlement some of these days when he sold the Brookhurst, because I expected him to sell it and I thought he would sell it, and he said it wouldn't be over a week before he would sell it. 10

*Q.* You haven't answered my question. What rate are you keeping out for the sale of the Brookhurst?

*A.* I expect I ought to have kept more out. \$400, I guess. I expected whatever difference there was we could settle that up when he sold it.

*Q.* When you made that agreement with Mr. Crowley, as you said you did, how is it you paid Mr. Crowley a part of the commission on what would be the commission on the sale of the Brookhurst before he sold it? 20

*A.* Well, I expected him to sell the property and we would fix it up sometime.

*Q.* That is not answering my question yet. What would be the commission on \$30,000?

Objected to.

Mr. Chandler—Well, he seems to be very hazy on the subject of even this mathematical proposition. 30

The Court—You can figure that up yourself.

*A.* It would be \$600.

*Q.* Why did you pay him \$200 of what would be the commission on the Brookhurst before he sold it?

*A.* Well, I knew it was more than I ought to have paid him at the time, and I expected to keep it out when he sold it, but the thing was no settled on either side, but the thing would be satisfactory when he sold the

Brookhurst and that would be the balance. Really I didn't owe him as much as he got, according to my agreement or my understanding.

*Q.* Now you said Mr. Crowley made an agreement that he would wait for the balance until the sale of the Brookhurst?

*A.* Yes, sir.

*Q.* Where did he give you that?

*A.* Down in Chelsea, at the cottage.

10 *Q.* When?

*A.* Why, it was sometime last spring, I think; not this spring, but last spring.

*Q.* Now you are certain, are you—

*A.* I am certain, positive; I certainly am.

*Q.* You don't think it was possible that you had given Mr. Crowley an agreement to that effect, do you?

*A.* No, we had an agreement together there.

*Q.* Did both of you sign that agreement that you refer to?

20 *A.* Well, I think we did, as far as I can remember now; but I had the agreement anyhow, and Mr. Crowley's name to it, about the commission, that I would pay the balance when the Brookhurst was sold.

*Q.* You say you never signed any other agreement but this one for the payment of these commissions?

*A.* No.

*Q.* Now did Mr. Crowley ever sign more than one agreement with you that you are mentioning now? Did he ever sign any other agreement with you than the one which you mentioned which you say was lost?

30 *A.* I don't think so.

*Q.* Well, you would know if he has?

*A.* Yes, sir.

*Q.* You are quite sure Mr. Crowley signed that agreement and not you, are you?

*A.* I am sure Mr. Crowley signed the agreement with me at that time.

*Q.* What kind of paper was it on?

A. It was on the regular paper, not on a regular office sheet but regular letter paper, and about note-head, I think.

Q. Whose note-head was it?

A. I kind of have an idea it was on one of my own note-heads.

Q. And what did you do with the paper after you got it?

A. I carried it around in my pocket for a long time and had it amongst some papers I had and I put it in my office there at Chelsea, the cottage down there, and when I come to look for it one day when I wanted it it was gone and I couldn't find it. Whether the folks destroyed it or mislaid it or put it away somewhere I don't know. I suppose it is down there yet somewheres amongst some old papers there.

Q. And you are sure that this occurred at the cottage?

A. I am pretty sure that it was at the cottage. I think that is where we had a talk about it.

Defendant rests.

20

---

PLAINTIFF'S TESTIMONY IN REBUTTAL.

*Samuel E. Crowley*, recalled.

Direct examination; by Mr. Chandler.

Q. Mr. Crowley, did you ever visit Mr. Myers at his cottage in Chelsea?

A. No, sir.

Q. Were you ever there at all?

A. Never was in his cottage at Chelsea, never in my life, or hotel there at Chelsea.

Q. Did you ever give Mr. Myers any such agreement as he stated?

A. I never did.

Q. Have you ever signed any agreement at all?

A. Never with Mr. Myers; no, sir.

Q. For the withholding of this commission until you sold the Brookhurst?

30

*A.* No, sir; never signed or entered into an agreement of that kind. Never signed one.

*Q.* Did you ever succeed in getting an offer for the Brookhurst and submit it to Mr. Myers?

*A.* I did.

*Q.* What was that offer?

*A.* I got an offer of \$30,000; \$2,500 of it was in some kind of stocks, which Mr. Myers accepted. The deed was written—first an agreement, then a deed was written  
10 for him to sign. He gave me an order on Mr. Clarence Cole to get the original deed from Mr. Bechtel, which I have got to this day in my safe.

Mr. Cole—I certainly object, if your Honor please. You see, we are now getting up to the situation that has been brought about by bringing a suit on a special contract. Your Honor will notice that I pleaded here a new contract. There was really  
20 no issue joined, and when I present my case now they come in setting up papers and so forth that are not offered and not produced. I certainly object to this witness testifying to papers that are not produced here. We have a right to have that, to have this case, if they are going to undertake now to set up a defence against this alleged agreement of ours as a bar to the right of recovery.

The Court—He refers to one of these interviews by Mr. Crowley, I think, with Mr. Myers. He is testifying about that. It is the same subject matter, to a certain extent, I should suppose. Of course,  
30 you see if new papers are produced, that's a different matter. Just confine yourself to what occurred between you and Mr. Myers. I think both sides would be content with that. Of course, that involves, I suppose, anything that was done between them, actually done, whatever it was.

Mr. Cole—I don't know, of course, what he is trying to show.

The Court—We will see when we come to it.

Mr. Chandler—If your Honor please, Mr. Cole opened the question with Mr. Myers.

The Court—Go ahead. There is nothing to prevent your going ahead.

Q. Mr. Crowley, you heard Mr. Myers' statement that the offer was for \$27,500 for the Brookhurst. Is that correct?

A. No, sir; that was for \$30,000.

Q. Did he decline to accept it?

A. No, sir; he accepted it. 10

Q. And was it consummated?

A. It was not.

Q. You heard Mr. Myers' statement that you gave him an agreement. Was any such agreement ever given by any officer of the Crowley Company?

A. Such statement as what?

Q. To withhold the demand for the balance of the commission due on this sale of the Pierrepont?

A. I can only speak for myself.

Q. Well, as far as you know, was there anything given by the company? 20

A. No, sir.

Q. When Mr. Myers paid you the \$1,000 that he refers to did he say anything to you about overpaying you?

A. No, sir.

Q. Did he say anything to you about that you would have to wait until the sale of the Brookhurst before he would pay the balance of the commission?

Mr. Cole—He has been asked about that on cross-examination.

No cross-examination. 30

*Wm. J. Middleton*, sworn.

Direct examination, by Mr. Chandler.

Q. Mr. Middleton, you heard the testimony of Mr. Myers in this case. Are you the Mr. Middleton he refers to?

A. I suppose I am; yes, sir.

*Q.* Did you ever make any agreement, verbal or otherwise, with Mr. Myers to refrain from collecting any part of the commission stipulated for in this contract until such time as the Brookhurst was sold?

*A.* I did not.

Cross-examination, by Mr. Cole.

*Q.* Mr. Middleton, how long was it after this agreement that Mr. Myers signed for the company for you that you went to see him about the sale of the Pierre-  
10C pont?

*A.* It is all about the same time, perhaps the same day.

*Q.* Well, it was after it was signed, wasn't it?

*A.* Yes, sir; I think it was after it was signed.

*Q.* You witnessed the signing of the paper, didn't you?

*A.* Yes, sir.

*Q.* Where was it witnessed?

*A.* Where, at what place?

20 *Q.* Yes.

*A.* His hotel.

*Q.* Well, now, how many hours was it afterwards when you went back with the proposition to him to sell?

*A.* I couldn't tell you.

*Q.* You don't know how long it was?

*A.* I don't remember.

*Q.* But you did go back?

*A.* Yes, sir.

*Q.* Now, at the time that you witnessed this paper did  
30 you then have this purchaser?

*A.* Yes, sir.

*Q.* What?

*A.* At the time I witnessed the paper?

*Q.* Yes.

*A.* Certainly.

*Q.* You then had a purchaser, didn't you?

*A.* Yes, sir.

Q. Now when you went back after Mr. Myers had signed this paper what did you say to him?

A. I hardly understand the question.

(Question repeated.)

A Well, I explained the deal to him.

Q. What did you say?

A. I don't know just what I did say now.

Q. You don't know what you said to him?

A. No, sir.

Q. Do you remember what he said to you? 10

A. No.

Both sides rest.

Mr. Cole—We shall ask your Honor to direct a verdict in this case, substantially upon the same grounds that the motion was made for a nonsuit. I think it must be upon the same grounds. There is no new fact developed except one which would be a proper function for the jury.

The Court—I think I understand your points, as you argued them before. 20

Exception to refusal to direct verdict.

CHARLES E. HENDRICKSON, [SEAL]

J. S. C.

CHARGE OF THE COURT.

*Gentlemen of the Jury:*—This is a suit on the part of the plaintiff to recover a claim for commissions as brokers on the sale of the Pierrepont Hotel at Atlantic City, to be made for the price of \$70,000. The commission agreed upon was 2 per cent. on the amount or on any selling price which might be agreed upon between this defendant and the purchaser, in case the plaintiffs should procure a purchaser for the property. The contract itself will be before you, gentlemen, and you can see just what its terms provide. I have stated the substantial points in it. 30

Now before the plaintiffs can recover commissions of the defendant they must satisfy you by the weight of

evidence that in pursuance of this contract they procured a purchaser for the property who was accepted by the defendant, and they must have done so within ten days after the contract for the commissions was signed, because there is a clause in the contract that it was to be void after ten days. It is in evidence that the plaintiffs procured a customer in the person of one John F. Bechtel and that an agreement of sale, which has also been offered in evidence, admitted in evidence, of the property  
10 was executed between the defendant and Mr. Bechtel. The contract with the broker is dated August 25, 1900, and the agreement to sell is dated August 28, 1900. The record of a deed has been offered to show that the defendant executed a deed to Mr. Bechtel, the purchaser. Its date is September 15, 1900. The consideration named in the deed is, as I recall, \$70,000. That deed book will also be before you in evidence and you may refer to it for the exact particulars.

It is contended upon the part of the defence that if a  
20 sale was made it was not made according to the terms of the contract until the deed was delivered, and that this suit must fail because the agreement was to be void after ten days. But I cannot take that view of the effect of this contract. I charge you that the execution of this agreement of sale, if it was made in pursuance of the contract, under instructions to be hereafter given, and the finding of a purchaser, that that was the finding of a purchaser as contemplated by the contract. So that if  
30 the agreement for the sale was made in pursuance of and in fulfillment of the contract for the commission, and you so find under the Court's instructions, then unless the defence prevails upon the points that they have suggested, and which I will consider, the plaintiff would be entitled to recover some amount of commission. The whole commission on \$70,000 it is admitted would be \$1,400. The plaintiff admits that the defendant has paid \$1,000, and the defendant admits paying that amount. So that at most all that can be recovered and

all the plaintiff asks in this case is \$400 with interest—I forget the exact date. You will remember about that, about the time; that if the sale was effected in accordance with the contract it would naturally draw interest from the time that that sale was effected, under the instructions that the Court will give you, whatever that date was; and if the plaintiff is entitled to recover anything it would be for interest upon the amount from that date, from the date that the sale was made or purchaser found, under the contract entered into between the defendant and the plaintiffs as real estate brokers. 10

The defence claims that the contract on its face must be construed to bind the defendant to pay commissions only on a cash sale, and I shall so construe this contract. You will look at its terms, of course, gentlemen. You will find some blanks there, blank left like this: "I will accept (blank) in cash and allow (blank) to remain on first mortgage at the rate of six per cent. per annum." Now, that is not to govern you at all, anything that occurs in that clause, because the blanks are not filled 20 and there is no evidence to indicate that there was any intention between the parties to have those blanks filled. Consequently that must be treated as practically out of the contract, and since it authorizes and empowers a sale at the price of \$70,000, I charge you that the legal meaning is a sale for money, for cash, unless it should appear afterwards that the defendant, understanding his relations with the plaintiffs, agreed to accept, without any conditions, some property or other consideration as cash. But I charge you that the contract itself calls for 30 a sale for cash. So that the defence claims that the agreement made afterward for a sale of this property, the Pierrepont Hotel, by taking part mortgage and taking another property, the Brookhurst, that that was not an agreement in pursuance of and fulfillment of the contract with the brokers. But it is for you, gentlemen of the jury, to look at the after conduct of the parties and say whether the agreement finally made, the agreement

of sale, was made by the defendant in view of and pursuant to this contract with the plaintiffs, brokers—that is, under the circumstances to which I will refer.

It is not disputed but that very shortly after this contract was signed that the plaintiffs or some one of the company approached the defendant and made a proposition for the sale of this hotel upon the terms embodied in the agreement as made. Now, gentlemen of the jury, if the defendant here, after signing this contract authorizing a sale, even though it be for cash, as the Court  
10 says is the true consideration of this contract, if they came to Mr. Myers and brought the name of a purchaser and made known to him that this purchaser would take the property at \$70,000 if he would accept certain property in exchange, and nothing was said by Mr. Myers to indicate that he objected to making such a sale and to any commissions being allowed upon a sale made in that way, differing from a contract that had been signed between them—I say in the absence of  
20 any objection at all—and he entered into this agreement for the sale of this property in the way that he did, then it brings up another question to your minds, and one that you may consider, whether or not the defendant did not thereby waive the strict terms of the contract with the plaintiffs as to commissions, the terms of which were a cash sale. But if he accepted the purchaser from the plaintiffs in this case without any objection and entered into this agreement in the presence of some member of the firm or otherwise upon the terms suggested to him  
30 by these brokers, without any objection to the change of the terms, that is, instead of cash, partly in cash or partly in property, or all in property, as you may find the facts under that agreement, you may look at such circumstances, the actions of the parties in this case, and say whether or not Mr. Myers waived his right to demand entirely cash under the original contract with the brokers; and if you determine from the actions of the parties and from those

circumstances that he did waive the right to a strict performance of the contract for cash and was willing to accept part in property or in trade, and signed this agreement under the circumstances that he did without any objection at all, I say then, if you believe the evidence you may infer from such actions, if you see proper, that Mr. Myers waived the strict letter of the original contract, and did in fact carry out, by signing the new agreement to accept the sale under the provisions of the original contract as to the amount of commissions. Now, 10  
if you do so find from all the circumstances, and there is no other defence that intervenes, which I will refer to, to prevent a recovery, why, then, upon that state of the case, you would be entitled to bring in a verdict in favor of the plaintiff for the whole amount of commissions, two per cent., \$1,400, and crediting the \$1,000, to bring in, of course, the balance in favor of the plaintiff.

But at that point there is another view to be taken of this case that is presented by Mr. Hyers, the defendant, and that is whether or not Mr. Myers did not at the 20  
time before this agreement to sell was executed, whether he did not decline to convey the property and allow the full commissions as executed by the original contract. Of course, if that agreement was cash—the contract, I mean, was cash—why, of course, under the Court's construction of it, Mr. Myers would have a right to decline, if he chose, the offer of the purchaser of exchange for other property; and if you find that he did decline when they went to him, except upon some variation of the contract as to commissions, and it was then and 30  
there agreed between him and Crowley & Company or their representative who was carrying on this negotiation that if he would take the Brookhurst, for instance—that is his allegation, that is the allegation of the defendant, that if he accepted the Brookhurst at a valuation of \$30,000 as a part of this \$70,000, that if he was unwilling to pay commissions on that until they should sell for him, make a sale of the Brookhurst at \$30,000,

for which he would give them fifteen days, I think it was said, to carry out—now if it was stated and if that was accepted and agreed to by the agent of these plaintiffs, gentlemen, why, that was binding on the parties; you might so find from the evidence. And if upon that verbal agreement afterwards entered into between these parties, if it was, then the defendant signed this agreement to sell the property to Mr. Bechtel upon the terms mentioned in that agreement, why, then, of course, the  
10 plaintiff must readjust his claim, and from a legal standpoint he could not recover until he sold the Brookhurst, under the terms of that agreement. He could not claim the two per cent. on that amount; and two per cent. on the \$30,000, you see, amounts to \$600. And if that be the true version, the plaintiffs could not recover. They have already received more than two per cent. upon the whole contract, if you deduct a commission on this \$30,000. So that is a matter you are to look at in the light of all the evidence in the case. You have heard Mr.  
20 Myers' testimony on that point. He testifies that the facts were about as I stated. It is for you to find what the testimony really was and how much credit you will attach to it. The weight of the testimony of these witnesses is entirely for you. He says further than that a paper was signed to the effect as I have already stated, that that paper was signed by Crowley & Company and given to him; that he had it in his possession at Chelsea, but has lost it; he has made searches, thinks perhaps he might yet find it, but has been unable to find it. You  
30 have heard his testimony about it, and you have heard the testimony upon the other side. Mr. Crowley has testified that he was not at Chelsea, not at the house, and that he did not sign such a paper. Now, all these matters are for the jury to say, whether they can reconcile such testimony, and say whether such a paper was signed, whether it was at Chelsea or somewhere else. Of course, Mr. Myers, the defendant, might be mistaken as to the place exactly, and yet there might have been such a paper

signed. But of course you are to look at all the circumstances around the parties to ascertain whether the statements made are to be believed.

Now, Mr. Middleton, who was on the witness stand, says that shortly after his contract with the plaintiffs was signed, very soon, that he went to the defendant, and that he had in his mind, even when this contract for the brokerage was signed, that he had in his mind and knew of the purchaser and of the terms of the proposed purchase, and having secured a contract he then went 10 and made known his purchaser to Mr. Myers; that they discussed it together, but he says he cannot remember what either party said; but as I recollect the substance of his evidence, he denies on his part making such an arrangement or agreement that would allow or relieve Mr. Myers from two per cent. on the value of the Brookhurst at \$30,000. Now, of course, you may look to see whether the witnesses remember what has happened and you have a right to give them credit accordingly. The fact that Mr. Middleton does not remember the 20 conversation, you may consider that. Still, he might remember the substance and not remember all the particulars. The jury are the judges of conflicting testimony between witnesses. You are to look at the interests of each and both sides and see where either side is corroborated by other facts in evidence in connection with that matter. It is urged upon the side of the plaintiff in this connection, why did the defendant pay \$600 when, if his version is right, he only owed \$400? You have heard his explanation, that he was not particular, 30 expecting them to sell the Brookhurst very shortly, as they had made a proposition of that kind, and he was not particular as to the amount paid. You have heard his explanation. Now, whether that satisfies your reason or not, that is another matter. It is contended upon the part of the defendant here, and they appeal to you to say whether or not it was reasonable, that upon a contract with them to sell for cash that he would be

willing to pay the whole amount of commissions where a property was taken in trade for nearly the whole value. Well, of course, you are to look at all the circumstances, the reasonableness or unreasonableness of all these views, and taking it all together, to determine what the true situation was in reference to the after agreement, if there was any. If, as I say, you are satisfied from the evidence that this original contract for commissions was ratified in the way that it was stated, why then, of course, the plaintiff could not recover in this suit. Your  
10 verdict would be for the defendant, not for any amount. Of course, any balance of overpayment, that is not for you to consider at all. It would be something to be considered hereafter.

I think that presents to you, gentlemen, about all the points of any difficulty there may be in this case, and it depends altogether upon you to resolve the testimony under these circumstances.

I am requested to charge for the defendant :

20 1. As a matter of law the statements in the contract to pay the commission of two per cent. on \$70,000 means an agreement to pay a commission for a cash sale, and not subject to a mortgage and property exchange.

I charge that as I have previously charged, I think, also.

2. If the jury believe that when Middleton reported the terms of the sale as stated, that property was to be taken in exchange, then the plaintiff cannot recover in this action under the pleadings.

30 I cannot charge that, containing, as it does, a single circumstance as to a matter of fact. I think I have charged upon that general subject what I think I should charge upon the facts of the case. I refuse to charge as requested in that second request.

3. If the jury believe that at the time Middleton reported the terms of the sale Myers declined to pay the commission on the price of \$30,000, the fixed price of the Brookhurst, until plaintiff effected a sale of the Brookhurst at \$30,000, there can be no recovery.

Yes, if he declined, and that was agreed upon between the parties, I charge as I am requested in that particular, as I have previously charged.

I am requested to charge by the plaintiff :

1. The defendant, in alleging the existence of a collateral agreement which he fails to produce, must carry the burden of proving the contents of said agreement, and it is not on the plaintiff to prove it does not exist.

Well, that request refers, I presume, to the alleged after agreement, verbal agreement, and which it is alleged by the defendant was reduced to writing. Of course proof was submitted by the defendant that that paper was lost, and he has given his evidence as to the contents of that paper, which is proper evidence. When a paper is lost it may be proven by the contents, but, of course, it depends upon the defendant Mr. Myers' testimony with reference to that. And so far as this request is, that the burden of proving that there was such a written paper or written contract, I shall charge that the burden of that was upon the defendant. But, of course, without regard to that written paper, no matter whether there was a written paper or not, if they have agreed verbally to this change with reference to the commission, if both agreed upon it, both parties, and it was in consequence of that agreement that Mr. Myers made the agreement of sale, if you are satisfied of those facts, why that is sufficient to justify you in returning a verdict for the defendant, even though he may not have proved to your satisfaction that it was in writing. I think that covers the request, and the whole case is in your hands, gentlemen, on the charge as I have already given it.

Mr. Cole (at side bar)—Your Honor stated to the jury that the deed offered in evidence showed a sale to the purchaser Bechtel. My contention on the motion to nonsuit and motion for direction was that there was nothing in the deed to identify the property which Myers had agreed to sell, and that therefore that statement of the Court's is a statement of an unproven fact.

The Court—There is one matter that escaped my attention, gentlemen of the jury, and that was in reference to the evidence of the deed, by the record of the deed of this property from the defendant Mr. Myers to Mr. Bechtel. I may have said that that showed a conveyance, but I did not mean, gentlemen, to charge you as a fact in the case at all that that deed was a conveyance of the property referred to in the agreement to sell. That is a fact I intended to submit to you for your consideration. Examining the deed-book and the other writings in the case, that is a fact for you, whether that was or not a sale of the property referred to in this case.

## DEFENDANT'S EXCEPTIONS.

1. The defendant excepts to the Court's submitting to the jury the question of whether the property described in the deed offered in evidence is the same property referred to in the agreement.

Which exception is hereby allowed and sealed accordingly.

20 CHARLES E. HENDRICKSON, [SEAL.]  
J. S. C.

2. The defendant also excepts to the Court's refusal to charge the second request of the defendant.

Which exception is hereby allowed and sealed accordingly.

CHARLES E. HENDRICKSON, [SEAL.]  
J. S. C.

3. The defendant also excepts to the Court's charging that the date of the agreement of sale is in law  
30 the date of sale.

Which exception is hereby allowed and sealed accordingly.

[SEAL.]

4. The defendant also excepts to all that the Court said respecting the right of the jury to find a verdict against the defendant if they should find that subsequent to the making of the agreement of sale for cash that the defendant agreed to accept something other than cash without objection.

Which exception is hereby allowed and sealed accordingly.

CHARLES E. HENDRICKSON, [SEAL.]

*J. S. C.*

10

5. The defendant also excepts to all that the Court said referring to the jury the right to look at the subsequent conduct of the parties to see whether there was a waiver of the right to insist upon a cash settlement.

Which exception is hereby allowed and sealed accordingly.

CHARLES E. HENDRICKSON, [SEAL.]

*J. S. C.*

6. The defendant also excepts to all that the Court said respecting the after conduct of Myers and the acceptance by him of property in exchange, which the jury might have taken into consideration as a waiver of the right to insist upon a sale for cash. 20

Which exception is hereby allowed and sealed accordingly.

CHARLES E. HENDRICKSON, [SEAL.]

*J. S. C.*

The plaintiff excepts to so much of the charge of the Court which states that the contract is exclusively a contract for cash. 30

## N. J. COURT OF ERRORS AND APPEALS.

CHARLES R. MYERS,	}	On Error.
<i>Def't. in Error,</i>		
<i>v.</i>		
CHARLES R. MEYERS,	}	
<i>Pltff. in Error.</i>		

## ASSIGNMENTS.

(Filed November 20, 1902.)

Defendant assigns following causes for reversal:

- 10 *First.* Refusal to nonsuit.  
*Second.* Refusal to direct a verdict.  
*Third.* Admission of paper *Exhibit P2*.  
*Fourth.* Overruling testimony of defendant as to how he came to execute contract.  
*Fifth.* Error in submitting to the jury the question of whether the property in deed offered was same as referred to in the agreement.  
*Sixth.* Refusal to charge defendant's second request.  
20 *Seventh.* Statement of Court to jury that they might find for plaintiff if they found that subsequent to making of contract defendant agreed to accept something other than cash.  
*Eighth.* Statement to jury as to their right to look at subsequent conduct of parties to see whether there was a waiver of right to insist upon cash.  
*Ninth.* Statement of Court as to conduct of Myers and acceptance by him of property in exchange as it might affect the question of waiver.  
30 *Tenth.* Statement by Court that the date of the agreement of sale is date of sale in law.

THOMPSON & COLE,  
*Attys. of Plaintiff in Error.*

EXHIBITS.

ATLANTIC, N. J., Aug. 25, 1900.

MESSRS. S. E. CROWLEY & Co.,

GENTLEMEN:—

I hereby empower and authorize you to sell all that certain property now owned by me in the City of Atlantic City, County of Atlantic and State of New Jersey, No. . . . . Pierrepont Hotel, N. J. Avenue, described as follows:

The price for which I authorize you to sell the above 10 described property is \$70,000.00 Seventy thousand dollars I will accept \$. . . . . in cash and allow . . . . . to remain on first mortgage at rate of 6 per cent. per annum. On which amount I agree to pay you a commission of 2 per cent., or on any selling price which may be agreed upon between myself and the purchaser, in case you procure a purchaser for the same.

Should I, or any agent sell the said property, I will notify you immediately of such sale.

Signed, CHAS R MYERS 20

Witness: W. J. MIDDLETON

P. S. This agreement is void after 10 days from date

CH R MYERS

For one dollar and other valuable considerations we hereby sell, assign, transfer and set over unto the S. E. Crowley Company all of our right, title and interest in and to the within contract and agreement.

Dated August, 25th 1900.

S E CROWLEY AND Co 30  
S. E. CROWLEY AND Co.

ARTICLES OF AGREEMENT, made this Twenty eighth day of August, in the year of our Lord one thousand eight hundred and ninety-nine hundred

*Between* Charles R. Myers, of the City and County of Atlantic, and State of New Jersey, party of the first part, and John L. Bechtel, of the City and County of Atlantic, and State of New Jersey, party of the second part, Witnesseth, that the said party of the first part, for and in consideration of the sum of Seventy thousand  
10 (\$70,000) dollars, to be paid and satisfied as hereinafter mentioned and also in consideration of the covenants and agreements hereinafter mentioned, made and entered into by the said party of the second part, does agree to and with the said party of the second part, that he the said party of the first part, will well and sufficiently convey to the said party of the second part, his heirs and assigns by Deed of general warranty, free  
20 from all encumbrance on or before the Twenty eight day of September all that lot, tract, or parcel of land and premises hereinafter particularly described, situate, lying and being in the City of Atlantic City in the county of Atlantic and state of New Jersey all that certain furnished hotel known as the Pierrepont, situated on the East side of New Jersey Avenue between Oriental Avenue and the Boardwalk, with all the furnishings of every description, therein contained.  
size of lot 60 ft. fronting on New Jersey Avenue and 145 ft. in depth.

And the said John L. Bechtel, for himself, his heirs,  
30 executors and administrators, do covenant, promise and agree to and with the said party of the first part his heirs, executors, administrators and assigns, that he the said part of the second part, will pay and satisfy or cause to be paid and satisfied unto the said party of the first part, the said sum of Seventy thousand (\$70,000) dollars as and for the purchase money of the foregoing described lands and premises in the following manner, that is to say: purchase money mortgages on

the Hotel Pierrepont, to the amount of fifty-six thousand (\$56,000) dollars, and give a deed on property No. 163 S. Virginia Avenue known as the Brookehurst, subject to \$16,000 mortgages, and all furniture and furnishings therein; belonging to the said John L. Bechtel.

First mortgage will be for the sum of \$40,000, for five years, and the second mortgage for the sum of \$16,000 to be payable \$2,000 per annum until fully paid. Interest on said mortgage to 6 %.

And it is further agreed, by the parties to these presents, that the said party of the second part, his heirs and assigns, may enter into and upon the said land and premises on the Twenty eighth day of September and from thence take the rents, issues and profits to and their use. 10

And for the performance of all and singular the covenants and agreements aforesaid, the said parties do bind themselves and their respective heirs, executors and administrators, and they hereby agree to pay, upon failure to perform the same, the sum of One thousand (\$1000) 20 dollars, which they hereby fix and settle as liquidated damages therefor.

In witness whereof, the said parties have hereunto interchangeably set their hands and seals the day and year first above mentioned.

CHAS R MYERS [SEAL.]  
JOHN L. BECHTEL [SEAL]

Signed, sealed and delivered in the presence of  
S E CROWLEY

State of New Jersey }  
Atlantic County, } ss. 30

Be it Remembered, that on this Twenty eighth day of August in the year of our Lord one thousand nine hundred before me, a commissioner of deeds of the State of New Jersey personally appeared Chas R Myers and John L. Bechtel, who, I am satisfied, are the vendor mentioned in the above (deed) agreement, or convey-

ance, and I having first made known to them the contents thereof, they acknowledged that they signed, sealed and delivered the same as their voluntary act and deed; all of which is hereby certified.

SAMUEL E. CROWLEY  
*Comr of Deeds*

[U. S. Stamp \$70.00]

Charles R. Myers }  
                  To        } Deed.  
10 John L. Bechtel. }

This Indenture made the fifteenth day of September in the year of our Lord one thousand nine hundred; Between Charles R. Myers of the City of Atlantic City, County of Atlantic, and State of New Jersey of the first part and John L. Bechtel of the same place of the second part: Witnesseth that the said party of the first part for and in consideration of the sum of Seventy thousand (\$70,000) dollars, lawful money of the United States of America, well and truly paid by the said party of the  
20 second part to the said party of the first part, at and before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, has granted, bargained, sold, aliened, enfeoffed, released, conveyed and confirmed and by these presents does grant, bargain, sell, alien, enfeoff, release, convey and confirm unto the party of the second part, his heirs and assigns, All that certain tract or parcel of land and premises, hereinafter particularly described, situate, lying and  
30 being in the City of Atlantic City, in the County of Atlantic and State of New Jersey Beginning in the easterly line of New Jersey Avenue eight hundred and fifty (850) ft. South of the southerly line of Pacific Avenue and runs thence (1) Eastwardly and parallel with Oriental Avenue One hundred and forty-five (145) ft. and runs thence (2) Southwardly and parallel with

New Jersey Avenue sixty (60) ft.; thence (3) westwardly and parallel with Oriental Avenue one hundred and forty-five feet (145) in the easterly line of New Jersey Avenue: thence (4) Northwardly in the said Easterly line of New Jersey Avenue sixty (60) ft. to the place of beginning. Together with all and singular the buildings, improvements, woods ways, rights, liberties, privileges, hereditaments and appurtenances, to the same belonging, or in any wise appertaining, and the reversion and reversions, remainder and remainders, 10 rents, issues and profits thereof, and of every part and parcel thereof; And also all the estate, right, title, interest, property, possession, claim and demand whatsoever, both in law and equity of the said party of the first part, of, in and to the premises with the appurtenances. To have and to hold the said premises with all and singular the appurtenances, unto the party of the second part, his heirs and assigns, to the only proper use, benefit and behoof of the said party of the second part, his heirs and assigns forever. And the said Charles 20 R. Myers, for himself, his heirs, executors and administrators, does by these presents covenant, grant and agree to and with the said party of the second part, his heirs and assigns, that he the said Charles R. Myers, his heirs, all and singular the hereditaments and premises hereinabove described and granted or mentioned and intended to be so, with the appurtenances unto the said party of the second part, his heirs and assigns, against him the said Charles R. Myers, his heirs and against all and every other person or persons whomsoever lawfully claiming or to claim the same or any part thereof, Shall and Will Warrant and forever defend. 30

In Witness Whereof, the said party of the first part to these presents has hereunto set his hand and seal, dated the day of year first above written.

CHAS. R. MYERS. [L. S.]

Signed, sealed and delivered in the presence of

C. L. COLE.

State of New Jersey, }  
Atlantic County, } ss.

Be it remembered than on this fifteenth day of September in the year of our Lord one thousand nine hundred, before me the subscriber a Commissioner for taking acknowledgments and proof of deeds, personally appeared Chas. R. Myers, who I am satisfied is the grantor mentioned in the above deed or conveyance and I having first made known to him the contents thereof, has  
10 acknowledged that he signed, sealed and delivered the same as his voluntary act and deed. All of which is hereby certified.

C. L. COLE,  
*M. C. C. of N. J.*

Rec'd. and recorded Sept. 20th 1900,

LEWIS P. SCOTT, *Clerk.*

