(Cases Nos. 44, 46).

NEW JERSEY COURT OF ERRORS AND APPEALS.

WILLIAM SOMERS, ET ALS.,
Defendants in Error,
vs.
W. SCOTT JOHNSON,
Plaintiff in Error.

} ERROR TO SUPREME COURT.

Two cases between same parties.

BRIEF OF PLAINTIFF IN ERROR.

First.—These suits are for breaches of the contract (pages 20, 21). The specific breaches assigned—are failure to pay the royalty (top page 21).

One suit (see Bill of Particulars, page 10) is for royalties, six years from August 1, 1893. The other suit (see Bill of Particulars, page 21) is for royalties from August 1, 1899, to August 1, 1902, same agreement.

John T. Mason and Robert B. Scull, two of the defendants, failed to plead, and defendant, W. Scott Johnson, pleaded separately and the trial was had between plaintiffs and Johnson. Johnson prosecutes this writ of error after order of severance.

Second.—Defendant Johnson pleaded two pleas:

a. General Issue, under which he claims the release offered (p. 49) and exhibited in full (p. 116) is a complete bar to recovery.

b. The Special Pleas—alike in each case (pages 11 and 22)—to the effect that the contract (page 20) does not represent the contract and transaction between plaintiffs and this defendant at all. That the plaintiffs employed defendant to dispose of their wheel and that defendant's signature represented the quantity unsold and that all the holding defendant represented was held for plaintiffs and that defendant's signature to the contract was only a scheme in the service and agency of defendant for plaintiffs to promote the sale of the wheel and that to insist upon it as an obligation is a fraud on defendant.

Third.—After plaintiffs introduced (p. 49) the release of the defendant Scull (p. 116) and rested their case, defendant moved for a non-suit on the ground that the contract (p. 20) sued on was distinctly and flatly joint between defendant Johnson and the defaulted defendants, Mason and Scull; and that the unqualified release of Scull released defendant Johnson, which was over-ruled and exception sealed (p. 52).

It is insisted that the motion to non-suit should have prevailed and that to over-rule it was error.

It will be seen (p. 6) that the writ in the first case was sealed Nov. 10, A. D. 1898, and in the second case (p. 17) July 15, A. D. 1903; and that the release (p. 116) was executed July 19, A. D. 1898. So that the release was executed long *ante litem motenr*. So that if the release under seal of the joint obligor, Scull, was a defense available to defendant, it was raised by the plea of the general issue, as it shows that there was not in law a subsisting cause of action when suit was brought.

5 Dutcher, 180;
1 Chitty Pl., 478;
2 Wend., 486.

Then the question recurs did the release under seal of

joint obligor, Scull, release defendant? The discipline of

Alpaugh vs. Wood, 24 Vr., 638,

establishes that the contract was joint.

One of the joint obligors, Scull, was by the indenture (p. 116) released by action of the obligees, evidence pages 44 and 45. That releasing of Scull released defendant.

Minyan vs. French, 31 Vr., 12.

Suppose the insolvent joint obligor in the above case had solemnly agreed with the obligee that the receipt of dividend from insolvent's assignee should not work a release of the other joint obligor. What figure would it have cut?

A release under seal excludes parol evidence.

Hale vs. Spaulding, 145 Mass., 482;

Ludlow vs. McCrea, 1 Wend., 228;

Seligman vs. Pinet, 78 Mich., 50.

It is submitted that there is no conflict of authorities at all. When the obligation is joint a release by the obligee of one obligor releases all. But when the obligation is joint and several as in

Brown vs. Mt. Holly Bank, 16 Vr., 360,

a different state of affairs may be worked out.

The obligee in a joint and several bond must in law treat the bond according to its letter, wholly joint, or wholly several. When he sues he must sue all as joint or one only as several.

In the above case, Brown vs. Mt. Holly Bank, the surety bond was joint and several, sealed by Brown, Kelly, Fennimore and Gaskill. The Bank elected to treat the bond as the several bond of Brown. Sued him alone. "BEFORE THE COMMENCEMENT OF THE SUIT THE BANK GAVE TO FENNIMORE A COVENANT NOT TO SUE HIM ON THE BOND," but the instrument provided that it should not release or discharge the other sureties or either

of them. This covenant was held to be no bar to the suit against Brown, one of the several obligors. The covenant reduced to its lowest terms was—that the Bank covenanted with Fennimore to treat the bond as a several bond; and selected Brown as the sole and several obligor, all of which Brown had agreed to in his bond. What occurred between the Bank and Fennimore was wholly *res inter alios acta*.

Crane vs. Alling, 3 Green, 423.

Except to compel credit to the amount of any moneys the Bank might have received on account of the debt of the cashier.

The learned Justice puts his vindication for refusal to non-suit (p. 106). The point of the vindication is that the person released agrees to acquiesce in being sued with his co-obligors. The suit there is only nominally against three; and in effect against two only, and with right to judgment and execution only for two-thirds of the debt, jointly against two only. Under this joint obligation, every cent of actual recovery must be against the three in entirety and in solido.

King vs. Hoare, 13 M. and W., 494;
Bell vs. Banks, 2 M. and Gr., 267;
Pierce vs. Kearney, 5 Hill, 86;
Robertson vs. Smith, 18 Johns, 459.

Fourth.—It will be seen that the plaintiffs by their replications (pages 12 and 24), traversed defendant's special pleas, and thereby treated them as sufficient bar and referred this controversy thus formulated to the arbitrament of the jury.

The only question for solution was one of fact: did defendant sign the contract as agent and promoter for the plaintiffs? Did he seal at the instance of, for the benefit of, and in the employment of plaintiffs? If he did, his case is made out.

The issue is made on the theorem that the contract (p. 20) sued on did not represent the contract between these particular parties at all; that the contract between the parties was wholly different, not partially, but wholly different in all its parts and so treated by the parties in its execution between them and the suit was an after thought and a fraud and a trick to oppress through form of law.

The issue made by the parties could be settled by verbal testimony of witnesses.

Brewster vs. Brewster, 9 Vr., 119, cited in
Dennison vs. Groves, 23 Vr., 147.
Shindler vs. Mulheser, 45 Conn., 153, citing
11 ib, 388; 24 ib, 578; 35 ib, 366;
36 ib, 39; 39 ib, 89;
Rogers vs. Hadley, 2 H. and C., 227;
Bolckow vs. Seymour, 17 C. B. (N. S.), 120;
Pym vs. Campbell, 6 E. and B., 370;
Furness vs. Muk, 27 L. J. Ex., 34.

If these cases express the law all defendant's assignments of error (page 112), to and including the 12th, are established—touching the rejection of defendant's testimony beginning page 52 to 69.

Fifth.—The assignment of error (113) on exception (111) to the learned Justice's refusal to direct a verdict for defendant is established—fully established by reference to the testimony.

Plaintiffs' testimony, page 61:

Q. Well, what did Somers say?

A. He said sign this agreement representing so much taken and he said that would make a good showing and an inducement to those taking stock, any part that was not taken they would assume themselves, and that for me to sign the agreement, that I would not be liable and that the future parties would pay the royalties, parties running and operating the wheel.

Q. Now did you sell any part of the wheel for them?

A. I sold it all.

Q. To whom did you sell it?

A. John T. Mason one-fourth, Robert Scull, one-eighth, George Holdzkom one-eighth, A. M. Heston one-fourth, Adolph Berthold one-eighth, Carpenter one-sixteenth, and Abram one-sixteenth.

Q. Did you sell all these various shares in the wheel at the same time?

A. Before the wheel was built and in operation at different times.

Q. And for whom were you acting when you sold these?

A. William Somers & Company.

Q. And you were paid by them for doing it?

A. Yes.

Q. Did you get a commission on the portion that was sold to Heston?

A. No, they never paid me.

Q. Why not?

MR. INGERSOLL:—I object. He doesn't know why not, probably.

A. I imagine.

Q. Did Somers & Company retain any portion of this wheel?

A. They did.

Q. How much?

Page 54.

Q. Did you ever act as the agent of Somers & Company?

A. I did.

Q. Did you get paid for your services by them?

A. I got part that was coming to me.

Edwards, one of the plaintiffs, page 46, says on cross-examination:

Q. Do you know Heston of Atlantic City?

A. Yes.

Q. Didn't you sell your interest in the wheel to Heston?

A. No; didn't have any interest to sell.

Q. Did you sell any interests at all to Heston?

A. No.

Q. Didn't you get a mortgage from Heston of $2000 for a one-quarter interest in this wheel?

A. I don't remember what the amount of the mortgage was. We got a mortgage from Heston through a second party?

Q. Then you did take a mortgage from Heston?

A. No.

Q. Of some amount?

A. No.

Q. Well, you got it through a second party from Heston?

A. And the second party paid this mortgage of Heston's over to us for his share of the interest.

Q. For Heston's share?

A. No; for the second party's share.

Q. Who was that second party?

A. W. Scott Johnson.

Q. Didn't Heston have a share?

A. I never had any words with Heston and I couldn't say concerning that.

Q. Then when you say that Heston had no interest you will correct your statement so far as to say that he had none so far as you know?

A. I didn't say that Heston had no interest.

Again on page 74, defendant is permitted to say:

THE COURT:—After the agreement, Judge, you will allow that amendment?

Q. After the agreement?

A. He would not look to me for any royalties in Gloucester, for I didn't own anything in Gloucester, and he said that I ought to have retained an interest for myself in Gloucester and he said they were going to make money and he said I should have retained an interest for myself; he though I made a mistake; and I told him I didn't want anything in Gloucester, the interests I had elsewhere was all I wanted.

Again on page 87, defendant squeezed in some facts:

Q. You were asked what percentage in this agreement you signed for. What did you sign for when you signed this agreement?

A. I signed representing the interest that William Somers & Co. retained for themselves.

Q. Did you do that by their direction?

A. Yes, sir.

Q. You have also said in answer to the cross-examiner that you did not get your commissions. What did you mean by that?

A. They never paid me, is what I meant.

Q. Commissions on what?

A. On selling the wheel.

Q. On selling what parts of the wheel?

MR. INGERSOLL:—I object. There is no offset in this case at all.

A. Selling all parts of the wheel.

Q. Who did you sell all parts of the wheel for. Whom were you acting for in selling all parts of the wheel?

MR. INGERSOLL:—I object, and ask that the answer be stricken out.

A. Somers & Co.

In addition to the above quotations, attention is directed to defendant's cross-examination by plaintiffs' counsel (page 77).

Now it is submitted that by this testimony defendant made out a prima facia case—of defense under the issue formed by the pleas.

Now, if these facts be not contradicted, defendant should have had a direction in his favor.

Were they contradicted? Were the material facts from which inferences could be drawn contradicted? It is submitted that they were not. The only appearance of contradiction is in Somers' testimony, page 92.

Q. Did you have any conversation with W. Scott Johnson in the latter part of March and the first part of April, 1893?

A. I did not.

Q. Did you at the time of the execution of this contract or at any time prior thereto, say to W. Scott Johnson that he should sign as your agent, or words to that effect, and that he would not be held personally?

A. For the Gloucester?

Q. The Gloucester wheel.

A. I didn't know anything about it till it was done.

Q. Did you have any conversation with W. Scott Johnson concerning the Gloucester wheel prior to the execution of it?

A. No.

It is not denied that the defendant sold to Mason, Scull, Holdy, Berthold, &c. It is not denied that he passed over the Heston mortgage of $2000, and the presumption is that that it was his duty to do so. And so he must have held that in trust as trustee for plaintiffs. Ratification, accepting proceeds of agent's services, is original authority.

Respectfully submitted,

WILLIAM I. GARRISON,
JOHN B. SLACK,
JOHN W. WESCOTT,
JOHN J. CRANDALL,
Attorneys for Plaintiff in Error.

New Jersey Court of Errors and Appeals

Wm. Somers et als, trading &c. as Wm. Somers & Co. Defts. in Error. vs. W. Scott Johnson, et al, Pl'ff in Error.	On Error.

BRIEF OF PLAINTIFFS IN ERROR.

TWO CASES.

WM. I. GARRISON,

JOHN W. WESCOTT,

JOHN B. SLACK,

Attorneys of Plaintiff in Error.

HON. ROB'T. H. INGERSOLL,

Attorney of Defendants in Error.

New Jersey Court of Errors and Appeals

WM. SOMERS et als, trading &c. as WM. SOMERS & CO. Defts. in Error.
vs.
W. SCOTT JOHNSON, et al, Pl'ff in Error.

On Error.

Brief.

There were two cases tried at the Atlantic County Circuit Court of the Supreme Court, in which the facts were identical and the parties, both plaintiffs and defendants were the same. Writs of error were taken in both cases and by agreement of the attorneys of the respective parties it was agreed to argue the two cases together.

Two suits were brought by Somers & Co. against W. Scott Johnson, John T. Mason and Robert B. Scull, trading, etc., as Johnson, Mason & Co., to recover royalties alleged to be due on an observation wheel erected at Gloucester, New Jersey, on which the plaintiffs below had letters patent. The first case was to recover royalties at $200 per year for the years 1893, 1894, 1895, 1896, 1897 and 1898, while the second suit was to recover the same amount of royalties for the years 1899, 1900, 1901 and 1902. Each of these cases were taken from the jury by the trial judge and judgments in full in each case directed for the plaintiffs below, and defendants below bring error.

Second assignment of Error. That the Court erred in not granting a non-suit (Printed Book, page 49 and 50). The proof was that these men, W. Scott Johnson, John T. Mason and Robert B. Scull, composing the firm of Johnson, Mason & Co., entered into an agreement to pay royalties to Somers & Co. that afterwards, during the year 1898 one of these contractors, Robert B. Scull, was released for a consideration of $50 from the payment of any royalties (see release, Printed Book, page) also evidence, page 48-49.

The plaintiffs in error claim that the release of the one joint obliger released all and that they were entitled to a non-suit.

Generally speaking a release to one of several joint, or joint and several covenantors or promisors, releases all. Add. Cont. 1222; Bac. Alr. title "Releases" G; Co. Litt, 232; Lacy vs. Kinester 1 ld. Raym, 690, cited in 60 N. J. L., page 18, Munyan vs. French, which holds that when one of several joint obligors is released, it releases all.

If the plaintiffs were to be allowed to release one defendant and were then to be permitted to bring suit against the other defendants it would work a hardship upon these remaining defendants, which was not contemplated in the beginning and which was made possible by the acts of the plaintiffs.

The Court erred in refusing to allow defendant W. Scott Johnson to testify in what capacity he signed the articles of agreement; also his refusal to permit defendant Johnson to testify as to his relation as agent for plaintiffs

in getting the contract signed; also the refusal of the Court to permit defendant Johnson to testify how he came to sign the articles of agreement (Printed Book, pages 52 to 58 inclusive) the Court alleging as his reason for excluding the evidence that it would alter, add to or change the written agreement (Assignments 3-10 inclusive). The Court erred in refusing to permit Johnson to testify as to his receiving a commission from Somers & Co. for selling the wheel (page 68). Fraud will vitilate any contract.

The Court should have admitted this evidence to show fraud in the inception of the contract. It should have been admitted to prove a waiver or a release or a discharge of the defendants obligations under a contract.

It should have been admitted as showing the circumstances attending the transaction. It should have been admitted to show that the defendant Johnson was the agent and that his name stood on the instrument as agent for Somers & Co.

Keen vs. Davis, 1st Zab. 683.

Bryant vs. Eastman, 7 Cush. (Mass.) P. 111.

Baldwin vs. Bank of Newburg, 1st. Wall, U. S. 234.

Am. and Eng. Ency. Law, P. 391 and cases under Note I;

Roberts vs. Bonaparte, L. R. A. V. 10-689, and cases cited, Ferguson vs. Lafferty, 6 L. R. A., P. 33.

The Court erred in directing a verdict for the plaintiff when there were questions of fact that should have been submitted to the jury. On page 61 (Printed Book) the defendant, W. Scott Johnson, testified that he was the agent for Somers and Company, that he sold the wheel for

Somers and Company and that he had an agreement with Somers and Company that whatever amount he subscribed for he would be subscribing for them and would not be obliged to pay any of the royalties mentioned in the agreement, and with that understanding he signed the agreement.

If he signed under those conditions he is not liable; and if Somers and Company made this agreement for the express purpose only of getting him to sign this agreement and of holding him to it they were practicing a fraud; he states on page 63 that he had no interest in the wheel, never owned any interest in the wheel and was never requested by Somers & Co. to put any money in the wheel, but that Somers & Co. did retain a portion of the wheel themselves (page 62).

Fraud. Glass vs. Hulbert, 102 Mass. 40.

On cross examination (page 79) W. Scott Johnson states that Wm. Somers, of the Somers Co., called upon him and requested him to organize a company because he (Somers) was not able to do so.

On page 88 defendant Johnson further states that he was acting entirely for Somers & Company. On page 92 Wm. Somers, of the Wm. Somers Co., denies that W. Scott Johnson, when he signed the contract, was acting as the agent for Somers & Co.

(See also testimony of Johnson, page 74).

All of which evidence left a question of fact to be passed upon by the jury.

The Court erred in not directing a verdict for defendant Johnson, because the proof shows that there was no consideration shown for the signing of the contract in question by W. Scott Johnson, that he received nothing before it was signed or after it was signed, that he had nothing to do with this wheel and that his relation to the wheel was only that of an agent for the Wm. Somers Co.

Again, because one of the joint debtors had been released and said release was under seal, which made it a technical instrument, and further, the proof is that Johnson was further released, (which is uncontradicted), by threatening to sue the plaintiff company (pages 76 and 78).

It may be argued that before any advantage could come to the defendant Johnson because of fraudulent misrepresentations, that he should have rescinded his contract; but the proof shows he had no contract individually, but only as agent for Somers & Co.

Respectfully submitted,

WM. I. GARRISON,

JOHN B. SLACK,

JOHN W. WESCOTT,

Attorneys of Plaintiff in Error.

New Jersey Court of Errors and Appeals.

WILLIAM SOMERS, et als., trading &c. as WM. SOMERS & Co., Defendants in Error.
vs.
W. SCOTT JOHNSON and others, trading &c. as JOHNSON, MASON & Co., Plaintiffs in Error.

ON CONTRACT.

BRIEF OF DEFENDANTS IN ERROR

On the Twenty-third day of April, eighteen hundred and ninety-one, William Somers, R. Morris Bateman and Devoux B. Edwards associated themselves as partners in the business of using, operating and developing a machine, known as an "Observation-Round-About" and by the same agreement, the said William Somers did sell, assign and set over unto the said Bateman and Edwards, the one half interest in and to all the right, title and interest which he had in an invention covering said machine, and all patent rights then granted or secured, or which might thereafter be secured or granted for such invention, or one of like nature, or anything connected therewith.

See Exhibit No. 2, on part of plaintiff.

On the Third day of January, eighteen hundred and ninety-three, letters patent for said invention were issued in the name of William Somers.

See Exhibit 1, page 28.

On the Fifth day of April, eighteen hundred and ninety-three, the defendants having associated themselves as a firm for the purpose of running and operating a machine known as an "Observation-Round-About" at Gloucester, New Jersey, and to be known and designated, and do business under the name, style and firm of JOHNSON, Mason & Co., entered into an agreement with Wm. Somers & Co., to purchase of the firm of Wm. Somers & Co., an "Observation-Round-About" forty-two feet in diameter for the sum of Five Thousand Five hundred Dollars, and also agreed to pay said Wm. Somers & Co., in consideration of the exclusive privilege of running and operating said round-about at said Gloucester, the sum of Two hundred Dollars as a royalty upon said machine each and every year during the life of the Letters Patent No. 489,238 granted for the same; Said Two hundred Dollars to be paid upon the First day of August in each year.

See Exhibit No. 3—Declaration, pages 8 and 20.

Two suits are now brought, the first for the Royalties for the years 1893 to 1898 inclusive together with interest thereon; the second for the years 1899 to 1902 inclusive together with interest thereon.

These suits were consolidated at the Circuit, and by agreement are to be argued together.

Judgment was entered in the first case for One thouand Seven hundred and Sixty-nine Dollars and Twenty-four Cents, and in the second case for Nine hundred and Eighty-six Dollars and Fifty-one Cents.

The First Assignment of error is:—

"Refusal of court to permit evidence of Devoux B. Edwards as to his knowledge of wheel being built at Gloucester."

The objection to this question page 37, is that it is not cross examination; This certainly was discretionary with the trial court.

2. "Refusal of Court to non-suit."

This motion is based entirely upon the question of the Release, Exhibit.—

The Courts' construction of the Law, Charge pages 106-107, certainly is a correct statement of the law upon the subject.

Lindley on Partnership on page 237 says.—

"While it is true that the general rule is that the release of one partner is a release of the firm, a convenant not to sue has a different effect, and if a release is so drawn as to show that it was intended to enure only for the benefit of the releasee personally, then persons jointly liable with him in respect of such debt released will not be discharged therefrom."

20th. Vol. A. & E. Encyl. of Law, 1st, Ed. page 750.

24th. Vol. 2nd. Ed. page 293, 295; states the law to be the same.

In Shotwell vs. Miller, 1 N. J. Law 81, decided in 1791 which was a case in which one defendant pleaded a release to another; the Court said:

"It was never the intention of the parties to discharge Miller, but Terrill and we cannot carry the transaction beyond the intent of the parties, and judgment is entered in favor of the plaintiff.

This is still the law.

Brown vs. Mount Holly National Bank, 16 Vr., 360.

Lane vs. Nelson, 9 Vr., 358.

An examination of the exhibit in question shows it to be not a release but a covenant to hold the party harmless from the effects of a suit. It does not even extend to the dignity of a covenant uot to sue.

The Assignments of Error Numbers 3 to 10 inclusive are all upon the question of the agency of W. Scott Johnson.

The contract is in writing uuder seal, complete, intelligible and certain.

Exhibit P. 3. Declarations pages 8, 20.

The Rule of Evidence is that Parol contemporaneous evidence is inadmissable to contradict or vary the terms of a valid written instrument. Greenleaf on Evidence, Sec. 275, is so clear and concise that it is useless to cite cases on that point, particularly so, when as in this case the suit is between the parties to the instrument.

In the case of Wright vs. Remington decided in the Supreme Court, 12 Vr. page 48, and affirmed in the Court of Errors and Appeals 14 Vr. page 452; It was held that parol declarations made by the payee of the note to the maker, endorser, or guarantor thereof at the time of the signing to the effect that such maker, endorser or guarantor would not be called upon to pay the note is not admissible in evidence, and is therefore no defense to such action.

Mr. Justice Reed said the weight of authority is overwhelming in favor of holding, in the language of the

American Editors of the Duchess of Kingston case, "that a person who is so ill advised as to execute a written contract in reliance upon an assurance that it shall not be literally enforced must submit to the loss if he is deceived and cannot ask that a principle of great moment to the community shall be made to yield for the sake of relieving him from the consequence of his indiscretion." This has been held the law in

Buchanan vs. Adams, 20 Vr. 636.

Johnson vs. Ramsay, 14 Vr., 279.

Styles vs. Vanderwater, 19 Vr., 67.

The Court in Van Deventer vs. Van Deventer, 17 Vr., 460, 462 said "The alleged declarations that they (the contracts) were not to be enforced according to their proper meaning made by the plaintiff at the time they were signed was not matter competent to be proved to alter or qualify the written terms of documents.

This was quoted as the law in Fivey vs. P. R. R. Co., 38 Vr., 627-634.

11. "Refusal to permit W. Scott Johnson to testify as to his release from his obligation under the contract or from paying royalties."

An examination of the record on page 73 &c., shows that all objections to this line of testimony were to the form of the questions.

Every question was either leading or calling for a conclusion of law or of fact, or as stated by the Court page 75 involved the judgment of the witness in a matter of law.

14. "Refusal of the court to entertain a motion for a direction;" and 15. "Because the Court directed a ver-

dict for the plaintiff " may be considered, together.

This case is entirely parallel with Somers and others vs. Myers and others, argued at the February term 1902, of the Supreme Court, and reported in 54 Atlantic Reporter, page 812, and in which the conditions were the same as in the case at issue. The Chief Justice in delivering the opinion of the Court, said :—"In charging the jury, the trial judge instructed them that the defense of fraud under the conditions which had been developed by the testimony could only be used for the purpose of reducing the amount of the plaintiffs' recovery; not as a bar to the action. (Lord vs. Brookfield, 37 N. J. Law, page 552.) That even if the evidence submitted would support the conclusion that fraud existed in the consideration of the contract, yet there was nothing to show that any loss had been sustained by the defendants by reason of such fraud."

It may be contended that this case is to be differentiated from that case on the ground that the consideration had entirely failed.

The Trial Justice said on this point, pages 108 and 109 of the charge, that the contract was partially or entirely executed, and that this defense must fail because there had been no rescission. An examination of the record will show there was no attempt to prove a rescission.

There was no evidence of a release from the payment of royalties under this particular contract. This question has been considered fully under the Second Assignment of Error.

Under these findings, it is respectfully urged that the trial Court did not err, that the only course open to the

Court was for a direction in favor of the plaintiff and that the case should be affirmed.

Respectfully submitted,

ROBERT H. INGERSOLL,

Att'y of Defendants in Error.

NEW JERSEY COURT OF ERRORS AND APPEALS

The State of New Jersey to the Chief Justice and the other Justices of our Supreme Court of Judicature.

[SEAL] For as much as in the record and proceedings, and also in the giving of judgement in a certain plaint, which was in our said Supreme Court of Judicature, before you, between William Somers, R. Morris Bateman and Devoux B. Edwards, trading &c., as William Somers & Company, plaintiffs, and W. Scott Johnson, John T. Mason and Robert B Scull, trading &c., as Johnson, Mason and Company, defendants, in an action of contract, manifest error hath intervened, to the great damage of the said defendants, as 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 confirmed, them you distinctly and openly send, under your seal, the record and proceedings aforesaid, with all things touching the same, to our Judges of our Court of Errors and Appeals in the last resort in all cases, at Trenton, on the twenty fourth day of December, instant, together with this writ, that the record and proceedings aforesaid being inspected, we 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 fourth day of December, A. D. nineteen hundred and three.

S. D. DICKINSON,
Clerk.

WM. I. GARRISON,
01 JOHN B. SLACK,
Attorneys.

NEW JERSEY COURT OF ERRORS & APPEALS.

20 WM. SOMERS, ET ALS
trading &c. as
WM. SOMERS & CO.,
VS
W. SCOTT JOHNSON, ET AL

WRIT OF ERROR

30 WM. I. GARRISON,
JOHN B. SLACK,
Attorneys.

Service of copy of within writ acknowledged.

ROBT. H. INGERSOLL,
Attorney of Defendant in Error.

The State of New Jersey to the Chief Justice and the other Justices of our Supreme Court of Judicature.

[SEAL] For as much as in the record and proceedings, and also in the giving of judgement in a certain plaint, which was in our said Supreme Court of Judicature, before you, between William Somers, R. Morris Bateman and Devoux B. Edwards, trading &c., as William Somers & Compnay, plaintiffs, and W. Scott Johnson, John T. Mason, and Robert B. Scull, trading &c., as Johnson, Mason and Company, defendants, in an action of contract, manifest error hath intervened, to the great damage of the said defendants, as 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 judgement be thereupon given and confirmed, then you distinctly and openly send, under your seal, the record and proceedings aforesaid, with all things tovching the same, to our Judges of our Court of Errors and Appeals in the last resort in all cases, at Trenton, on the fifth day of January, A. D. 1904, together with this writ, that the record and proceedings aforesaid being inspected, we 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 sixteenth day of December, A. D. nineteen hundred and three.

S. D. DICKINSON,
Clerk.

WM. I. GARRISON,
JOHN B. SLACK,
Attorneys.

NEW JERSEY COURT OF ERRORS & APPEALS

WM. SOMERS, ET ALS
trading &c. as
WM. SOMERS & CO.
vs
W. SCOTT JOHNSON, ET ALS

WRIT OF ERROR

WM. I. GARRISON,
JOHN B. SLACK,
Attorneys.

NEW JERSEY SUPREME COURT.

WILLIAM SOMERS, et als, trading, &c., as William Somers & Co., Plaintiffs. Vs. W. SCOTT JOHNSON, Impleaded, &c., Defendant. } ON POSTEA. ON CONTRACT, GEORGE A BOURGEOIS, ROBERT H. INGERSOLL, Attorneys.

As yet of the tenth day of November, A. D. eighteen hundred and ninety-eight.

Witness, WILLIAM J. MAGIE, Esquire. Chief Justice.
WILLIAM RIKER, Jr., Clerk.

ATLANTIC COUNTY, SS.

W. SCOTT JOHNSON, JOHN T. MASON and ROBERT B. SCULL, trading as Johnson, Mason & Co., the defendants in this suit, were summoned to answer until WILLIAM SOMERS, ROBERT MORRIS BATEMAN and DEVOUX B. EDWARDS, trading as Wm. Somers & Co., the plaintiffs therein, in an action upon contract, and thereupon the said plaintiffs, by Robert H. Ingersoll and George A. Bourgeois, their attorneys, complain for that whereas, heretofore, to wit, on the fifth day of April, A. D. eighteen hundred and ninety-three, at Trenton, to wit, in Atlantic City, in the County of Atlantic aforesaid, by certain articles of agreement in writing then and there made between the said plaintiffs of the one part and the said defandants on the other part, which said articles of agreement are annexed to and made a part of this declaration, the date whereof is the day and year aforesaid. The said plaintiffs, in consideration of the sum of two hundred dollars per annum agreed to give the said defendants the exclusive privilege to run and operate the device known as "observation roundabouts" at Gloucester, New Jersey, during the life of the letters patent No. 489238, and the said defendants agreed to pay to said plaintiffs for said exclusive privilege as aforesaid the said sums of two hundred dollars on the first day of August of each and

every year during the term aforesaid.

And plaintiffs aver, that from the date of said agreement, to wit, on the fifth day of April, A. D., eighteen hundred and ninety-three, hitherto, the said defendants have been, and now are, in the full enjoyment of said exclusive privilege, at Gloucester aforesaid.

Plaintiffs further aver that from the date of said agreement, to wit, the fifth day of April, A. D. eighteen hundred and ninety-three, hitherto, the said letters patent No. 489238 have continued to be, and now are, in full force, life and effect.

And although the said plaintiffs have always from the time of the making of said articles of agreement, hitherto, done, performed, permitted and fulfilled all things in said articles of agreement contained, on their part to be done, performed, permitted and fulfilled; yet, the said plaintiffs say, that the said defendants did not pay to the said plaintiffs the said sum of two hundred dollars by them so agreed, or any other sum so due and payable as aforesaid on the said first day of August, A. D. eighteen hundred and ninety-three, or the sum of two hundred dollars so due and payable as aforesaid on the said first day of August, A. D. eighteen hundred and ninety-four, or the sum of two hundred dollars so due and payable as aforesaid on the said first day of August, A. D. eighteen hundred and ninety-five, or the sum of two hundred dollars so due and payable on the said first day of August, A. D. eighteen hundred and ninety-six, or the sum of two hundred dollars so due and payable as aforesaid on the said first day of August, A. D., eighteen hundred and ninety-seven, or the sum of two hundred dollars so due and payable on the said first day of August, A. D. eighteen hundred and ninety-eight, or at any other time as in said articles of agreement specified, but neglected and refused so to do.

And so the said plaintiffs say that the said defendants have not kept their said agreement, or any part thereof, so by them made as aforesaid, but have broken the same, and to keep the same with the plaintiffs have hitherto wholly refused and still refuse, whereby the said defendants then and there became and were indebted to the said plaintiffs in the said last mentioned sums of money, to be paid to the plaintiffs when they, the said

defendants should be thereunto afterwards requested, yet the said defendants, although often requested, have not paid any of said moneys, or any part thereof, to the damage of the plaintiffs, twenty-five hundred dollars.

AND FURTHER, for cause of action, plaintiffs aver that the said defendants heretofore, to wit, on the day and year last aforesaid, at Trenton, to wit, at Atlantic City, in the County of Atlantic aforesaid, were indebted to the plaintiffs in the sum of tweny-five hundred dollars for the value and price of goods sold and delivered by the plaintiffs to the defendants at their request; and in the like sum of money for the price and value of goods bargained and sold by the plaintiffs to the defendants at their request; and in the like sum of money for the price and value of work done, and materials for the said provided by the plaintiffs for the defendants at their request; and in the like sum of money for money lent by the plaintiffs to the defendants at their request; and in the like sum of money for money received by the defendants for the use of the plaintiffs; and in the like sum of money for money paid by the plaintiffs for the use of the defendants at their request; and in the like sum of money for interest due from the defendants to the plaintiffs for the plaintiffs having forborne moneys due from the defendants to the plaintiffs as defendants' request for a long time then elapsed; and in the like sum of money for money found to be due from the defendants to the plaintiffs 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 several last mentioned moneys respectively to the plaintiffs on request; yet the defendants disregarded their promises, and have not paid any of the said moneys, or any part thereof, to the plaintiffs' damage, twenty-five hundred dollars, and thereupon they bring their suit, &c.

THIS AGREEMENT made the fifth day of April, A. D. 1893, between Wm. Somers & Co., of the first part, and Johnson, Mason & Co., of the second part,

WITNESSETH, That for and in consideration of the sum of five thousand five hundred dollars, the said parties of the first part agree to build for the said parties of the second part,

one forty-two feet Observation Roundabout, with supporting frames 8x8 inches, arms 3x6 inches, less planing, rim 3x6 inches, less planing, iron shafts and hubs. The carrying arms and collars to be the same size as those on the machine run and operated by the said party of the first part in Atlantic City. Fifteen coaches, each to seat four people, the seats to be upholstered and the coaches to have awnings. The machinery to be two 15-horse power engines coupled together, boiler to be 36 horse power, all steam fittings necessary to run and complete the same. The cable to be ⅝-inch wire. One organ engine to be of sufficient power to run the organ.

The Roundabout to be in all things, except as mentioned above, similar to and of as good quality as the larger one owned and operated by the said party of the first part at Atlantic City.

The organ to be the same or of as good quality and of equal power as the one in use by the party of the first part at Atlantic City. The said Roundabout to be erected upon a site selected by the said Johnson, Mason & Co., and to be completed and in running order on or before the first day of June, 1893.

The said party of the second part agree to pay the said party of the first part the sum of five thousand five hundred dollars, as follows:

Five hundred dollars upon the signing of the agreement; two thousand two hundred and fifty dollars upon the first day of May, 1893, and the balance of two thousand seven hundred and fifty dollars when the wheel is completed and in perfect running order.

In case of failure to complete said wheel at the time mentioned the said party of the first part agrees to pay the party of the second part the sum of twenty-five dollars for each and every day after said date until the wheel is completed. In case of any unavoidable accident in connection with the building of said wheel the said forfeiture is not to be paid.

In consideration of the further sum of two hundred dollars per annum the said party of the first part agree to give the said party of the second part the exclusive privilege to run and operate the device known as Observation Roundabouts at Gloucester, N. J., during the life of the letters patent, No. 489238, granted for the same; which sum of two hundred dollars the

party of the second part agree to pay to the party of the first part on the first day of August during the continuance of the same.

IN WITNESS WHEREOF, the said parties have hereunto set their hands and seals the day and year first above written.

Signed and sealed in the
presence of

W. S. JOHNSON. (Seal)
JOHN T. MASON. (Seal)
ROBT. B. SCULL. (Seal)
WM. SOMERS & CO. (Seal)

JOHNSON, MASON & CO.,
To WM. SOMERS & CO., Dr.

Aug. 1, 1893.	Royalty on patent	$200.00
	Interest to October 19, 1898	62.60
Aug. 1, 1894	Royalty on patent	$200.00
	Interest to October 19, 1898	50.60
Aug. 1, 1895.	Royalty on patent	200.00
	Interest to October 19, 1898.....	38.60
Aug. 1. 1896.	Royalty on patent	200.00
	Interest to October 19, 1898	26.60
Aug. 1, 1897.	Royalty on patent	200.00
	Interest to October 19, 1898	14.60
Aug. 1. 1898.	Royalty on patent	200.00
	Interest to October 19, 1898	2.60
		$1395.60

And the said defendant, W. Scott Johnson, by William I. Garrison, his attorney, comes and defends the wrong and injury, when, &c., and says that he did not undertake and promise in manner and form as the said plaintiff has above thereof complained against him, and of this he puts himself upon the country, and the said plaintiff does the like.

And for a further plea in this behalf the said defendant by

leave of the court here for this purpose first had and obtained according to the statute in such case made and provided, and says that the said supposed articles of agreement is not his deed, &c., and of this the said defendants puts himself upon the country and the said plaintiff does the like.

And for a further plea in this behalf this defendant, W. Scott Johnson, by leave of the Court here for this purpose first had and obtained according to the form of the statute in such case made and provided, says that he ought not to be charged with the said debt by virtue of said supposed articles of agreementfi because he says that he was the agent of the plaintiffs in founding companies for the purchase of their devices known as the Observation Roundabout; that he formed several companies while acting as such agent for said plaintiffs, and among the companies thus formed was the defendant company in question; that he was authorized and advised by the plaintiff company to sign the said articles of agreement mentioned in plaintiff's declaration on behalf of and for said plaintiff company. And the defendant further says that he stated to the plaintiff company at the time he signed said agreement that he might become personally liable, and that they assured him that he would not become liable, as he was only their agent in that behalf; and the defendant futher says that after the signing of said agreement he had a conversation with William Somers, President of said company and others of said plaintiff company, wherein and whereby they agreed to release him from any and all obligations arising from said agreement mentioned in plaintiff's declaration, at Trenton, to wit, at Atlantic City, aforesaid, and this the said defendant is ready to verify, wherefore he prays judgment if he ought to be charged with said debt by virtue of said writing, &c.

And for a further plea in this behalf the said defendant by leave of the court here for this purpose first had and obtained according to the statute in such case made and provided, says that he ought not to be charged with the said debt by virtue of the said supposed articles of agreement, because, he says, that the said writing in said declaration mentioned was obtained from the said defendant by the said plaintiff company by fraud, covin and misrepresentation; that is to say, by the

said plaintiff falsely and fraudulently representing to the said defendant that by signing said supposed articles of agreement and forming said defending company, he, this defendant, would not become liable thereby and that this plaintiff company would consider him only as the agent of said plaintiff company and would hold him harmless and release him from all liability arising from his signing said supposed articles of agreement, and that by reason of such fraudulent and false misrepresentations he was induced to sign said supposed articles of agreement aforesaid, at Trenton, to wit, at Atlantic City aforesaid, wherefore he, the said defendant saith that the said writing in the said declaration mentioned was and is void in law and this he the said defendant, is ready to verify, wherefore he prays judgment if he ought to be charged with the said debt by virtue of the said writing, &c.

And for a further plea in this behalf the said defendant by leave of the court here for this purpose first had and obtained according to the form of the statute in such case made and provided, says that he ought not to be charged with the said debt by virtue of the said supposed articles of agreement, because, he says, that the said writing in said declaration mentioned was obtained from the said defendant by the said plaintiff company by fraud, covin and misrepresentation, and that by reason of such false and fraudulent misrepresentation he was induced to sign the said supposed articles of agreement aforesaid, at Trenton, to wit, at Atlantic City, in the County of Atlantic aforesaid, wherefore he saith that the said writing aforesaid mentioned was and is void in law and this he, the said defendant, is ready to verify, wherefore he prays judgment if he ought to be charged with the said debt by virtue of the said writing, &c.

And the said plaintiffs as to the first and second pleas of the said W. Scott Johnson, defendant, by him above pleaded, and whereof he hath put himself upon the country doth the like. As to the third plea of the said defendant thirdly above pleaded, the said plaintiffs say that they ought not to be barred from having or maintaining their aforesaid action against said defendant because they say that the said defendant, W. Scott Johnson, was not authorized and advised by the plaintiffs or any of them to sign the said articles of agreement mentioned in plain-

tiff's declaration on behalf of them, the said plaintiffs, or either of them, and the plaintiffs say that the plaintiffs are not an incorporation but are partners trading together under the name, style and firm of William Somers & Co.

The plaintiffs further say that they nor either of them ever assured the said W. Scott Johnson that he would not become liable if he signed said agreement, and that he signed said agreement personally, but not as agents of the said plaintiffs. The plaintiffs further say that after the signing of said agreement, the said plaintiffs or either of them did not agree to release the said defendant, W. Scott Johnson, from any and all obligations arising from said agreement mentioned in plaintiff's declaration, and this they pray may be inquired of by the country, &c.

As to the fourth plea of the said defendant, W. Scott Johnson, by him fourthly above pleaded, the said plaintiffs say that he ought to be charged to the said debt by virtue of the said articles of agreement, and says that the said articles in the said declaration mentioned was not obtained from the said W. Scott Johnson by the said plaintiffs, or either of them, by fraud, covin and misrepresentation or by falsely and fraudulently misrepresenting to the said defendant that by signing the said articles of agreement, and forming said defendant's company, he, the said W. Scott Johnson, would not become liable thereby, and that the said plaintiffs would consider him, the said W. Scott Johnson, only as the agent of said plaintiffs, and would hold him harmless and release him from all liability arising from him signing said articles of agreement; and plaintiff says that the said W. Scott Johnson was not induced to sign said articles of agreement by reason of said alleged misrepresentation.

Wherefore, they, the said plaintiffs, say that the writing in the said declaration is not void in law, and this they pray may be inquired of by the country, &c.

As to the fifth plea of the said defendant, W. Scott Johnson, by him fifthly above pleaded, the plaintiffs say that the said W. Scott Johnson ought to be charged with the said debt by virtue of the said articles of agreement, and say that the said writing in the said declaration mentioned was not obtained from the said defendant, by the said plaintiff by fraud, covin and misrepresentation, and that he, the said W. Scott Johnson, was not in-

duced to sign the said articles of agreement in the said declaration by reason of said alleged misrepresentation.

Wherefore, they, the said plaintiffs, say that the said writing in the said declaration is not void in law, and this they pray may be inquired of by the country, &c.

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

And now at this day, to wit, the twentieth day of October, A. D. nineteen hundred and three, before our said Supreme Court at Trenton comes the said plaintiffs, by their 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 Mays Landing, in and for the County of Atlantic, before His Honor, Charles E. Hendrickson, one of the Justices of the Supreme Court, on the eleventh day of September, in the year of our Lord one thousand nine hundred and three, according to the form of the statute in such case made and provided, comes as well the said plaintiffs as the said defendants, by their respective attorneys within mentioned, and the jurors of the jury between the parties aforesaid in the plea aforesaid, being summoned, also come, who, to speak the truth of the matters and things within contained, being chosen, tried and sworn, say, upon their oath, that the said impleaded defendant, W. Scott Johnson, did undertake and promise in such manner and form as the said plaintiffs, William Somers, Robert Morris Bateman and Devoux B. Edwards, trading, &c., as Wm. Somers & Co., hath within complained against him and hath in their said declaration alleged.

And as to the second issue within joined, between the said parties, the jurors aforesaid upon their oath aforesaid say, that the said impleaded defendant, W. Scott Johnson, did undertake and promise in manner and form as the said plaintiffs, William Somers, Robert Morris Bateman and Devoux B. Edwards,

trading, &c., as Wm. Somers & Co., hath within complained against him, and hath in their said declaration alleged.

And as to the third issue within joined, between the said parties, the jurors aforesaid upon their oath aforesaid say, that the said impleaded defendant, W. Scott Johnson, was not authorized and advised by the plaintiffs to sign the said articles of agreement mentioned in said declaration on behalf of, and for said plaintiffs, and that the said plaintiffs did not assure him, the said W. Scott Johnson, that he would not become personally liable if he signed said articles of agreement in said declaration mentioned, and that the said plaintiffs did not release him, the said W. Scott Johnson, from any and all obligations arising said agreement mentioned in said plaintiffs' declaration.

And as to the fourth issue within joined, between the said parties, the jurors aforesaid upon their oath aforesaid say, that the said defendant ought to be charged with the said debt by virtue of the said articles of agreement, and that the said writing in said declaration mentioned was not obtained from the sid defendant, W. Scott Johnson, by the said plaintiffs, by fraud, covin and misrepresentation or false and fraudulent misrepresentations in manner and form as therein alleged. And the jurors aforesaid upon their oath aforesaid say that the said writing in the said declaration mentioned was not and is not void in law.

And as to the fifth issue within joined between the said parties, the jurors aforesaid upon their oath aforesaid say that the said defendant, W. Scott Johnson, ought to be charged with the said debt by virtue of the said articles of agreement, and that the said writing in said declaration mentioned was not obtained from the said defendant by the said plaintiffs, by fraud, covin and misrepresentation, and that the said writing aforesaid mentioned, was not, and is not, void in law.

And the said jurors assess the damages of the said plaintiffs, William Somers, Robert Morris Bateman and Devoux B. Edwards, trading, &c., as Wm. Somers & Co., by reason of not performing the said promises and undertakings within mentioned over and above the costs and charges by them about theirr suit in this behalf expended at the sum of one thousand six hundred and ninety-two dollars and forty-nine cents (1692.49) and for

their costs and charges.

Therefore it is considered that the said plaintiffs do recover against the said defendant, W. Scott Johnson, impleaded as aforesaid, their said damages by the jury in form aforesaid found to one thousand six hundred and ninety-two dollars and forty-nine cents, and also seventy-six dollars and seventy-five cents for their costs and charges aforesaid, by the Court now here adjudged to the said plaintiffs and with their assent, which said damages, costs and charges in the whole amount to ONE THOUSAND SEVEN HUNDRED AND SIXTY-NINE DOLLARS AND TWENTY-FOUR CENTS.

Judgment signed the twentieth day of October, A. D. nineteen hundred and three.

WM. S. GUMMERE, C. J.

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

In testimony whereof I have set my hand and the seal of said Court at Trenton, this tenth day of February, A. D. nineteen hundred and four.

(Seal) WM. RIKER, Jr., Clerk.

NEW JERSEY SUPREME COURT.

WILLIAM SOMERS, et als., Trading, &c., as Wm. Somers & Company, Plaintiff. vs. W. SCOTT JOHNSON, Impleaded, &c., Defendant. | ON CONTRACT. ON POSTEA. ROBERT H. INGERSOLL, Attorney.

As yet of the fifteenth day of July, A. D. nineteen hundred and three.

Witness, WILLIAM RIKER, Jr., Clerk. WILLIAM S. GUMMERE, Esquire, Chief Justice.

ATLANTIC COUNTY, ss.

W. SCOTT JOHNSON, JOHN T. MASON AND ROBERT E. SCULL, trading, &c., as JOHNSON, MASON & COMPANY, the defendants in this suit, were summoned to answer unto WILLIAM SOMERS, R. MORRIS BATEMAN and DEVOUX B. EDWARDS, trading, &c., as WILLIAM SOMERS & COMPANY, the plaintiffs therein in an action upon contract, and thereupon the said plaintiffs by Robert H. Ingersoll, their attorney, complains for that whereas, heretofore, to wit, on the fifth day of April, A. D. eighteen hundred and ninety-three, at Trenton, to wit, at Atlantic City, in the County of Atlantic aforesaid, by certain articles of agreement in writing then and there made between the said plaintiffs of the one part and the said defendants of the other part, which said articles of agreement are annexed to and made a part of this declaration, the date whereof is the day and year aforesaid.

The said plaintiffs in consideration of the sum of two hundred dollars per annum agreed to give the said defendants the

exclusive privilege to run and operate the device known as Observation Roundabouts at Gloucester, New Jersey, during the life of the letters patent No. 489238, and the said defendants agreed to pay to said plaintiffs for said exclusive privilege as aforesaid the sum of two hundred dollars on the first day of August of each and every year during the term aforesaid.

And plaintiffs aver, that from the date of said agreement, to wit, on the fifth day of April, A. D. eighteen hundred and ninety-three, hitherto, the said defendants have been and now are, in the full enjoyment of said exclusive privilege at Gloucester aforesaid.

Plaintiffs further aver, that from the date of said agreement, to wit, the fifth day of April, A. D. eighteen hundred and ninety-three, hitherto, the said letters patent No. 489238 have continued to be and now are, in full force, life and effect.

And although the said William Somers, R. Morris Bateman and Devoux B. Edwards, trading, &c., as Wm. Somers & Co., the said plaintiffs have always from the time of the making of said articles of agreement hitherto, done, performed, permitted and fulfilled all things in said articles of agreement contained concerning, relating to, or in any manner affecting the rights and benefits of said exclusive privilege on their part to be done, performed, permitted and fulfilled and yet the said plaintiffs say that the said defendants did not pay to the said William Somers & Co., the said plaintiffs, the said sum of two hundred dollars by them so agreed or any other sum so due and payable as aforesaid on the said first day of August, A. D. eighteen hundred and ninety-nine, or the said sum of two hundred dollars so due and payable as aforesaid on the first day of August, A. D. nineteen hundred; or the sum of two hundred dollars so due and payable as aforesaid on the first day of August, A. D. nineteen hundred and one; or the sum of two hundred dollars so due and payable as aforesaid on the first day of August, A. D. nineteen hundred and two, or at any other time as in said articles of agreement specified so to do.

And the said plaintiffs say that the said defendants have not kept their said agreement, or any part thereof, so by them made as aforesaid, but have broken the same, and to keep the same with the plaintiffs have hitherto wholly refused and still refuse,

whereby the said defendants then and there became and were indebted to the said plaintiffs in said last mentioned sums of money, to be paid to the said plaintiffs when they, the said defendants, should be thereunto afterwards requested, yet the said defendants, although often requested, have not paid any of said moneys, or any part thereof, to the damage of the said plaintiffs two thousand dollars.

And further, for cause of action, the plaintiffs aver that the said defendants heretofore to wit, on the day and year last aforesaid, at Trenton, to wit, at Atlantic City, in the County of Atlantic aforesaid, were indebted to the plaintiffs in the sum of two thousand dollars for the price and value of goods sold and delivered by the plaintiffs to the defendants at their request; and in the like sum of money for the price and value of goods bargained and sold by the plaintiffs to the defendants at their request; and in the like sum of money for the price and value of work done and materials for the same provided by the plaintiffs for the defendants at their request; and in the like sum of money for money lent by the plaintiffs to the defendants at their request; and in the like sum of money for money received by the defendants for the use of thep laintiffs; and in the like sum of money for money paid by the plaintiffs for the use of the defendants at their request; and in the like sum of money for interest due from the defendants to the plaintiffs for the plaintiffs having forborne moneys due from the defendants to the plaintiffs at the defendants' request; for a long time then elapsed; and in the like sum of money for money found to be due from the defendants to the plaintiffs on an account then and there stated between them; and the defendants 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 several last mentioned moneys respectively to the plaintiffs on request; yet the defendants disregarded their promises, and have not paid any of the said moneys or any part thereof, to the plaintiffs' damage two thousand dollars, and therefore they bring their suit, &c.

The following is a bill of particulars of the demand and copy of the agreement whereon the annexed declaration is founded:

THIS AGREEMENT made this fifth day of April, A. D. 1893, between William Somers & Co., of the first part, and Johnson, Mason & Company, of the second part,

WITNESSETH: That for and in consideration of the sum of five thousand five hundred dollars, the said parties of the first part agree to build for the said parties of the second part, one forty-two feet Observation Roundabout, with supporting frame 8x8 inches, arms 3x6 inches less planing, rims 3x6 inches less planing, iron shafts and hubs. The carrying arms and collars to be the same size as those on the machine run and operated by the said party of the first part in Atlantic City. Fifteen coaches, each to seat four people, the seats to be upholstered and the coaches to have awning. The machinery to be two 15-horse-power engines coupled together, boiler to be 36 horse-power, all steam fittings necessary to run and complete the same. The cable to be 5/8-inch wire. One organ engine to be of sufficient power to run the organ.

The roundabout to be in all things, except as mentioned above, similar to and of as good quality as the larger one opened and operated by the said party of the first part at Atlantic City.

The organ to be the same or of as good quality and of equal power as the one in use by the party of the first part at Atlantic City. The said roundabout to be erected upon a site selected by the said Johnson, Mason & Company, and to be completed and in running order on or before the first day of June, 1893.

The said party of the second part agree to pay the said party of the first part the sum of five thousand five hundred dollars, as follows:

Five hundred dollars upon the signing of the agreement; two thousand and two hundred and fifty dollars upon the first day of May, 1893; and the balance of two thousand seven hundred and fifty dollars when the wheel is completed and in perfect running order.

In case of failure to complete said wheel at the time mentioned the said party of the first part agrees to pay the party of the second part the sum of twenty-five dollars for each and every day after said date until the wheel is completed. In case of any unavoidable accident in connection with the building of said wheel the said forfeiture is not to be paid.

In consideration of the further sum of two hundred dollars per annum the said party of the first part agree to give the said party of the second part the exclusive privilege to run and operate the device known as Observation Roundabout, at Gloucester, N. J., during the life of the letters patent No. 489238 granted for the same, which sum of two hundred dollars the party of the second part agree to pay to the party of the first part on the first day of August during the continuance of the same.

IN WETNESS WHEREOF the said parties have hereunto set their hands and seals the day and years first above written. Signed and sealed in the presence of

W. S. JOHNSON, (Seal)
JOHN T. MASON, (Seal)
ROBT. B. SCULL, (Seal)
WM. SOMERS & CO. (Seal)

Judgment will be claimed for the sum of nine hundred and fourteen dollars and forty cents, which, by the terms of the agreement, came due as follows:

JOHNSON, MASON & CO.,

To WM. SOMERS & CO., Dr.

Aug. 1, 1899.	Royalty as per agreement	$200.00
	Interest to June 20, 1903	46.60
Aug. 1, 1900.	Royalty	200.00
	Interest to June 20, 1903	34.60
Aug. 1, 1901.	Royalty	200.00
	Interest to June 20, 1903	22.60
Aug. 1, 1902.	Royalty	200.00
	Interest to June 20, 1903	10.60
		$914.40

Together with interest from the twentieth day of June, nineteen hundred and three, besides costs of suit to be taxed.

And the said defendant, W. Scott Johnson, by William I. Garrison, his attorney, comes and defends the wrong and injury, when, &c., and says that he did not undertake and promise in manner and form as the said plaintiff has above complained against him nd of this he puts himself upon the country. And the said plaintiff doth the like.

And for a further plea in this behalf the said defendant by leave of the court here for this purpose first had and obtained according to the statute in such case made and provided, and says that the said supposed articles of agreement is not his deed, &c., and of this the said defendant puts himself upon the country, and the said plaintiff doth the like.

And for a further plea in this behalf this defendant, W. Scott Johnson, by leave of the Court here for this purpose first had and obtained according to the form of the statute in such case made and provided, says that he ought not to be charged with the said debt by virtue of said supposed article of agreement, because he says that he was the agent of the plaintiffs in founding companies for the purchase of their devices known as the Observation Roundabout; that he formed several companies while acting as such agent for said plaintiffs and among the companies thus formed was the defendant company in question; that he was authorized and advised by the plaintiff company to sign the said articles of agreement mentioned in plaintiffs' declaration on behalf of and for the said plaintiff company. And the defendant further says that he stated to the plaintiff company at the time he signed the said agreement that he might become personally liable, and that they assured him that he would not become liable as he was their only agent in that behalf; and the defendant further says that after the signing of said agreemnt he had a conversation with William Somers, President of said company, and others of said plaintiff company, wherein and whereby they agreed to release him from any and all obligation arising from said agreement mentioned in plaintiff's declaration, at Trenton, to wit, at Atlantic City aforesaid, and this the said defendant is ready to verify, wherefore he prays judgment if he ought to be charged with said debt by virtue of said writing, &c.

And for a further plea in this behalf the said defendant, by

leave of the Court herefor this purpose first had and obtained according to the form of the statute in such cases made and provided says that he ought not to be charged with the said debt by virtue of the said supposed articles of agreement because, he says, that the said writing in said declaration mentioned was obtained from the said defendant by the said plaintiff company by fraud, covin and misrepresentation, that is to say by the said plaintiff falsely and fraudulently representing to the said defendant that by signing said supposed articles of agreement and forming said defending company, he, this defendant, would not become liable thereby and that this plaintiff company would consider him only as the agent of said plaintiff company and would hold him harmless and release him from all liability arising from his signing said supposed articles of agreement, and that by reason of such fraudulent and false misrepresentations he was induced to sign said supposed articles of agreement aforesaid, at Trenton, to wit, at Atlantic City aforesaid; wherefore he, the said defendant, saith that the said writing in the said declaration mentioned was and is void in law and this he, the said defendant is ready to verify, wherefore he prays judgment if he ought to be charged with the said debt by virtue of the said writing, &c.

And for a further plea in this behalf the said defendant, by leave of the Court here for this purpose first had and obtained according to the form of the statute in such cases made and provided says that he ought not to be charged with the said debt by virtue of the said supposed articles of agreement because, he says, that the said writing in said declaration mentioned was obtained from the said defendant by the said plaintiff company by fraud, covin, misrepresentation, and that by reason of such false and fraudulent misrepresentations he was induced to sign the said supposed articles of agrement aforesaid, at Trenton, to wit, at Atlantic City in the County of Atlantic aforesaid, wherefore he saith that the said writing aforesaid mentioned was and is void in law and this he the said defendant is ready to verify, wherefore he prays judgment if he ought to be charged with the said debt by virture of the said writing, &c.

And the said plaintiffs as to the first and second pleas of the said W. Scott Johnson, defendant by him above pleaded, and

whereof he hath put himself upon the country doth the like. As to the third plea of the said defendant thirdly above pleaded, the said plaintiffs say that they ought not to be barred from having or maintaining their aforesaid action against the said defendant, because they say that the said defendant, W. Scott Johnson, was not authorized and advised by the said plaintiffs, or any of them, to sign the said articles of agreement mentioned in plaintiff's declaration on behalf of them the said plaintiffs or either of them, and the plaintiffs say that the plaintiffs are not an incorporation, but are partners trading together under the name, style and firm of William Somers & Company.

The plaintiffs further say that they nor either of them ever assured the said W. Scott Johnson that he would not be liable if he signed said agreement, and that he signed said agreement personally, but not as agent of the said plaintiffs. The plaintiffs further say that after the signing of said agreement, the said plaintiffs, nor either of them, did not agree to release the said defendant, W. Scott Johnson, from any and all obligations arising from said agreement mentioned in plaintiff's declaration, and this they pray may be inquired of by the country, &c.

As to the fourth plea of the said defendant, W. Scott Johnson, by him fourthly above pleaded, the said plaintiffs say that he ought not to be charged to the said debt by virtue of the said articles of agreement, and says that the said articles in the said declaration mentioned was not obtained from the said W. Scott Johnson by the said plaintiffs, or either of them, by fraud, covin or misrepresentation, or by falsely and fraudulently misrepresenting to the said defendant that by signing the said articles of agreement, and forming said defendant's company, he, the said W. Scott Johnson, would not become liable thereby, and that the said plaintiffs would consider him, the said W. Scott Johnson, only as the agent of said plaintiffs, and would hold him harmless and release him from all liability arising from him signing said articles of agreement; and plaintiffs say that the said W. Scott Johnson was not induced to sign said articles of agreement by reason of said alleged misrepresentation.

Wherefore, they, the said plaintiffs, say that the said writing in the said declaration is not void in law, and this they pray

may be inquired of by the country, &c.

As to the fifth plea of the said defendant, W. Scott Johnson, by him fifthly above pleaded, the plaintiffs say that the said W. Scott Johnson ought to be charged with the said debt by virtue of the said articles of agreement, and say that the said writing in the said declaration mentioned was not obtained from the said defendant by the said plaintiff by fraud, covin and misrepresentation, and that he, the said W. Scott Johnson, was not induced to sign the said articles of agreement in the said declaration by reason of aforesaid alleged misrepresentations.

Wherefore, they, the said plaintiffs, say that the said writing in the said declaration is not void in law, and this they pray may be inquired of by the country, &c.

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

And now at this day, to wit, the twentieth day of October, A. D. nineteen hundred and three, before our said Supreme Court at Trenton comes the said plaintiffs by their attorney aforesaid, and the Justice before whom, etc., having first sent hither his record and had before him in these words, to wit:

Afterwards, to wit, at a Circuit Court holden at Mays Landing, in and for the County of Atlantic, before His Honor, Charles E. Hendrickson, one of the Justices of the Supreme Court, on the eleventh day of September, A. D. 1903, according to the form of the statute in such case made and provided, comes as well the said plaintiffs as the said defendants, by their respective attorneys, within mentioned, and the jurors of the jury between the parties aforesaid, in the plea aforesaid, being summoned, also come, who to speak the truth of the matters and things within contained, being chosen, tried and sworn, say, upon their oath that the said impleaded defendant, W. Scott Johnson, did undertake and promise in manner and form as the said plaintiffs, Wm. Somers, R. Morris Bateman and Devoux B.

Edwards, trading, &c., as Wm. Somers & Co., hath within complained against him and hath in their said declaration alleged.

And as to the second issue within joined between the said parties, the jurors aforesaid upon their oath aforesaid say, that the impleaded defendant, W. Scott Johnson, did undertake and promise in manner and form as the said plaintiffs, Wm. Somers, Robert Morris Bateman and Devoux B. Edwards, trading, &c., as Wm. B. Somers & Co., has within complained against him, and hath in their said declaration alleged.

And as to the third issue within joined, between the said parties, the jurors aforesaid upon their oath aforesaid, say, that the said impleaded defendant, W. Scott Johnson, was not authorized and advised by the plaintiffs to sign the said articles of agreement mentioned in said declaration on behalf of, and for said plaintiffs, and that the said plaintiffs did not assure him, W. Scott Johnson, that he would not become liable if he signed said declaration mentioned, and that the said plaintiffs did not release him, the said W. Scott Johnson, from any and all obligations arising in said plaintiffs' declaration.

And as to the fourth issue, within joined between the said parties, the jurors aforesaid upon their oath aforesaid say, that the said defendant ought to be charged with the said debt by virtue of the said articles of agreement, and that the said writing in the said declaration mentioned, was not obtained from the said defendant, W. Scott Johnson, by the said plaintiffs by fraud, covin and misrepresentation or by false and fraudulent misrepresentation in manner and form as therein alleged and the jurors aforesaid upon their oath aforesaid say, that the said writing in the said declaration mentioned was not and is not void in law.

And as to the fifth issue within joined, between the said parties, the jurors aforesaid upon their oath aforesaid say, that the said defendant, W. Scott Johnson, ought to be charged with the said debt by virtue of the said articles of agreement, and that the said writing in said declaration mentioned was not obtained from the said defendant by the said plaintiffs, by fraud, covin and misrepresentation, and that the said writing aforesaid mentioned, was not, and is not void in law.

And the said jurors assess the damages of the said plaintiffs,

William Somers, Robert Morris Bateman and Devoux B. Edwards, trading, &c., as Wm. Somers & Co., by reason of not performing the said promises and undertakings within mentioned, over and above the costs and charges by them about their suit, in this behalf expended at the sum of nine hundred and thirty-two dollars and twenty-four cents (932.24) and for their costs and charges.

Therefore it is considered that the said plaintiffs do recover against the said defendant, W. Scott Johnson, impleaded as aforesaid, their said damages by the jury in form aforesaid found to nine hundred and thirty-two dollars and twenty-four cents, and also fifty-four dollars and thirty-three cents for their costs and charges aforesaid, by the Court now here adjudged to the said plaintiffs, and with their assent, which said damages, costs and charges in the whole amount to NINE HUNDRED AND EIGHTY-SIX DOLLARS AND FIFTY-SEVEN CENTS.

Judgment signed the twentieth day of October, A. D. nineteen hundred and three.

WM. S. GUMMERE, C. J.

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

In testimony whereof I have set my hand and the seal of said Court at Trenton, this tenth day of February, A. D. nineteen hundred and four.

(Seal) WM. RIKER, Jr., Clerk.

THE UNITED STATES OF AMERICA.

No. 489,238.

To All to Whom These Presents Shall Come:

Whereas, William Somers, of Atlantic City, New Jersey, has presented to the Commissioner of Patents a petition praying for the grant of Letters Patent for an alleged new and useful improvement in Roundabouts, a description of which invention is contained in the specification of which a copy is hereunto annexed and made a part hereof, and has complied with the various requirements of law in such cases made and provided, and

Whereas, upon due examination made, the said claimant is adjudged to be justly entitled to a patent under the law.

Now therefore these letters patent are to grant unto the said William Somers, his heirs or assigns for the term of seventeen years from the third day of January, one thousand eight hundred and ninety-three, the exclusive right to make, use and vend the said invention throughout the United States and the Territories thereof.

In testimony whereof I have hereunto set my hand and caused the seal of the Patent Office to be affixed at the city of Washington, this third day of January, in the year of our Lord, one thousand eight hundred and ninety-three, and of the Independence of the United States of America, the one hundred and seventeenth.

CYRUS BUSSEY,
Assistant Secretary of the Interior.

Countersigned.

W. B. SIMONDS,
Commissioner of Patents.

UNITED STATES PATENT OFFICE.

William Somers, of Atlantic City, New Jersey.

ROUNDABOUT.

SPECIFICATION forming part of Letters Patent No. 489,238, dated January 3, 1893.

Application filed October 28, 1891, Serial No. 410,110.

(No Model.)

TO ALL WHOM IT MAY CONCERN:

Be it known that I, William Somers, a resident of Atlantic City, in the County of Atlantic and State of New Jersey, have invented certain new and useful improvements in Roundabouts; and I do declare the following to be a full, clear and exact description of the invention, such as will enable others skilled in the art to which it appertains to make and use the same, reference being had to the accompanying drawings, and to letters of reference marked thereon, which form a part of this specification.

Figure I of the drawings is a representation of the invention in side elevation. Figure 2 is a front view. Figure 3 is a side view of the driving gear. Figures 4 and 5 are details of the belt tightener. Figure 6 is a detail of the brake. Figures 7 and 8 are details illustrating the construction of the hub. Figures 9 and 10 are details showing the construction of the rims and Figures 11 and 12 are details showing the manner of suspending the carriers.

This invention has relation to improvements in roundabouts, and it consists in the novel construction and combination of parts as hereinafter specified.

In the accompanying drawings, the letter A designates a circular wheel-like frame, carried upon a horizontal axis, and designed to revolve in a vertical plane. The shaft or axle of the wheel is provided with bearings b in any suitable supporting frame B.

The frame A is shown as consisting of the two parallel annular rings or rims C, C', of equal diameter and spaced laterally from each other, as shown. Said rims are supported from the

hub or axial portions by the radial arms or spokes D, suitably connected and braced to insure proper strength. Connecting the rims C, C' is a series of transverse bars or shafts E, located at intervals from each other and extending around the entire circumference of the wheel or frame. From each of these bars is vertically suspended a suitable carrier or seat F by means of rods, links, or cables H, H, secured to said carriers or seats at their lower ends, and at their upper ends having loose bearings on the bars. As the wheel or frame is revolved, said carriers or seats are carried therewith, and by reason of their loose bearings on the bars D, will at all times keep their vertical suspension whatever may be the relative position of the frame. The distance between the rings or rims C, C' is sufficient to allow the seats to swing between them and to pass therethrough, and the distance between the bars D, is also sufficient to permit the seats to swing between them.

If it is desired to provide a machine of a larger carrying capacity, an additional rim or rims may be provided, together with an additional series of seats or carriers. An important feature of the invention resides in the driving gear, the arrangement of which will not be described. In the peripheral edge of each rim is a continuous surrounding groove, e, in which runs one of the endless parallel belts or cable K. These cables pass down on their respective sides and several times around the grooved wheels L, L', of the driving gear. They are held to the grooves in the rims by means of the idler pulleys or wheels l, l respectively. The idler wheels are hung in the boxes P, which are adjusted vertically in their supports P', by means of the screws p, bearing in brackets p' and engaging said boxes, whereby any excess of slack in the cables may be taken up to prevent their slipping.

Q designates small idler wheels, one on each side, which are hung in bearings at the rear of the driving wheels L', and serve to guide the driving cables into the grooves on said driving wheels.

R designates a pulley on the main shaft of the engine, said pulley carrying a belt R', which passes over a larger pulley R^2 on the shaft of the driving wheels L', and by means of which they are driven. On the end of the main shaft is a balance

wheel R3, and R4 is a brake shoe in engagement therewith, said shoe being operated by the bar r. By cutting off steam and applying the brake, the machine may be stopped almost immediately. By this double arrangement of the driving cables a greater degree of safety is insured, inasmuch as should one cable break, or become so loose as to slip, the remaining one will still keep the machine in operation.

The application of the driving power as above described whereby the cables are caused to run around the peripheries of the outer rims of the frame, is preferred, if not essential to the successful operation of the device, for the reason that insomuch as the frames are usually made of large diameter, the circumferential series of seats are at a great radial distance from the centre. Consequently the application of power at any point within the circumference is not sufficient to operate the machine when heavily loaded. But by passing the cables directly around the rims between which the seats are suspended, the power is applied directly to the point where the work is to be done, and all danger of accident arising from the slipping or breaking of gear is obviated.

It is, of course, necessary that the rims C, C' should possess sufficient strength to insure safety, and at the same time that they should be as light as possible. They are therefore usually made of wood, and constructed as follows: The body of each rim is composed of the two annular rings S, S', suitably secured together. In order that the grain of the wood forming these rings may run as straight as possible they are each formed of the short segments s, the joints of the said segments in the two rings being so located as to overlap each other. To the outer surface of each of these rings is usually secured a thin veneer-like ring S2, as shown.

s', s', designate two pieces secured on the rings S, S', and forming between them the groove for the cable. By this construction a strong as well as durable ring is provided. A thin strip s3 may be interposed between the rings S, S', and the pieces S', S', as shown in Figures 9 and 10, said piece being secured to the rings S, S'. This piece serves to break the joints between the said rings S, S' and s', s', but it may, however, be omitted, in which case the latter pieces are secured directly to

the frame.

The hub portions T of the wheel in which the radial arms or spokes are secured, are also usually of special construction, to insure proper strength. The shaft of the wheel usually consists of a squared beam T', around which the hub portions are secured. The portion t of each hub, against which the ends of the spokes rest, is shown as formed of four segments or sections secured around the shaft.

Abutting against each end of this portion t is a disk U, formed of similar sections, the whole being bolted or otherwise secured together. Between these two disks are held the spokes, their inner ends abutting against the portion t, and separated from each other by segment wedges V.

Having described this invention, what I claim as new and desire to secure by Letters Patent is:

1. In a roundabout the combination of the parallel annual rims, their braces, and a peripheral series of cross ties, forming suspension rods, the carriages suspended from said rods, the continuous grooves in the peripheries of said rims, and the double parallel driving cables working in said grooves, substantially as specified.

2. In a roundabout, the combination of the parallel annular rims, the continuous grooves in the peripheral faces of said rims, the double parallel driving cables working in said grooves, and the series of carriages suspended between said rims and cables, substantially as specified.

3. The combination with the rotary, circular vertical frame, arranged to turn on a horizontal axis, and having grooves in its peripheral rims, of the driving gear for said frame, said gear comprising the double driving cables working in the grooves in said peripheral rims, and actuated by grooved wheels on the driving shaft, substantially as specified.

4. The combination with the rotary, circular vertical frame, having the peripheral rims grooved on their outer edges, of the driving gear for said frame, said gear comprising double endless cables working in said grooves, the grooved wheels L, L', carrying said cables, one pair for each cable, and carried by a common driving shaft, the idlers and tighteners for said cables, and the brake device, substantially as specified.

5. In a roundabout comprising a circular rotary frame having the outer parallel rims supported from the hub portion, said rims consisting each of the following parts: The annular rings S, S, secured together and composed each of a series of lap jointed segments, the veneers S2, and the peripheral pieces S!, S!, forming the grooves for the driving cables, substantially as specified.

In testimony whereof I affix my signature in presence of two witnesses.

WILLIAM SOMERS.

Witnesses—
CLIFTON C. SHINN,
H. F. COGILL.

NEW JERSEY SUPREME COURT.
ATLANTIC CIRCUIT.

William Somers, et al.,
Plaintiffs,
vs.
W. Scott Johnson, et al.,
Defendants.
} On Contract. (Two cases.)

Mays Landing, N. J., September 8, 1903.

TESTIMONY

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

APPEARANCES.

For Plaintiffs,—Hon. Robert H. Ingersoll.

For Defendants,—William I. Garrison and John W. Wescott, Esqs.

THE COURT:—In case No. 1 a motion was made to amend the pleas on notice and an amendment was allowed by adding the pleas; and the plaintiff joins issue with those pleas and is permitted to file a replication by consent similar to the replication in case No. 17, the transcript of which is marked No. 11,132. Case No. 1 is marked, the transcript, No. 2,186. Counsel for the plaintiff is to prepare his replication during the trial and put it on file in accordance with this order and consent.

MR. INGERSOLL:—I offer in evidence letters patent No. 489,238, signed by the officers of the patent office, with the seal attached, together with the papers connected with and as parts of the papers, the plans, four sheets, and the specifications, entitled, "Specifications forming part of letters patent No. 489,238, dated January 3, 1893, application filed October 28, 1891, serial No. 410,110, no model." The patent was issued January 3, 1893.

(Paper marked Exhibit P 1.)

I also offer in evidence the articles of co-partnership between William Somers, R. Morris Bateman and Devoux B. Edwards, between the plaintiffs.

(Paper marked Exhibit P 2.)

DEVOUX B. EDWARDS, Sworn.

DIRECT EXAMINATION.

BY MR. INGERSOLL:—

Q. Mr. Edwards, I hand you a paper purporting to be a paper bearing date the 5th day of April, 1893, between William Somers & Company and others, and ask you, have you seen that paper before?

A. I have.

Q. Were you present when the signatures thereto were placed thereon?

A. I was.

Q. By whom was it signed?

A. W. Scott Johnson, John T. Mason and Robert B. Scull and William Somers & Company.

Q. Signed by each of the parties in your presence?

A. Yes.

MR. INGERSOLL:—I now offer this paper in evidence.

MR. WESCOTT:—I would like to ask about the signatures.

BY MR. WESCOTT:—

Q. Were you a member of the company of William Somers & Company?

A. I am.

Q. You are now?

A. I am.

Q. You were at the time this paper was signed?

A. I was.

Q. Who drew the paper, do you know?

A. I did.

Q. You drew it yourself?

A. Yes.

Q. Typewrote it?

A. Yes.

Q. Where?

A. In Atlantic City.

Q. Whereabouts in Atlantic City?

A. 107 South Carolina Avenue.

Q. Were the people together when this paper was signed?

A. They were.
Q. They signed it where?
A. 107 South Carolina Avenue.

(Paper admitted in evidence and marked Exhibit P 3.)

DIRECT EXAMINATION. (Resumed.)

BY MR. INGERSOLL:—

Q. Mr. Edwards, has the firm of William Somers & Company ever granted to any other parties than the firm of Johnson, Mason & Company any right to operate observation roundabouts in Gloucester, New Jersey?
A. No.
Q. Mr. Edwards, has the royalty amounting to $200 for the year 1893 been paid?
A. No.
Q. For the year 1894?
A. No.
Q. Has any royalty since the year 1893 up to and including the year 1902 been paid to the firm of William Somers & Company by Johnson, Mason & Company or any one else?
A. No.
Q. Mr. Edwards, who composed the firm of William Somers & Company at the time of entering into this agreement, which was on the 5th day of April, 1893?
A. William Somers, R. Morris Bateman and Devoux B. Edwards.
Q. Do the same parties still compose that firm?
A. They do.
Q. And have they continuously since that time?
A. They have.

CROSS-EXAMINATION.

BY MR. WESCOTT:—

Q. Who are these parties you say compose the firm?

A. William Somers, R. Morris Bateman and Devoux B. Edwards.

Q. Do you know whether other wheels, roundabout wheels, have been built in Gloucester?
(Objected to.)

MR. WESCOTT:—That only calls for whether he has any knowledge.

A. Not to my knowledge.

Q. Have you ever been to Gloucester since this wheel was built?

A. No.

Q. Were you there when it was built?

A. No.

Q. How do you know it was built?

MR. INGERSOLL:—There never has been any question. This witness has not said he knew it was built.

THE COURT:—The objection is it would not be cross-examination; is that the objection?

MR. INGERSOLL:—Certainly. I refrained from asking this witness any questions concerning the building of this wheel, because I knew that he didn't know anything about it.

THE COURT:—The objection is sustained.
(Whereupon the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.)

Q. Were any royalties paid at all?

A. No.

Q. Not from the beginning?

A. No.

Q. Nobody paid any royalties or parts of royalties; that is correct, is it not?

A. I believe my answer was no.

Q. I say it is correct, is it?

A. That no royalties have been paid?

Q. Yes.
A. Yes, that is correct.
Q. For this wheel?
A. For that wheel, yes.
Q. Not by anybody?
A. No.
Q. Well, have any of these defendants been released from the payment of royalties?
A. No.

MR. INGERSOLL:—The question now is, have any of the defendants been released from the payment of any royalties. I object to that question as not being pertinent to this issue. Suit now is brought for these royalties, and if the plaintiffs may have released any individual party from any payments, that is a matter between them and not between the firm. The firm has never paid any royalties, according to the testimony of this witness. Now what the plaintiffs' firm may have done in regard to some individual members, not a party in the suit, I take it is not relevant.

THE COURT:—Not a party to the suit?

MR. INGERSOLL:—No, he is not one of the answering defendants here.

THE COURT:—This witness?

MR. INGERSOLL:—Yes.

THE COURT:—I would like to understand how this is pertinent to this testimony. I am not clear about it, Judge Wescott.

MR. WESCOTT:—Well, I asked the question. He says that none of these royalties have been paid.

THE COURT:—And he is not a party plaintiff?

MR. INGERSOLL:—Oh, yes, he is one of the plaintiffs.

MR. WESCOTT:—Then I asked him if any of these defendants have been released from the payment of royalties. It would seem to be quite manifest and clear that if they had been released they would have no right of action, I should think. It seems to me that is mere A B C. But the answer of counsel is that they may have released them personally but have not released them as a firm, and if they paid personally and had not paid as a firm they are entitled to a judgment against them as a firm and then make them pay twice, either as a firm or as the individuals of a firm. That is the answer of counsel.

MR. INGERSOLL:—If your Honor please, that is not the answer of counsel. I take it that the purpose is to show there are three defendants here. I may be wrong in my supposition as to the purpose, but I take it that there are three defendants, two of which have made no defence, they are not answering defendants here. Against them judgment could have been taken any time. One defendant answers. The question now is, have any of these been released. It may be quite likely that if a judgment should be entered against this only one defendant and it should be shown then that the others had been released, that this defendant who is now answering could bring that up in the question of contribution toward the payment of the judgment. But there is no question about that; that if this defendant, one of the parties—I don't know what proportion he owned in the firm—owning a certain portion, and one owning another portion, had been released—

THE COURT:—But they all owe, if at all, each owes the whole, no partition.

MR. INGERSOLL:—Yes, that is true.

THE COURT:—And if the creditor or party releases one partner or one of the joint debtors from the debt or claim, does not that operate as a release of the others in the law?

MR. INGERSOLL:—It may be so, but I don't think that is

a proposition of law that will hold in this case.

THE COURT:—Why not? If they are all released how would you have a right to sue, if the whole debt was released? Why would not that be pertinent then to the defence in this case?

MR. INGERSOLL:—If the whole debt were released, if they are on that line. I ask an exception.

THE COURT:—Well, an exception to what? I merely asked you what you thought about that legal question and I did not make a particular ruling. The question I ask you, if you have nothing further to say I will rule. Do you object to the question?

MR. INGERSOLL:—I object to the question.

THE COURT:—On what ground?

MR. INGERSOLL:—Of not being relevant to the issue.

THE COURT:—I will allow the question.
(Exception noted for plaintiffs.)
(Question repeated.)

THE COURT:—Of course, the witness will speak from his own knowledge, not from hearsay.

A. I would like to understand. I did understand when I made the statement before that W. Scott Johnson was the only defendant in this case, from what Judge Ingersoll said.

THE COURT:—Well, the trial is against W. Scott Johnson, that is correct; but originally the contract was with the three, as I understand it.

MR. WESCOTT:—The trial is against all three, if your Honor please.

THE COURT:—Well, this issue is against one. The issue is against the one who has plead. The other two have defaulted, you know. That is a default, you know.

MR. WESCOTT:—It may be that the pleadings are in that shape. I have not seen them.

A. Then does this question apply to all?

(Question repeated.)

THE COURT:—Well, now that applies to the three men that were originally sued. Two of them did not plead. It means those three. That is the way I understand it.

A. I answer that question yes.

Q. How many of these defendants have been released from the payment of royalty?

A. One.

Q. Who?

A. Scull.

Q. Was not the other released?

A. No.

Q. What arrangement was made with the other not to prosecute him?

A. With the other not to prosecute him?

Q. Yes, not to bring suit against him.

(Objected to.)

Q. If any.

A. None.

Q. Was the release of Mason in writing?

MR. INGERSOLL:—I object. There has been no release of Mason according to the testimony.

Q. Scull, I mean.

A. I never saw any to my knowledge. If there is any I don't recollect. There may be.

Q. You began as a firm, as a company, to do business away back in 1891, did you?

MR. INGERSOLL:—I object to that question when he

says, "You began business as a company." It is not as yet a company, but articles of co-partnership.

THE COURT:—Yes, it does not appear that they were incorporated, Judge. Just change that. I suppose you mean the same thing as a partnership.

MR. WESCOTT:—Well, I don't see the propriety of changing it. An incorporation is a company and a partnership is a company. These articles of agreement here show that it is a partnership company. It says it is a company.

THE COURT:—That is the partnership name, eh?

MR. WESCOTT:—Yes. I don't want to split hairs.

THE COURT:—Well, it will be understood that they are not incorporated.

MR. INGERSOLL:—The question embraces both: "You began business as a firm and as a company." There may be some confusion there and I object to it on that ground.

THE COURT:—I will allow that question.

(Exception noted for plaintiff.)

(Question repeated.)

A. Yes.

Q. Where did you begin to do business?

A. Atlantic City.

Q. Did you have an office there?

A. Yes.

Q. Where?

A. At my place of business.

Q. Where was that?

A. 107 South Carolina Avenue.

Q. Did you keep a set of books?

A. Yes.

Q. Now you have been in active business from that time to

this, have you?

A. Well, you might say yes, relative to these suits, and no, not actual business.

Q. You have been in active business in these suits but in nothing else?

A. Part of the time.

Q. Well, the firm as a matter of fact has not been doing business?

MR. INGERSOLL:—I object. I cannot see what relevancy it has whether the firm was doing any business or not. Here is a firm for a certain specific purpose and it makes no difference whether they did any other business or not.

THE COURT:—I don't see the bearing of that, Judge.

MR. WESCOTT:—It was especially proven here that this co-partnership was formed under articles of agreement that were offered in evidence and that was followed by a statement by the witness that they had been ever since a firm under this agreement. Now I want to exploit that a little and see if it is true; because forsooth it may not have been a firm under this contract at all; they may have dissolved, either by legal arrangement or by their conduct, and they may be not related, no firm at all; they may be a mere shadow here for the purpose of prosecuting this single defendant.

THE COURT:—Well, if they were lately trading I think it would be the same thing, so far as this application goes; and whether they conducted business as partners regularly or not, I don't see how it is relevant.

MR. WESCOTT:—Well, I cannot offer any additional suggestions to your Honor, only I understand it to be a fact that the company was dissolved and went out of business and released one or more creditors.

THE COURT:—How does that affect this, Judge?

MR. WESCOTT:—Well, if they had done that and released, as already appears, one of their creditors under this joint undertaking, they would be in no position to sue.

THE COURT:—Well, the release would operate the same if they were partners as it would if they had been dissolved. I don't see any difference. Well, of course, I will allow this question. I don't think it ought to be carried too far.

(Exception noted for plaintiff.)

(Question repeated.)

A. No.

Q. Now how long has it been out of business?

(Objected to for the same reason.)

THE COURT:—Answer the question.

(Exception noted for plaintiff.)

A. I can't state the year. I don't remember.

Q. Well, about what year did you go out of business?

A. About 1895 or 1896. We didn't go out of business at all. There was no dissolution of partnership.

Q. Well, since 1895 or 1896 the firm has done no business under this agreement?

A. Except trying to collect royalties, no, sir.

Q. Well, was that a part of the firm's business?

A. Certainly.

Q. Well, when you stopped all business except the business of collecting royalties, did you release Scull at that time?

A. For a consideration.

Q. You released him from paying any royalties under this agreement that you sue on; is that correct?

MR. INGERSOLL:—I object. If the release was in writing the writing should be produced here. If not, it should be shown that it was not in writing and I object to it.

THE COURT:—Oh, certainly.

MR. INGERSOLL:—If there was a release it must have been in writing.

MR. WESCOTT:—Not necessarily.

THE COURT:—Just ask whether it was in writing or oral, Judge.

MR. WESCOTT:—I would rather, if your Honor please—pardon me. I know you are patient. I want to find out first—We have found out that Scull was released.

THE COURT:—That is a kind of legal question, you know, a question of law, whether there was a release or not, Judge. It might not be a release, you know.

MR. WESCOTT:—He says that he was. Now I think your Honor is bound.

THE COURT:—He says they did?

MR. WESCOTT:—He said they did release him. I think your Honor is bound by that. I don't think you can take the sting out of that admission by saying that cannot mean anything.

THE COURT:—The sting is there. The only question is the legal effect of it.

MR. WESCOTT:—Now the second step was that Scull was released in 1895 or 1896, when this firm went out of all business excepting collecting royalties; third, he was released for a consideration. Now there are various modes of releasing parties. Suppose it may be conceded one is an oral method and another is a written method. Now for the present purpose I don't care which method was pursued, whether it was by word of mouth or whether it was in writing. This question now is simply a reiteration of what has already been proven in one form and another, that Scull was released at that time from the payment of royalties under this agreement which these plaintiffs now sue on. That is as far as I want to go. It seems to me it is a

proper question.

THE COURT:—That has already been in evidence, that he had released him for a consideration. I don't see that this question can add anything to what he has already said.

MR. WESCOTT:—I think the criticism would be a more pertinent one that it is mere repitition. On that ground I am willing to concede that it may not be proper.

Q. When this agreement that you sue on was signed, did Somers & Company retain any interest in this wheel?

A. No, sir.

Q. Had none in it whatever?

A. None.

Q. Didn't they afterwards sell their interest to somebody, their interest in this wheel?

A. They didn't retain any interest to sell.

Q. Do you know Heston of Atlantic City?

A. Yes.

Q. Didn't you sell your interest in the wheel to Heston?

A. No; didn't have any interest to sell.

Q. Did you sell any interest at all to Heston?

A. No.

Q. Didn't you get a mortgage from Heston of $2000 for a one-quarter interest in this wheel?

A. I don't remember what the amount of the mortgage was. We got a mortgage from Heston through a second party?

Q. Then you did take a mortgage from Heston?

A. No.

Q. Of some amount?

A. No.

Q. Well, you got it through a second party from Heston?

A. And the second party paid this mortgage of Heston's over to us for his share of the interest.

Q. For Heston's share?

A. No; for the second party's share.

Q. Who was that second party?

A. W. Scott Johnson.

Q. Didn't Heston have a share?

A. I never had any words with Heston and I couldn't say concerning that.

Q. Then when you say that Heston had no interest you will correct your statement so far as to say that he had none so far as you know?

A. I didn't say that Heston had no interest.

MR. INGERSOLL:—I object to this line of questioning. This suit is brought upon a written agreement which has been offered here in evidence signed by W. Scott Johnson, John T. Mason and Robert B. Scull. Now it can make no difference whether Heston afterwards or at any time obtained an interest in that wheel. The point is that this agreement is between these particular parties and it can make no difference who afterwards became interested in that wheel. He may have sold it to many outside now. We don't know who does own it now.

THE COURT:—Yes, I will hear Judge Wescott.

MR. WESCOTT:—I have nothing to say.
(Question repeated.)

THE COURT:—What date does this question refer to?

MR. WESCOTT:—About the beginning or at the time of the agreement.

THE COURT:—Well, if it was before the agreement it would be a different thing.

MR. WESCOTT:—I won't pursue it any further. It will come out all right in a different way.

BY MR. INGERSOLL:—

Q. Do you know whether what you have termed a release to Robert B. Scull was in writing or not?

A. I am not positive.

WILLIAM SOMERS, Sworn.

DIRECT EXAMINATION.

BY MR. INGERSOLL:—

Q. Mr. Somers, are you one of the firm of William Somers & Company?

A. Yes, sir.

Q. Do you remember the firm of Johnson, Mason & Company?

A. I do.

Q. Did your firm build a wheel for Johnson, Mason & Company at Gloucester?

A. They did.

Q. When?

A. In 1893, the spring of 1893.

Q. Was it turned over to them?

A. It was.

Q. Do you know whether it was operated that year?

A. It was.

Q. Did your firm receive from Johnson, Mason & Company the royalty for the year 1893 or any year since then?

A. They did not.

NO CROSS-EXAMINATION.

DEVOUX B. EDWARDS, Recalled.

DIRECT EXAMINATION.

BY MR. INGERSOLL:—

Q. I show you a paper purporting to be an agreement betwee William Somers & Company of the first part and Robert

B. Scull of the second part and ask you if you have seen that paper before.

A. Yes.

Q. I call your attention to the signature, "William Somers & Company," and ask you by whom that was placed there.

A. By myself.

THE COURT:—This is an agreement with whom?

MR. INGERSOLL:—Robert B. Scull. This is the paper which has been termed a release. I offer it in evidence.

MR. WESCOTT:—We have no objection.

(Paper marked Exhibit P 4.)

PLAINTIFFS REST.

MOTION FOR NON-SUIT.

MR. WESCOTT:—If your Honor please, it seems to me under this proof as it stands the defendant is not called upon to put in any defence; that this was a suit to recover damages, which damages, while they are specific on the face of the instrument sued upon, may in the natural course of events become unspecific and undeterminative outside of the verdict of the jury on account of various conceivable situations, such as fraud or partial payment, or failure of consideration or other conceivable facts. Now with the contract in that situation this is susceptible of impairment or diminution, reduced to a state of interrogation as far as the ultimate amount recoverable thereon may be. The parties plaintiff see fit to release for a consideration one of the parties thus bound, one of the parties bound by the contract, and when they release one of the defendants under a contract of that character they release all of the defendants. Otherwise

two defendants may be released, which is a payment, satisfaction of the contract, and the other remaining defendant may be soaked for the whole business; because if they are entitled—suppose there is no impairment or diminution of the consideration of the contract and they are entitled to recover the whole thing; then what followed? Why, this particular defendant must pay what three defendants, to wit, a company, were bound to pay. This is a company.

THE COURT:—Yes, a partnership.

MR. WESCOTT:—Now one of the partnership, the rest having been released, may be obliged to pay the obligations of the entire partnership.

THE COURT:—Suppose he could recover contribution?

MR. WESCOTT:—Oh, but the law won't put him in that position.

THE COURT:—Well, I say if they were liable—

MR. WESCOTT:—Furthermore, bear in mind that at the time this release was signed the plaintiffs determined in dollars and cents what they thought and estimated then the liability of this released member of the firm to be, to wit, $50. That is what they thought at the time that any claim against him might be worth.

THE COURT:—Wasn't there a note besides the $50?

MR. INGERSOLL:—$50 was the total amount.

MR. WESCOTT:—Now they say back in 1898—

THE COURT:—Was that before or since the suit brought?

MR. WESCOTT:—But what they say is that in effect, "All

we think you are liable for is $50;" and when they said that they said that all the firm is liable for is $50, because they could not differentiate, they could not separate one man from another, they were dealing with an entity, a partnership, and which they could not cut up into three parts; they had to deal with the whole thing, the entire partnership. And then they said, "We think that this partnership is liable to the extent of $50." Now since they released the partnership for $50, they pick out one member of the partnership and say, "We want a judgment against them for several thousand dollars."

THE COURT:—Well, they have taken two. Only one is released.

MR. WESCOTT:—Well, he is in the same boat.
(Mr. Ingersoll replies.)

THE COURT:—There is another question here, whether under this paper, whether it did have any effect to release this indebtedness, because it was only $50, actually a part of the debt; whether under the principles of law that is not a good defence either to Scull or those associated with him for any more than the amount of $50. That is the way it occurs to me, the way the evidence is now, if it was a compromise.

MR. WESCOTT:—Well, you might say it was not, because this was a contract that might rise and fall according to the ultimate circumstances of liability.

THE COURT:—It is not to be presumed from the evidence that it is to be reduced. It is a matter of debt for only royalty from year to year.

MR. WESCOTT:—Your Honor will have to pardon me when I say I cannot at all agree with that, because the plaintiffs themselves put the estimate of liability at $50. (Continues argument.)

THE COURT:—It may be so. It may be that some facts

will come out to make this clear. However, I think that I should deny the motion at this time, but I will reserve my right to reconsider this before the end of the cause. I will allow the case to proceed now because I am not sufficiently that I ought to nonsuit. We will proceed now with the case.

(Whereupon the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.)

DEFENDANTS' TESTIMONY.

W. SCOTT JOHNSON, Sworn.

DIRECT EXAMINATION.

BY MR. WESCOTT:—

Q. Where do you live, Mr. Johnson?

A. Atlantic City.

Q. Were you ever associated in partnership with Mason and Scull?

MR. INGERSOLL:—I object. There is a paper here purporting to be an agreement between Johnson, Mason & Company which is signed by this party individually, W. Scott Johnson, John T. Mason and all the members of that firm as set forth in the agreement.

THE COURT:—Then what is the ground of your objection?

MR. INGERSOLL:—My objection is that it is already in writing that there was a partnership.

THE COURT:—That this contradicts the writing, is that your point?

MR. INGERSOLL:—Yes.

THE COURT:—Now, Judge, I will hear you.

MR. WESCOTT:—The circumstances under which this party put his name to this instrument can be explained—membership, or agency or facts that are determinable outside of the terms of the written instrument. This gentleman, as we will prove, if permitted, never knew anything about this wheel at Gloucester, never had anything to do with it directly or indirectly, never participated in the business of it, in its earnings or profits, and knew nothing about it at all, and that his name appears on this instrument at the direction of the plaintiffs themselves, has their name under his name, that he was acting as their agent. Now as I understand it, that is permissible. It was a fraud, practically, upon him. We have given notice of the circumstances that we proposed to prove and we ought to be permitted to prove them. You cannot take a man and fool him and get his name to an instrument and then close his mouth by the terms of the instrument. If you can you make it impossible to show fraud in any shape, it seems to me. If I should come to you and you reposed confidence in me sufficiently to get your signature to a paper, and when you came to examine that paper you found that I had lied to you and fooled you entirely, you ought to be permitted to show, your mouth should not be closed, because the paper is there and has been signed. Or if, as a matter of fact, a signature to a paper is put there as an agent for an undisclosed principal, it can be invariably shown. Notes, bonds and other instruments are often signed by agents. The agent is sued and in the course of the development of the difficulty it is found he was an agent, that there was a responsible party back of him, a principal. Now it does not need to be told to your Honor that you can immediately proceed against this principal.

THE COURT:—Well, the agent is liable, too.

MR. WESCOTT:—Not necessarily.

THE COURT:—If he did not disclose his principal?

MR. WESCOTT:—Oh, if he did not disclose it, certainly; but where the principal is proceeding against the agent then the agent is not liable. If the principal has used the agent to get his name to a piece of paper and then proceeds against the agent then the principal is not liable. Now that is this case exactly. And this is not a vague defence, it is the truth, and if ever there was a damnable fraud introduced into a court of justice it is this case. I feel bound to use that strong language to your Honor, and this defendant is entitled to protection, because as an unwary agent, egged on by these men in order to get this wheel built in the city of Gloucester, they at the same time retaining an interest in it, they got this man to sign it for them as if he was a member of this firm. They knew that he knew nothing about it; they knew that he would have nothing to do with it, and the very interest which he was presumed to control and which this paper intends to exhibit, was the interest of the principal himself, to wit, this plaintiff company. It seems to me we ought to be permitted to show it. That is our offer now.

(Mr. Ingersoll replies.)

THE COURT:—It seems to me that the paper shows on its face with tolerable clearness that Johnson and Mason, parties of the second part, agree with the parties of the first part, Somers & Company, to pay so much for the building of this observation roundabout, and then that the party of the second part agrees to pay this consideration and also the sum of $200 per annum as royalty for the exclusive privilege to run and operate this at Gloucester, and as to the time of payment. It seems to me it shows sufficiently clear upon its face a contract, that he signed the contract in his own name as principal. It seems to me that this offer now is an offer by parol testimony to contradict a written paper. Of course if there is any defence of fraud, that his signature was fraudulently obtained, that might be a question. So for the present I overrule this evidence as tending to contradict a written agreement.

(Whereupon the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.)

Q. Did you ever act as the agent of Somers & Company?

A. I did.
Q. Did you get paid for your services by them? Yes or no.
A. I got part that was coming to me.
Q. In the course of your work for them as an agent, were you requested by them to sign any papers?
(Objected to.)

THE COURT:—That refers to these papers, I suppose. I sustain the objection.
(Whereupon the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.)
Q. Have you in the course of your agency signed any papers for them?
(Objected to. Objection sustained.)
(Whereupon the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.)

Q. Did you have anything to do with the erection of the roundabout wheel in the city of Gloucester?
(Objected to. Objection sustained.)
(Whereupon the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.)

Q. Did you ever built or aid in building or contribute in building a roundabout wheel in Gloucester?
(Objected to.)

THE COURT:—Let me understand. This wheel, according to the agreement, was to be built by Somers & Company?

MR. WESCOTT:—Yes.

THE COURT:—I sustain the objection.
(Whereupon the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.)

Q. Did you as a member of any company or personally ever contribute anything toward the construction of a wheel in Gloucester City or have anything to do with it?

(Objected to. Objection sustained.)

(Whereupon the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.)

Q. Did Somers & Company get you as their agent to sell any interest that they had in the Gloucester wheel to anybody else?

(Objected to.)

THE COURT:—What is the object of that question, whether they got him to sell somebody's share in the wheel?

MR. WESCOTT:—The point is simply to get the fact.

THE COURT:—I sustain the objection.

(Whereupon the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.)

Q. Were you ever called upon by Somers & Company to pay any royalty for any wheel erected under any contract in Gloucester City?

A. No, sir.

Q. Did you ever have anything to say to Somers & Company about the appearance of your name on the paper marked Exhibit P 3, namely, the agreement purporting to be made between W. S. Johnson, John T. Mason and Robert B. Scull and Somers & Company?

MR. INGERSOLL:—I object, for two reasons: first, that no difference what conversation he might have had with them after that, after the signing of it; and secondly, that the question is entirely too indefinite, asking if he had any conversation

with William Somers & Company, of which firm there were three members. My objection is, first, that it makes no difference what he said about that signing after he had signed it.

THE COURT:—It seems to me that what the defendant said would not be evidence. I will sustain the objection.

(Whereupon the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.)

Q. Who got you to sign the paper marked Exhibit P 3?

MR. INGERSOLL:—I object. What relevancy can it have who got him to sign it? He has signed it and his signature is there—unless it was under duress.

THE COURT:—I sustain the objection.

(Whereupon the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.)

Q. How came you to sign the paper marked Exhibit P 3?

(Objected to for the same reason.)

THE COURT:—I don't think it is relevant to show how he came to do it unless there is something proven to show that he was defrauded in signing it.

MR. WESCOTT:—That is what I am trying as hard as I can to prove.

THE COURT:—Well, the question does not indicate it. It says how he came to sign it. His signature is there.

MR. WESCOTT:—Well, suppose he was blindfolded and seized hand and foot and taken in a dark room and somebody took his hand and put it on a piece of paper.

THE COURT:—Well, if counsel would ask a question that indicates something of that kind—

MR. WESCOTT:—Then it would be leading. I asked how he came to sign it.

THE COURT:—I sustain the objection.

(Whereupon the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.)

Q. Before and at the time of your signing this paper, what did Somers & Company say to you about it?

MR. INGERSOLL:—I object to that for two reasons: first, because the paper is complete and shows a completed contract between the parties, and what they said prior, leading up to it, cannot be relevant, in the face of the complete contract. Beyond that I object to the question on the ground that it is too indefinite, about what Somers & Company say, of which there is more than one member.

THE COURT:—Well, as to the contents of the paper, of course, they could not be stated, but as counsel by his plea indicates the proposition to show fraud in the execution, he has a right to show that, and I suppose he cannot get at it without his stating what was said, and then rule it out unless it is on the line that their plea indicates, that it was fraud or coercion.

(Exception noted for plaintiff.)

THE COURT:—Now who is speaking? Somers & Company is the firm name.

MR. INGERSOLL:—That was my second objection to that question.

Q. At any before signing that paper, did any of the members of Somers & Company speak to you or say anything to

you?

A. They did.

Q. Who was it?

A. Mr. Somers.

Q. What part did he occupy in the organization of Somers & Company?

A. That they would represent so much interest—

Q. No, what part did he occupy? What was he, an officer?

A. He was a party of William Somers & Company.

Q. Do you know whether he was president of the company or don't you?

A. I couldn't say.

Q. Do you know whether he ran the thing?

MR. INGERSOLL:—I object. The witness cannot say which member of the firm ran it.

THE COURT:—I will allow the question.

Q. Who was the active man in this partnership?

A. He was.

Q. Who?

A. William Somers, himself.

Q. Now what did he say to you about this matter in the first place?

MR. INGERSOLL:—I want to ask that it be limited to the time.

THE COURT:—Yes, counsel can do that.

Q. Well, can you give the hour of the day when the conversation occurred?

A. Before any papers were signed.

Q. I know, but can you give the hour of the day? It seems that we have to give the hour.

A. The conversations took place at a number of times before the signing of these papers and before there was any stock sold in the Gloucester.

Q. Well, can you give the day of the month and minute and

the hour when it was said?

A. No, I can't do that.

Q. Can't do it?

A. No.

Q. How long before the agreement was signed did you have any conversation?

A. Sometime before the agreement was signed and about the time the agreement was signed.

MR. WESCOTT:—It seems to me, if your Honor please, to require us to come right down to the day and name it, the very hour and minute, that this conversation occurred, is out of the question.

THE COURT:—Well, Judge, so that you show that the paper was in contemplation. You must show that there was a paper, but what was to go into the paper I do not think would be proper and legal. I want to limit it to what occurred practically in reference to the execution of this agreement.

Q. Now tell at the beginning what Somers said to you about this project?

MR. INGERSOLL:—I object to that until we are brought down to some time in connection with the time of this agreement. From this question we can't tell whether it means one year or five years before the signing of this article and we are entitled to some limit.

THE COURT:—We will see what he said and then strike it out if necessary.

Q. Don't get back to the beginning of the world, when Adam and Eve were in their garden. Now come right down as near as you can to the time of making this paper.

A. He said sell all this wheel that I could; if I could sell one-half or more they would take the balance.

Q. What wheel?

A. That was the Gloucester wheel. Which they did.

MR. INGERSOLL:—I object to that as not being respon-

sive.

THE COURT:—Yes, what they did is not conversation, hardly.

Q. Well, what was said about getting up this agreement, executing this agreement?

A. They said that I would not be held responsible, the parties running the wheel would pay the royalty and the parties would be liable.

MR. INGERSOLL:—I object to all that answer and ask that it be stricken out, as not responsive to the question at all.

THE COURT:—No, I don't think it is. I don't think it is admissible, Judge. The answer may be stricken out.

Q. What did they say about this paper? Can't you come right down to dots and tell us the whole story?

MR. INGERSOLL:—I object to what was said.

Q. Well, what did Somers say?

A. He said sign this agreement representing so much taken and he said that would make a good showing and an inducement to those taking stock, and any part that was not taken they would assume themselves, and that for me to sign the agreement, that I would not be liable and that the future parties would pay the royalties, parties running and operating the wheel.

Q. Now did you sell any part of the wheel for them?

A. I sold it all.

Q. To whom did you sell it?

A. John T. Mason one-fourth, Robert Scull, one-eighth, George Holdzkom one-eighth, A. M. Heston one-fourth, Adolph Berthold one-eighth, Carpenter one-sixteenth, and Abram one-sixteenth.

Q. Did you sell all these various shares in the wheel at the same time?

A. Before the wheel was built and in operation at different times.

Q. And for whom were you acting when you sold these?
A. William Somers & Company.
Q. And you were paid by them for doing it?
A. Yes.
Q. Did you get a commission on the portion that was sold to Heston?
A. No, they never paid me.
Q. Why not?

MR. INGERSOLL:—I object. He doesn't know why not, probably.

A. I imagine.
Q. Did Somers & Company retain any portion of this wheel?
A. They did.
Q. How much?

MR. INGERSOLL:—I object. The articles speak for themselves, that there is John T. Mason, Robert Scull and W. S. Johnson in that partnership at that time.

THE COURT:—That is the agreement ordering its being built, constructed?

MR. INGERSOLL:—Being built, constructed, and they agreed to pay royalty.

THE COURT:—They agree to pay royalty?

MR. INGERSOLL:—Yes. It makes no difference who entered into the firm afterward, no matter to whom they sold afterward. These are the parties that we hold responsible. We can't hold them.

THE COURT:—Yes, and it calls for a conclusion that they retained. I sustain the objection.

(Whereupon the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.)

MR. WESCOTT:—I would like your Honor to bear in mind that they specifically testify that they never had any interest in this wheel, did not obtain any interest, and Heston had none in it.

THE COURT:—That was your cross-examination.

MR. WESCOTT:—Yes.

MR. INGERSOLL:—He said at the time of the agreement Heston hadn't any. He didn't know about it afterward.

Q. You already testified that you had no interest in this wheel, never owned any interest in it?

A. No, sir.

Q. Did you put any money in it?

A. Not of my own.

Q. Were you ever requested by Somers & Company to put any money in this wheel?

A. No.

Q. You have already said that they never called upon you before this suit for payment of royalties.

MR. INGERSOLL:—I object to the form of the question, referring to what he has already testified to, making it the form of a leading question.

(Objection sustained.)

Q. Did you get any profits from this wheel?

MR. INGERSOLL:—I object. It has no relevancy whether there were any profits or not.

(Objection sustained.)

MR. WESCOTT:—That all fits what your Honor permits to go in. You have got to take the entirety of these circumstances to get the fraud of the thing, it seems to me. We ask an exception.

(Whereupon the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.)

Q. Did you have any conversations with Somers & Company about your signature to this paper after you had put your signature there?

MR. INGERSOLL:—I object. It can have no relevancy what conversation he might have had with them afterward. There is no consideration by which it would be binding.

(Objection sustained.)

(Whereupon the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.)

THE COURT:—The question is whether he had any conversation.

MR. INGERSOLL:—The question itself may not be objectionable. I will withdraw that objection.

THE COURT:—I will admit it.

Q. Will you state what Somers said after you put your name to this paper with reference to that fact?

MR. INGERSOLL:—I object. It can have no relevancy what Somers might have said after the signing of the paper.

(Objection sustained.)

(Whereupon the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.)

Q. Did you lose anything by the construction and operation of this wheel under this contract?

MR. INGERSOLL:—I object. It can have no relevancy whether he lost or not.

(Objection sustained.)

(Whereupon the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.)

Q. Before and at the time of your signing this paper, the contract in question, did Somers ever make any representations or statements to you as to whether he had a patent on round-about wheels?

MR. INGERSOLL:—I object to that for two reasons: first, the question is unlimited as to time, before the signing, so limitless that it is impossible to confine the time; secondly, that it is leading, directing his testimony directly to one point.

THE COURT:—I will allow that question.
(Objection noted for plaintiffs.)
A. He did.
Q. What did he say to you as to his possession of a patent?
A. He said he had a patent thoroughly covering the wheel in all its parts, could be no other wheels of any description, thoroughly covered.

MR. INGERSOLL:—I object to that and ask that it be stricken out. There is no plea in this particular case that there is any infringement; there is no plea in this case that there were any damages because of infringements of patent rights in Gloucester in this particular case. It makes no difference what he had said in regard to the patent. It is not relevant to the pleadings.

THE COURT:—Well, he puts in a plea that it was void because of fraud.

MR. INGERSOLL:—Yes, in the inception of the contract, but it does not set out that there was any infringement or any loss by reason of there being other wheels in Gloucester. This is the only case that does not come in as an element, but in this case there is no allegation of other wheels in Gloucester. Therefore it would not make any difference what was said about it in this particular case. They got what they asked for; there were no other wheels, whether they had a right or not. There is no allegation that there were other wheels there; but even if he

had no patent at all, they got what he agreed to give; therefore I ask that that be stricken out as not relevant and also as not responsive.

THE COURT:—I will allow that question.

Q. Did he say anything to you with reference to the value of this wheel under the patent that he claimed to have and what it would amount to?

MR. INGERSOLL:—I object to that as being leading and irrelevant to this issue. It makes no difference what the value was. They agreed to pay a certain figure; they also agreed to pay a certain figure for royalty. It makes no difference what the other party said as to value. It was their privilege and he most govern himself by what he himself saw. The value is before him, and the mere fact, even if the other said the value was double what it might be, that was no fraud. The mere fact that the seller says that the value of an article is greater than it actually is, if the party purchasing can see it and by the use of judgment can find out what it is worth he should do so and it is no fraud on the part of the other party. The patent is a matter of record, a matter which they were bound to go by, not what some one told them about it.

THE COURT:—Well, if he fraudulently misrepresented the value of the machine, the wheel, in order to get an agreement to purchase it at a certain price, might that not be a fraud?

MR. INGERSOLL:—That is just the point that I endeavored to show, that it would not be an element of fraud. If the purchaser, by reason of the inspection which a reasonable man should give, could ascertain whether it was or not, that is not fraud.

THE COURT:—Yes, but suppose the plaintiff company knew all about these values and he had no opportunity to acquaint himself with the value, this defendant, and rested upon the plaintiff's representation.

MR. INGERSOLL:—But, if your Honor please, that is just exactly the point. He had no right to rest, if he did rest, upon the plaintiff's representations, for the reason that a machine of exactly the same character as set out in this agreement was in operation in Atlantic City, where this agreement was entered into. It is right in the articles of agreement that there shall be a machine built the same as the one in Atlantic City. It was there for his inspection. The patent upon it was a public record of the United States and it was there for his investigation and as a reasonable man he must form his own opinion as to that, and any statement as to the value of it made by the plaintiffs, is not fraudulent. Certainly it is not fraudulent for a man in selling a horse to say it is worth twice what it is.

THE COURT:—Does it appear thus far that he had an opportunity to know and judge the value?

MR. INGERSOLL:—Yes, for this reason, because in the agreement it says. (Reads.)

THE COURT:—Well, it may be that that might be a question for the jury. I will allow the testimony.

(Exception noted for plaintiff.)

A. He did.

Q. What?

MR. INGERSOLL:—I make the same objection.

A. It was so thoroughly covered by a patent the parties operating this wheel could make a barrel of money. He said it was the same as a gold mine, represented that you would never want anything else, all you would want was a wheel, make you all the money you wanted all the days of your life in any proper place to do business.

MR. INGERSOLL:—I object to the latter part as a conclusion.

A. That was his conversation.

Q. That is what he said to you?

A. Directly his conversation, and that was never anything else but his conversation with other people—
(Objected to.)

THE COURT:—Never mind that.
Q. Did he ever say that to other people in your presence?
(Objected to as irrelevant.)
Q. Did he make these statements to you before the wheel at Gloucester was built?
A. Yes, sir.

MR. INGERSOLL:—I object to that as to the time, before it was built. This agreement was a long time before it was built.
Q. Did he make these statements to you before this agreement was signed?
A. Yes, sir.
Q. Did you get any commission from William Somers & Company for selling these different parts of the Gloucester wheel?
(Objected to as irrelevant.)
A. Yes, sir.
Q. As their agent?
A. Yes, sir.

MR. INGERSOLL:—I ask that those answers be stricken out until the Court rules.

THE COURT:—I will sustain the objection.
(Whereupon the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.)

MR. WESCOTT:—I want to reiterate the question as to whether or not the defendant lost any money in the Gloucester wheel.
(Objected to.)

MR. WESCOTT:—As a matter of fact he did not lose a cent, but I want it to appear in the record if I can.

MR. INGERSOLL:—I object and ask that the statement of counsel be stricken out.

(Objection sustained.)

(Whereupon the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.)

Q. Did you become interested at any time in other wheels which were supposedly covered by this patent?

A. Yes, sir.

Q. Before or after the Gloucester wheel was erected?

A. Before.

Q. Did you learn that other roundabout wheels were being constructed in different places by other people, other than wheels erected under the patent in question?

MR. INGERSOLL:—I object. It can have no relevancy in this case, because as I state, there are no pleadings alleging that there has been any infringement of the rights in Gloucester; and on the other ground, I also object to it because of the fact that the question as asked is prior to the time of signing this agreement, that he knew of these facts, and therefore perhaps more favorable to me. I object to it as being irrelevant.

(Objection sustained.)

(Whereupon the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.)

Q. Did you, after the construction of wheels under this patent in which you had an interest, call Somers' attention to the fact that other parties were building roundabout wheels in different places in opposition to the wheel under this patent?

(Objected to as irrelevant.)

THE COURT:—This refers to after this wheel now in question had been constructed?

MR. INGERSOLL:—Yes, sir.

THE COURT:—And the offer is, I suppose, for the purpose of showing that he was called upon to make good his agreement that he should have the exclusive privilege? That I suppose is the ground of the offer?

MR. WESCOTT:—Yes.

MR. INGERSOLL:—But, if your Honor please, this witness has already testified that he had no interest in this particular wheel.

THE COURT:—Yes, but you say he had. He has a right to defend on every point.

MR. INGERSOLL:—Every point that is pleaded; but in this case there is no such plea filed. The only plea filed in this case was fraud in the inception of this contract. There is no plea of any infringement of rights in this particular case. That is the only plea there is filed, is fraud in the inception of the contract, and therefore anything that might occur afterward certainly is not a defence.

THE COURT:—Well, he says in the first place he represented to him his patent to have exclusive privilege; now the offer is, I suppose, to show that he did not carry that out. But I don't think that is admissible, that evidence. The objection is sustained.

(Whereupon the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.)

THE COURT:—That is, there is nothing in the written contract that he should agree to guarantee to him the exclusive right, so far as I can see. He said the exclusive privilege.

MR. INGERSOLL:—At Gloucester, New Jersey, in that

particular place.

THE COURT:—He does not agree, I mean, to prosecute every infringement of the patent?

MR. INGERSOLL:—No, sir.

THE COURT:—I sustain the objection.

Q. Did you find that competition by other wheels, other roundabout wheels in Gloucester City and other places in which you were interested in wheels, destroyed their use?

MR. INGERSOLL:—I object. In the first place it is leading, and then it is irrevelant.

(Objection sustained.)

(Whereupon the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.)

Q. After you found that the construction of other roundabout wheels in Gloucester and other places under this patent were injuring the business that you were engaged in, did you go to Somers and make any complaint about it?

MR. INGERSOLL:—I object. The first part of the question presumes a statement of facts which have not been proven; and secondly, it is still leading. He says after you found certain facts. There have been no such facts found as yet.

(Objection sustained.)

(Whereupon the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.)

Q. Did you in your conversations with Somers, after discovering that other wheels could be built by other parties similar to the wheels under this patent, threaten him with prosecution for damages if he did not stop competition with your round-

about wheels, with the roundabout wheels which you were interested in?

MR. INGERSOLL:—I object. It states a premise again which has not been proven.

THE COURT:—It is a conversation and it may be that the Judge offers this evidence as introductory to the question of the release. I think that comes in.

MR. INGERSOLL:—That is not the objection that I make. My first is that it is leading; secondly, that the Judge in forming the question makes a statement of facts which have not been proven and are not before the jury.

THE COURT:—I think that assumes facts not proven and I sustain the objection.

MR. WESCOTT:—The facts that are there your Honor has held to be impertinent and immaterial. What I want to prove is that experience taught this defendant here that other roundabout wheels of all sorts and kinds could be built, despite this patent and the representations by Somers that there could not be; that this party and others then went to Somers and complained about it and threatened him with prosecution, getting him into these contracts and then not protecting him as he said he would and could under his patent, and that then there was a release following that conversation from the payment of royalties. That is my offer.

THE COURT:—Well, I will allow those facts to be proven then. You may have your exception and I will see what it leads to.

MR. INGERSOLL:—My objection was not on the broad ground that it was an improper line of questioning, but to the statements of facts that were not proven at all.

THE COURT:—I did not mean to rule as broadly as that. I

sustain the objection to that question.

Q. Did Somers, acting for Somers & Company, ever release you or say to you that you need not pay him royalties?

MR. INGERSOLL:—I object to that as being absolutely leading and also as being a conclusion of law, before this man can say whether or not he was released; and also a conclusion of fact whether Somers represented Somers & Company. It is leading in all parts of it.

THE COURT:—Yes, I think that we should have the conversation that occurred.

MR. WESCOTT:—Well, I am simply asking now a specific fact, if he said a certain thing. Now that standing alone I will admit would not be binding here. Now after he answers that question I propose to ask him next what were the circumstances of the conversations eventuating in that discharge or release. I don't see how else I can get at it. Every question I have asked up to this point has been with the view of bringing out these facts and they have all been overruled. Now I am going to try to go backward and begin at the other end.

(Objection sustained.)

(Whereupon the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.)

Q. Were you ever released from the payment of royalties?

(Objected to. Objection sustained.)

(Whereupon the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.)

Q. What was said by Somers, if anything, with reference to the payment of royalties by you in this particular case?

MR. INGERSOLL:—I object unless the time is fixed.

THE COURT:—Well, it is not usual to require every particular. It was after the agreement, I judge, from the question.

MR. INGERSOLL:—There is no indication of it.

THE COURT:—After the time of the agreement, I suppose you mean, Judge?

MR. WESCOTT:—Certainly. It could not mean anything else.

THE COURT:—I will admit it.
(Exception noted for plaintiff.)
(Question repeated.)

THE COURT:—After the agreement, Judge, you will allow that amendment?

Q. After the agreement?

A. He would not look to me for any royalties in Gloucester, for I didn't own anything in Gloucester, and he said that I ought to have retained an interest for myself in Gloucester and he said they were going to make money and he said I should have retained an interest for myself; he thought I made a mistake; and I told him I didn't want anything in Gloucester, the interests I had elsewhere was all I wanted.

MR. INGERSOLL:—I object to that as not responsive, what Somers told him, and ask that the latter part, what this witness said to Somers, be stricken out.

THE COURT:—I think that will have to stand. Your objection was not in time.

MR. INGERSOLL:—I could not tell what the witness was going to say. I objected as soon as he said it.

THE COURT:—You stayed pretty still while he was talking. Let that stand.

(Exception noted for plaintiffs.)

Q. After you signed this agreement, did Somers & Company release you from the payment of any royalties under it?

(Objected to.)

THE COURT:—I sustain the objection, on the ground that it involves the judgment of the witness in a matter of law.

Q. Did Somers & Company or Somers himself say anything to you about releasing you from the payment of royalties?

MR. INGERSOLL:—I object. That question has already been answered and he has stated the conversation he had with Somers.

(Objection overruled. Exception noted for plaintiff.)

A. Yes.

Q. What did he say?

A. He said that he would release us from all royalties if he could not stop other wheels from being operated.

Q. What had you said to him that led to his saying that?

MR. INGERSOLL:—I object, unless the time is something definite, and also that this question is irrelevant to this issue. This witness has just stated that Somers would not look to him for any royalty because he had no interest there; therefore, it must be irrelevant, anything that Somers may have told him about other wheels, that if he had no interest in this wheel therefore Somers could not release him from any payment of royalty on this wheel, and that if he released him from others it is irrelevant to this issue.

THE COURT:—I think the witness has said he had an interest in other wheels, so that the question would certainly have to be related to the Gloucester wheel, any conversation about that. I think that is admissible, that feature is, as part of the conversation.

Q. What had you said previously to him which led to his saying that?

A. That we were going to bring suit against him for damages; he hadn't given us no protection.

Q. Now what did he say directly in response to that?

MR. INGERSOLL:—I object to that unless it limited to the Gloucester wheel. Now we are roving all over.

THE COURT:—I sustain the objection unless it is limited to the Gloucester wheel.

Q. Did this conversation involve the Gloucester wheel also, as well as other wheels?

A. It included interests that I had elsewhere and I was not expected to pay any royalties, as he did not consider that I owned anything in Gloucester. This was in reference to other wheels.

MR. INGERSOLL:—I ask that it be stricken out.

A. And this came up at the same time, that they would not expect no royalties for none of the wheels—

THE COURT:—Anything that was said with reference to other wheels is not admissible here. He says that that was in reference to other wheels.

Q. Then in this conversation the Gloucester wheel was entirely excluded, do I understand?

A. No.

Q. Well, was it included in it?

A. He would not expect it from me.

Q. Oh, don't talk to me that way. I ask you if it was included in the Gloucester wheel.

A. It was included in the Gloucester wheel, as far as the other parties were concerned.

THE COURT:—Don't talk about the other parties.

Q. Was it included in the Gloucester wheel as far as you were concerned?

A. Yes, so far as I was concerned.

Q. Had you threatened him with suit more than once?

MR. INGERSOLL:—I object. The threatening of suit is

not a consideration for a release.

THE COURT:—Well, the question is whether there was a reference to the Gloucester wheel, whether there was any threat of suit as to that. W are not trying any other wheel but the Gloucester wheel.

Q. Had you threatened him with suit with reference to the Gloucester wheel?

A. I had.

Q. Now when you threatened him with suit with reference to the Gloucester wheel, what did he say to you?

A. He said that if they couldn't stop the wheels and we didn't bring no suit against them they would expect no royalties.

Q. Was that the reason you didn't bring any suit against him, because of this conversation?

A. That was one reason.

CROSS-EXAMINATION.

BY MR. INGERSOLL:—

Q. Mr. Johnson, how much interest did you have in the Gloucester wheel?

A. I didn't have any.

Q. Why did you threaten to sue him then, sue Somers & Company, if you had no interest in the Gloucester wheel?

A. This was, I think, just about the time, just prior to these suits. He then called on me for royalties in the Gloucester wheel.

Q. He then called on you for royalties in the Gloucester wheel?

A. I think I received a notice from you with reference to Gloucester and that was after I received this notice that we had the talk.

Q. When was it you had a talk with him when he said that he would not ask any royalty from you because you had no interest in it?

A. This was soon after the wheel was built.
Q. Soon after the wheel was built?
A. Yes.
Q. When was it you had the other agreement when you said you would sue him for the Gloucester wheel?
A. That was perhaps a year or two later, I couldn't say.
Q. After suit had been brought?
A. No.
Q. After you had been notified to pay?
A. This was after we were notified to pay. I didn't know that I would be expected to pay in Gloucester.
Q. What interest did you have in the Gloucester wheel at the time you threatened to sue?
A. I hadn't anything.
Q. Upon what were you going to base your suit?
A. That if he would expect royalties from me that I would sue him on Gloucester because that the Gloucester wheel was not protected.
Q. You would sue him on Gloucester?
A. Yes.
Q. When you had no interest in it?
A. No, I had no interest in Gloucester.
Q. How many wheels were there in Gloucester at that time?
A. I couldn't say whether there were other wheels there or not.
Q. You don't know whether there were or not?
A. No, sir.
Q. Were you ever in Gloucester?
A. I was in Gloucester.
Q. After this wheel was built?
A. No.
Q. While it was being built?
A. Yes.
Q. Who else of the firm of Johnson, Mason & Company were there then?
A. I couldn't say as to that.
Q. Who was superintending the building of it?
A. I suppose Somers.
Q. Who was representing Johnson, Mason & Company in

the building of it, anybody? Were any of that firm there?
A. There was nobody to represent them.
Q. Nobody to represent them at all?
A. No, not in building the wheel. We had nothing to do with the wheel.
Q. Who named the firm of Johnson, Mason & Company?
A. I couldn't say.
Q. Did you?
A. I couldn't say.
Q. You can't say whether you did or not?
A. No.
Q. When did you have this conversation with Somers about signing your name as the agent of Somers & Company?
A. That conversation took place before and after.
Q. Did it take place at the signing?
A. He was not able to organize the company.
Q. Just answer the question.
A. And called on me—
Q. Just answer my question.
(Question repeated.)
A. I think so.
Q. How long before the signing was the last conversation you had with Somers?
A. Well, saw him often and it was discussed.
Q. How often?
A. Perhaps every two or three days.
Q. You had seen him two or three days before the signing of this agreement, had you, and talked to him about it?
A. Yes, sir.
Q. Where?
A. Mostly saw him at the Law Building, and seen him at different places.
Q. In Atlantic City, you mean?
A. Yes.
Q. Had you seen him the week before the signing?
A. I should say so.
Q. Had you seen him two weeks before the signing?
A. I expect I did.
Q. How soon after the signing did you see him?

A. I may have saw him every day or every other day, I couldn't say.

Q. Did you see him after the signing?

A. Yes, quite often.

Q. How often?

A. Every two or three days.

Q. Did you see him a week after the signing?

A. I guess so.

Q. Well, did you?

A. I should say so.

Q. Did you see him two weeks after the signing?

A. I couldn't say as to that.

Q. This agreement was signed the 5th day of April. Had you seen him the latter part of March and the first part of April and talked to him about it?

A. I judge so.

Q. Did you or did you not?

A. I saw him very often, every few days.

Q. During that time?

A. Every few days.

Q. At the time of signing this agreement, what proportion did John T. Mason hold?

A. I think he held one-quarter.

Q. What proportion did Robert B. Scull hold?

A. I think one-eighth. At the time that was signed?

Q. At the time that was signed.

A. I couldn't say at the time it was signed.

Q. How much did he have afterward?

A. I think one-eighth.

Q. He had one-eighth all the time, hadn't he?

A. I couldn't say.

Q. You spoke of a man named Holdzkom. When did he come into this firm?

A. He came in partnership while it was in operation. I couldn't say exactly.

Q. During the building of the wheel?

A. Yes.

Q. How about Berthold?

A. They all came in during the construction.

Q. Carpenter, Abrams and Heston all came in at the same time?

A. Yes, sir.

Q. At the time of entering into this agreement, the 5th day of April, were you interested in other wheels similar in construction to the wheel at Gloucester?

A. Yes.

Q. Where were you interested in other wheels?

A. South Beach.

Q. What was the name of the firm operating that? 10

A. I can't tell you.

Q. How much interest did you have in that?

A. One-eighth.

Q. Name another, please.

A. Coney Island.

Q. Do you know the name of that firm?

A. I think it was Mason & Co.

Q. How much interest did you have in that?

A. One-eighth.

Q. Name another one, please.

A. Asbury Park.

Q. What was the name of that firm? 20

A. I can't tell you.

Q. Wasn't that Johnson & Co.?

A. Perhaps. I am not sure about that.

Q. How much interest did you have in that?

A. I think it was one-fourth.

Q. Name another one, please.

A. Well, I am glad that I can't name any more.

Q. How about Rockaway, were you in that?

A. No, sir.

Q. Where did the firm of Johnson, Myers & Co. operate, do you know?

A. South Beach, I guess. I am not sure. Perhaps South 30 Beach.

Q. Now what was your interest at the time of signing in the co-partnership of Johnson, Myers & Co.?

A. I think one-eighth.

Q. As a matter of fact, wasn't it three-eighths, Mr. John-

son?

A. I couldn't say.

Q. You don't know?

A. No.

Q. Were all these, South Beach, Coney Island, Asbury Park, started before this present Gloucester wheel was organized?

A. I think they were. Well, Coney Island and Asbury Park were.

Q. Coney Island and Asbury Park were?

A. Yes.

Q. Wasn't South Beach organized three or four months before this one? In other words, wasn't it organized some time in February, 1893, and this one in April?

A. I couldn't say.

Q. In each of those you had an interest?

A. Yes, sir.

Q. And in each of those cases you organized a company?

A. Yes.

Q. In the same manner as this?

A. No.

Q. In what way was the organization of the company in those cases different from this?

A. I retained a small interest in those.

Q. And you did not retain an interest in this?

A. No.

Q. When did you sell to Holdzkom?

A. I couldn't say positive.

Q. Don't you know?

A. No.

Q. What did you do with the money you received from Holdzkom?

A. Paid it to Somers & Co.

Q. Paid it to Somers & Co.?

A. Yes.

Q. What amount did you pay to them, the same proportionate amount that it would have been if you had held the interest?

A. I judge so.

Q. What profit then would you make from it?

A. I would make the commission on the wheel if I had got my commission, but I didn't get it.

Q. You didn't get it?

A. No, sir.

Q. Can you tell me about the time it was when Somers told you, as you say, that if they didn't protect you from competition there would be no royalty paid?

A. Yes.

Q. When was it?

A. It was in September.

Q. Of what year?

A. 1893.

Q. September of 1893?

A. Yes, sir.

Q. Then it was not as you said a few minutes ago after you had received notice that you would have to pay royalty on this wheel?

A. This was with reference to the Coney Island and Asbury Park.

Q. This was not in reference to the Gloucester wheel?

A. This was another particular time.

Q. Now when was the time that they told you you would not have to pay royalty for the Gloucester wheel because he did not protect you?

A. This was in 1894 that we would not pay no royalty.

Q. When was it that payment of royalty was demanded of you?

A. Demanded in 1893.

Q. Demanded of you in 1893?

A. And the other wheels.

Q. I am asking you about the Gloucester wheel, Mr. Johnson. When was royalty demanded of you for the Gloucester wheel?

A. I think in 1894.

Q. It was demanded of you then in 1894?

A. I am not sure as to the time.

Q. At the time royalty was demanded of you, were there any other wheels in operation in Gloucester?

A. I couldn't say.

Q. Then why did you say that you threatened to bring suit for other wheels when you say you don't know whether there were any other wheels or not?

A. Why, we had opposition all over the country and I was interested in other wheels.

Q. No, but I am asking you about Gloucester now. Please confine yourself to Gloucester.

A. Well, I certainly would have brought a counter suit if he had sued me for Gloucester. There is only one reason why I haven't long ago and you know what that is.

Q. I don't believe the jury know.

A. They ought to know.

Q. Will you please answer the question?

(Question repeated.)

A. I knew there were other wheels in other parts of the country.

Q. Then your threatening to bring suit was because there were other wheels in other places than Gloucester?

A. We had a claim just the same, we considered.

Q. You considered you had a claim just the same whether the other wheels were in Gloucester or not?

A. Yes.

Q. And you threatened to bring suit on that basis?

A. When he spoke about holding me responsible for royalties.

Q. At the time of signing this agreement with William Somers & Co., what percentage did you sign for?

A. I couldn't tell you.

Q. You don't know?

A. I don't know.

Q. If you say John T. Mason had a quarter and Scull an eighth, can you now tell me how much percentage you signed for?

A. Well, you say William Somers hadn't anything.

Q. I am asking you.

A. No, I don't know how much I signed for.

Q. What did you sell after that?

A. I sold it all at that time, or before, I couldn't say.

Q. How much was it?

A. I couldn't say whether it was at that time or before. William Somers & Co., their interest had been sold then.

REDIRECT EXAMINATION.

BY MR. WESCOTT:—

Q. You say that Somers & Co. hadn't sold their interest then?

A. No, sir.

Q. What interest had they that they hadn't sold?

A. They had a half. I don't know now, Judge.

Q. When was it you are speaking of, what time?

A. The time these papers were signed.

Q. At the time these papers were signed?

A. Yes, sir.

Q. Did they then retain their interest some time after these papers were signed?

MR. INGERSOLL:—I object. The agreement specifically shows that William Somers & Co. had no interest, that the interest was in Johnson, Mason & Scull.

MR. WESCOTT:—I would like to get spunk enough up to ask a little—

THE COURT:—Didn't you ask him what interest Somers & Co. had?

MR. INGERSOLL:—No, I asked him what he had. I asked him what amount of interest he had.

MR. WESCOTT:—Yes, and you were asking what interest they had, the very thing the Court would not let me do.

MR. INGERSOLL:—I have not asked anything about the interest of Somers & Co. in it. I asked him about his interest.

THE COURT:—I think it is permissible. You asked it in that way and he denied having any. Now you cut him off from an explanation in reference to somebody else's interest.

MR. INGERSOLL:—That is exactly the question I was objecting to in the direct examination all the time. The paper is an agreement in which it shows Johnson, Mason & Scull were the parties who had the interest and Somers & Co. had no interest, and during the direct examination it was brought out that Mason had a quarter, Scull had an eighth, and then by refreshing his recollection by that statement I asked him what interest he had, which, according to the paper, must be the difference between the total and what they had. Now the Judge comes in with the old question which we fought out all through the direct examination, what Somers had, which would be contradicting a written instrument.

MR. WESCOTT:—Now to be perfectly straight, we will have to recall the questions and answers put to this witness on direct examination. My recollection is that he went into the interest of the individuals. I asked to go into it and it was ruled out. Now for purposes of his own he has gone into it in cross-examination and I do not think this defendant ought to be bound by that cross-examination without an opportunity to explain. I ought to be permitted, in other words, to pursue the cross-examination that counsel indulged in so far as it elicited that matter. That is the rule and it ought to apply to this case as well as others.

THE COURT:—Well, I don't see in the question how he could know what Somers had in it. He says he doesn't know.

MR. WESCOTT:—But he may know. Counsel on the other side thought he might know when he asked him those questions, and if counsel thought he might know I think we can indulge the same risk.

THE COURT:—The paper shows that there was an agree-

ment between him and others to take the machine and to pay certain royalties, and I think he is bound by that. Of course William Somers probably had the whole interest before he made this agreement, as far as we know. Now what interest he had in it I don't think is relevant, what he may have had or what he thinks he had. This agreement was signed; the agreement speaks for itself and this would tend to contradict it. I sustain the objection.

(Whereupon the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.)

Q. You were asked what percentage in this agreement you signed for. What did you sign for when you signed this agreement?

A. I signed representing the interest that William Somers & Co. retained for themselves.

Q. Did you do that by their direction?

A. Yes, sir.

Q. Were you told at the time whether you would be involved in any difficulty and trouble by doing that?

MR. INGERSOLL:—I object. That has been gone into.

THE COURT:—Yes, that has been gone into very fully. I sustain the objection.

(Whereupon the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.)

Q. You have also said in answer to the cross-examiner that you did not get your commissions. What did you mean by that?

A. They never paid me, is what I meant.

Q. Commissions on what?

A. On selling the wheel.

Q. On selling what parts of the wheel?

MR. INGERSOLL:—I object. There is no offset in this case at all.

A. Selling all parts of the wheel.

Q. Who did you sell all parts of the wheel for? Whom were you acting for in selling all parts of the wheel?

MR. INGERSOLL:—I object, and ask that the answer be stricken out.

A. Somers & Co.

Q. Did you buy any parts of the wheel yourself?

MR. INGERSOLL:—I object, because the written instrument speaks for itself.

THE COURT:—I sustain the objection to that.

(Whereupon the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.)

Q. You were cross-examined pretty extensively about your interest in other wheels. You had an interest in other wheels had you?

A. Yes, sir.

Q. And when you talked to Somers & Co. when this question of suit came up, had you still an interest in other wheels then?

MR. INGERSOLL:—I object. The Court has already limited this line of questioning to the Gloucester wheel, not to the other wheels, and said it was not permissible in this case.

MR. WESCOTT:—Now, if your Honor please, didn't counsel on the other side go extensively into this question?

THE COURT:—You asked particularly what interest he had in other wheels before this was gone into.

MR. WESCOTT:—And after the agreement was entered

into.

THE COURT:—I sustain the objection.

(Whereupon the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.)

Q. You said in answer to the cross-examiner that Somers was not able to organize the company and he called on you. What do you mean by that?

MR. INGERSOLL:—I object to it as a conclusion.

THE COURT:—What answer was that?

MR. WESCOTT:—It was in answer to questions asked by counsel on the other side.

MR. INGERSOLL:—It was not responsive to the question at all. It was harmless.

THE COURT:—I sustain the objection.

(Whereupon the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.)

Q. And you further said to the cross-examiner that you threatened Somers with a suit concerning the Gloucester wheel after you got notice from Judge Ingersoll, if I understand you?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

Q. And was it after that or then that Somers said he would release you from royalties on the Gloucester wheel if you did not bring the suit?

(Objected to as irrelevant. Objection sustained.)

(Whereupon the defendants, by their counsel, pray a bill of

exceptions, which is hereby allowed and sealed accordingly.)

MR. WESCOTT:—Now we want to make the offer, in order that I may be sure of my position. I have put a good many questions to try to bring out these two propositions and they have been overruled. Now I make the offer in substance.

THE COURT:—No, I don't want that, Judge. I want you to ask the questions. We have had the direct examination of this witness and cross-examination and now it is redirect and anything that is pertinent on the redirect you ask and I will rule upon the questions.

DEFENDANTS REST.

PLAINTIFF'S TESTIMONY IN REBUTTAL.

WILLIAM SOMERS, Recalled.

DIREST EXAMINATION.

BY MR. INGERSOLL:—

Q. Mr. Somers, where were you on the 5th day of April, 1893?

A. In Chicago.

Q. And when did you go to Chicago?

A. In the beginning of March of the same year.

Q. How long did you remain there?

A. Well, I was there for six weeks—seven weeks.

Q. Were you in Atlantic City at any time in the latter part of March and the first part of April, 1893?

A. I was not.

Q. Did you see and did you have any conversation with W. Scott Johnson during a space of time two weeks prior to April 5 or two weeks after April 5?

A. I did not see any of them.

Q. Whom do you mean when you say any of them?

A. Anybody in Atlantic City or about there. I was out in Chicago.

Q. Were you present then when the agreement signed between Johnson, Mason & Co. and William Somers & Co. was executed?

A. I was not. I didn't see it.

Q. Did you at that time or prior thereto say to W. Scott Johnson to sign that as the agent of William Somers & Co.?

(Objected to.)

MR. INGERSOLL:—It is absolutely rebuttal of the testimony offered on the other side.

MR. WESCOTT:—I withdraw the objection. The Court would not let us prove that.

THE COURT:—What is the record on that subject? I thought he was allowed to prove that William Somers said to him before the signing of this paper in an effort to prove that he was deceived, that he was to sign that paper—everything that was said in the way of fraud. I overruled objections, but allowed you to prove everything that was said before the execution. That is my recollection. He said that he signed because they told him to sign as their agent.

MR. GARRISON:—That was my opening, but you would not let us get it in. We would be delighted if you would.

THE COURT:—I am only speaking as to my recollection. I overruled evidence directly in the paper, but when it was offered for the purpose of showing fraud at the time of the execution I allowed it to go in.

(Question withdrawn.)

Q. Did you have any conversation with W. Scott Johnson in the latter part of March and the first part of April, 1893?

A. I did not.

Q. Did you at the time of the execution of this contract or at any time prior thereto, say to W. Scott Johnson that he should sign as your agent, or words to that effect, and that he would not be held personally?

A. For the Gloucester?

Q. The Gloucester wheel.

A. I didn't know anything about it till it was done.

Q. Did you have any conversation with W. Scott Johnson concerning the Gloucester wheel prior to the execution of it?

A. No.

CROSS-EXAMINATION.

BY MR. WESCOTT:—

Q. When did you first find out that there was such a contract as this here?

A. When I came back from Chicago.

Q. How long was that after the contract was made?

A. Well, I got back about the middle of April, I believe, as near as I can remember.

Q. That is the first time you ever heard of the wheel at Gloucester or this contract at all, eh?

A. My company wrote out to Chicago—

Q. Pardon me. That is the first time you ever heard of the wheel at Gloucester or this contract?

A. Well, I got a letter when I was out in Chicago that they had sold a wheel for Gloucester.

Q. Who sent you that word?

A. Mr. Devoux B. Edwards.

Q. That was the gentleman here on the witness-stand?

A. Yes.

Q. Where is that letter?

A. I don't know whether we have that letter or not. It is not worth while keeping such things.

Q. That is the first you knew of it?
A. That is the first I knew of it.
Q. Was it that letter that enabled you to fix these dates so perfectly?
A. No, not particularly. I had a good deal to do and I got home as soon as I could.
Q. Where were you on the 3d day of April last year?
A. Last year?
Q. Yes.
A. I presume I was in Collingswood.
Q. Can't you tell to a certainty?
A. Well, no, not particularly.
Q. Long years before that you can tell, when you were in Chicago?
A. Well, I have reason to know that I was there building a wheel.
Q. Where were you on the 1st of July, 1896?
A. Oh, I don't know anything about that date. I had no particular business to remember the dates of that time.
Q. When were you in Philadelphia?
A. Oh, lots of times.
Q. In 1901?
A. Oh, a good many different dates.
Q. State the dates.
A. Oh, not particular. I have no dates.

REDIRECT EXAMINATION.

BY MR. INGERSOLL:—

Q. How do you remember the time in 1893 as being in Chicago?
(Objected to.)

MR. INGERSOLL:—On the cross-examination the Judge has attempted to impeach his memory as to a specific time. On the redirect I think I am entitled to know why he knows a certain date.

MR. WESCOTT:—The witness testified to the date and he has been cross-examined. There has been no new matter brought out.

THE COURT:—I will allow that question.

A. Well, I know that I was there building a wheel at that time and received a letter that there had been a wheel sold—

MR. WESCOTT:—I object to that on the ground that it is not responsive.

A. Well, that I had occasion—

THE COURT:—We had that over about receiving a letter.

MR. INGERSOLL:—My question is about his fixing the date only.

THE COURT:—He said he knew the particular date and fixed the date. He ought to be very closely confined in re-examination.

MR. INGERSOLL:—The answer is not responsive. I will admit that. Repeat the question.

MR. WESCOTT:—I object to its repetition because it was answered responsively.

THE COURT:—I will admit the question being repeated.

(Question repeated.)

A. Well, I know I was there at that time and for about six weeks and as I said, got word—

Q. Never mind that. What were you doing there?

A. Building a wheel. Erecting one.

Q. At what place in Chicago was that wheel erected?

MR. WESCOTT:—I object on the ground that it is not proper redirect examination.

MR. INGERSOLL:—What is your point, about the place in Chicago?

MR. WESCOTT:—To fix the date.

MR. INGERSOLL:—To fix the date simply?

MR. WESCOTT:—How would that help us on the date?

MR. INGERSOLL:—The wheel was built and I want to show that this wheel was built for the World's Fair at that time and that is why he fixes it.

THE COURT:—The World's Fair was a whole year, wasn't it?

MR. INGERSOLL:—Yes, but he fixes the date when he was doing it. First, I asked him in regard to the year and then I was going down to the other matter.

THE COURT:—Well, you come within two weeks before and two weeks after April 5. Now what is the effect of it being the World's Fair? If I can see a prospect of your reaching anything tangible, I will allow it.

Q. Have you anything to fix the date upon which you returned from Chicago to Atlantic City?

A. I haven't with me at present.

DEVOUX B. EDWARDS, Recalled.

DIRECT EXAMINATION.

BY MR. INGERSOLL:—

Q. At the time of the execution of the contract between Johnson, Mason & Co. and William Somers & Co., was William Somers present?

A. No.
Q. How long prior to that time had you seen him?
A. About a month.
(Objected to.)
Q. How long after that time before you saw him?
(Objected to.)

THE COURT:—I will admit it. Is there any proof as to delivery of the wheel?

MR. INGERSOLL:—I will ask permission to call a witness to prove the delivery.

WILLIAM SOMERS, Recalled.

DIRECT EXAMINATION.

BY MR. INGERSOLL:—

Q. Mr. Somers, at the time of the completion of the Gloucester wheel and the beginning of its operation were you there?
A. I was there when it was started.
Q. To whom did you deliver the wheel?

THE COURT:—You had better tell what was done. The word "delivery" is a kind of legal term.

Q. What was done with regard to the completion of the wheel and the commencement of the operation?
A. Hanging the coaches, getting up steam and filling it with people and starting it to going.
Q. Who was present?
A. Mr. Scott Johnson and Mr. Mason.
Q. What Mason?
A. John T. Mason, I believe it is, and Mr. Scull.
Q. Who took charge of the wheel?
A. I can't just say who took charge to operate it and handle the bell. I don't know whether they continued—I think it

was just about night and I don't think they started it for the public that evening. I don't think they did. I am not positive.

Q. Did you leave?

A. I left for Atlantic City then.

Q. When did you leave?

A. I think not until the morning train of the next morning after it was ready.

Q. In whose charge did you leave it at the time you left?

A. With the company that was there.

Q. Whom?

A. John T. Mason and Mr. Scull was there, and another party that they brought up, I don't know. I hadn't had anything to do with them. Mr. Holdzkom was there.

CROSS-EXAMINATION.

BY MR. WESCOTT:—

Q. What date was that?

A. I don't remember exactly the date it was. It was some time about June.

Q. It was not while you were in Chicago, was it?

A. No, I couldn't very well do that.

Q. You can't tell when it was? Some time around about May or June?

A. No, it was some time about the beginning of June, about the first of June, I think.

Q. A pretty important thing for you to remember, wasn't it?

A. I don't know that it was. I got it completed and turned over. They were very much pleased to get it, I know.

Q. I don't doubt that. How did they manifest their pleasure?

A. Well, they had made so much money in other wheels the season before—

Q. Well, how did they manifest their pleasure?

A. By being ready to operate.

Q. How did they manifest their pleasure, laugh?

A. Yes.

Q. Jump up and down?
A. Oh, yes; they were glad to get it.

BY THE COURT:—

Q. Were you there afterwards?
A. I was there during the summer of 1893 and 1894.
Q. At Gloucester?
A. Yes, sir.
Q. And this was 1893?
A. When we turned it over to them, yes, some time about the first of June that we had it completed and ready to run, in practically running shape. They were satisfied with it and done well, I know, that season. I don't know after that.

MR. WESCOTT:—I don't suppose I have any right to object now.

THE COURT:—Yes you have.

MR. WESCOTT:—Then I object to all this.

THE COURT:—I overrule the objection.

BY MR. WESCOTT:—

Q. What were you doing there in 1894?
A. I would occasionally go up and see how things were moving, you know.
Q. What were you doing there in 1894?
A. Up on a pleasure trip.
Q. Up on a pleasure trip?
A. Yes.
Q. Where did you go?
A. To Gloucester.
Q. Attending the races?
A. No, I didn't ever do any of that kind of work.
Q. What did you do for pelasure up there?

A. Oh, well, there is lots of excitement around Gloucester, plenty of people there, you know, the same as others in other resorts.

Q. And I suppose you joined the throng?

A. Well, I suppose I went as far as I felt like going. I never get excited in such places.

DEFENDANTS' TESTIMONY IN SURREBUTTAL.

W. SCOTT JOHNSON, Recalled.

DIRECT EXAMINATION.

BY MR. WESCOTT:—

Q. Did you hear what Somers said just now, that he delivered this wheel to you in Gloucester?

A. I heard that.

Q. Is it true?

A. No, sir.

Q. Did you ever go to Gloucester to see this wheel?

A. No, sir.

Q. Did anybody ever deliver it to you directly or indirectly?

A. No, sir; I knew nothing at all about its operation.

Q. Did you ever operate it or undertake to operate it?

A. No, sir.

Q. Did you ever make a cent out of it?

A. No, sir.

(Objected to.)

Q. Did you ever know anybody to make a cent out of it?

A. No, sir.

MR. INGERSOLL:—I object, and ask for a ruling.

THE COURT:—I overrule that.

MR. WESCOTT:—Somers said these men made a whole lot of money out of it and said so to your Honor.

MR. INGERSOLL:—I ask for a ruling upon that question.

THE COURT:—I will allow that question and answer.

BY MR. INGERSOLL:—

Q. You have never been in Gloucester?
A. I have been in Gloucester.
Q. Were you there while the wheel was being built?

THE COURT:—He said that. That is in evidence.
Q. Were you there when it was completed?
A. No, not when it was turned over nor after.
Q. You never were there when it was operated?
A. No.

BOTH SIDES REST.

Adjourned till September 10, 1903, 10.00 A. M.

Mays Landing, N. J., September 10, 1903.

Trial of the cause resumed at 10.00 A. M.

MR. WESCOTT:—I ask permission of the Court to open the case for the purpose of proving the assignment of a mortgage by Heston to these plaintiffs, that was referred to in the testimony.

MR. INGERSOLL:—I object to the offer on this ground: There was no testimony, to the best of my recollection, and I think I am correct in it, concerning the assignment of any mortgage from Heston, and I object to the offer of this particular record because there is nothing anywhere to connect this assignment with the case now at issue. There is absolutely no connection in any way between that record and the case. There is no testimony that there was any mortgage assigned, and the mere fact that at a certain time there was a mortgage assigned is certinly not binding in the case at issue. There may have been many other transactions with Heston, as it has been testified there was with Johnson, and there is nothing to connect in any way this record with the case at issue. I also make another objection that the assignment of the mortgage was some time subsequent to this agreement, and therefore not binding.

THE COURT:—What is the relevancy?

MR. WESCOTT:—The relevancy consists in the fact that while they said there was a mortgage it was not assigned to them direct. We contend that the plaintiffs retained an interest in this wheel and assigned it to Heston in consideration of this mortgage.

THE COURT:—Well, this offer coming now, after you have rested—I understand you don't object on the ground of surprise and on the ground that it would interfere with your counter-proofs?

MR. INGERSOLL:—Well, of course I was surprised and I must object on that ground. I understood the case was closed Monday night and I have been acting on that line ever since. Had I known that this would have been offered I would have had Mr. Heston here if it had been necessary. I, of course, would have taken such steps.

THE COURT:—Do you object on that ground?

MR. INGERSOLL:—Yes, I object on that ground of surprise. I think it is my duty to my client to make that objection at this time.

THE COURT:—I don't think that under the circumstances there is sufficient connection in this offer for me to reopen the evidence again, which counsel on the other side says would cause him surprise and the necessity of having other testimony. If it was a matter, I can see, of very serious import, it might be different, but under the circumstances, I do not feel that I should open the case to let it in.

MR. WESCOTT:—If your Honor please, I wish to renew the application was made when plaintiffs closed their case for binding instructions. I make it on these various grounds: The first is that under the general issue fraud in the execution of the contract may be shown. If your Honor needs any authority there is a case in New Jersey, an opinion by Chief Justice Beasley, the case of Connor vs. Dundee Chemical Works, reported in 21 Vr., 257. That authority is explicative law upon this point in this State. Furthermore, under the general issue, or by way of special plea, as appears in this case, failure of consideration in the execution of the contract may be shown. Now the evidence on the subject of fraud in the execution of this paper stands, as I recollect in this way: That the plaintiffs represented to the defendant, Mr. Johnson, that they had a patent on roundabout wheels which amounted to a monopoly, or a patent on wheels of such a character as would exclude all competition, and the wheel itself was of such a character as would result, if Johnson went into this contract, in a barrel of money, a fortune. Now that evidence stands uncontradicted. It was not disputed in any wise by the plaintiffs in this case that it was offered. So it is binding upon the conscience of this Court and stands as substantive, uncontradicted proof. Upon an inspection of the patent which was acquired after this contract, although an application for it has been made before—anyhow, upon an inspection of the patent upon which these representations were made, it appears that the patent was not upon roundabout wheels at all, that it was upon the mo-

tive power of the wheel. The virtue of this patent is confined exclusively to the motive power of roundabout wheels. Roundabout wheels, as your Honor knows without any argument—you are bound to take notice of it as common property—there can be no patent on a wheel, a roundabout wheel. So that the defendant Johnson had these misrepresentations made to him. Now after going into the contract upon these uncontradicted misrepresentations he finds, as I say, that there is no such patent as the plaintiffs represented to him, and that there is competition everywhere, and anybody has a right to competition anywhere and everywhere. Now with these facts uncontradicted there cannot be but one inference, and that it seems to me the Court must draw, and that is that there was fraud in the execution of this contract and hence the defendant Johnson is excused. If your Honor does not agree with me about that point, clearly it is a question the jury must pass upon. Then as a fact under the authorities the defendant is not liable on that ground.

But there is another point which is more potent yet. It is that there was a total failure of consideration in this case under the proofs. You will recollect that Johnson testified that he received nothing for signing this contract, and that he got nothing for signing the contract, either before it was signed or after it was signed; he gave nothing before it was signed or after it was signed; he had nothing whatever to do with this wheel. So that in no ascept can he be liable in this case. Taking the proposition of fraud, together with the proposition of total failure of consideration—and that stands contradicted because Johnson's evidence in that particular was not contradicted by the plaintiffs—this case fails and there ought to be binding directions upon these two grounds.

But there is another ground upon which the case fails, two other grounds. The first is—this point, however, is in contradiction. I had better not undertake to press that. I will adhere to my original statement that there are three points. The point that I was about to refer to which is in contradiction is whether or not Johnson was not released after he complained that he had been imposed upon and threatened suit and the plaintiffs said they would release him provided he would not

sue them if they could not stop the competition. If that is the truth, and the jury should so find, then it would amount to a release and Johnson would be excused. Of course, that was in connection with other wheels, but he included this wheel; the conversation related to other wheels which are all in use, but it is testified that this wheel also was contemplated in the conversation and it related to the whole thing. Of course, there was no differentiation in the wheels, they were all included. Johnson threatened to sue because the thing had been misrepresented to him; then the plaintiffs said: "You hold off and don't sue and I will stop this competition with roundabout wheels in which you have an interest, and if I fail to do it we won't expect any royalties from you." Of course, that would be an absolute defense if the jury believed it to be true. And I need no other authority than the case in the Supreme Court involving this very case which your Honor is familiar with. That was the point in that case, one of the points.

Now the point which it seems to me is binding upon your Honor which must result in a direction is the fact that the plaintiffs proved that they released one of the joint defendants in this case. Of course, the law is plain on that subject. We have an abundance of authority which holds that where one of two or more joint obligors have released it releases all. It is particularly true in partnership law, as the cases show. If you want the authorities we will give them to you. Now the only possible question about the propriety of that matter arises upon the face of the release and the surrounding circumstances, and if there could be any question about it of course it would have to be submitted to a jury under proper instructions according to the authorities. But there can be no question but that this paper was a release. The paper is in this language. (Reads.)

So that that very language only intensifies the preceding purpose of the party to release this one partner, Scull. There cannot be any doubt about it. (Reads attesting clause). So that you have got their signatures and seals. Now all our authorities in this State hold that a release under seal cannot be contradicted; it imports consideration, it is absolutely binding upon the parties and a release under seal by one party releases

all the rest of them. (Cites authorities). You have evidently looked at those cases and it is a mere consumption of time to read them.

THE COURT:—Yes, that is the doctrine laid down in the case that you refer to.

MR. WESCOTT:—Of course, it may be contended here that this agreement amounts to a covenant not to sue; but that construction is not possible for two reasons: First, because the language of the act is explicit; it has all the terms of a release; more than that, it is the expressed intention to secure that result. The intention is manifest in the language of the instrument, the release, and a mere reference to the fact that they may in the future sue somebody else does not rob it of the character of being a release.

The next reason is it is under seal; it is a technical instrument, as these cases hold, and where a release is under seal that is the end of it; it cannot be construed to be a covenant not to sue. Of couse, there is no use going over the ground that was presented here roughly on the trial, in which I referred to what the result inevitably be unless your Honor took this view of the law. You see the very purpose of releasing all when one is released is to absolve the remaining obligors from the unjust burden of paying the whole debt. That is the philosophy of the decisions. Otherwise there might be a partnership made up of twenty men and they execute a partnership obligation to A; A goes to work and realeses nineteen of them. The consequence is that the twentieth has to pay the whole obligation and he may be the only one able to pay it, and when it comes to contribution he is forever stopped because he is met with this release. Again, when a debt is released the debt is paid. That is the second branch of the legal philosophy which underlies this rule. If it is paid by a release of one man it necessarily pays the obligation for all the rest; you can't collect it half a dozen times. If you release one and there are three and you bring suit against one other and make him pay, then you can bring suit against the remaining third and make him pay. But this is not the philosophy of the law. So it seems to me

upon all these grounds there ought to be binding instructions in this case.

(Mr. Ingersoll replies.)

THE COURT:—In this case the defendant claims that the release in writing marked Exhibit P 4; executed by the plaintiffs to Scull, I think, one of the joint contractors, purporting to release him from further royalties to be paid, must operate as a release of the defendant in this case, the defendant, Mr. Johnson, who was also one of the joint contractors. If this were what is known as a technical release of Scull I should think the position was correct, leaving out of view what has been suggested here, that the signing of the name as William Somers & Co. before the seal is not binding upon the members of the firm as a sealed instrument. But the effect of a technical release under seal would be such as I have indicated; that is, it would release the other joint obligors. This was the doctrine laid down in Crane vs. Alling, 3 Green, 423; and that doctrine has been approved by other cases in the Supreme Court. The reasons usually stated for this rule are that such release under seal is evidence of a full payment and satisfaction of the obligation; also that in case of a recovery against the other joint obligors they could not look to their co-contractor thus released for contribution. But it seems that the rule is that where the release on its face shows that the parties thereto did not intend that it should operae as a final release of the contract, but that the right to sue the others is reserved, and that the person released acquiesces, he is liable to contribute in such a case; he cannot decline to answer to a suit for contribution where he consents in such a release to a suit being brought against other defendants and himself, a right which seems to be reserved in this paper. And where it appears upon the face of the supposed release that the intention of the parties was to reserve this right to proceed against the others and the party claiming to be released acquiesces in it, it seems that the weight of the authorities is that such a paper does not operate as a technical release, and does not discharge the obligation of the co-contractors. The decisions on this subject may be found in 24 Am. and Eng. Ency. of Law, 2d Ed., 293, 295.

Now in this case the document proceeds to declare that it does release Scull from all royalties under that agreement; and assuming that it is properly under seal, if you stopped there, it would be a technical release, which must relieve the other obligors. But it goes further and says that it is to be understood that in case a suit to recover royalties becomes necessary against Scull himself and the others, then they agree to—the agreement says "assess," which apparently means assign—transfer and set over to him so much of the amount reserved as would indemnify him against any amount he should be liable for. So that it would seem to me that the intent of the parties was not to so release this obligation as to prevent suit against the others, and that undoubtedly if a recovery was made against the others, that Scull would be liable to contribute his share of whatever is recovered. Now I may be wrong in this, but that is my strong impression from a fair examination of the authorities, that such a paper is treated as in the nature of a covenant not to sue. This is a question which has not been very thoroughly considered, this phase of it, in New Jersey, and it is an interesting question to be presented to the Supreme Court for its decision. But I feel inclined under the law as I understand it and the evidence in this case, to hold that this paper does not operate as a release to the extent claimed, and does not have the effect to discharge Mr. Johnson from his liability. The amount received from Mr. Scull by Somers & Co., it seems to me, should be credited, however, in any event, on the amount of the royalties that are sued for.

Now the other defense in this case is, as I understand it, that of fraud in the consideration of the contract, and it is insisted by the pleas and by counsel that this fraud invalidated this agreement and rendered it void, so there should be no recovery under it of anything. I note the fact that the pleadings in this case have no notice attached, claiming a partial failure of consideration or claiming any deduction on that ground. The claim is that the contract is invalid and void; but as I understand the law, this defense is not a bar to an action on such a contract where the contract has been executed by both parties and remains unrescinded and where the consideration has not entirely failed or where the defendant retains some right or interest he

has received under the contract. This is the doctrine in the case of Lord vs. Brookfield, 8 Vr. 552; and that has been approved in more recent authorities and again by the Supreme Court in the opinion of Chief Justice Gummere in the case of Somers, et al., vs. John Myers, et al. In the last case I think this defendant was one of the defendants also. The case was somewhat similar, and was tried here about a year ago. The opinion, I think, was filed on April 15, 1903.

Now in the present case it is contended by counsel for the defendants that this case is to be differentiated from that case or other cases, on the ground that the consideration has entirely failed. But I do not so understand the situation from the evidence. Here is a license giving exclusive right to use a wheel erected under a patent. It is a license to use it during the life of the patent, and the patent is in evidence and the license is in evidence, signed and executed by William Somers & Co. and by the other party, described in the paper as Johnson, Mason & Co., and, I think, as partners. Now it may appear in the evidence and probably does in the evidence of Mr. Johnson, the defendant, that he had no interest in the use of this wheel, or something to that effect. But here is a written instrument under seal which is executed by Mr. Johnson with the others and he takes under that agreement the exclusive use of such a wheel, a roundabout, during the life of the patent. Now what right or interest may have existed between him, if any at all, and Mason & Co., does not appear in this case. The evidence does not go into the business matters, the operation, as I understand it, of that wheel. The evidence stops there. It shows a wheel was erected under the terms of the agreement and put in motion by the party of the first part at Gloucester, where the agreement calls for its erection. And the statement made by Mr. Johnson on the stand that he had no interest in it may be an opinion; that is, on a matter of law; it may be a matter of fact. But it seems to me under this agreement he had an interest, he had a right which, by signing this agreement, if this is to be considered as his agreement, in connection with the others, that he had a right to the exclusive use, which he voluntarily received; that is, assuming it was a voluntary assignment—giving him this exclusive right during the life of the

patent on paying the royalty of $200. Now as far as the evidence shows he has never made any return or offer to return that right or interest to the plaintiffs in this case. Several years have passed by and there is no evidence, as far as I understand it, that he has ever made any proffer whatever in that particular or any attempt to rescind the contract by returning such interest as he had, or making any effort to do so. So that I am inclined to think that under this evidence he had an interest in the right and the contract was to that extent executed or partly executed, and that this defense must fail because there has been no rescinding, no offer to return; that this defense of fraud or invalidity, if the proofs would sustain it, cannot be operative under those conditions.

Now counsel for a further defense has argued that there was evidence in this case that is uncontradicted, that there was fraud in the consideration. Now even supposing that it could be applied as a defense here without rescinding the contract, so far as the question of agency was concerned, which is assumed as one of the grounds; that is, that he was acting as agent of these plaintiffs, and that he took no interest under the agreement—the Court ruled out the testimony of that sort as contradicting defendant's own written agreement signed and sealed, and consequently that part of the testimony cannot be considered for that purpose upon the question whether there were any fraudulent misrepresentations invalidating the contract.

With reference to the other matters that counsel suggested in the argument; that is, that Mr. Somers pretended and falsely pretended, that this was under a patent and one that would give a monopoly, and that he would make so much money, and make lots of money and so on. Now whether the evidence is such as to show that the statement is true or not, I do not think the evidence is such as should go to the jury on the question of fraud. Fraud must consist of a fraudulent misrepresentation as to some existing facts, not a mere puffing or promise that he could make a great deal of money out of it, or that this patent would protect against all wheels. I think that would be a statement so absurd on its face that it could not be regarded as a false pretense. That is the way it strikes me. I may be wrong about that. And then there is another phase of

that testimony in which Mr. Johnson also says that he threatened to bring some suit, and that if he would not do so Somers & Co. said they would release him from all royalties. I merely advert to that in connection with the other testimony to show, as, I think, that Mr. Johnson's testimony, when fairly weighed, taking all of his evidence together, does not mean that even Mr. Somers, speaking for that firm, made these misrepresentations to him with reference to this wheel at Gloucester. In the first place, the evidence seems to show that there was no opposition in Gloucester; that there was no attempted infringement there, and that there could not be a suit about it as related to this agreement covering the observation roundabout to be located at Gloucester. And then again in his own testimony he says with reference to what occurred prior to the agreement that he was not to receive any interest, did not receive any, that he was a mere agent, so that such statement would be entirely, as applied to the Gloucester wheel, a contradiction of what he states in that respect. If he had no interest in it how could he ask and expect that representations should be made with reference to it being a monopoly? What effect would it have? What loss would result if such turned out not to be true? Again, it does not appear that the patent was ever asked for, or that he did not see the patent, or that it was concealed from him. I take it that a man claiming fraud must show ordinary diligence, at least, in informing himself as to the nature and circumstances of the contract upon which he claims or in relation to which the fraud is declared.

So that taking these things together—as I said before, I may not be correct about it—but taking up the case on the trial here as it impresses me, I do not see that under the law as stated I can leave to the jury the question of fraud as applied to the defense. My ruling was similar in the other case that was tried. This is a little different from that case and may make a difference in the review which will probably be had before the higher court. Feeling that way, I deem it my duty to direct a verdict for the plaintiffs in both these cases, and if counsel will calculate the amount of royalties and interest, deducting the amount paid by Scull and interest, I will direct a verdict for the difference.

Gentlemen of the jury, in this case the verdict will be taken in the two cases and you are not responsible for the result. The Court directs a verdict on its view of the law applying to these cases, and if the Court is in error the court above will correct me and then the cases may be tried again. So you will render a verdict for the plaintiffs in the first suit for $1,692.49 and in the second suit for $932.24.

The defendants except to the refusal of the Court to allow the motion for a direction.

(Which exception is hereby allowed and sealed acocrdingly.)

The defendants also except to the Court's direction of a verdict.

(Which exception is hereby allowed and sealed accordingly.)

NEW JERSEY SUPREME COURT.

WILLIAM SOMERS et als., trading, &c., as Wm. Somers & Co., Defendants in Error.

vs.

W. SCOTT JOHNSON et als., Plaintiffs in Error.

On Error.

Assignment in Error.

And now the plaintiffs in error assign the following causes:

1. Refusal of Court to permit evidence of Devoux B. Edwards as to his acknowledge of wheel being built at Gloucester.

2. Refusal of Court to non-suit.

3. Refusal of Court to admit evidence of W. Scott Johnson's connection with partnership of Johnson, Mason & Co.

4. Refusal to admit W. Scott Johnson's evidence as to the capacity in which he signed agreements between Wm. Somers & Co. and Johnson, Mason & Co.

5. Also to his relation (W. Scott Johnson) with wheel in Gloucester in regard to the erection of same and contributing towards the erection.

6. Also whether Somers & Co. employed him (W. Scott Johnson) as agent to sell any interest that they had in Gloucester wheel.

7. Refusal to admit his (W. Scott Johnson's) conversation relative to his name being on articles of agreement marked exhibit P 3, or as to who got him to sign same.

8. Refusal to admit W. Scott Johnson's evidence as to plaintiff retained in Gloucester wheel.

9. Refusal to admit W. Scott Johnson's evidence as to profits received from wheel, or whether he lost anything through it; or whether he received an commission from Somers & Co. for selling their patent.

10. Refusal to admit evidence of W. Scott Johnson showing that competitive wheels were being built of a similar pattern to Gloucester wheel.

11. Refusal to permit W. Scott Johnson to testify as to his release from his obligations under the contract or from paying royalties.

12. Refusal to admit evidence of Johnson's relation as agent to plaintiff company.

13. Refusal to admit evidence as to the organization of a

company for plaintiffs by W. Scott Johnson, as agent to operate Gloucester wheel.

14. Refusal of the Court to entertain a motion for a direction.

15. Because the Court directed a verdict for the plaintiff.

WM. I. GARRISON,
JOHN B. SLACK,
Attorneys of Plaintiffs in Error.

ADDENDA

(Writ No. 1 endorsed on back)

NEW JERSEY COURT OF
ERRORS & APPEALS.

WM. SOMERS, ET ALS trading &c. as WM. SOMERS & CO., VS W. SCOTT JOHNSON, ET AL	WRIT OF ERROR

WM. I. GARRISON,
JOHN B. SLACK,
Attorneys.

Service of copy of within writ acknowledged.
ROBT. H. INGERSOLL,
Attorney of Defendant in Error.

(Writ No. 2 endorsed on back)

NEW JERSEY COURT OF
ERRORS & APPEALS

WM. SOMERS, ET ALS trading &c. as WM. SOMERS & CO. vs W. SCOTT JOHNSON, ET ALS	WRIT OF ERROR

WM. I. GARRISON,
JOHN B. SLACK,
Attorneys.

(Judgment No. 1 endorsed on back)

NEW JERSEY SUPREME COURT.

WILLIAM SOMERS, et als., Trading, &c., as Wm. Somers & Company,

Vs.

W. SCOTT JOHNSON, Impleaded, &c.,

Copy of Judgment

GEORGE A BOURGEOIS,
ROBERT H. INGERSOLL,
Attorneys.

(Judgment No. 2 endorsed on back)

NEW JERSEY SUPREME COURT.

WILLIAM SOMERS, et als, trading, &c., as William Somers & Co.,

vs.

W. SCOTT JOHNSON, Impleaded, &c.,

Copy of Judgment

ROBERT H. INGERSOLL,
Attorney.

Agreement made this nineteenth day of July, A. D. eighteen hundred and ninety eight.

Between Wm. Somers Company, of the first part and Robert B. Scull, of the City of Atlantic City, in the County of Atlantic and State of New Jersey, of the second part.

Witnesseth: Whereas the said party of the first part did sell, transfer and convey unto the said party of the second part, et als., the right to operate a Pleasure Machine, known as Roundabout, under the protection of a patent from the United States Government, at Gloucester, New Jersey, upon paying a royalty of two hundred (200) dollars. per annum, payable August first, eighteen hundred and ninety three, and each and every year thereafter, during the life of the patent as aforesaid.

And whereas the said party of the second part is desirous of being finally released from said agreement:—

Now therefore, This agreement Witnesseth, That the said party of the first part in consideration of the sum of fifty (50) dollars, to them in hand paid, by the said party of the second part, as follows—cash thirty (30) dollars, the receipt of which is hereby acknowledged, and a promissory note for twenty (20) dollars, payable on the first day of September, eighteen hundred and ninety eight, agrees to release and does hereby release said party of the second part from all and any further liability under said contract of royalty; and it is hereby expressly understood that in the event of the said party of the first part being obliged to prosecute the said party of the second part, together with the other parties to said agreement in order to recover the moneys due for said royalties, then and in that event the said party of the first part will assess, transfer and set over such portion to be recovered as

shall be sufficient to cover the liability of the said party of the second part thereunder.

In witness whereof the parties hereto have hereunto set their hands and seals the day and year first above written.

Sealed and delivered in the presence of G. A. BOURGEOIS.

WM. SOMERS CO. [SEAL]

ROBT. B. SCULL, [SEAL]