ficial purchaser, determined to make use of that fact to secure some additional advantage.

I find as a fact that what took place on the 17th amounted to a deliberate repudiation on the part of Finkleman and his solicitor of all obligation to convey the lands in question and a refusal so to convey.

On the morning of the 18th, there was an entirely unexpected change of heart on the part of Finkleman and Smith. They were then ready to convey. There was likewise a change of heart and desire on the part of the purchaser. The contract having been repudiated and performance of it refused on the 17th, the purchaser claimed to be entirely exonerated therefrom. The purchaser refused on the 18th to carry out the contract of which he sought performance on the 17th, and he also maintained that Finkleman, having refused to convey on the 17th, when he ought to have conveyed, became liable to refund the $1,000. This action is brought to recover this sum. The $500 was paid to Vanderwater, and I am not concerned with it.

First as to Smith. He acted as agent for Finkleman. He received the money as Finkleman's agent. When the money was paid to Smith, it became and was Finkleman's. If there is a liability to refund, that liability is Finkleman's. I, therefore, think the action should be dismissed as to Smith, but I would not give him costs, as I cannot see that costs have been in any way increased by his presence.

Mr. Watson contends, first, that there was no repudiation of the contract on the 17th; that there was no contract closed on the 17th; time not being of the essence of any arrangement that was made; and that, even if there was a repudiation, there is a right, where no harm is shewn to have been done, to reform the contract.

I think this argument is based upon a fundamental misconception. Originally there was no contractual relationship between the parties to this action. The plaintiff's contract was with Vanderwater; the defendant's contract was also with him; but there was a parol agreement by which the defendant should convey to the plaintiff on receipt from the plaintiff of the balance due under the defendant's contract with Vanderwater. It was known that this was under and in part performance of a contract between the plaintiff and Vanderwater. It was known that time was of the essence of this contract; and, when the plaintiff found himself unable to complete the contract on the 15th as he had undertaken, the new contract then made, to close on the 17th, was a contract that, I think, embodied in it by