

I N D E X

	PAGE
Complaint	1
Answer of Edward C. McGarry	3
Answer of Sheppard W. Coombs and Joseph Probinsky	9
Reply	15-16
Judgment	17
Substitution of Attorney	18
Notice of Appeal	19
Grounds of Appeal	20
Order	21
 PLAINTIFF'S TESTIMONY:	
Adam Kosobucki—Direct	25-30
Cross	29-30
Edward C. Fox—Direct	42
Cross	51
David Ostreicher—Direct	53
Cross	57
Defendant's Motion for Non-Suit	62

DEFENDANT'S TESTIMONY:

Shepard W. Coombs—Direct 63
 Cross 71
 Re-direct 85

Joseph Probinsky—Direct 86
 Cross 92

Edward C. McGarry—Direct 95
 Cross 99
 Re-direct 101

PLAINTIFF'S REBUTTAL TESTIMONY:

David Ostreicher—Direct 101

Court's Charge to Jury 104

Plaintiff's Exhibit 1, Agreement 108

JUDGMENT RECORD.

COMPLAINT.

NEW JERSEY SUPREME COURT.

ADAM KOSOBUCKI, <i>Plaintiff,</i>	}	Judgment Record. 10 Action at Law. On Postea. James Mercer Davis, Attorney.
v.		
EDWARD C. MCGARRY, JOSEPH PROBINSKY and SHEPPARD W. COOMBS, <i>Defendants.</i>		

Edward C. McGarry, Joseph Probinsky and Sheppard W. Coombs, the defendants in this cause, were summoned to answer unto Adam Kosobucki, the plaintiff therein in an action at law upon the following complaint: 20

(Summons issued December 26, 1925.)

The plaintiff residing at Wildwood, in the County of Cape May and State of New Jersey, says:

1. That on or about September 8th, 1925, the said defendants individually and collectively represented the said plaintiff. They had formed a syndicate or association and had obtained an option upon a certain piece of real estate in the County of Cape May and State of New Jersey, and that they had resold the same at a considerable profit. 30

2. The said defendants individually and collectively further represented that in order to complete said transaction it was necessary for them to have an additional sum of money, to wit, the sum of \$2500, and that if the said plaintiff would advance said sum of money the said defendants would give him an equal interest in the profits to accrue from the sale of said property which had been made at that time.

10

3. The said plaintiff relying upon the representations, promises and assurances of the said defendants advanced to them the sum of \$2500 for the purpose of perfecting their option so that said property could be resold.

4. But the said defendants well knowing the promise, falsely represented and pretended that the said property had already been resold at a considerable profit and thereby induced the said plaintiff to invest the said sum of \$2500.

5. The said defendants, as a matter of fact, had not resold said property but merely acquired an option thereon for the purpose of speculation, and have abandoned said proposed venture whereby the said plaintiff's money is lost.

The plaintiff demands of the said defendants the sum of \$3500.

30

JAMES MERCER DAVIS,
Attorney of Plaintiff.

(Filed January 18, 1926.)

ANSWER OF EDWARD C. MCGARRY.

The defendant, Edward C. McGarry, answering the plaintiff's complaint filed herein says that:

1. He denies paragraph one of said complaint.
2. He denies paragraph two of said complaint. 10
3. He denies paragraph three of said complaint.
4. He denies paragraph four of the said complaint.
5. He denies paragraph five of the said complaint.

SEPARATE DEFENSES.

20

1. Defendant, Edward C. McGarry, never at any time entered into any negotiations with the plaintiff, either individually or with others, to purchase any real estate in the County of Cape May and never made any representations to said plaintiff concerning any such purchase of resale, or requested said plaintiff to advance any sum or sums of money for that purpose.

2. This defendant entered into an agreement with one David Ostreicher to purchase certain lands and premises in the City of Wildwood, New Jersey, known as the Biltmore Hotel, which agreement was signed by him, the said plaintiff (described as Adam Adams), Edward Z. Fox, Joseph Probinsky, Shep-

30

pard W. Coombs and Clara Rasnek, and each assumed their proportionate share of the purchase price mentioned in said contract of the expenses incident to its purchase, and further agreed to stand his or her proportionate share of any losses that might be sustained by reason of said purchase. A copy of said agreement is attached hereto, made a part hereof and marked Exhibit A.

10 3. Plaintiff failed and neglected and refused to provide the balance of his share of the amount required to make settlement upon said property under the terms of said agreement, although this defendant was ready, willing and able to settle for the same to the extent of the share held by him, and the plaintiff, Adam Kosobucki, did not appear and was not present at the time and place set for settlement, thereby forfeiting his rights under said contract.

20 4. This defendant never at any time entered into any agreement with the said plaintiff, whereby the said Kosobucki should advance any money for the procuring of any option as in said complaint set forth, but is merely a party to the agreement of sale annexed hereto.

COUNTER-CLAIM.

30 Defendant, Edward C. McGarry, by way of counter-claim against plaintiff, Adam Kosobucki, alleges that:

1. On or about the 8th day of September, A. D. 1925, one David Ostreicher, a single man, entered into an agreement of sale wherein and whereby he agreed to sell certain lands and premises situate in

the City of Wildwod, County of Cape May and State of New Jersey to Adam Adams (appearing herein as plaintiff, under the name of Adam Kosobucki, his true name) 1 part, Edward Z. Fox, 1 part, E. C. McGarry, 1½ parts, Sheppard W. Coombs, 1½ parts, Joseph Probinsky, 1½ parts.

2. That the said Adam Kosobucki, the plaintiff herein, under and pursuant to said agreement, paid as his proportion of the deposit on account of the purchase price of said property the sum of \$2500 and that these defendants paid their proportionate shares of the total deposit of \$20,000 paid on account of the purchase price as shown by the agreement hereto annexed. 10

3. That because of the failure and refusal of the said plaintiff, Adam Kosobucki, to produce the balance of the purchase price upon his share in said agreement, settlement could not be effected, and this defendant has lost the deposit amounting to \$3750.00 which he paid on account of the purchase price. 20

Judgment will be demanded for the sum of \$3750.00 with interest from January 15, 1926.

MARK R. SOOY,
Attorney for Defendant,
Edward C. McGarry.

EXHIBIT "A."

THIS AGREEMENT, Made the Eighth day of September, A. D. 1925, between David Ostreicher, single man, of the City of Wildwood, County of Cape May and State of New Jersey, party of the

first part and Adam Adams, 1 part; Edward Z. Fox, 1 part; E. C. McGarry, 1½ parts; Joseph Probinsky, 1½ parts; S. W. Coombs, 1½ parts, and Clara Rasnek, 1½ parts, all of the City of Wildwood, County of Cape May and State of New Jersey, of the second part, hereinafter called the Buyers.

Witnesseth, That the Seller agrees to sell and convey and the buyers agree to buy all those certain lots, tracts or parcels of land and premises situate
 10 in the Second Ward, City of Wildwood, County of Cape May and State of New Jersey, more particularly described as follows: situate on the westerly side of Atlantic Avenue between Cedar and Schellenger Avenue in the said City, being lots #13, 14, 15 and parts of 28, 29, and 30 of Block #168, being 150 feet on Atlantic Avenue, by about 130 on Cedar and Schellenger Avenue, and it is hereby made a
 20 part of this agreement of sale that when the property to the south, in said tract, is desired to be improved by the erection of a building or buildings thereon that he, the said seller will execute a release part of mortgaged premises on such southerly portion, taking back a mortgage for the amount to be released and will accept partial mortgages on said building or buildings as may be agreed upon between the parties hereto that the Hotel Ruric building thereon will not be demolished or removed unless nor until satisfaction therefore shall have been given therefor, for the price or sum of ONE
 30 HUNDRED AND SEVENTY FIVE THOUSAND DOLLARS under and subject to the following terms and conditions:

1. A first payment of Twenty thousand dollars, receipt of which is hereby acknowledged by the seller.

2. The balance of the purchase price shall be paid in the following manner:

\$45,000. on January 15th, 1926, at which time a purchase money mortgage for \$110,000. for the term of 10 years at 6% payable ½ yearly. shall be given. It is further agreed that should the Hotel Ruric Building be permitted to be removed or demolished by permission of the said David Ostreicher he will take such an amount on mortgage on the new building to be erected thereon at the request of the buyers. The time of final settlement shall be made
 10 at the office of Robert Bright, 1st and New Jersey Avenues, N. Wildwood, N. J. on or before January 15th, 1926, at the deposit of \$20,000. made herewith, at the option of the Seller may be applied on account of the purchase price or be forfeited as liquidated damages to the seller, and not as a penalty, provided that the necessary title searches can be obtained from any first class New Jersey Title company by that date. Should there be any delay, not
 20 the fault of the Buyers, in the procuring of such searches, the time for final settlement shall extend until such searches can be obtained.

3. The title to the premises shall be free and clear of all encumbrances, including municipal liens and assessments, except municipal improvements in the course of construction and not assessed, obvious easements, usual restrictions running with the land, and the buyers agree that there shall accompany said mortgage fire insurance to the amount of \$50,000.00, and shall be a marketable title, and the seller shall tender a special warranty deed conveying such title
 30 at the time of the final settlement, or in the event that such title cannot be as above, then this deposit shall be returned to the buyers.

4. All adjustments shall be made as of January 15th, 1926, and possession shall be given the buyers.

5. They buyers shall pay for searches and all other

expenses, excepting the preparation of the Deed and the necessary revenue stamps attached thereto, which shall be paid by the seller.

6. This agreement shall extend to and be binding upon the heirs, executors, administrators, successors and assigns of the parties hereto.

7. Time is the essence of this agreement.

8. This contract includes all fixtures and appurtenances permanently attached to the building or buildings on the land herein described and also specifically the following items:

IT IS AGREED THAT NO COMMISSION IS TO BE ALLOWED OR PAID ON THIS SALE TO ANY AGENT OR BROKER.

In Witness Whereof, the parties hereto have set their hands and seals the day and year first above written.

DAVID OSTREICHER (SEAL)
EDWARD Z. FOX (SEAL)
EDWARD C. MCGARRY (SEAL)
JOSEPH PROBINSKY (SEAL)
SHEPPARD W. COOMBS (SEAL)
CLARA RASNEK (SEAL)

20

Signed, sealed and delivered
in the presence of
(Filed May 1, 1926.)

30

ANSWER OF SHEPPARD W. COOMBS AND
JOSEPH PROBINSKY.

The defendants, Sheppard W. Coombs and Joseph Probinsky, answering the plaintiff's complaint filed herein say that:

10

1. They deny paragraph one of the complaint.
2. They deny paragraph two of said complaint.
3. They deny paragraph three of said complaint.
4. They deny paragraph four of said complaint.
5. They deny paragraph five of said complaint.

20

SEPARATE DEFENSES.

1. The said plaintiff joined with the defendants in the taking of an agreement of sale for said property described in plaintiff's complaint and agreed to pay his proportionate share of the costs thereof and the expenses incident to its purchase and to stand his proportionate share of any losses that might be sustained.

30

2. Plaintiff was one of the parties to said agreement of sale, a copy of which is attached hereto, and made part hereof and marked Exhibit "A," and assumed his equal share of the liabilities thereunder.

3. Plaintiff has refused to produce his share of

the amount required to settle upon said property under the terms of the said contract, and for that reason has forfeited any rights which he may have had under said contract.

These defendants appeared on the day of settlement prepared and ready and able to make settlement upon said property, under said contract, but the plaintiff, Adam Kosobucki, did not appear and
10 was not present to consummate his share of said agreement, whereby his rights thereunder became forfeited and void.

The said plaintiff, Adam Kosobucki, in spite of requests so to do, has at all times refused to join with these defendants in making settlement upon said property and has refused to assign his interest in said contract of sale, whereby it has become impossible for these defendants to make settlement upon said property.
20

COUNTER-CLAIM.

Defendants, Joseph Probinsky and Sheppard W. Coombs, by way of counter-claim against plaintiff, Adam Kosobucki, allege that:

1. On or about the 8th day of September, A. D. 1925, one David Ostreicher, a single man, entered into an agreement of sale wherein and whereby he
30 agreed to sell certain lands and premises situate in the City of Wildwood, County of Cape May and State of New Jersey to Adam Adams (appearing herein as plaintiff, under the name of Adam Kosobucki, his true name) 1 part; Edward Z. Fox, 1 part; E. C. McGarry, 1½ parts; Sheppard W. Coombs, 1½ parts; and Clara Rasnek, 1½ parts.

2. That the said Adam Kosobucki, the plaintiff herein, under and pursuant to said agreement, paid as his proportion of the deposit on account of the purchase price of said property the sum of \$2500 and that these defendants paid their proportionate shares of the total deposit of \$20,000.00, paid on account of the purchase price as shown by the agreement hereto annexed.

10

3. That because of the failure and refusal of the said plaintiff, Adam Kosobucki, to produce the balance of the purchase price upon his share in said agreement, settlement could not be effected, and these defendants have lost the deposits which they paid on account of the purchase price.

Defendants allege that they have sustained damage in the sum of \$5000.00, because of plaintiff's refusal to make settlement according to the terms of
20 said agreement.

MARK R. SOOY,
Attorney for Defendants.

EXHIBIT "A."

THIS AGREEMENT, Made the Eighth day of September, A. D. 1925 between David Ostreicher,
30 single man, of the City of Wildwood, County of Cape May and State of New Jersey, party of the first part and Adam Adams, 1 part; Edward Z. Fox, 1 part; E. C. McGarry 1½ parts; Jos. Probinsky 1½ parts; S. W. Coombs, 1½ parts and Clara Rasnek 1½ parts, all of the City of Wildwood,

County of Cape May and State of New Jersey, of the second part, hereinafter called the Buyers.

Witnesseth, That the Seller agrees to sell and convey and the buyers agree to buy all those certain lots, tracts or parcels of land and premises situate in the Second Ward, City of Wildwood, County of Cape May and State of New Jersey, more particularly described as follows: situate on the west-
10 erly side of Atlantic Avenue between Cedar and Schellenger Avenues in the said City being lots #13, 14 and 15 and parts of 28, 29, and 30 of Block #168, being 150 feet on Atlantic Avenue, by about 130 on Cedar and Schellenger Avenues, and it is hereby made a part of this agreement of sale that when the property to the south, in said tract, is desired to be improved by the erection of a building or build-
20 ings thereon that he, the said seller will execute a release part of mortgaged premises on such south-erly portion, taking back a mortgage for the amount so released and will accept partial mortgages on said building or buildings as may be agreed upon between the parties hereto that the Hotel Ruric building thereon will not be demolished or removed unless nor until satisfaction therefore shall have been given therefor, for the price or sum of ONE HUNDRED AND SEVENTY FIVE THOUSAND DOLLARS under and subject to the following terms and conditions:

30 1. A first payment of Twenty thousand dollars, receipt *receipt* of which is hereby acknowledged by the Seller.

2. The balance of the purchase price shall be paid in the following manner:
\$45,000. on January 15th, 1926, at which time a purchase money mortgage for \$110,000. for the term of

10 years @ 6% payable 1/2 yearly, shall be given. It is further agreed that should the Hotel Ruric Building be permitted to be removed or demolished by permission of the said David Ostreicher he will take such an amount on mortgage on the new building to be erected thereon at the request of the buyers. The time of final settlement shall be made at the office of Robert Bright, 1st and N. J. Avenues, N. Wildwood, N. J. on or before January 15th, 1926, 10 or the deposit of \$20,000. made herewith, at the option of the Seller may be applied on account of the purchase price or be forfeited as liquidated damages to the Seller, and not as a penalty, provided that the necessary title searches can be obtained from any first class New Jersey title company by that date. Should there *by* any delay, not the fault of the Buyers, in the procuring of such searches, the time for the final settlement shall extend until such searches can be obtained. 20

3. The title to the premises shall be free and clear of all encumbrances, including municipal liens and assessments, except municipal improvements in the course of construction and not assessed, obvious easements, usual restrictions running with the land, and the buyers agree that *ther* shall accompany said mortgage fire insurance to the amount of \$50,000.00, and shall be a marketable title, and the seller shall tender a special warranty deed conveying such title at the time of the final settlement, or in the event 30 that such title cannot be as above, then this deposit shall be returned to the buyers.

4. All adjustments shall be made as of January 15th, 1926, and possession shall be given the Buyers.

5. The buyers shall pay for *searchs* and all other

expenses, excepting the preparation of the deed and the necessary revenue stamps attached thereto, which shall be paid for by the seller.

6. This agreement shall extend to and be binding upon the heirs, executors, administrators, successors and assigns of the parties hereto.

7. Time is the essence of this agreement.

8. This contract includes all fixtures and appurtenances permanently attached to the building or buildings on the land herein described and also specifically the following items:

IT IS AGREED THAT NO COMMISSION IS TO BE ALLOWED OR PAID ON THIS SALE TO ANY AGENT OR BROKER.

In Witness Whereof, the parties hereto have set their hands and seals the day and year first above written.

20 DAVID OSTREICHER (L. S.)
 EDWARD Z. FOX (L. S.)
 E. C. MCGARRY (L. S.)
 JOSEPH PROBINSKY (L. S.)
 SHEPPARD W. COOMBS (L. S.)
 CLARA RASNEK (L. S.)

Signed, sealed and delivered
in the presence of
(Filed January 21, 1926)

REPLY.

The plaintiff, replying to the answer and counter-claim of Edward C. McGarry, says:

1. He denies the separate defenses set up by the defendant, Edward C. McGarry.

The plaintiff, by way of answer to counter-claim says:

1. He denies the allegations of paragraph 1, so far as this defendant is concerned.

2. He denies that he made any payment pursuant to said agreement, but that the said \$2500 advanced by him was paid by virtue of the agreement set out in the complaint.

3. He denies the allegations set out in paragraph 3.

JAMES MERCER DAVIS,
Attorney of Plaintiff.

(Filed May 3, 1926.)

REPLY.

The plaintiff replying to the answer and counter-claim of Sheppard W. Coombs and Joseph Probinsky says:

1. He denies the separate defenses set up by the
10 several defendants.

The defendant by way of answer to counter-claim says:

1. He denies the allegations to paragraph 1 so far
as these defendants are concerned.

2. He denies that he made any payment pursuant
to said agreement, but that the said \$2500 advanced
20 by him was paid by virtue of the agreement set out
in the complaint.

3. He denies the allegations set out in paragraph
3.

JAMES MERCER DAVIS,
Attorney of Plaintiff.

(Filed January 26, 1926.)

JUDGMENT.

This action was tried at the Cape May Circuit before W. Frank Sooy, Circuit Court Judge, and jury, on December 14th and 15th, 1926, and a general verdict rendered by the jury in favor of the plaintiff and against the defendants, Edward C. McGarry, Joseph Probinsky and Sheppard W. Coombs, for the sum of twenty-six hundred and sev-
10 enty-five Dollars (\$2675.00).

Whereupon it is adjudged that the plaintiff, Adam Kosobucki, do recover of the said defendants, Edward C. McGarry, Joseph Probinsky and Sheppard W. Coombs, the sum of
60.20 two thousand six hundred and seventy-five
dollars damages, together with his costs,
\$2735.20 which have been taxed at the sum of sixty
dollars and twenty cents, making in the
whole the sum of two thousand, seven hun-
dred thirty-five dollars and twenty cents. 20

Judgment entered December 27, 1926.

W. S. GUMMERE,
C. J.

I, Edward J. Kelleher, clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the judgment entered in the above stated cause as the same remains of record
in my office. 30

In testimony whereof I have set my
hand and the seal of said Court at Tren-
(Seal) ton, this twenty-seventh day of January,
A. D. nineteen hundred and twenty-seven.

EDWARD J. KELLEHER,
Clerk.

SUBSTITUTION OF ATTORNEY.

(Filed Jan. 30, 1927.)

NEW JERSEY SUPREME COURT.
CAPE MAY COUNTY.

10

ADAM KOSOBUCKI,
Plaintiff,

v.

EDWARD C. MCGARRY, ED-
WARD Z. FOX, CLARA RAS-
NEK, EZE RASNEK, JO-
SEPH PROBINSKY and
SHEPPARD W. COOMBS,
Defendants.

Action at Law.
Substitution of At-
torney.

20

I hereby retire as attorney of record, and consent to the substitution of Bourgeois and Coulomb, as attorneys of record for Edward C. McGarry, Joseph Probinsky, and Sheppard W. Coombs, in the above entitled case.

MARK R. SOOY,
Attorney.

30

Dated January 22nd, 1927.

NOTICE OF APPEAL.

(Filed Jan. 19, 1927.)

NEW JERSEY SUPREME COURT.

ADAM KOSOBUCKI,
Plaintiff,

v.

EDWARD C. MCGARRY, ED-
WARD Z. FOX, CLARA RAS-
NEK, EZE RASNEK, JO-
SEPH PROBINSKY and
SHEPPARD W. COOMBS,
Defendants.

10

Action at Law.
Notice of Appeal.

20

To James Mercer Davis, Attorney of Plaintiff:

Take notice that the defendants, Edward C. McGarry, Joseph Probinsky, Sheppard W. Coombs, Clara Rasnek and Eze Rasnek, appeal to the Court of Errors and Appeals from the whole of the judgment entered in this cause.

BOURGEOIS & COULOMB,
Attorneys of Defendants.

30

Service of the within notice of appeal is hereby acknowledged this 17th day of January, 1927.

JAMES MERCER DAVIS,
Attorney of Plaintiff.

GROUNDS OF APPEAL.

(Filed Feb. 16, 1927.)

NEW JERSEY COURT OF ERRORS
AND APPEALS.

10 ADAM KOSOBUCKI,
Plaintiff-Respondent,

v.

EDWARD C. MCGARRY, JOSEPH PROBINSKY and SHEPPARD W. COOMBS,
Defendants-Appellants.

On Appeal from Supreme Court.
Grounds of Appeal.

20 The appellants state the following grounds of appeal:

1. The Court erred in refusing to grant the defendant's motion for a non-suit.

BOURGEOIS & COULOMB,
Attorneys of Defendants-Appellants.

30 Service of the copy of the within grounds of appeal is hereby acknowledged on this 15th day of February, 1927.

JAMES MERCER DAVIS,
Attorney of Plaintiff-Respondent.

ORDER.

(Filed Feb. 28, 1927.)

NEW JERSEY SUPREME COURT.

ADAM KOSOBUCKI,
Plaintiff,

v.

EDWARD C. MCGARRY, EDWARD Z. FOX, CLARA RASNEK, EZE RASNEK, JOSEPH PROBINSKY and SHEPPARD W. COOMBS,
Defendants.

Action at Law.
On Appeal.
Order.

10

On application of Bourgeois & Coulomb, attorneys for appellants in the above stated cause: 20

It is, on this 25th day of February, 1927, ordered that appellants have leave to strike from the notice of appeal filed in the said cause, the names of Clara Rasnek and Eze Rasnek, so that the said appeal may proceed in the names of Edward C. McGarry, Joseph Probinsky and Sheppard W. Coombs, this not being a satisfaction as to the said Clara Rasnek and Eze Rasnek.

LUTHER A. CAMPBELL,
Supreme Court Justice. 30

I consent to the making of the above order.

JAMES MERCER DAVIS,
Attorney for Adam Kosobucki.

TESTIMONY.

CAPE MAY COUNTY SUPREME COURT.

10 ADAM KOSOBUCKI, *Plaintiff,*
 v.
 EDWARD C. MCGARRY, ED-
 WARD Z. FOX, CLARA RAS-
 NEK, EZE RASNEK, JO-
 SEPH PROBINSKY and
 SHEPPARD W. COOMBS,
Defendants. } Action at Law.

20

APPEARANCES:

JAMES MERCER DAVIS, Esq., for plaintiff.
 MR. ATKINSON of counsel.
 PALMER M. WAY, Esq., and MARK R. SOOY, Esq.,
 for defendants.

30 The above entitled case was tried December 15th,
 1926, before HON. WILLIAM FRANK SOOY, Judge, and
 a jury.

Mr. Atkinson: I would like to amend the complaint by inserting in the first paragraph the words "and falsely and deceitfully represented that no commission was to be allowed," and by adding to the fourth paragraph the same words coupled with the further sentence "And that a commission was allowed."

Mr. Sooy: I object. As I understand the complaint, it has been filed. This action has been pending now for a matter of about eighteen months. A non-suit was taken last term and by consent of counsel for the defendant this non-suit was listed. Had there been any intention to make an amendment it should have been made prior to this time. He is now attempting to introduce something which we are not prepared to defend. 10

The Court: I do not think after a year's delay that an amendment that goes to a material part of the complaint, which as a matter of fact really adds another count to the complaint, should be allowed at this time if they say they are surprised and would not be able to go on with their defense. 20

Mr. Atkinson: Then I will ask the Court to withdraw a juror and give me permission to file an amended complaint and serve it upon the other side.

The Court: Then to remove the case from the list for the term? 30

Mr. Atkinson: Yes, sir.

The Court: After the case has been on the list ever since last January?

Mr. Atkinson: Yes, sir.

The Court: I won't do it.

Mr. Atkinson: May I have an exception?

The Court: Yes, sir.

Mr. Atkinson: Then, as I understand your Hon-
10 or's ruling, I am precluded from showing that there
was any false representation or deceit so far as the
commission was concerned?

The Court: I am not going to pass upon that at
the present time. I naturally assume that under
your pleadings you will be held to the allegation of
misrepresentation that you make therein, but I am
not going to pass upon the reception of evidence at
this time.

20

(Recess to 1.15 P. M.)

AFTER RECESS.

(Mr. Atkinson opened the plaintiff's case to the
jury.)

30 (Mr. Sooy opened the defendant's case to the
jury.)

Mr. Atkinson: I assume it is admitted by the
defendant that the \$2500 was actually paid on this
date, September 8th, 1925?

Mr. Sooy: I don't know. It is something that
has to be proved.

Mr. Atkinson: I call the Court's attention to the
fact that it is admitted in the pleadings.

The Court: Well if it is admitted in the plead-
ings there is no need of proving it.

10

ADAM KOSOBUCKI, the plaintiff, called as a witness
in his own behalf, being sworn, was examined and
testified as follows:

The Court: I do not see where there is anything
admitted as I read it. There are five allegations in
your complaint and five separate denials in the an-
swer as I read it.

20

Direct examination.

By Mr. Atkinson:

Q. Where do you live?

A. North Wildwood.

Q. And how long have you lived there?

A. For six years.

Q. Are you always known under the name of
Kosobucki?

30

A. Yes, sir. Some men call me Adam because it
is hard to pronounce my second name, and they call
me by the first name, Adams.

Q. Prior to September 8th, 1925, did you know
Edward C. McGarry?

A. No, sir.

- Q. Did you know Edward Z. Fox?
 A. I know him, yes, sir.
 Q. Did you know Clara Rasnek?
 A. Yes, I know that lady.
 Q. Eze Rasnek?
 A. Yes.
 Q. Joseph Probinsky?
 A. Yes, I know him.
 Q. Shepard W. Coombs?
 10 A. I didn't know him.
 Q. Now, did you meet these people on or about September 8, 1925?
 A. Well, they come to my place of business, the Hotel Royal.
 Q. Who?
 A. That is Mr. Shepard Coombs, Mr. Probinsky, Mr. Rasnek and Mr. Fox and Mr. McGarry. They come into my place around half past ten, close to eleven o'clock.
 20 Q. On what day?
 A. Labor Day night.
 Q. Pardon me?
 A. Labor Day night.
 Q. Who talked to you?
 A. Well, they all come together and Mr. Fox presents me to Mr. Coombs and Mr. McGarry.
 Q. You mean introduced you?
 A. Introduced me to these two gentlemen. Of course, I know Rasnek and Mr. Probinsky. I knew
 30 them.
 Q. Did they talk about anything?
 A. Well, they said they had a good proposition for a short time, if I want to go with them to purchase the Hotel Biltmore and they showed me a telegram. They said it would only be two days before you will get your money with profit.

Mr. Sooy: I object unless the telegram is produced.

The Court: He is not giving the contents of the telegram at all.

- Q. Go on.
 A. They showed me a telegram they got a purchaser coming in a few days to get the property and it will be only two or three days before everything 10 will be settled.
 Q. Yes.
 A. And, of course, I didn't know the other two. Mr. Fox said to me: "Well, you don't have to be afraid of those people. They are all good people, because I am in it myself, too," and on the strength of Mr. Fox's words I then went and filled a check and handed to Mr. Shepard Coombs, and in his name.
 Q. How much was the check?
 A. \$2500. 20
 Q. Now, was there any paper signed at that time?
 A. No, sir; there was nothing signed whatever.
 Q. Did they tell you what property they were going to buy?
 A. Yes, sir; Hotel Biltmore.
 Q. Did you know the owner of the Hotel Biltmore property at that time?
 A. Yes, sir.
 Q. Did they tell you how much they were paying for the property?
 A. Well, not exactly. 30
 Q. Was there any explanation given to you or did they tell you why they had come to see you at that time of the night?
 A. There was no explanation given to me whatever because I was busy that night; because that

was the biggest night in the year in Wildwood—Labor Day night. Of course, I was with them only for about half an hour or so.

Q. Did they say anything to you about any arrangements which they had made with the owner of the property?

A. No, sir.

Q. Well, now, after you had invested your money or given your check was any settlement made?

10 A. There was no settlement made, but about a week later I saw a friend of mine and he said to me: "Oh. You get in on that proposition ——"

Mr. Sooy: I object.

Q. You cannot tell what your friends said to you. You can only say what you said to these people and what they said to you?

A. There was no settlement with them.

20 Q. None of these days?

A. No.

Q. Was there any resale of that property at any time so far as you know?

A. No.

Mr. Sooy: I object, if your Honor please. It calls for a conclusion, unless he produces the instrument.

30 The Court: I will permit that question.

Mr. Sooy: May I have an exception.

Q. Did any of the defendants ever say to you or report to you that they had made a sale of this property?

A. No.

Q. Did you sign any papers at that time?

A. No, sir.

Q. Did you ever sign any papers?

A. I never did. The only thing I signed was a check for \$2500.

Mr. Sooy: Do you want to produce that?

(Paper offered and received for identification, 10 and marked Exhibit P1.)

Q. I show you a paper marked P1 for identification, purporting to be an agreement between David Ostreicher, Adam Adams, Ed. C. Fox, E. C. McGarry, Joseph Probinsky, S. W. Coombs and Clara Rasnek, dated September 8, 1925, and ask you if you signed that paper? (Paper handed to and examined by witness.)

A. I never see that paper.

20

Q. Never saw that paper?

A. The paper was never presented to me.

The Court: Does that paper purport to be the agreement of sale between the owner of the Hotel Biltmore and these defendants?

Mr. Atkinson: Yes, sir. I will now turn this witness over for cross-examination, reserving the right to recall him so far as the counter-claim is concerned. 30

Cross-examination.

By Mr. Sooy:

Q. What is your business?

A. Hotel keeper.

Q. Pardon me?

Mr. Atkinson: I omitted one question.

Re-examination.

By Mr. Atkinson:

Q. Have you ever been convicted of crime?

10 A. I pleaded guilty once in a prohibition case in Trenton.

Q. That is in the Federal Court?

A. In the Federal Court.

Cross-examination resumed.

By Mr. Sooy:

Q. What is your business?

A. Hotel keeper.

20 Q. What hotel do you conduct?

A. The Hotel Royal.

Q. On this particular evening, Labor Day evening, as I understand you to say, where were you?

A. I was in my place of business.

Q. In your place of business?

A. The inner private apartment in the rear in my place of business.

Q. Did these gentlemen come in there all together?

A. All together.

30 Q. In what portion of the premises were they?

A. Well, they were right in the barroom.

Q. What?

A. In the barroom.

Q. In the barroom. Was it at that time under padlock?

A. No, sir.

Q. It was not? With whom did you have the conversation pertaining to the payment of this \$2500?

A. Well, I had with Mr. Probinski, Shepard Coombs and all them gentlemen.

Q. Were they all there together?

A. They were all together.

Q. As a matter of fact, weren't you back in your private office?

A. I went back to sign my check there, to get the 10 check for them.

Q. Was Mrs. Kosobucki there?

A. No, sir.

Q. She was not present?

A. She was not in the bar.

Q. Was it your own personal check that you gave?

A. My own personal check.

Q. It was not Mrs. Kosobucki's check?

A. No.

Q. Do you remember these gentlemen coming into 20 the cabaret portion of your premises?

A. I don't remember that.

Q. And sitting down at the table?

A. I don't remember that.

Q. Do you remember going out to the machine?

A. Yes.

Q. In which they were sitting at that time?

A. When they were ready to leave I went out with them to the machine.

Q. Who handed the check to Mr. Coombs? 30

A. Mr. Fox.

Q. And you gave the check to Mr. Fox?

A. Yes, but signed to Mr. Coombs' name, for Mr. Coombs, an order to Mr. Coombs, Shepard Coombs.

Q. Isn't it a fact that any conversation you had

concerning this transaction was had with Mr. Fox only?

A. They were with them, only when Mr. Fox went back to my private apartment I filled the check and I said: "There, Mr. Fox, is the check for you."

Q. Mr. Fox went back with you?

A. Yes.

Q. The other gentlemen didn't?

A. No, we had conversation together before I went back.

10 Q. How is it Mr. Fox was the only one went back in your private apartment?

A. Because he is the gentleman I think—because he is the agent I think of all the bunch of them.

Q. Isn't it a fact that he is the one got you into this?

A. What?

Q. He is the one asked you into this deal?

A. They all come together.

20 Q. But isn't Mr. Fox the one who asked you to go into it?

A. Introduced me to Mr. Shepard Coombs and they explained me all this business.

Q. Have you had any conversation with Mr. Fox recently in regard to this particular case?

A. No.

Q. You haven't had any conversation with him?

A. No, no conversation whatever.

30 Q. Did you ever have any conversation with Robert Bright concerning this transaction?

A. Robert Bright? No, sir.

Q. You did not. Did you ever sign any agreement as to the purchase of the Hotel Biltmore?

A. Not whatever.

Q. Not this particular one?

A. No agreements whatever.

Q. Did you ever have any conversations with Mr. Ostreicher as to the signing of this agreement?

A. Not to sign an agreement, not with Mr. Ostreicher.

Q. Two days after the date of this agreement didn't you go into Mr. Ostreicher's place of business?

A. I don't recollect that.

Q. You don't remember that?

A. I don't remember.

Q. Didn't Mr. Ostreicher ask you to come in and sign this agreement? 10

A. No.

Q. Mr. Ostreicher didn't ask you?

A. Never did ask me.

Q. Did you have any conversation then one or two days after the date of this agreement with Mr. Ostreicher?

A. No.

Q. You did not?

A. No, not about the agreement. 20

Q. Did you ever have any dealings with these gentlemen before in connection with real estate transactions?

A. Well, yes.

Q. Had you bought and sold property in conjunction with them?

A. Not bought and sold, but one time I was met on the street by Eze Rasnek and he said to me: "Adam, I've got a good proposition." I said: "All right." "Come on, give me \$300 in a hurry," and I gave it to him and a couple of days later—I don't know which property or what was it, I got the check from him for \$500. 30

Q. You made \$300 on that transaction?

A. Yes, and at the same time I gave him another \$200 and I never heard from him since.

Q. Is that your signature?

A. Yes, that is my signature.

Q. Is that check drawn to your order?

A. Yes, sir.

Q. Did you cash it?

A. I did.

Q. And you got the proceeds?

A. Yes, I did.

Q. Can you tell the jury what that check was for?

10 A. That check was—I don't know really what that was for. I know Rasnek since I come to Wildwood. He said "You got any money on you, Adam, cash—got to be cash." "Yes, I have." "Well, I got a good proposition for you." That was the time of that Wildwood boom. He said: "I got some apartment here. It cost you \$300 a share. There is ten of us going in," and I gave him that and a day or two later he gave me that check. When he gave me that check he got me another proposition and I
20 gave him \$200 for some apartment on Magnolia Avenue. I didn't know—I don't know where that was, wherever it was; because I trusted the man. I used to do business with him, when he was in the furniture business I used to buy a lot of furniture and he trusted me and I trusted him.

Q. As a matter of fact, at that time particularly you were in the habit of dealing in real estate?

A. Well, only —

Q. Just answer that question.

30 A. I was not in the habit.

Q. How many times were you in Rasnek's office?

A. Twice.

Q. Only two occasions?

A. Yes, sir.

Q. Isn't it a fact that you went into Rasnek's office and asked to go into the Biltmore transaction?

A. Not me.

Q. Didn't you have Mr. Fox say that he would like to get you into it?

A. Mr. Fox never mentioned about the Biltmore.

Q. When did you first hear about the purchase of the Biltmore Hotel?

A. Oh, well, I heard about a couple of weeks ago, as I say. Never after to go into it. I never was interested in it.

Q. Do you know what particular transaction this 10 check was given for?

A. No, sir.

Q. You cannot remember that?

A. I didn't know it. It was supposed to be some apartment house.

Q. Where is your cancelled check to show that you gave —

Mr. Atkinson: I have the check.

20

Mr. Sooy: Let's see it.

Mr. Atkinson: I haven't it with me. I haven't it among the papers, so I cannot produce it.

Q. Are you sure the check that was given on this particular transaction was your own check?

A. I know—on what particular transaction?

Q. On the Biltmore transaction?

A. My own check, signed Adams. I got under 30 that name money there in the Wildwood Title and Trust Company.

Q. It was not signed Kosobucki?

A. No, just "A. Adams."

Q. Are you in the habit of signing checks "Viola Kosobucki?"

A. No, only my private checks I do sign them.

Q. You sometimes sign them "Viola Kosobucki?"

A. No. Because my wife has a separate account and I got separate account in the bank.

Q. On this particular night this transaction was submitted to you you say all of them were present at the time you discussed the matter with them?

A. All except Mrs. Rasnek. Mrs. Rasnek wasn't there but Mr. Rasnek was there.

10 Q. What induced you to give \$2500 on this proposition?

A. Well, when they present—Mr. Joe Probinsky is a big man. He used to own the ice plant and the lumber company. I trusted that man. I thought everything he said was O. K.

Q. You expected to get a share of the profits?

A. Well, not exactly.

Q. You didn't expect to get any profits?

20 A. Because they didn't tell me what profit was going to be there. They just told me they were in need of money to go through with it.

Q. Did you know anything about the value of the Biltmore Hotel at the time you got into this deal?

A. Well, not at that time.

Q. Whose word did you take as to the valuation of the properties?

A. Well, I took Mr. Probinsky's and they told me it is \$150,000, supposed to be.

30 Q. Didn't make any inquiries from any outside source?

A. I never did.

Q. You didn't expect to get any profits out of it?

A. Well, I expected some but I didn't know what I would get and so; because they didn't tell me and I didn't ask them.

Q. As a matter of fact you presumed that this property was going to be resold, didn't you?

A. That is why on the strength of that I gave him that money.

Q. And if so, you intended to get your share of the profits?

A. Well, they didn't tell me what this share is.

Q. What was said in connection with this transaction?

A. "Well, you get a little profit when we get rid of 10 it." I didn't know how much.

Q. Was anything said as to profit or loss?

A. No.

Q. Was anything said as to settlement?

A. No.

Q. As a matter of fact did you receive notice of settlement?

A. I did.

Q. Did you show up?

A. No. At the time —

20 Q. You did not. Do you know whether or not the rest of them were prepared to make settlement?

A. Before I got this notice for settlement I find out that the other gentlemen got ten thousand dollars commission, and on the strength of that I went to my lawyer.

Mr. Atkinson: I ask that that be stricken out.

30 Q. (Repeated by the stenographer): Do you know whether or not the rest of them were prepared to make settlement?

The Court: The answer to that is yes or no.

Q. Did you receive notice of the time and place of settlement on this property?

A. I received after I gave my case to the lawyer.

Q. Did you or did you not receive?

A. Yes, I received it.

Q. Did you attend that settlement?

A. No, sir.

Q. You did?

A. No, sir.

Q. Why didn't?

10 A. Because I had my case to the lawyer.

Q. And had he instructed you not to make settlement?

A. Well, of course, I didn't intend to make settlement after I gave my case to the lawyer, because the transaction wasn't fair.

Q. How many transactions did you have with these defendants concerning real estate during the summer or fall of 1925?

A. Three.

20 Q. With whom did you deal?

A. Well, twice I deal with Mr. Rasnek personally and the third time three of them combined together, with the exception of Mrs. Rasnek. She was not there.

Q. But Mr. Fox was there, wasn't he?

A. Mr. Fox was there.

Q. You and Mr. Fox are close personal friends?

A. Not exactly.

30 Q. Did you ever have any dealings with Mr. Fox prior to this transaction?

A. No, not any other transactions; nothing of the dealings like that.

Q. Where were all of these transactions conducted?

A. Well, two of them as I know were conducted in Mr. Rasnek's office and this one I don't know

where. All I know about the last one is I gave them the check.

Q. So the time these gentlemen came up was the first time you ever heard about this Biltmore deal?

A. That was not the first time I heard of it.

Q. Well, from whom had you heard about it first?

A. Well, everybody know it in all Wildwood. I guess all over the Cape May County.

Q. Knew that the Biltmore was to be purchased?

A. Yes.

Q. And you knew it, didn't you?

A. I knew it.

Q. Had you inquired as to the valuation of it?

A. No, sir.

Q. Did you make inquiry afterward?

A. I wasn't interested in it until that night, Labor Day night. That was the only way I went into it.

Q. That was the first you ever heard about it?

A. That was not the first I ever heard about it. 20
Of course, I heard about it about a week before that.

Q. Did you ever ask Mr. Rasnek for the privilege of getting in on some of these deals?

A. No, sir; not in the Biltmore.

Q. On any occasions?

A. Why, he asked me. I never asked him for any.

Q. As a matter of fact, didn't you frequent Mr. Rasnek's office?

A. What?

Q. Didn't you frequent Mr. Rasnek's office? Weren't you in there frequently?

A. Well, I was there three times.

Q. Didn't you and Mr. "Thorpe" go down there frequently?

A. Well, he went in one of them deals too, and

lost money. He went with me on some proposition on Magnolia Avenue, but he never was called to settlement or nothing, and I don't know where the money went to Mr. Thorpe lost \$200 and I lost \$200 on that deal.

Q. Isn't this the check you got back on that proposition?

A. That is not the same proposition. That used to be the Scallenger Avenue Apartment, this check
10 was.

Q. You told me a few minutes ago you didn't know what that check was for.

A. That was supposed to be, because I was not at the settlement. I know I get this check from Mr. Rasnek, and I gave a boy ten dollars commission, to his son. He said: "You give him that check and then you get \$10 for your trouble."

Q. Do you know what this check was for?

A. No.

20 Q. You can't say. Didn't you say just about two minutes ago that you did know?

A. I did know what it was supposed to be, but I don't know which one. It is supposed to be the property on Scallenger Avenue, some property; but I don't know to this day which property it was. I never go near it.

Q. Is this the only check you ever got from Mr. Rasnek?

A. That is the only one.

30 Q. How many checks did he ever give you?

A. Only one.

Q. How many did you get back from Mr. Rasnek?

A. Just one I guess, this one here.

Q. How many did you give him?

A. I gave him twice. I gave him cash both times.

Q. Both cash?

A. I gave him \$300 first and second time \$200.

Q. Are you in the habit of carrying large sums of money in your pocket?

A. Sometimes I do.

Mr. Sooy: That is all.

The Court: Mr. Kosobucki, I do not remember just what you testified to as to the conversation they
10 had with you on the night they came in and you gave the \$2500. Will you tell me just what they said to you again.

The Witness: Well, they come in together and says: "Adam, we got good proposition for you," and they showed me telegram from some—I can't recollect his name, from Philadelphia.

The Court: Tell me what they said to you about
20 the telegram, not what was in the telegram.

The Witness: They said to me: "We got a buyer for this place, maybe two or three days, and you could make a little profit on it."

(Witness excused.)

EDWARD C. FOX, called as a witness on behalf of the plaintiff, being duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Atkinson:

- 10 Q. Where do you live, Mr. Fox?
A. Wildwood.
Q. How long have you lived there?
A. Fifteen years.
Q. Do you know Adam Kosobucki?
A. Yes, sir.
Q. Do you know Edward C. McGarry?
A. Yes, sir.
Q. Henry Rasnek—Clara Rasnek?
A. I do.
- 20 Q. Eze Rasnek?
A. Yes, sir.
Q. Joseph Probinsky?
A. I know him.
Q. And Shepard W. Coombs?
A. I know them all.
Q. In the month of September, 1925, did you call upon Mr. Kosobucki in company with any of these persons?
A. I did, with the exception of Mrs. Rasnek who
30 was not there; but all the other men were with me.
Q. How did you come to go to Mr. Kosobucki at this time?
A. Well, if you will give me the permission I can relate the entire case.
Q. All right.
A. It would lead us up to it. Would it be permissible to read the case as I have it copied here?

Q. No. You will have to testify from your recollection.

A. On Labor Day night, about nine-thirty or ten o'clock in the evening I took a walk along the Boardwalk in company with my wife and baby and we were about at Magnolia Avenue on the Boardwalk in Wildwood. Somebody touched me on the shoulder and I turned around and saw it was Mr. Rasnek's boy, and he told me he had been down to my place of business looking for me and somebody in the home—or in the place of business had told him that I was out on the Boardwalk; and that I was wanted very urgently at his office. I told him—I told my wife and she agreed to go home alone, and I would go to Rasnek's office, which I did in company with Rasnek's boy. When I got to Rasnek's office, I found Rasnek, Probinsky, McGarry and Shep Coombs there; and they told me they had a proposition open in the case of the purchase of the Biltmore Hotel, the price of which was \$175,000, the purchase price, and that in order to fasten the sale they are compelled to raise money before midnight of that night, and that within the next day or two they had a purchaser that would positively come down to Wildwood and buy the Biltmore from them for the sum of \$225,000, and in order to substantiate that thing they showed me a telegram. The contents of the telegram as near as I can remember —

Mr. Sooy: I object to the statement as to the contents of the telegram.

Mr. Atkinson: It is in the possession of the defendants, and clearly is not in this man's possession.

The Court: Have you called for the production

of the telegram at all? The telegram, of course, is the best evidence. Have you called for its production?

Mr. Atkinson: No, sir; I will call for it now. I make a demand now.

Mr. Sooy: If your Honor pleases, I object to the demand at this time. It should have been made before this.

The Court: No, he has a right to make a demand now for the telegram. Of course, he could have made it before.

Mr. Sooy: We cannot produce it because we don't know of the existence of any such telegram.

Mr. Atkinson: I submit I am entitled to have the witness testify to it then.

The Court: I will permit it on the statement of counsel that they have or know of no such telegram.

Mr. Sooy: Allow me an exception.

The Witness: The contents of the telegram was to the effect that you can sell everything you have on hand.

Mr. Sooy: A little louder.

The Witness: The contents of the telegram was to the effect: "You can sell everything you have on hand but hold the Biltmore. The buyer will be down within a day or two." I asked him who the

buyer was because I didn't know exactly what the name was signed to the telegram, and one of the gentlemen in the office—I don't remember who it was because it was so long ago—told me that the name of the purchaser was "Poteck" from Philadelphia; W. Poteck. I had known Poteck's place of business and I had known, too, that he was a man of means, and probably would be interested in buying the Biltmore for the sum of \$275,000.

Q. Well, pardon me just a moment. I understand you to say that you did know Mr. Poteck?

A. I had done some business with Poteck.

Q. Did you know whether or not—do you know or did you know at that time whether or not he was a man financially able to purchase such a property as the Biltmore?

A. Yes, sir. His very name appealed to me as being a man able to purchase it for that sum.

Q. Now, after you had seen this telegram what did you do and what did the others do?

A. I asked them what the amount of the shares was, or what the amount of money was required of me in order to enter into this deal, and he told me it would require for me to produce \$2500. I didn't have any check on me, so I made use of Mr. Rasnek's check book. I made out this check (producing a check) in the sum of \$2500, and I remember distinctly that I handed this check to Mr. Probin-sky and asked him would he be kind enough to hold that check for about two or three days, as I didn't think I had sufficient funds in the bank on the very next day to take care of it.

Q. Now, after you had given this check what did you do, Mr. Fox?

A. When I asked him to hold it for a few days

Q. We have gotten by that. Then what did you do?

A. The man promised me they would hold the check for three or four days before they deposited it. Then I was ready to go home because I knew my wife was walking along the Boardwalk, and I rode up in order to catch up with her. When they asked
 10 me would I jump in the automobile with them, one of the gentleman's cars was outside parked along the curb, and I told them I would. I was the first one out of Mr. Rasnek's office when they called me back and asked me to join them for another few moments, and they told me, too, to ride with them. As I was ready to go into the automobile these men retired again to Rasnek's office and had a little conference there of about two or three minutes duration. Meanwhile I took a seat in the car. When
 20 they came out of the office and all took their respective seats in the automobile and before they started the car the question arose as to who they were going to see next, and one of the gentlemen whose name I don't remember exactly now, who it was of the company, asked me whether Adam would be interested, as I was, in buying a share in the Biltmore. I told them that I believe he would because they knew that he had invested some money with them before as the check here testifies, and it was agreed among
 30 those men that they were to go up to Anglesea in North Wildwood to see Adams; but before they started on the way to Anglesea somebody in the company suggested they go out to see McArdle on Holly Beach and see whether he would buy a share. We drove around to McArdle's place. I was left in the automobile in the back seat, and Mr. Coombs

and Mr. Probinsky, I believe, left the automobile and went into McArdle's place, a little saloon there, and in three or four minutes they came out and from what they talked I gathered that McArdle was not interested and turned it down, and we started up on our way toward Anglesea to see Adam. On the way up somebody in the company mentioned about "Ludy Thorpe," the probability of him buying a share, and then another man in the company suggested that
 10 Thorpe was not interested because it appeared that they had broached the subject to him before and he turned it down. At that time we had reached Adam's place of business and altogether we walked into Adam's barroom, and happened to find Adam right there, and I believe that I introduced Adam to some of those men with whom he didn't have any acquaintance, and one of the gentlemen broached the proposition. I think it was Mr. Rasnek, about the Biltmore deal, and Adam stopped to think for a minute or two. Finally he mentioned or motioned to me to come
 20 back with him. So I left these men in the bar and I followed Adam back into his kitchen, private apartment he had, and Adam said: "What do you know about that deal?" "Well, Adam," I said, "what I think about the deal is I just paid them \$2500 of my own money and that is all I can tell you." Then he went back into another room and I was left in the kitchen and I remember that he brought back a check with him and made it out, I don't know who to, and he carried the check in his hand leading, and I
 30 followed him. We came to the barroom again and we found that the men were not there. So Adam walked back toward the cabaret room, that back room he has on the side. Meanwhile I walked on the outside to see where they were. I didn't find them outside, so I walked in through the side door into

the cabaret room and there I found the gentlemen seated around the table and they were just about ready to get up. Adam had a few more words with them the purport of which I don't remember exactly, and the men walked over towards the automobile and I saw Adam hand the check, I believe, to Mr. Coombs, and they went back to the car and the men took me home and where they went from there I don't know.

10 Q. Now, during this interview there was there any statement made as to what was being paid for the property?

The Court: You mean the interview with Adams?

Q. At Adams' place.

A. That I don't remember exactly; but I knew what the price was to be.

20 Q. Well, was there anything said at Adams' place about what they proposed doing with the property?

A. Well, the same statement was repeated, what was said to me, that they had a buyer for the Biltmore and that buyer will show up in a day or two.

Q. Was the telegram produced there?

A. I believe it was. I wouldn't be sure of that; but I spoke to Adam afterward and he told me he had at that time seen the telegram. I thought the telegram was just a secret to me alone.

30 Q. Was there any statement by any of these parties that they had as a matter of fact resold the property?

A. Well, that is how they induced me —

Mr. Sooy: I object to the form of that question.

The Court: Yes; I think it is leading.

Mr. Atkinson I think it is objectionable, sir.

Q. Won't you tell me everything that was said by any of these parties concerning the disposition of this property that they proposed buying?

A. The only thing I can remember I remember that they represented to me that particular evening —

Mr. Sooy: I object.

10

Q. I am referring now, Mr. Fox, to any conversation which took place at Mr. Kosobucki's place of business.

A. Well, they represented that they had a buyer for the Biltmore. I believe, too, they stated —

Mr. Sooy: I object to this—he "believes."

The Court: You have to state your recollection— your recollection of what they or any of them said 20 to Mr. Adams or Mr. Kosobucki there that night, in other words, repeat the conversations as you remember them, not verbatim, but as you remember them.

The Witness: Well, your Honor, that is what I am trying to do.

The Court: But don't repeat anything other than just that. Don't repeat anything that you just have a hazy recollection of, but something that you ac- 30 tually heard them say.

Mr. Atkinson: May I be permitted to suggest that the last answer was not responsive to any question that was pending, and I, therefore, move that it be stricken out.

The Court: Well, I guess there is no objection to having the thing stricken, is there? It will be stricken.

Mr. Atkinson: That is the remark that he believed that they mentioned a purchase price.

Q. Did you subsequently call upon Mr. Poteck in Philadelphia?

10 A. I did, not personally, but over the telephone.

Mr. Sooy: I object to any statement between Mr. Poteck and this witness.

Q. Do you have any knowledge as to whether or not there was any settlement made for this property within the next two or three days?

A. I believe there was not any settlement because I had not been notified of any.

20 Mr. Sooy: I move to strike that out. His belief is not admissible.

The Court: Repeat the question.

Q. (Repeated by the stenographer): Do you have any knowledge as to whether or not there was any settlement made for this property within the next two or three days?

30 A. There was not any settlement made.

Q. You are one of the defendants in this suit, are you not?

A. Unfortunately, yes.

Q. And you discussed this matter with me both yesterday and today, did you not?

A. Yes.

Mr. Atkinson: Cross-examine.

Cross-examination.

By Mr. Sooy:

Q. Did you ever file an answer to this suit?

A. I did not.

Q. Why not?

A. Because I felt that I was not the party to the 10 suit.

Q. You were served with a summons and complaint, were you not?

A. Yes.

Q. Do you have any arrangement of any character with the plaintiff as to your testimony today?

A. No arrangements.

Q. No arrangements of any character?

A. No.

Q. Why didn't you file an answer?

A. The reason why I didn't file an answer was 20 because I felt that I was absolutely innocent in the entire transaction.

Q. Didn't you know you were subjected to a judgment because of your failure to file an answer?

A. I felt if a judgment was entered against me that I would in turn sue these men and recover whatever money I have to pay.

Q. So do you admit that you were liable?

A. I do not.

Q. As a matter of fact, didn't you first broach this 30 question to Mr. Kosobucki?

A. This question?

Q. Before these other gentlemen had any conversation with him?

A. I did not.

Q. Was there any conversation between any of these gentlemen and Mr. Kosobucki out of your presence that you know of?

A. Any conversation out of my presence that I know of?

Q. Any conversation out of your presence that you know of, that you know anything about?

A. I don't know.

Q. Didn't you do most of the talking with Mr. Kosobucki?

A. No.

Q. Who did?

A. Why, Mr. Coombs and Mr. Probinsky, what I can remember.

Q. How long were you in the back room with Mr. Kosobucki while you were getting this check?

A. How long was I back with him?

Q. Yes.

A. A matter of just about two or three minutes, that is all.

Q. Two or three minutes. Who handed the check to Mr. Coombs, if it was handed to him?

A. Mr. Adam.

Q. Mr. Kosobucki himself?

A. Yes.

Q. Did you hear Mr. Kosobucki testify that he was told that the money had to be produced by that midnight?

A. I did hear that.

Q. And you testified that you had asked Mr. Probinsky to hold your check for two or three days?

A. That is what I did.

Q. How did you expect this deposit to be paid if your check was not going to be collectible during those two or three days, when the deposit had to be made by midnight?

A. Because I understood Mr. Probinsky was to lay some of the money out in order to make good whatever he had to meet.

Q. You expected him to make your check good?

A. He promised to me that he would hold it.

Q. Did he also agree to make Mr. Kosobucki's check good?

A. Not within my range of memory.

Q. As a matter of fact did you hear any representation by any of these gentlemen to Adam that he would positively make a profit?

A. No.

Q. No, you did not?

A. Positively no.

(Witness excused.)

DAVID OSTREICHER, called as a witness on behalf of the plaintiff, being duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Atkinson:

Q. Mr. Ostreicher, you live at Wildwood, do you not?

A. Yes, sir.

Q. In the month of September, 1925, you were the owner of the Biltmore?

A. Yes, sir.

Q. And during that month had you given an option or made some sort of an agreement with Mr. McGarry, Mr. Fox and Mrs. Rasnek, Joseph Probinsky and Shepard W. Coombs?

A. I had it sold that time to Mr. Shepard Coombs. That is the man I done business with.

Q. Shepard W. Coombs?

A. That is the man I done business with.

Q. And subsequently you signed a paper, did you not?

A. I signed it when I got my deposit.

Q. Yes. And did you get your deposit the day that that agreement was dated?

10 Mr. Sooy: I object. The agreement says so.

The Court: I presume it does, does it not?

Mr. Atkinson: It is not part of the record yet. He testified that he afterwards made a written agreement and it has not been offered in evidence yet, so it is not a part of the record.

20 The Court: I will permit the question.

Mr. Sooy: Allow me an exception.

Q. (Repeated by the stenographer): And did you get your deposit the day that that agreement was dated?

A. The first day I got the deposit first. The settlement took place a week later.

30 The Court: That is the answer. The latter part is not responsive to the question. Strike it out.

Q. Well, who first came to see you about this property?

A. Mr. "Shep" Coombs.

Q. At the time that he came was any money paid by him to you?

Mr. Sooy: I object —

A. Not the first time.

Mr. Sooy: —as incompetent, immaterial and irrelevant. There is a written contract here if he desires to present it.

The Court: Unfortunately the witness answered before you made your objection. His answer is 10 "no," so that I assume it makes no difference at all under the circumstances.

Q. Well, when did you get your money out of it?

A. I can't remember the date. The first day he came down I got some money then and the following week I got some —

Mr. Sooy: Now I would like to call your Honor's 20 attention to the pleading. This case is based entirely on a misrepresentation and any evidence of what he got does not make any difference.

The Court: There is no question pending.

Q. Well, did you subsequently, sometime or other in the month of September, 1925, make an agreement to sell this property known as the Biltmore Hotel?

A. I did make an agreement to see it. 30

Q. And was that a written agreement which was signed by you, Mr. Fox, Mr. McGarry, Mr. Probinsky, Mr. Coombs and Mrs. Rasnek?

A. I suppose that is the one. (Referring to and examining a paper handed to the witness by counsel.)

Q. Well, did you make any other agreements except this one that I asked you about?

A. That is the only thing, that is on there.

Q. What?

A. That is the only agreement that I made, that is on that list there.

Q. That is, the only time that you sold the property was to these people, that is true, is it not?

A. Well, I sold it to those people. I was handed
10 the money—Mr. Coombs handed me the money, the deposit.

Q. But this is the only agreement you executed for the sale of it?

A. That is the only agreement, yes.

Q. And that was some time in the month of September, 1925, is that right?

A. Well, I cannot remember the date.

Q. I show you an agreement which has been
20 marked P1 for identification and call your attention to the signatures on the back of it. Is that first name yours?

A. Yes, this is my name.

Q. That is in your handwriting?

A. That is in my handwriting.

Q. Signed by you?

A. Signed by me, yes, sir.

Q. Aside from this paper did you make any other written papers concerning the sale of this prop-
erty?

30 A. No.

Q. Did you ever have any final settlement?

A. No.

Q. Under this agreement?

A. The deal didn't go through.

Q. Deal didn't go through?

A. No.

Q. Have you ever talked to any of the defendants about this case?

A. No, sir.

Q. Have they sent any one to see you?

A. Nobody did.

Q. Has any one discussed this case with you?

A. Nobody did.

Mr. Atkinson: Cross-examine.

10

Cross-examination.

By Mr. Sooy:

Q. Mr. Ostreicher, let me ask you this question; wasn't there another agreement drawn before this which was not satisfactory to you?

A. Well, there was a first one a week ahead of time. We had a little agreement first for the little
deposit. Then there was the second one. 20

Q. That was not satisfactory to you?

A. The first one.

Q. Afterward to whom did you go to have this contract drawn?

A. This one is Mr. Bright.

Q. Mr. Robert Bright?

A. Mr. Robert Bright, in Anglesea.

Q. Then there was a further discussion had as to the purchase price and the terms?

A. That was the terms. 30

Q. Well, who was there?

A. Well, there was Mr. "Shep" Coombs, Probin-
sky, McGarry and Mr. Rasnek.

Q. Did you ever have any conversation with Mr. Kosobucki as to signing that agreement later?

A. No.

Q. Didn't Mr. Kosobucki come into your place about two days after the date of that agreement?

A. I don't remember he was in the place or not. I do not remember that. I never had anything to do with the deal, never said anything to him and he never said anything to me.

Q. Did Mr. Bright or any of the defendants tell you that Mr. Kosobucki had come down to your place to sign this agreement?

10 A. No.

Q. Did you take the copies of this agreement down to your place?

A. I got one of them, yes.

Q. You got them all, didn't you?

A. Well, I had one and they had one.

Q. And Mr. Kosobucki was to come in and sign them, wasn't he?

A. Well, they were supposed —

Q. Well, wasn't that your understanding?

20 A. Well, yes; he was supposed to sign it because they put his name down.

Q. And he didn't come in?

A. I don't know whether he was supposed to sign, but they put his name down to sign.

Q. Well, you had them in your possession, didn't you?

A. Well, they put his name down. I didn't deal with him at all.

30 Q. Well, on the other hand, Mr. Kosobucki had made a promise that he would come in and sign that contract?

Mr. Atkinson: I object to that.

A. No, he didn't make it to me —

The Court: What is the ground of the objection?

Mr. Atkinson: There is nothing in the testimony that warrants it. The testimony of this witness is that he had no dealings with Mr. Kosobucki.

The Court: This is cross-examination.

Mr. Atkinson: But he cannot put something into this witness' mouth which never existed. He is now trying to make this witness, apparently, admit something about the testimony does not bear out; namely, 10 that Kosobucki had promised to come down and sign this agreement, and the testimony is that he did not have any conversation with him.

The Court: I think he has quite a little latitude on cross-examination. I will permit it.

Q. Who delivered these contracts to you?

A. Well, they didn't deliver it. I got it the same day that I settled. 20

Q. Were you there at the time they were drawn in Robert Bright's office?

A. I was right there.

Q. And these fellows were all with you, weren't they?

A. They were all there and I got my deposit there.

Q. Now, how did it happen that you had those contracts in your possession?

A. I had mine and they —

Q. You had them all? 30

A. No, I didn't have them all, not all the contracts.

Q. Didn't you have two copies of the contract in your possession?

A. No, there is two contracts drawn, one for them and one for me. I had my own.

Q. Did you have the other one, too?

A. No, I didn't have theirs, no.

Q. Did you ever have a conversation with Adam about the purchase of this property?

A. No, I didn't.

Q. None at all?

A. None at all.

Q. Did you know that Adam was supposed to be a party to this contract?

10 A. I didn't know anything about it, didn't even bother about it.

Q. You read that before you signed it?

A. Well, I saw his name was down there, that is all. I didn't deal with him. I saw they put the name down.

Q. Why do you suppose they had his name in there?

A. I suppose he was supposed to go in there. I seen they put six names on there; that is all I know.

20 Q. Didn't he come into your place of business about two days after this contract was drawn up?

A. No, not that I remember.

Q. You don't remember?

A. I don't remember at all.

Q. Did you make this remark to Mr. Kosobucki: "You are one of the fish, are you?"

A. No, I did not.

Q. You did not make that remark?

A. No, I never did.

30 Q. Was any time and place for settlement on this property ever fixed to your knowledge?

A. I notified everybody. I notified all of them, six names I notified.

Q. Did everybody appear?

A. Not all of them.

Q. At the time set?

A. Not all of them.

Q. Did anyone appear?

A. Yes.

Q. How many of them appeared?

A. I think there were four of them.

Q. Did Mr. Kosobucki appear?

A. No.

Q. Did Mr. Kosobucki ever at any time tender his willingness to make settlement?

A. Not to me.

10

Q. He never did. Was Mr. Fox there on the day of settlement?

A. He wasn't there the first time, no.

Q. The rest were there?

A. There were four of them down there. I had everything ready for them.

Q. Now, as a matter of fact, wasn't there an objection to the title?

A. The title was all right. They were not all there and the money was not there.

20

Q. Wasn't there a certain release required in order to protect the interest of these people?

A. I had everything ready.

Q. Wasn't objection made to the title on the ground that a release was necessary from a certain person?

A. No.

Q. Now, Mr. Ostreicher, please remember. Didn't you agree to procure a certain release?

A. I didn't agree. I agreed if I get my money, 30 which I have everything there, the property is theirs.

Q. Didn't you agree that you would procure a release from a certain person in order to eliminate any possible questions or claim that that person might have had?

A. I don't remember.

Q. Don't you remember saying to the attorney who represented these people at that time that you would not ask this particular person to sign a deed, but you would get a release? Do you remember that?

A. I do not remember.

Mr. Sooy: That is all.

10 Mr. Atkinson: That is all.

(Witness excused.)

Mr. Atkinson: I am reserving the right to recall Mr. Ostreicher. Otherwise the plaintiff rests.

DEFENDANT'S MOTION FOR NON-SUIT.

20 Mr. Sooy: I move for a non-suit. There is nothing to support this complaint of misrepresentation that induced Adam to enter into this agreement.

The Court: I will refuse the motion for non-suit if that is the only ground. I overrule the motion for non-suit.

Mr. Sooy: Exception.

30 (Which exception was duly allowed and noted.)

DEFENDANT'S CASE.

SHEPARD W. COOMBS, called as a witness on behalf of the defendant, being duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Sooy: 10

Q. Mr. Coombs, where do you live?

A. Wildwood.

Q. You are one of the defendants in this suit?

A. Yes, I am.

Q. Are you acquainted with Mr. Kosobucki, the plaintiff?

A. Well, I know him now. Yes, I met him.

Q. Did you during September of last year have any conversation with Mr. Kosobucki concerning the entering into an agreement to purchase the Biltmore Hotel? 20

A. I did not. I never have had.

Q. Were you in company with Mr. McGarry, Mr. Probinsky and Mr. Rasnek and Mr. Fox on the evening they went up to the Royal Hotel?

A. I was.

Q. Did you have any conversation with Mr. Kosobucki on that particular evening? 30

A. None at all.

Q. Tell us what you did or what you said? What any one else said who was there present.

A. Well, we all, as a whole—I think there were four parties: Mr. Probinsky, Mr. Rasnek—we went up to the hotel and went in and sat down at one of

the tables at the cabaret, if I recollect right—yes, it was; and Mr. Fox was with us at the time and Mr. Fox went back and did some business with Mr. Kosobucki and just what that business was, of course, I don't know; but I do know what he was to go there for. He was to go there to get him to be interested to take one share of the purchase of the Hotel Biltmore. And we waited there a long while, and I would not be afraid to say at all that we

10 waited there at least fifteen or twenty minutes and we didn't know what became of Mr. Fox. So we went out and got in the automobile, sat there, and possibly waited there at least five more minutes. Mr. Fox and Mr. Kosobucki came out together and Mr. Fox at that point introduced me to Mr. Kosobucki. That was the first time I ever met him or ever knew him. And he also introduced him to some of the other gentlemen there, which Mr. Kosobucki said: "I have been acquainted with such and such

20 parties;" and Mr. Kosobucki handed me a check and said: "Mr. Coombs, here is a check of \$2500 which is my part of the purchase of the Hotel Biltmore." That was all.

Q. Had you had any conversation of any character with Mr. Kosobucki prior to the handing of that check to you?

A. I never seen Mr. Kosobucki in my life until I was introduced to him at that moment and received that check. I never knew the man. As long as I have

30 been in Wildwood never seen him and never knew him.

Q. Did you at any time tell Mr. Kosobucki that the property had been sold and he was going to get a profit?

A. Never did. I never had any conversation with Mr. Kosobucki. He handed the check to me, we shook hands and said, "Good night," and went.

Q. Were you present at the time settlement was fixed for this property?

A. I was.

Q. Who else was there?

A. Well, Mr. Probinsky was there. I am not positive but I think Mr. McGarry was there and all parties concerned were there excepting Mr. Kosobucki.

Q. Was Mr. Benjamin Conch there?

A. Yes, he was there, too.

Q. Were you gentlemen able to settle on that day? 10

A. Yes, we stood ready to settle providing that we had the assistance we thought of all those concerned.

Q. Was any question raised as to the title?

A. Sir?

Q. Was any question raised as to the title?

A. There was —

Mr. Atkinson: I object to that. 20

The Court: You waited until the answer went in.

Q. Was the day of settlement adjourned?

Mr. Atkinson: I object to that.

A. It was.

The Court: One second before you answer. 30

The Witness: Pardon me.

Mr. Atkinson: Our case is simply an action for defeat, of this plaintiff against these defendants, in

which the plaintiff represents that they obtained from him money on the proposition that they had resold the property.

The Court: What relevancy has the question?

Mr. Sooy: My counter-claim is based solely on the loss because of Adams' refusal to perform his part of the settlement. Now I want to know whether
10 or not there was a settlement.

The Court: Mr. Adams has testified that he was not present at any settlement.

Mr. Sooy: He admitted that, yes.

The Court: Now, would whether the settlement was adjourned or not have any relevancy at all?

20 Mr. Sooy: I think if I can show a valid objection to the title and an honest, conscientious effort to rectify that error in the title and a willingness and ability of these people to make settlement, and Adams' flat refusal —

The Court: Well, you have his flat refusal. Now, it seems to me the only question that goes to your counter-claim at all is was there an eventual settlement or was there not an eventual settlement?

30 Mr. Sooy: Well, that I intend to bring out.

The Court: What difference does it make whether it was at an adjourned time or any other time? Mr. Adams was not there at any time. I will overrule the objection, however.

Mr. Atkinson: Exception.

(Which exception was duly allowed and noted.)

Q. (Repeated by the stenographer) Was the day of settlement adjourned?

A. It was.

Q. Were you present at the time to which the settlement was adjourned?

A. I was.

10

Mr. Atkinson: I object. May I have a general exception to any interrogation to any transaction concerning a settlement?

The Court: Yes. You may have a exception, and the objection is now overruled to this particular question and an exception allowed.

Mr. Atkinson: Exception, sir.

20

(Exception duly allowed and noted.)

Q. Was a settlement effected upon the Hotel Biltmore?

A. Was there any effected?

Q. Yes.

A. From a resale?

Q. No. Was there any settlement made by you gentlemen who took this contract with Mr. 30 Ostreicher?

A. Yes, there was; not a settlement of sale, but there was a deposit made—there was no settlement made.

Q. There was no settlement?

A. No actual settlement ever made; no, sir.

Q. In other words, title never passed?

A. Never did pass.

Q. Do you know whether or not Mr. Kosobucki was ever requested to attend settlement—of your own knowledge?

A. No, not of my own knowledge. I don't think—I don't think so—yes, our attorney—he was notified. He was notified.

Q. But you didn't do it personally?

10 A. No, I didn't do it personally.

Q. Did you ever have any conversation with Mr. Fox as to this case?

A. Well, yes, when we went—as we had a conversation with regards as to who was going to be interested in this purchase of the Hotel Biltmore, and we met up there in Mr. Rasnek's office, a few of us, Probinsky and those who are on the record there, on the agreement; and Mr. Fox said, "I have a friend, Mr. Kosobucki——"

20 Mr. Atkinson: Isn't the question pending a different question entirely?

The Court: Yes.

Mr. Atkinson: I move the answer be stricken out.

The Court: It may be.

30 Q. Did you have any conversation with Mr. Fox as to this case?

A. Yes, I did.

Q. Will you state what that conversation was and when it was?

A. Well, the last conversation I had with him was the evening before we went up to Mr. Kosobucki's to make arrangements for that deal.

Mr. Atkinson: I move that be stricken out.

The Court: Are you using this for the purpose of substantiating your counter-claim?

Mr. Sooy: Yes.

Mr. Atkinson: Possibly I am in error, but he is using the word "case," as I understand it. Do you refer to the original proceedings or to this present 10 lawsuit?

Mr. Sooy: I am referring to the proceedings now pending.

The Court. You are asking questions as to the proceedings now pending or as to what happened prior to the time they went down to Mr. Adams' place for the purpose of having him get into the deal? 20

Mr. Sooy: Perhaps the question was not nicely framed. I should have said the transaction out of which this case arose.

Q. Did you have any conversation with Mr. Fox, and if so, when.

A. I don't just get that, Mr. Attorney.

Q. Did you have any conversation with Mr. Fox concerning the purchase of the Hotel Biltmore prior to the execution of the agreement for the purchase? 30

A. Prior to the execution? Yes, I did prior to the execution.

Q. Will you state what that conversation was between you and Mr. Fox?

A. Well, I made a statement that we were about

to buy the Hotel Biltmore and we bought other properties with the expectation of trying to sell it some day at a profit. Mr. Fox said, "Well, I want to be in." Mr. Rasnek said, "I want to be in." Mr. McGarry said, "I want to be in." So did Mr. Probinsky—"I want to be in." I said, "Does anybody else want to be in?" Mr. Fox said, "I have a friend at Anglesea, at the Hotel Royal, and I want him to get in, too. He has been in other deals here with us and I want him to get in." I said, "All right. We will get busy with him." So we formed our little crew together and went in and went to Anglesea, and the same thing happened as I explained here before. That was the result. He came out and gave me the check and he said, "I am in. The deal is closed."

10 Q. I show you a contract which has been introduced in evidence here and ask you whether or not that is your signature "Shepard W. Coombs?"

20 A. That is my signature; yes, sir.

Q. Where was that contract drawn?

A. Robert Bright's office, Anglesea.

Q. Had there been one prior to this drawn?

A. Had there been one prior to that drawn?

Q. Yes.

A. Yes, I think there was. I think there was one drawn prior to that.

Q. Had it been signed by anyone?

30 A. No; it was gotten up in my name; see? And I went to Mr. David at the Biltmore and said, "Now that it is in my name there will be several parties going in this purchase," and I went to Robert Bright and had one agreed on—

Q. At whose request was this drawn in Robert Bright's office?

A. Why, Mr. Ostreicher's.

Q. At his own request?

A. At his own request, yes, sir.

The Court: You said that it was offered in evidence. I think not. It has been marked for identification; that is all.

Mr. Sooy: I offer it in evidence, on behalf of the defense.

(The paper offered, heretofore marked as an exhibit for identification for the plaintiff P1, is received in evidence on behalf of the defense.) 10

Mr. Atkinson: Well, I do not see how it can be binding on this defendant inasmuch as he has not signed it.

The Court: Well, you used it yourself by reference. I will admit it for the purpose of showing 20 what the contract was. It may or may not have any binding effect on Mr. Adams insofar as binding him to the terms of the contract itself is concerned.

Mr. Atkinson: I see.

Mr. Sooy: Cross-examine.

Cross-examination.

By Mr. Atkinson: 30

Q. Mr. Coombs, this is the first time or this was the first time that you had ever been to Kosobucki's, was it not?

A. At the time that he gave me the check?

Q. Yes.

A. That is positively the first time. I never knew the man.

Q. You never had any conversation with him that night?

A. Not a bit until after I met him and the only conversation I had was, I think he said, "I hope we have success" and "good-night;" and it was getting late and away we went.

10 Q. That was the first you had seen Kosobucki, was when he came out and handed you this check?

A. Positively the first time I ever saw him.

Q. Weren't you surprised that he would hand you a check for \$2500?

A. Why, no; I was not surprised.

Q. Why not?

A. Because I went in several deals myself. It was a money-making proposition, not surprised at all. I make purchases all the time.

20 Q. How did Kosobucki know anything about it?

A. Why, Mr. Fox, the understanding was to me, must have told him all about it. He went back and was gone—

Q. Did you take Fox there for that purpose?

A. We took him there. I don't know particularly for that purpose. I would say that Mr. Fox was the one suggested. He was deeply interested and he wanted to get him in. I would say so.

30 Q. So that you went with Fox and your understanding was that Fox was to interest Kosobucki in this deal?

A. Yes; because he wanted him to be in that deal and he was the only one who knew about him wanting to be in. I didn't know it.

Q. And so far as he was concerned you thought that Fox, knowing Kosobucki, could act as spokesman for all of you, didn't you?

A. I certainly did; yes, sir.

Q. You had had a conversation prior to that with Mr. Fox, hadn't you?

A. Oh, yes; yes, sir; down in Mr. Rasnek's office I did, sir.

Q. At that time did you show him a telegram or was a telegram shown to Mr. Fox in your presence?

A. Not to my best knowledge; no, sir.

Q. Was there such a telegram?

A. Not to my knowledge; no, sir.

Q. Have you heard that a telegram—

10

Mr. Sooy: I object.

Q. —in connection with this matter?

A. Not in connection with this matter; no, sir. I haven't, anything more than I heard on the stand today.

Q. Was the name of any person mentioned in connection with this deal at Mr. Rasnek's office as being 20 likely to be the purchaser?

A. No, sir. We had no knowledge of anybody buying that property at that moment when we bought it. If I had I would have bought myself.

Q. You had an option?

A. Yes, sir.

Q. When did your option expire?

A. I don't know. I don't think I can answer that. I don't know.

30

Mr. Sooy: I object.

The Court: He is cross-examining your witness.

The Witness: I really can't answer the date of that option.

Q. Was there any necessity of raising money on this particular night of Labor Day?

A. I question that, I don't think there was, not particularly that day.

Q. What time in the evening was it you went down to Kosobucki's place?

A. Well, I know it was pretty late in the evening. It might have been half-past ten or eleven o'clock.

10 Q. The place was quite busy there, was it not?

A. Whose place?

Q. I say the place was quite busy?

A. What place are you referring to, may I ask?

Q. Kosobucki's place, where you went to?

A. I would say no; it was not very busy. I was surprised to see at the time of the season there was no business at all. Practically one table besides our own was occupied.

20 Q. And you didn't talk to Kosobucki or talk to any of your associates inside at all about this deal, did you?

A. I never met that gentleman before.

Q. My question goes a little further than that. You never talked about this particular deal inside of that place that night?

A. Yes, we were in there, as I said before, we were in there waiting for Mr. Kosobucki to come out. We got very tired waiting and went out, waited twenty-five minutes, and, of course, we had some conversation about this deal. It is more than likely we did.

30 Q. Now, were the terms of this agreement dated September eighth, 1926, fully complied with?

A. My part I think were, with the exception of Mr. Kosobucki's signature there.

Q. He didn't sign it?

A. It shows he didn't sign it.

Q. Now, I show you the first page of that agree-

ment, Mr. Coombs. You will notice it is written with a carbon paper; and I show you the second page of that agreement in which it has in apparently original typewriter ribbon "It is agreed that no commission——"

Mr. Sooy: I object to any question of commissions being injected into this case.

The Court: The question is not completed. 10

Q. —"is to be allowed or paid on this sale to any agent or broker," and ask you if you can tell me when the last paragraph was inserted?

Mr. Sooy: I object.

The Court: I will permit that.

Mr. Sooy: Exception. 20

A. When was this inserted? This was inserted at the time the agreement was made by Robert Bright.

Q. And that was before it was signed?

A. Yes; it was before it was signed,—"it is agreed that no commission is to be allowed or paid on this sale to any agent or broker"—well, I really don't know when that was inserted in there; but I presume it was inserted in there at the time the agree- 30 ment was made up.

Q. That is your presumption?

A. I presume it was, yes.

Q. Now, as a matter of fact, Mr. Ostreicher—does this agreement actually represent the agreement between the parties? Does this agreement actually rep-

resent the true agreement between Ostreicher and yourself and these other gentlemen?

Mr. Sooy: I object, if your Honor please. The agreement speaks for itself.

Mr. Atkinson: The agreement may speak for itself, but if I can show it is not the true agreement and there was something done contrary to the agree-
10 ment, it is admissible.

The Court: Do you expect to be able to show that there was something contrary to that agreement done between the parties, contrary to the agreement they had with Mr. Adams?

Mr. Atkinson: I have offered this in evidence, alleging that there was an agreement made where-
20 by these people should purchase this property, and that Adam was a party to it; that is, a party to the contract. They introduced this. This is offered by them as a part of their case in support of their counter-claim and they are alleging upon their counter-claim and by virtue of this exhibit—they are alleging that my client is bound by it although he did not sign it; that he should contribute his share of the damages, if any. Now, I propose to show this agreement is false and fraudulent; that the terms of the agreement were never performed or
30 carried out; that, on the contrary, there was an entirely different arrangement between the parties and it turns precisely on the question of commissions.

The Court: I will permit it by way of defense to the counter-claim.

Mr. Sooy: May I be allowed an exception? It seems to me the question he is now asking was decided at the time he made his motion to amend.

The Court: No. He was making the motion to amend then so that he could include as part of the allegation of fraud another allegation with reference to commissions. He is now trying to support a claim for damages by reason of a commission ar-
10 rangement that was either at variance with or in accordance with the terms of that agreement; but he is trying to establish a defense to your counter-claim by showing that this agreement that was introduced in evidence was not the agreement upon which settlement was to be made but that there was an entirely different agreement.

Q. (Repeated by the stenographer) Now, as a matter of fact, Mr. Ostreicher—does this agreement actually represent the agreement between the parties? 20
Does this agreement actually represent the true agreement between Ostreicher and yourself and these other gentlemen?

Mr. Sooy: I would like to make the further objection that this is not proper cross-examination.

The Court: I will permit it.

Mr. Sooy: Allow me an exception. 30

Mr. Atkinson: May I be permitted to withdraw that question and ask a much shorter one?

The Court: Yes.

Q. Mr. Coombs, in the second paragraph of the

agreement it is provided, "It is agreed that no commission is to be allowed or paid on this sale to any agent or broker." Was there any commission allowed to anyone?

Mr. Sooy: I object on the ground that it is irrelevant and immaterial. The question of whether or not any commission was paid has no bearing upon this issue as I see it.

10

The Court: The question as to whether or not there was any commission paid in itself would not be a defense to the counter-claim, would it, Mr. Atkinson?

Mr. Atkinson: That may be true, but I cannot combine all of my defense in one question. I may say frankly to the court that what I propose to do is to show that notwithstanding this statement in
20 this agreement that no commission is to be allowed, that the other parties to this contract accepted and received a commission upon the sale of this property. It seems to me that goes to the question if I can show that they took a commission.

The Court: Suppose there was a commission taken by the other parties to that contract—that is what I assume you mean to say.

30 Mr. Atkinson: Yes, sir.

The Court: They are not charging your client on their counter-claim for anything other than the amount of money that he was supposed to have put in, are they?

Mr. Atkinson: No, but it resolves itself down to this, that under no circumstance can they recover upon their counter-claim if it appears that they are guilty of bad faith. They have offered in evidence an agreement that sets up that no commissions were to be allowed, and I propose to show as a matter of fact that these very people sought and obtained a commission from the sale of this property, and notwithstanding that they are now trying to recover
10 upon and to charge this plaintiff and a cross-defendant with the terms of that agreement.

The Court: Well, supposing they had accepted from the vendor a commission. That simply reduced the purchaser's price, didn't it? In other words, they took advantage of the vendor who had agreed to pay no commissions, and at the time of settlement or at a time subsequent to the signing of that agreement—
20

Mr. Atkinson: No. The agreement showed that there was a certain payment of twenty thousand dollars, "Receipt of which is hereby acknowledged by the seller." As a matter of fact, that twenty thousand dollars was never paid.

The Court: The fact that it was never paid does not enter into the question of whether or not at the time of settlement they deducted the commission,
30 does it?

Mr. Atkinson: Yes, I think it does, sir.

The Court: Not unless your contention is that that twenty thousand dollars was allowed by way of commission.

Mr. Atkinson: Well, I am going a step further. I want to be perfectly fair to Mr. Sooy.

The Court: I will overrule the question as it now stands.

Mr. Atkinson: May I have an exception, sir.

The Court: Yes.

10 Q. The twenty thousand dollars mentioned in this agreement was never paid, was it?

Mr. Sooy: I object on the same ground.

The Court: I will permit it.

Mr. Sooy: Allow me an exception.

20 The Court: Yes.

Q. The twenty thousand dollars mentioned in this agreement was never paid, was it?

A. It was never paid? The twenty thousand dollars in this agreement never paid? Repeat that question again.

Q. (Repeated by the stenographer.)

A. It was paid.

Q. In cash?

A. What?

30 Q. In cash?

A. Now, let's see. Part was paid in checks and part—some was paid in cash; some checks and some cash; yes, sir.

Q. Were there checks and cash totalling twenty thousand dollars paid to Mr. Ostreicher under the terms of this agreement?

Mr. Sooy: I object on the same ground.

The Court: I will permit it.

Mr. Sooy: Exception.

A. Checks and cash? Well, let's see. There was a little deal about selling the property—yes, I would practically say there were.

Q. I want to be perfectly clear, Mr. Coombs. I want to be perfectly fair with you. I understand your answer to be that checks and cash to the amount of twenty thousand dollars was paid to Mr. Ostreicher under this agreement? 10

A. Checks and cash?

Q. Yes.

A. Well, I will explain that to you clearly now. You asked for it clear. There was a commission allowed. See? We got ten thousand dollars in checks and then there was a commission allowed to me at the day of settlement. 20

Q. What actually happened at the time was that you turned over to Mr. Ostreicher a piece of ground and some cash, wasn't it?

Mr. Sooy: I object to that as incompetent, immaterial and irrelevant.

The Court: I will permit it.

Mr. Sooy: Exception. 30

A. What is that again?

Q. Isn't it true at the time you made this settlement with Mr. Ostreicher you turned over to him a piece of ground and some few checks or cash?

A. To represent the ten thousand dollars, you mean? That I have just spoken of?

Q. You just testified that there was a commission of ten thousand dollars retained by you gentlemen in checks?

A. Yes.

Q. That ten thousand dollars was due to Mr. Ostreicher?

A. Yes, at the time of settlement. It was never
10 made.

Q. Well, I don't get that. On September 8th, 1925, did Mr. Ostreicher get anything under this agreement?

A. Yes; he got ten thousand dollars.

Q. Ten thousand dollars?

A. In cash.

Q. In cash?

A. No, that was in checks, and the consideration
20 in two thousand dollars—eight thousand dollars in checks, two thousand dollars in consideration of a piece of ground that I sold him.

Q. That is, you put in a piece of ground for two thousand dollars and gave him eight thousand dollars in cash?

A. He owed me two thousand dollars on a piece of ground he purchased from me and in that ten thousand dollars he considered that two thousand dollars for me.

Q. You gave him that two thousand dollars?

30 A. Yes.

Q. What he got out of this twenty thousand was eight thousand dollars in cash?

A. No; he got ten thousand.

The Court: He still got ten thousand if he gave him the two thousand dollars that was owed. What

difference does it make if it was in cash or how it was? He has testified that there was two thousand dollars that was owed from Mr. Ostreicher to the witness, and the witness allowed that on account of the ten thousand dollars. So, as a matter of fact only eight thousand dollars in cash was given at that time. That does not change the situation.

The Witness: That is right, sir.

10

Q. Have you ever talked to Mr. Fox about this present lawsuit?

A. Present lawsuit?

Q. Yes.

A. The present case that we have here?

Q. Yes, the present case that we have here?

A. I don't know as I ever did talk to him bearing
on this case.

Q. Didn't you have a conference down in Wild-
wood at which Probinsky and McGarry were
20 present?

A. Talk to Fox at that time about it?

Q. Yes.

A. You will have to bring forth something else to make me recollect it. I don't recollect it.

Q. Well, you remember the sheriff served some papers on you, didn't he?

A. Yes.

Q. Now, after those papers were served on you did you not have a conference with McGarry,
30 Probinsky and possibly Mr. Rasnek at which Fox was present?

A. I wouldn't say that I did not. To the best of my knowledge I didn't. I had conversation with Mr. Fox.

Q. You had conversation with the rest of them but not Fox?

A. No. Fox was never in our presence.

Q. You have never talked to him since that time?

A. I have spoken to him but not bearing on this case. Not to the best of my knowledge.

Q. Well, you would know whether you talked to him about it?

A. I presume I would know, but I meet these people every day and I have lots of business in my mind, and I question whether I ever spoke of this case.

10 Q. Did you ever talk to Mr. Ostreicher about it?

A. Not that I know of to any extent. I may have met him and if he asked me about how the case was getting along or something like that,—nothing bearing on this particular case here today; not unless there was something said about our supposed settlement. Twice he was there.

20 Q. Since that time, since then, you have learned sometime ago, have you not, that Mr. Ostreicher would probably be a witness at this trial?

A. I never knew he would be a witness at this trial. I did not.

Q. Never knew that he would?

A. Not until the day before yesterday, Mr. Ostreicher stopped me and told me he had a subpoena for this trial as witness.

Q. Did you have any discussion with him then about it?

30 A. Nothing pro and con. I didn't know anything about Mr. Ostreicher; don't know how he feels about this matter or anything about it; didn't approach him on it, no.

Q. You were not curious as to what he would testify to?

A. No; I was not curious as to what he would testify to. I knew he would testify to the truth. That is all I knew.

Re-direct examination.

By Mr. Sooy:

Q. Are you a licensed real estate broker?

A. I am; yes, sir.

Q. How long have you held a license under the New Jersey Real Estate Commission?

A. Approximately two years and six months.

Q. During September of 1925 were you engaged 10 in the real estate business in the City of Wildwood?

A. Was I engaged? I was; yes, sir.

Q. Did you individually or in connection with others buy and sell any unnumber of properties?

A. Numerous properties. I was making a special business.

Q. Did you at any time have any other transactions than this one with the plaintiff, Mr. Kosobucki?

A. I did not. Personally myself, I did not.

Q. Did you ever at any time prior to the execution of this contract now in evidence make any representation as to what possibly could be made with Mr. Kosobucki? 20

A. I did not get that last.

Q. Did you ever make any representations of any kind prior to the time that you received Mr. Kosobucki's check as to the possibility of making or losing on this Biltmore transaction?

A. I did not. I never met the gentleman. I never knew him until he handed me the check.

Q. Never knew him? 30

A. Wouldn't know him from the wind blowing in down the street. Never heard of the gentleman.

Q. Are you engaged in any other business in the City of Wildwood?

A. Sir?

Q. Are you engaged in any other business in the City of Wildwood?

A. Yes, sir.

Q. What business are you engaged in?

A. Lumber business, wholesale groceries, real estate. I was previous into a general store, or a retail store, the last 22 years, up until a year ago.

10 Mr. Sooy: That is all.

(Witness excused.)

JOSEPH PROBINSKY, called as a witness on behalf of the defendant, being duly sworn, was examined and testified as follows:

Direct examination.

20

By Mr. Sooy:

Q. Where do you live?

A. Wildwood.

Q. Engaged in business in Wildwood?

A. Yes, lumber business.

Q. During September of 1925 were you acquainted with Mr. Kosobucki?

30 A. I have known Mr. Kosobucki from seeing him on the street, being pointed out to me, for the last couple of years.

Q. Did you ever have any business transactions with him prior to September last year?

A. No.

Q. Were you present on the occasion that has been testified to when Mr. Coombs, Mr. McGarry, Mr.

Rasnek, Mr. Fox and yourself are alleged to have been up in the Hotel Royal?

A. Yes; I remember that.

Q. Did you have any conversation with Mr. Kosobucki at that time?

A. None whatever.

Q. Will you tell the jury what occurred, what was said and what was done by those who were present?

A. I drove them down in my car and Mr. Fox was with us, and he was the one asked us to go down there because he wanted to see—or he was told that Mr. Kosobucki wanted to be in on that deal; he was a friend of his and he wanted him to be in on it, and that is how we come to go down. We got over there and went inside and there was no sight of Mr. Kosobucki. We sat down at the table and Mr. Fox went on to the rear end of the building to look for him and he was gone there fifteen or twenty minutes and we got tired, went outside and sat in the car again, sat out there about five minutes and then Mr. Kosobucki and Mr. Fox came out and handed a check to Mr. Coombs who was sitting in the front seat alongside of me, handed the check and said, "Hope we would make something on it." 10 20

Q. Did you hear Mr. Kosobucki ask any of those present as to the resale of that property?

A. No; I did not.

Q. There was nothing of that character said?

A. No.

Q. Were you present when this contract was drawn?

A. I was.

Q. Can you explain to the jury why it is that Mr. Kosobucki did not sign that contract?

A. No, hardly. Mr. Kosobucki wasn't to be found, and being it left it all to Mr. Coombs to take

- care of the deals, of the signing of the agreement, why, we didn't think it was necessary; in fact, it was only I, Mr. Coombs, Mr. Rasnek and Mr. Ostreicher there, and Mr. Bright. He drew the agreement up personally, wrote it himself, and we had the line-up of the men that were willing to go in and put in a certain amount of money, and we explained the details to Mr. Bright. That was Mr. Ostreicher's attorney. He filled it out in general and I think Mr. Coombs and I told the—Mr. Coombs and I went out to get McGarry's signature, scare up Mr. McGarry who was not there, and also Rasnek's signature. We spoke to Mr. Ostreicher and told him that we were not able to procure Mr. Kosobucki's signature for the simple reason that he was not to be found, and that he was a personal friend; he was acquainted with Mr. Kosobucki; if he could dig him up; and he said, "Oh, yes. That is all right. I will just call him and he will come up and sign it."
- 20 Q. And Mr. Ostreicher agreed that he would get Mr. Kosobucki's signature?
- A. Yes. Mr. Ostreicher agreed with that.
- Q. And you left the contract with Mr. Ostreicher for that purpose?
- A. Yes, two copies we had. He kept two and we had one.
- Q. When did you first find that Mr. Kosobucki wasn't going to sign it?
- A. Why it was only a matter of two or three days.
- 30 I seen Mr. Ostreicher and asked him whether he had the contract filled up in proper form.

Mr. Atkinson: I object.

The Court: These conversations with Mr. Ostreicher outside of the presence of Mr. Kosobucki cannot possibly be relevant.

- Q. Did you ever have any conversation with Mr. Kosobucki concerning the contract after it was drawn up?
- A. No; I didn't.
- Q. You never did?
- A. No.
- Q. Were you present at the time set for settlement on this property?
- A. Yes, sir.
- Q. Who else was there? 10
- A. Rasnek, Coombs, myself, represented by our attorney; Mr. Ostreicher.
- Q. Was there any objection raised as to the title?
- A. Yes, several; one—I think there were two objections.
- Q. You heard Mr. Ostreicher testify that he was not asked for a release; did you not?
- A. Yes. Our attorney asked Mr. Ostreicher if he would not bring in a certain release. He didn't have it there at that time and he asked for thirty days' extension which didn't really suit us, and we wanted sixty in the meantime. But he wouldn't agree to us and just took the thirty; and he said he would get that extension. At that particular time there was padlock proceedings being taken and our attorney wanted to have some kind of precaution that the property was in proper shape to be turned over.
- Q. Was there any question as to procuring a release from some individual? 30
- A. Yes.
- Q. Outside of any court proceedings?
- A. Yes; another party.
- Q. Did you hear any conversation as to the manner in which that claim could be released?

Mr. Atkinson: I object to any further testimony along this line. It is not material to the issue.

The Court: You do not expect to bind Mr. Adams by conversations that took place there with respect to releases?

Mr. Sooy: I will withdraw the question.

Q. Was any settlement ever made on this prop-
erty? 10

A. It was not.

Q. Were you prepared to make settlement?

A. I was.

Q. Do you know whether or not Mr. Kosobucki was ever asked to make settlement on this date?

A. Well, it is only hearsay conversation.

Q. You never personally asked him?

A. No.

Q. He didn't appear on the date of settlement? 20

A. No; he was not there.

Q. Did you at any time hear any representations made to Mr. Kosobucki by either Edward C. McGarry, Edward Z. Fox, Clara Rasnek, Eze Rasnek, yourself or Shepard W. Coombs as to whether or not a resale had been made of this property prior to the execution of the contract?

A. We had never spoken on those terms at all.

Q. As a matter of fact do you know whether or not you had a resale of it?

A. I know we didn't. If we did we wouldn't have had— 30

Q. Did Mr. Kosobucki know that you didn't?

A. I don't know. We didn't have any conversation with Mr. Kosobucki.

Q. Did Mr. Kosobucki ever come to you personally

and make any claim or demand on account of this transaction?

A. No.

Q. Mr. Probinsky, do you know of any telegram which was shown to Mr. Kosobucki concerning the resale of this property?

A. I do not.

Q. Did you ever see such a telegram?

A. I never seen any.

Q. Were you in Mr. Rasnek's office frequently 10 during that period?

A. I was. I suppose you all know at that particular period was real estate booms in all parts of the country and they were all flying up and down sidewalks and streets and everyone was afraid the other fellow was going to make a little more money than he was, and he wanted to get in this and that, and they come around talking, pleading, and coaxing, and naturally I would play in the real estate market the same as everybody else was. We were 20 not attending to our private business affairs, and it was one would get sore because the other fellow wouldn't take him in, and the other fellow would come along and say, "You didn't take me in on this," and "You didn't take me in on that," as if to say, "We were the whole goat." But they were all trotting up and down asking me to go in on real estate deals which were pooled together, and some made money and some didn't. I made some, lost 30 on a good many others,—

Mr. Atkinson: Is there any question pending?

The Court: No.

Cross-examination.

By Mr. Atkinson:

Q. Well, Mr. Probinsky, I can understand why you went up that night, but why did the others go up in the machine to see Kosobucki?

A. At that particular time we were buying and selling real estate as late as twelve and one o'clock, 10 after midnight.

Q. Yes. Well, why was it necessary to take anybody up to see Adam with the exception of yourself? You went to drive the machine and Mr. Fox went to do the talking?

A. Well, yes—the crowd always kept together.

Q. You all dealt together?

A. We all dealt together. If one fellow bought the other fellow was declared in on it, declared in on it.

20 Q. And you had no conversation with Adam this particular night, did you?

A. No, sir.

Q. You depended on Mr. Fox to be the spokesman for you, did you?

A. I didn't depend on anything. Mr. Fox didn't

Q. Well, you went there for the purpose of having Kosobucki take an interest or a share in this, didn't you?

30 A. Not for that purpose, no. I went for the purpose of offering Mr. Fox to have his friend in on the deal with us.

Q. You didn't want anybody to have any more of the shares?

A. Sir?

Q. You weren't hunting for anyone to take a share in that?

A. Why, as a rule some of the boys knowing a particular piece of real estate, they would come and tell you, "Now, when you get so and so I want to be in on that," and we would all pool together.

Q. But on this particular occasion you had Fox, McGarry, Coombs, Rasnek and you only wanted one more man, is that true?

A. That was as far as signature on that agreement of sale was concerned, yes.

Q. As far as the deal was concerned? 10

A. Why, it was as much as all in; because Mr. Fox declared him in right there and then. We took it for granted Mr. Kosobucki wanted to get in on it.

Q. You wanted to get his money?

A. So we could get our funds together to make the final settlement.

Q. And you didn't go in to see him because you depended on Mr. Fox talking to him about it, didn't you? 20

A. No. We all went in there and thought we would all see him. Instead of that we didn't. Mr. Kosobucki wasn't around. So we sat around the table while Mr. Fox went to the rear end of the building to seek Mr. Kosobucki.

Q. And when Fox came back with the check you were fully satisfied, were you not?

A. Well, it didn't mean anything.

Q. What?

A. It didn't mean anything. 30

Q. What?

A. It didn't mean anything.

Q. Did not mean anything?

A. No.

Q. That is the way you felt about it at that time?

A. Why, sure. I thought I was pleasing Mr. Kosobucki.

Q. But it didn't mean a thing?

A. No.

Q. Did you go in to see anybody else this particular night?

A. Yes. There was—this particular place being a cabaret or bar, or hotel, whatever you may call it, and one of the best known places in town, all the other saloon-keepers and barkeepers and cafe-keepers were—sort of like the place because Mr. Ostreicher probably had a better business than they did.

Q. Did you go in to see anybody else?

A. Yes, those who were interested in that particular property.

Q. How many other people did you visit?

A. One.

Q. One other person beside Adam?

A. Yes.

Q. Under the terms of your agreement you divided the thing up into eight shares; did you not?

A. Exactly.

Q. And the shares were \$2500 apiece?

A. Exactly.

Q. And the \$2500 apiece would take care of the first payment of \$20,000, wouldn't it?

A. Yes, per share, yes.

Q. \$2500 per share. Well, as a matter of fact, you only had to make actually ten thousand dollars toward that first payment, didn't you?

A. I hadn't anything to do with that; didn't know anything about that.

Q. Didn't you pay your \$2500?

A. I paid \$3750.

Q. You took a share and a half?

A. Yes.

Q. Do you know who got the \$10,000 commission allowed?

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

The Court: I will permit it. Does he know?

A. No, I don't know that only from conversation here now.

Q. That is the first you knew of it?

A. Yes.

Q. And the time the contract was signed by you was there a paragraph on the second page, "It is agreed that no commission is to be allowed" etc.?

A. That paragraph was inserted right there at the same time the signatures were placed on it.

Q. Right at the same time. That is all.

(Witness excused.)

EDWARD C. MCGARRY, called as a witness on behalf of the defendant, being duly sworn, was examined and testified as follows: ²⁰

Direct examination.

By Mr. Sooy:

Q. Mr. McGarry, where do you live?

A. Wildwood.

Q. Are you engaged in business in the city of Wildwood? ³⁰

A. Yes, sir.

Q. What is your business?

A. Contractor and builder and hotelkeeper.

Q. Are you acquainted with the plaintiff, Mr. Kosobucki?

A. No; never saw him before until today.

Q. Then you didn't have any conversation with him?

A. No; I don't know him.

Q. Were you present on the evening when these other defendants were supposed to have been in the Hotel Royal?

A. Yes.

Q. Did you see Mr. Kosobucki that night?

10 A. No.

Q. Did you see a check pass to Mr. Coombs from Mr. Kosobucki?

A. Yes.

Q. Did you hear any conversation between Mr. Kosobucki and Mr. Coombs?

20 A. Mr. Kosobucki acknowledged an introduction to Mr. Coombs given by Mr. Fox. After the introduction was made Mr. Kosobucki passed a check over. It was very dark outside, and I was sitting in the back end of the car, and Mr. Kosobucki said something to the effect that, "This is my share and I hope we are successful."

Q. Were you introduced to Mr. Kosobucki that night?

30 A. Mr. Fox made an introduction here between the two of us and Mr. Kosobucki didn't acknowledge it, made no effort. I was kind of brushed aside and I became quite cross about it. As a matter of fact, I didn't want to take this man in on it because I didn't know him and I didn't want to get connected with any other than our own little crowd.

Q. Then you had been dealing with those other defendants generally in real estate, had you?

A. Yes.

Q. Do you know whether or not Mr. Fox or Mr. Kosobucki had any prior dealings with Mr. Rasnek in his office?

A. Yes. I know that Mr. Fox dealt in Mr. Rasnek's office quite a little, and I knew that Kosobucki was in on a deal or two there, a deal outside of our syndicate; because our syndicate never seemed to split up. We all stuck together.

Q. Did you ever see a telegram in which it was mentioned that there had been a resale made of this property?

A. Of this Biltmore?

Q. Yes.

A. No.

Q. Did you ever hear of such a telegram before?

A. No.

Q. You never showed such a telegram to Mr. Kosobucki, did you?

A. No. If there had been any telegrams I would have seen them.

Q. Did you ever make any representations of any kind to Mr. Kosobucki?

A. Pardon me.

Q. Did you ever make any representations of any kind to Mr. Kosobucki concerning the Biltmore Hotel?

A. No. As I say, I never saw the man before until today in court.

Q. Were you present on the day of settlement?

A. I was not. I was in Florida, but I had my counsel there with the instructions to settle for me.

Q. And who was your counsel?

A. Mark R. Sooy.

Q. You instructed me to take care of your share?

A. Yes, sir.

Mr. Sooy: Cross-examine.

Cross-examination.

By Mr. Atkinson:

Q. You afterwards learned, did you not, Mr. McGarry, that there was some question about a release?

A. Why, yes. I knew that there was some question about the title in a report from Mr. Sooy, I believe, as to why the settlement had not gone through, and it was a question of title there that was not in his judgment perfected. In other words, there was a release and there were some bonds or something with regards to bootlegging.

Q. In the opinion of your counsel the title was defective?

A. Yes; and they granted Mr. Ostreicher an extension to perfect it.

Q. You had a share of one and a half shares?

A. Yes, sir.

Q. That amounted to —

A. \$3750.

Q. \$3750. You paid yours by check?

A. \$1250 by check and there were \$2500 of mine in Mr. Coombs' hands on other deals that we didn't consummate, and we used that money up and declared an even balance on it.

Q. There was a matter of fact only eight thousand dollars in actual cash paid on this first payment?

A. I didn't know anything about that.

Q. Well, who would know about that?

A. Why, Mr. Coombs, if there was only eight thousand dollars. I don't know anything about that; never heard of it until today.

Q. And you never got any benefit of any ten thousand dollars?

A. In what way? You mean this commission that has been brought up?

Q. Yes.

A. No.

Q. What was the occasion of your going down to the Hotel Royal this particular night?

A. I went down there much against my will, to be perfectly frank with you. I didn't care to go down or to take anybody else in this transaction at all. But Mr. Probinsky seemed to be very desirous of pleasing Mr. Fox and Mr. Fox wanted Mr. Kosobucki, whatever his name is, to get in on this deal; and rather than have any dissension among our syndicate which had gotten along so nicely together, I agreed to go along with them. Somebody said, "Well, we will get a good glass of beer there," and you know how they do, a crowd of fellows together. That is how I happened to go along there.

Q. Now, at the time you went down there the written agreement had not been signed by Mr. Ostreicher, had it?

A. Just let me get that again.

Q. I say at the time you went down there to the Hotel Royal the written agreement between you and Mr. Ostreicher had not been signed, had it?

A. I never made any agreement. I wasn't there to see the agreement when it was signed. I wasn't there. If my memory serves me right I signed it—I signed that agreement there over at Mr. Ostreicher's saloon, in his office, so far as my memory recalls.

Q. Was that done on the eighth of September?

A. I couldn't answer you that. I don't recall.

Q. Do you know whether that agreement had been signed at the time you went down and saw Kosobucki?

A. No, not that I know of. It appears to me that Mr. Coombs had it sewed up somehow. I can't recall exactly those details.

Q. Mr. Coombs had the agreement?

A. There was another agreement which was signed up. See? And then that agreement didn't suit Mr. Ostreicher and they subsequently drew this agreement and the drawing of this agreement was also another reason why I put in quite a few kicks about this deal.

10 Q. At the time you went down to Kosobucki's place on September eighth you had determined certain things; namely, that you were to take a share and a half and that Mrs. Rasnek was to take a share and a half, and Mr. Coombs was to take a share and a half, and Mr. Probinsky a share and a half; isn't that true?

A. That is correct.

20 Q. And Adam Adams, which was the name that they gave to Kosobucki, was to take one share and Mr. Fox was to take another share?

A. Mr. Fox had already taken his share, I believe.

Q. Mr. Fox had already taken his share? That part of the agreement had already been made, and you also knew at that time that you were to pay twenty thousand dollars for the first payment, didn't you?

A. That is correct.

30 Q. You knew that the proportion of shares of these buyers would be \$2500 for each part?

A. For each full share, yes.

Q. For each full share, that is right.

Re-direct examination.

By Mr. Sooy:

Q. Did you ever get back any part of your \$3750 that you put in this transaction?

A. I did not.

Mr. Sooy: That is all.

10

(Witness excused.)

DEFENDANT RESTS.

PLAINTIFF'S REBUTTAL.

DAVID OSTREICHER, recalled in rebuttal, having 20 been previously sworn, was further examined and testified as follows:

Re-examination.

By Mr. Atkinson:

Q. Mr. Ostreicher, under the terms of the agreement which has been offered in evidence as Exhibit P1, the first payment of \$20,000 was to be made to you. Did you ever receive that \$20,000? 30

A. Yes, I received twenty and I gave ten thousand commission out of it.

Q. To whom did you give a commission?

A. Mr. Shep Coombs.

Q. And of the ten thousand dollars that you did

have, that you did receive, was all of that paid in cash?

A. No.

Mr. Sooy: If your Honor please, I object to this.

The Court: I do not see that it makes any difference so long as he got twenty thousand dollars, and we are going back again into the same old proposition as to allowance for a piece of land, etc.

Mr. Atkinson: Yes.

The Court: I will overrule it.

Mr. Atkinson: That is all right.

The Witness: I got eight thousand dollars in 20 checks —

The Court: Never mind that.

(Witness excused.)

PLAINTIFF RESTS.

30 The Court: Before we sum up I would like to hear counsel for the defense as to their counter-claim, as to what you conceive to be the measure of damage if there is any damage proved.

Mr. Sooy: As far as the counter-claim is concerned, we are willing to abandon it.

The Court: Then there will be an abandonment of the counter-claim?

Mr. Sooy: Yes.

(Mr. Atkinson opened the plaintiff's case to the jury.)

(Mr. Sooy summed up for the defendant.)

(Mr. Atkinson summed up for the plaintiff.)

10

20

30

COURT'S CHARGE TO THE JURY.

Sooy, J.:

Gentlemen of the jury: Adam Kosobucki is the plaintiff in this case and I shall hereafter refer to him as "Mr. Adam." The only defendants left in the case are Edward C. McGarry, Joseph Probinsky
10) and Shepard W. Coombs. If your verdict is in favor of the plaintiff it can be only against the defendants that I have named and not against the other defendants who have been named in the original suit.

The complaint alleges that the defendants collectively falsely represented to Mr. Adam a situation which they then said existed, the false representation being as alleged in the complaint that the defendants represented to Mr. Adam that they had an option on a piece of property; that they needed
20) \$2500 more in order to complete that option and that if they did complete it they had a chance to resell at a profit. Mr. Adam says that, relying on their representation, he invested his money with them and that he afterwards found out that the representation was untrue, and that he did not go through with the settlement.

In order for the plaintiff to succeed in this case he must carry the burden; that is, he must convince you by the greater weight of the believable testimony as to the allegations made by him in his complaint.
30

The false representation, in order that he may have relied upon it to his detriment, must have been made by the defendants knowing it to have been false.

The proof of the plaintiff is that whatever repre-

sentations were made to him were made collectively by all three of these defendants and at the same time; in other words, his testimony is that they came into his place of business and that all of them were together and that they told him they had this option and that they had a chance to resell at a profit in two or three days, and that, relying on that representation, he went into the back room with Mr. Fox and that he there gave Mr. Fox a check
10) which was afterwards turned over to the other defendants.

Mr. Fox also testifying for the plaintiff says that the conversation and whatever representations were made were made when they were all together. So that I charge you that there is nothing in the case that would justify a verdict for the plaintiff by reason of any representations that may have been made, if there were any, in any other part of the room or building than that part of the room about
20) which the plaintiff has testified; that is, where they first met when the defendants and the plaintiff came together on the night in question.

There has been introduced in evidence, and it was permitted to go in by the Court, testimony as to a telegram, which, if you will recall, Mr. Fox says was read to him at the office of Mr. Rasnek, he testifying as to the contents of that telegram. I charge you that that telegram should not be considered by you at all; that it should be considered out of the case and be given no weight by you by reason of the fact
30) that there is no connecting testimony with reference to that telegram with the plaintiff; that is to say, there is no testimony that shows that that telegram that Mr. Fox says he had read to him at the office of Mr. Rasnek was ever thereafter brought to the attention of Mr. Adam—that is, that that same tele-

gram was read to Mr. Adam does not appear in the testimony, and, therefore, I charge you that evidence of reference to the telegram shall not be considered.

The defense to the charge made by Mr. Adam is that there was no representation made at all to Mr. Adam that there was a customer for resale already obtained; but that the defendants at the request of Mr. Fox went down for the purpose of allowing Mr. Adam to participate in a speculative deal that they had on hand. The defendants say that the negotiations with reference to the deal were first conducted at the office of Mr. Rasnek and that then they went down to the place of business of Mr. Adam; that when they got there Mr. Adam was not in the room and that they sat down at a cabaret table and that Mr. Fox went into another part of the building and had whatever conversation was had with Mr. Adam.

As I have before charged you, any conversations that Mr. Fox may have had with Mr. Adam outside of the presence of the other defendants would not bind them at all. The allegation of the plaintiff is that all the representations were made in the first room in the presence of all, and you must rely on that allegation and not on any conversations that may have happened between him and Mr. Fox in another part of the building when the other defendants were not present.

Now, then, the damages claimed by the plaintiff, if you should find a verdict in favor of the plaintiff, are the \$2500 that he paid on account of this deal plus interest at the rate of six per cent. You will have before you the summons and complaint and will be able, if you find a verdict for the plaintiff, to figure the interest. You must not bring in a verdict for \$2500 with interest, in that style, but you

must bring it in, if you find for the plaintiff, for \$2500 plus the interest that you will figure out. In other words, you will have to be your own mathematician. So that there are two verdicts, either one of which you may render: first, you can render a verdict for the plaintiff against the defendants, the three of them that I have named, for \$2500, together with the interest that you will figure; or, if you find for the defendants against the plaintiff, you will bring in a verdict of no cause for action.

Won't you note, Mr. Stenographer, on the record an exception for the plaintiff to that part of my charge which deals with the exclusion of the testimony with reference to the telegram, and Mr. Atkinson also asks me to enter a general exception. I do not know just what good a general exception will be but you may enter it at his request.

There is another element in the case that I want to deal with. At the outset of the plaintiff's case motion was made to amend the complaint and the motion was denied, so that the complaint was not allowed to be amended. There is some testimony in this case with reference to some commission. That testimony I charge you are not to consider because the allegation of the plaintiff is that the fraudulent representation consisted in the statement that the property had already been resold at a considerable profit and that he was thereby induced to invest the sum of \$2500. There is no charge that there was any false representation made with reference to commission, and, therefore, in considering whether or not false representation had been made you are not to consider the question of commission.

(The jury retired.)

EXHIBIT "P1."

THIS AGREEMENT, Made the Eighth day of September, A. D. 1925 between David Ostreicher, single man, of the City of Wildwood, County of Cape May and State of New Jersey, party of the first part and Adam Adams, 1 part; Edward Z. Fox, 1
 10 part; E. C. McGarry 1½ parts; Jos. Probinsky 1½ parts; S. W. Coombs, 1½ parts and Clara Rasnek 1½ parts, all of the City of Wildwood, County of Cape May and State of New Jersey, of the second part, hereinafter called the Buyers.

Witnesseth, That the Seller agrees to sell and convey and the buyers agree to buy all those certain lots, tracts or parcels of land and premises situate in the Second Ward, City of Wildwood County of Cape May and State of New Jersey, more partic-
 20 ularly described as follows: situate on the westerly side of Atlantic Avenue between Cedar and Schellenger Avenues in the said City being lots #13, 14, 15 and parts of 28, 29, and 30 of Block #168, being 150 feet on Atlantic Avenue, by about 130 on Cedar and Schellenger Avenues, and it is hereby made a
 30 part of this agreement of sale that when the property to the south, in said tract, is desired to be improved by the erection of a building or buildings thereon that he, the said seller will execute a release part of mortgaged premises on such southerly portion, taking back a mortgage for the amount so released and will accept partial mortgages on said building or buildings as may be agreed upon between the parties hereto that the Hotel Ruric building thereon will not be demolished or removed unless nor until satisfaction therefore shall have been given therefor,

for the price or sum of ONE HUNDRED AND SEVENTY FIVE THOUSAND DOLLARS under and subject to the following terms and conditions:

1. A first payment of Twenty thousand dollars, receipt of which is hereby acknowledged by the Seller,

2. The balance of the purchase price shall be paid in the following manner:

\$45,000. on January 15th, 1926, at which time a purchase money mortgage for \$110,000. for the term of
 10 10 years @ 6% payable ½ yearly, shall be given. It is further agreed that should the Hotel Ruric Building be permitted to be removed or demolished by permission of the said David Ostreicher he will take such an amount on mortgage on the new building to be erected thereon at the request of the buyers. The time of final settlement shall be made at the office of Robert Bright, 1st and N. J. Avenues, N. Wildwood, N. J. on or before January 15th, 1926,
 20 or the deposit of \$20,000. made herewith, at the option of the Seller may be applied on account of the purchase price or be forfeited as liquidated damages to the Seller, and not as a penalty, provided that the necessary title searches can be obtained from any first class New Jersey title company by that date. Should there be any delay, not the fault of the Buyers, in the procuring of such searches, the time for the final settlement shall extend until such searches can be obtained.

3. The title to the premises shall be free and clear
 30 of all encumbrances, including municipal liens and assessments, except municipal improvements in the course of construction and not assessed, obvious easements, usual restrictions running with the land, and the buyers agree that *ther* shall accompany said mortgage fire insurance to the amount of \$50,000.00,

and shall be a marketable title, and the seller shall tender a special warranty deed conveying such title at the time of the final settlement, or in the event that such title cannot be as above, then this deposit shall be returned to the buyers.

4. All adjustments shall be made as of January 15th, 192 and possession shall be given the Buyers.

5. The buyers shall pay for *searchs* and all other expenses, excepting the preparation of the deed and the necessary revenue stamps attached thereto,
10 which shall be paid for by the seller.

6. This agreement shall extend to and be binding upon the heirs, exeuctors, administrators, successors and assigns of the parties hereto.

7. Time is the essence of this agreement.

8. This contract includes all fixtures and appurtenances permanently attached to the building or buildings on the land herein described and also specifically the following items:

20 IT IS AGREED THAT NO COMMISSION IS TO BE ALLOWED OR PAID ON THIS SALE TO ANY AGENT OR BROKER.

In witness whereof, the parties hereto have set their hands and seals the day and year first above written.

DAVID OSTREICHER (L. S.)

EDWARD Z. FOX (L. S.)

E. C. McGARRY (L. S.)

JOSEPH PROBINSKY (L. S.)

SHEPPARD W. COOMBS (L. S.)

30 CLARA RASNEK (L. S.)

Signed, sealed and delivered
in the presence of

NEW JERSEY COURT OF ERRORS
AND APPEALS.

ADAM KOSOBUCKI,
Plaintiff-Respondent,

v.

EDWARD C. MCGARRY, JOSEPH PROBINSKY and
SHEPPARD W. COOMBS,
Defendants-Appellants.

ON APPEAL FROM SUPREME COURT.

BRIEF OF APPELLANTS.

This action was instituted in the New Jersey Supreme Court, Cape May County Circuit, to recover from Edward C. McGarry, Joseph Probinsky, Sheppard W. Coombs, Edward Z. Fox, Clara Rasnek and Eze Rasnek a certain sum of money which the plaintiff alleged that he was induced to pay to them by reason of certain fraudulent misrepresentations. The complaint alleges that the defendants individually and collectively represented to the plaintiff that they had formed a syndicate and had obtained an option on a certain piece of real estate in Cape May County, New Jersey; that they had resold said property at a considerable profit and that, in order

to complete the transaction it was necessary for them to have an additional sum of money, to wit; twenty-five hundred (\$2500.00) dollars, and that, if the plaintiff would advance the said sum of money, the defendants would give him an equal interest in the profits of the resale of the property; that these representations were false to the knowledge of the defendants, and that the plaintiff, relying upon the representations, advanced to them the sum of twenty-five hundred (\$2500.00) dollars; that the defendants subsequently abandoned the enterprise whereby the plaintiff lost the money which he had advanced to the defendants.

Answers were filed by Sheppard W. Coombs, and and Joseph Probinsky, and a separate answer was filed by Edward C. McGarry. These answers denied the allegations of the complaint and set up a counter-claim, which counter-claim was subsequently abandoned at the trial. (Case, pp. 102 and 103.)

Interlocutory judgment by default was entered against the defendants, Edward Z. Fox, Clara Rasnek and Eze Rasnek.

At the trial, after the close of the plaintiff's testimony a motion for a non-suit was made, on the ground that the plaintiff had not made out a case of fraudulent misrepresentation (p. 62). This motion was refused and, after the defendants' testimony had been put in the case was submitted to the jury. The Court, in its charge to the jury, stated that the only defendants left in the case were Edward C. McGarry, Joseph Probinsky and Sheppard W. Coombs, and that, if the verdict of the jury should be in favor of the plaintiff, it could be only against these three defendants, and not against the other defendants. The jury returned a verdict in favor of the plaintiff for the sum of twenty-six hun-

dred seventy-five (\$2675.00) dollars; upon which verdict a judgment was subsequently entered. The present appeal is based upon the ground that the Court erred in refusing plaintiff's motion for non-suit.

ARGUMENT.

As has been stated above this action is based upon an alleged fraudulent misrepresentation, which was that the defendants had an option on a piece of property which they had succeeded in reselling at a profit; and that the plaintiff was induced to advance the money upon the faith of this representation, and that he would secure a share in the profits of the resale.

In the case of *Byard v. Holmes* (34 N. J. L. 296), our Supreme Court stated:

"The action being grounded on fraud in the defendant, concurring with damage to the plaintiff resulting from that fraud, to maintain it, the plaintiff must allege, with reasonable certainty, and be prepared to prove at least these three things: (1) That the defendant made some representation to the plaintiff meaning that he should act upon it. (2) That such representation was false, and that the defendant, when he made it, knew it to be false. (3) That the plaintiff, believing such representation to be true acted upon it, and was thereby injured."

This case was cited with approval by the Court of Errors and Appeals in *Lams v. Fish* (86 N. J. L. 321). In that case the Court held that moral fraud in a misrepresentation is an essential element in an action for deceit.

Taking the rule laid down in this case as the criterion, let us examine the testimony produced by the plaintiff in order to find out whether he has met the requirements set forth in this case.

On pages 26 and 27 the plaintiff testifies as follows:

“Q. Did they talk about anything?”

A. Well, they said they had a good proposition for a short time, if I want to go with them to purchase the Hotel Biltmore and they showed me a telegram. They said it would only be two days before you will get your money with profit.

Mr. Sooy: I object unless the telegram is produced.

The Court: He is not giving the contents of the telegram at all.

Q. Go on.

A. They showed me a telegram they got a purchaser coming in a few days to get the property and it will be only two or three days before everything will be settled.

Q. Yes.

A. And, of course, I didn't know the other two. Mr. Fox said to me: ‘Well, you don't have to be afraid of those people. They are all good people, because I am in it myself, too,’ and on the strength of Mr. Fox's words I then went and filled a check and handed to Mr. Shepard Coombs, and in his name.

(It should be noted that the Court in its charge instructed the jury that all reference to the telegram should be excluded and should not be considered; p. 105.)

In cross-examination the plaintiff testified as follows, pp. 36 and 37:

“Q. You expected to get a share of the profits?”

A. Well, not exactly.

Q. You didn't expect to get any profit?

A. Because they didn't tell me what profit was going to be there. They just told me they were in need of money to go through with it.”

* * * * *

“Q. You didn't expect to get any profits out of it?”

A. Well, I expected some but I didn't know what I would get and so; because they didn't tell me and I didn't ask them.”

* * * * *

“Q. What was said in connection with this transaction?”

A. ‘Well, you get a little profit when we get rid of it.’ I didn't know how much.

Q. Was anything said as to profit or loss?

A. No.

Q. Was anything said as to settlement?

A. No.”

On p. 41 plaintiff testified as follows:

“The Court: Mr. Kosobucki, I do not remember just what you testified to as to the conversation they had with you on the night they came in and you gave the \$2500. Will you tell me just what they said to you again.

The Witness: Well, they come in together and says: ‘Adam, we got good proposition for you,’ and they showed me telegram from some—I can't recollect his name, from Philadelphia.

The Court: Tell me what they said to you about the telegram, not what was in the telegram.

The Witness: They said to me, 'We got a buyer for this place, maybe two or three days, and you could make a little profit on it.' "

This is all the testimony given by the plaintiff himself with respect to the alleged misrepresentations. In addition to the plaintiff, Edward Z. Fox, one of the defendants testified on the plaintiff's behalf. His testimony with regard to the interview between the plaintiff and the defendants is found on page 47 and is as follows:

"At that time we had reached Adam's place of business and altogether we walked into Adam's bar room, and happened to find Adam right there, and I believe that I introduced Adam to some of those men with whom he didn't have any acquaintance, and one of the gentlemen broached the proposition. I think it was Mr. Rasnek, about the Biltmore deal, and Adam stopped to think for a minute or two. Finally he mentioned or motioned to me to come back with him. So I left these men in the bar and I followed Adam back into his kitchen, private apartment he had, and Adam said, 'What do you know about that deal?' 'Well, Adam,' I said, 'What I think about the deal is I just paid them \$2500 of my own money and that is all I can tell you.' Then he went back into another room and I was left in the kitchen and I remember that he brought back a check with him and made it out, I don't know who to, and he carried the check in his hand leading, and I followed him. We came to the bar room again and we found that the men were not there. So Adam walked back toward the cabaret room, that back room he has on the side. Meanwhile I walked

on the outside to see where they were. I didn't find them outside, so I walked in through the side door into the cabaret room and there I found the gentlemen seated around the table and they were just about ready to get up. Adam had a few more words with them the purport of which I don't remember exactly, and the men walked over towards the automobile and I saw Adam hand the check, I believe, to Mr. Coombs, and they went back to the car and the men took me home and where they went from there I don't know."

On page 48 he testified:

"Q. Well, was there anything said at Adam's place about what they proposed doing with the property?

A. Well, the same statement was repeated, what was said to me, that they had a buyer for the Biltmore and that buyer will show up in a day or two."

On page 53 he testified:

"Q. As a matter of fact did you hear any representation by any of these gentlemen to Adam that he would positively make a profit?

A. No.

Q. No, you did not?

A. Positively no."

The testimony above given represents the entire evidence produced by the plaintiff to prove his claim of false and fraudulent misrepresentation.

Applying the test laid down in *Byard v. Holmes*, it is submitted that the plaintiff has produced no testimony whatsoever to meet the second and third re-

quirements of the rule in that case, that is to say, there was no testimony that the alleged misrepresentations were false and that the defendants when they made them knew them to be false, or that the plaintiff relied upon these misrepresentations in handing over the check for \$2500.

After reading the testimony given on behalf of the plaintiff it is apparent that the plaintiff's claim is based upon two alleged misrepresentations; first, that the defendants said they had a buyer for the property; and, second, that plaintiff could make a profit if he went into the deal. As to the question of the profit the testimony is very meagre, and whatever there is relates, not to an existing fact, but to what would be done thereafter. Plaintiff himself said at page 36:

“Q. You expected to get a share of the profits?”

A. Well, not exactly.”

Again on page 37:

“Q. Was anything said as to profit or loss?”

A. No.”

Again on page 41:

“They said to me, ‘We got a buyer for this place, maybe two or three days, and you could make a little profit on it.’”

Witness, Edward Z. Fox, positively stated that he heard no representation by any of the defendants to the plaintiff that he would positively make a profit, page 53.

It thus appears that whatever was said with regard to any profit, which the plaintiff might get out of the deal was merely a statement of an opinion

by the defendants as to what might happen in the future. In the case of *Lembeck v. Gerken* (86 N. J. L. 111, at p. 114), the Court said:

“There is no legal principle more firmly rooted in the law that a representation, in order to form the basis of an action of deceit, must be material to the subject-matter of the contract and relate to some existent fact. *Byard v. Holmes*, 34 N. J. L. 298. If it merely affect the probability that it will be kept, i. e., some assurance what shall thereafter be done, or as to any further event, it is not a representation but a contract for the violation of which a remedy must be sought on the contract. *Dawe v. Morris*, 149 Mass. 188; 4 L. R. A. 158.”

Under the rule in this case it is clear that the statements of the defendants on the subject of future profit cannot be considered and the case, therefore, comes down to the question as to the alleged statement that the defendants had a buyer for the property. The plaintiff's testimony was very hazy, but finally, on questioning by the Court the plaintiff stated (page 41): “The said to me, ‘We got a buyer for this place, maybe two or three days, and you could make a little profit on it.’” The witness, Fox, testified that the statement was made when they had a buyer for the property, and that the buyer would show up in a day or two, but he said that this statement was made by Rasnek, who broached the proposition to the plaintiff, and who is not one of the present appellants pp. 47 to 48. Assuming that the statement was made by the defendants that they had a buyer for this property there was not a scintilla of evidence produced by the plaintiff to show that this statement was false or that the defendants when they

made it knew it to be false. The only testimony was that the settlement did not take place, but there is no evidence of the fact that the defendants did not have a buyer for the property when they talked to the plaintiff. The conversation with the plaintiff took place on Labor Day, which was September 7th, 1925. The formal agreement for the purchase of the property was dated September 8th, 1925, one day later, but the vendor testifying for the plaintiff; admitted that he had an agreement with the defendants a week before Labor Day, as to the purchase of the property p. 57. The agreement called for settlement on or before January 15th, 1926, and the testimony indicates that the settlement was not made because of difficulty with the title, which has nothing to do with the question of whether or not the defendants had a buyer for the property at the time when the conversation with the plaintiff took place.

In the case of *Byard v. Holmes*, the third proposition laid down by the Court was that the plaintiff had also to prove that he acted in reliance upon the alleged misrepresentations. The plaintiff testified at p. 27:

“Q. Yes.

A. And, of course, I didn't know the other two. Mr. Fox said to me, 'Well, you don't have to be afraid of those people. They are all good people, because I am in it myself, too,' and on the strength of Mr. Fox's words I then went and filled a check and handed to Mr. Shepard Coombs, and in his name.”

The witness, Fox, testified that after Rasnek had broached the proposition to the plaintiff, on the date in question, the plaintiff requested him, Fox, to go back with him into his private room, where the plain-

tiff asked Fox what he thought about the deal, to which Fox replied, “What I think about the deal is, I just paid them \$2500 of my own money, and that is all that I can tell you.” After this conversation the plaintiff went and made out a check. It is therefore clear that the plaintiff was not relying upon the statements of the defendants, but, as he himself said, “On the strength of Mr. Fox's words,” and, this being so, he cannot make a claim that he was acting in reliance upon any representations of the defendants.

For these reasons it is submitted that the judgment in this case should be reversed.

Respectfully submitted,
BOURGEOIS & COULOMB,
Attorneys for Appellants.

