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PLEADINGS, ETC.

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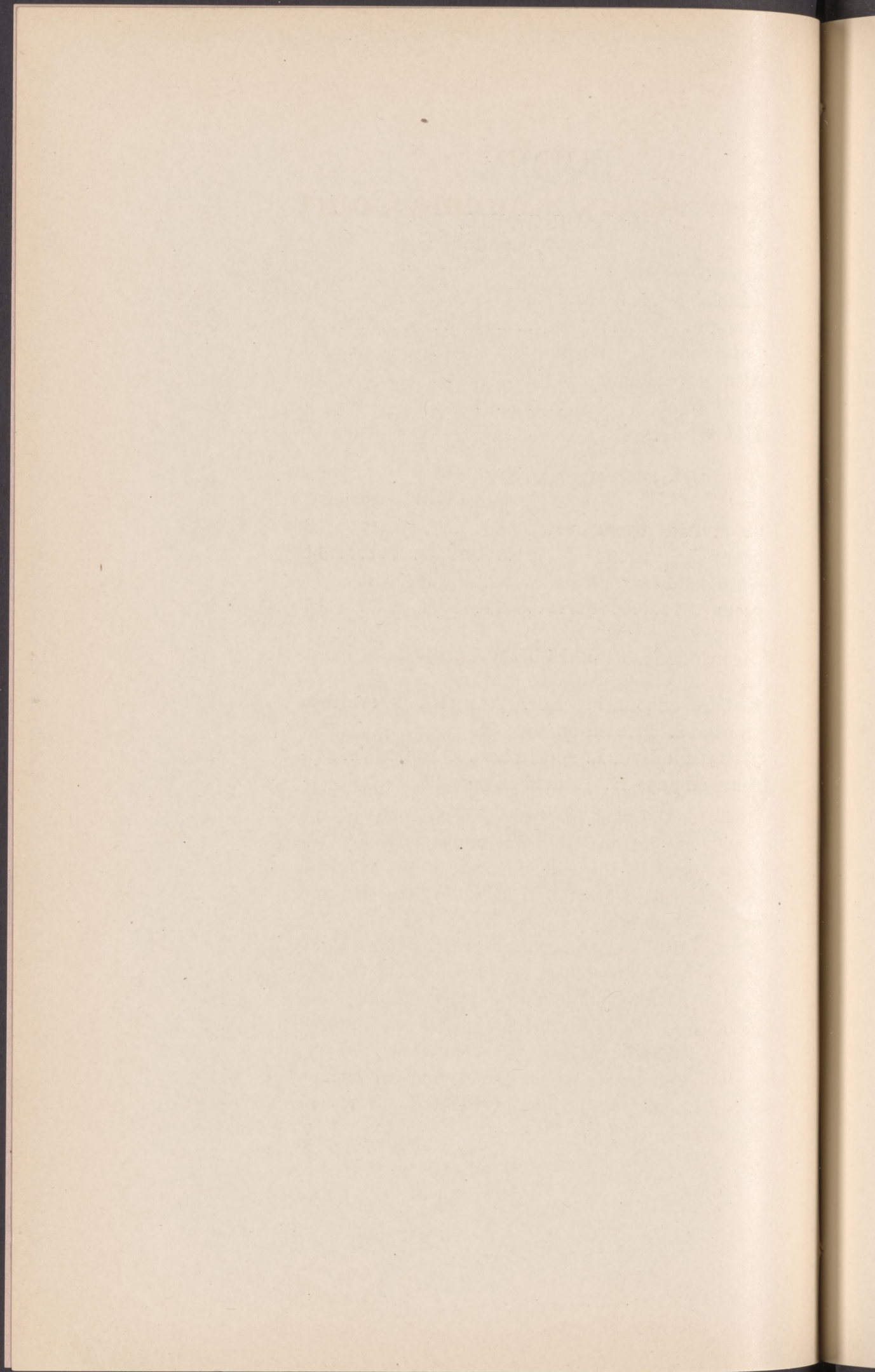
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EXHIBITS

P-1—Card announcing sale. Admitted in evidence on page 8. Printed on page 22.

P-2—Receipt from R. A. Clement. Admitted in evidence on page 10. Printed on page 23.



Complaint

New Jersey Supreme Court

Passaic County

Raymond J. Lee,

Plaintiff,

vs.

Robert A. Clement,

Defendant.

Transcript of
Pleadings for
Trial

Edward F. Merrey,

10

Attorney for Plaintiff,

Humphreys & Sumner,

Attorneys for Defendant.

Summons issued November 25, 1924.

Plaintiff, a resident of the City of Paterson, County of Passaic and State of New Jersey, says that:

1. On the twenty-first day of March, Nineteen Hundred and twenty-four, the defendant, Robert A. Clement, held a public auction sale in the City of Paterson, wherein he proposed to sell property claimed by the said Robert A. Clement, to be the property of Martha W. Perine, substitutionary administrator with the will annexed, of the last will and testament of Martha W. Morris, deceased, and Cornelius C. Morris.

20

2. Plaintiff, believing the representations there made, by the said Robert A. Clement, bid for the said premises the sum of Eleven thousand, five hundred dollars, the terms being that Eleven hundred and fifty dollars in cash was to be paid then, Twenty-three hundred dollars to thirty days and a mortgage was to be made for the sum of Eight thousand and

30

Answer

fifty dollars to the said Martha W. Perine, substitutionary administrator as aforesaid, the said owners to thereupon convey said premises to plaintiff, free and clear of all encumbrances, within thirty days thereafter.

3. The said Robert A. Clement then and there knocked down the said premises to the said plaintiff and the plaintiff paid to the said Robert A. Clement, the sum of Eleven hundred and fifty dollars.

10 4. Thereupon said defendant promised to procure from the owners of said premises, an obligation on their part to convey said premises to plaintiff under the terms of said sale.

5. The said defendant never procured from said owners any instrument in writing obligating them to convey said premises to plaintiff, free and clear of all encumbrances and thereby became obligated to return to plaintiff said deposit.

20 6. Plaintiff was ready and willing at all times to carry out the terms of said sale on his part.

7. Plaintiff demands judgment for Eleven Hundred and fifty dollars, with interest from March 21, 1924.

Edward F. Merrey,
Filed Dec. 2, 1924. Attorney for Plaintiff.

ANSWER

30 Defendant, a resident of the City of Paterson, County of Passaic and State of New Jersey, says, in answer to the complaint in the above entitled cause, that:

1. He denies the first paragraph of the complaint.
2. He denies the second paragraph of the complaint.

Objections to Complaint

3. He denies the third paragraph of the complaint.

4. He denies the fourth paragraph of the complaint.

5. He admits he never procured any instrument in writing obligating any persons to convey any property to the plaintiff free and clear of all encumbrances, or otherwise, but he denies that he is, or ever was, obligated to return to plaintiff the deposit mentioned in the complaint, or any other sum of money.

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6. He denies the sixth paragraph of the complaint.

Humphreys & Sumner,
Attorneys of Defendant.

OBJECTIONS TO COMPLAINT

Defendant objects to the complaint, and will move to strike the same out for the following reasons, namely:

20

First: Because paragraph 1 of the complaint fails to show with any particularity or even generality whether the property proposed to be sold by the defendant was real or personal property, or within which of either of those definitions it was comprehensible of what it in fact was composed, describing it so that the subject matter of the suit would be identifiable as between the parties thereto and third parties.

30

Second: Because paragraph 2 of the complaint fails to allege when the mortgage of \$8,050 was to be made, executed and delivered, and if it can be concluded by the language of paragraph 2 of the

Objections to Complaint

complaint that the mortgage was to be made, executed and delivered on April 20, 1924, the second paragraph of the complaint alleges that the conveyance of said property was not to be made until within thirty days after April 20, 1924, which would render the mortgage ineffectual (except by estoppel) and the contract set forth in the second paragraph of the complaint is so confused and unintelligible as to be incapable of intelligent answer on the part of the defendant.

10

Third: Because the fourth paragraph of the complaint states a conclusion of law unsupported by any facts set forth in the complaint.

Fourth: Because the complaint contains no averment of tender by the plaintiff to the defendant of the sum of \$2300, or of the mortgage for the sum of \$8050, which said sum of money and which said mortgage, it appears by the averments of the second paragraph of the complaint, the plaintiff was bound to pay and deliver to the defendant in thirty days from the day of sale, which date of sale, as averred in the bill of complaint, was March 21, 1924.

20

Fifth: Because the complaint fails to specify or describe with sufficient certainty the property real or personal which it is averred in the first paragraph of the complaint, the defendant proposed to sell, and which it is averred in the third paragraph of the complaint, the defendant knocked down to the plaintiff.

30

Humphreys & Sumner,
Filed Dec. 18, 1924. Attorneys of Defendant.

I, Edward J. Kelleher, Clerk of the Supreme Court

Objections to Complaint

of the State of New Jersey do certify that the foregoing is a true transcript of the pleadings in the above-stated cause as the same remain on file in my office,

In testimony whereof I have set my hand and the seal of said Court at Trenton, this twenty-fifth day of June, A. D. nineteen hundred and twenty-five.

Edward J. Kelleher,
Clerk.

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6
Judgment

NEW JERSEY SUPREME COURT

Robert A. Clement,	Defendant,	Action at Law On Postea
ads.		
Raymond J. Lee,	Plaintiff.	

10 It is ordered that judgment of non suit be and hereby is entered in favor of defendant and against the plaintiff with costs to be taxed nisi.

Entered July 1, 1925.

On motion of
Humphreys & Sumner,
Attorneys.

Costs
\$39.10

20 A true copy

Edward J. Kelleher,
Clerk.

7
Appeal

NEW JERSEY SUPREME COURT

Raymond J. Lee,	} Plaintiff,	} Action at Law
vs.		
Robert A. Clement,	} Defendant.	

NOTICE OF APPEAL

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To Humphreys & Sumner,
Attorneys for Defendant.
Gentlemen:

Take Notice that the plaintiff appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause, on the following grounds:

(1) Because the Court below non-suited the plaintiff.

(2) Because the Court held that there was no consideration for the agreement by defendant to procure a written agreement from the owners of the lands sold by him to plaintiff.

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Edward F. Merrey,
Attorney of Appellant.

Service of the within Notice of Appeal is hereby acknowledged this 4th day of June, 1926.

Humphreys & Sumner,
Attorneys of Defendant.

30

John F. Lee—direct

PASSAIC CIRCUIT

Raymond J. Lee,

Plaintiff,

vs.

Robert A. Clement,

Defendant.

At Law

Paterson, N. J., June 29, 1925.

10

Before Hon. Clifford L. Newman, Judge, and a Jury.

Edward F. Merrey, Esq., for Plaintiff.

Messrs. Humphreys & Sumner, for Defendant.

JOHN F. LEE, sworn.

20 Direct Examination by Mr. Merrey:

Q. Mr. Lee, did you receive this card through the mail? A. I did.

Mr. Merrey—I want to offer this.

Mr. Sumner—All right.

(Card offered in evidence and marked "Exhibit P-1" and read to the jury.)

30 Q. Mr. Lee, did you attend that sale? A. I did.

The Court—What was the date of it?

Mr. Merrey—March 21, 1924.

John F. Lee—direct

Q. Who conducted the sale? A. Mr. Clement.

Q. Which Mr. Clement? A. Robert A. Clement.

Q. Robert A. Clement who is sitting here? A. Yes.

Q. Did it occur on the day of this advertisement? A. It did.

Q. Were there many bidders there? A. Oh, probably about a half a dozen.

Q. Did you bid on the property? A. I did. 10

Q. For whom? A. For my son.

Q. What was your son's name? A. Raymond J. Lee.

Q. How much did you bid? A. \$11,500.

Q. At that time did you speak to the auctioneer about your bid? What did the auctioneer say when you bid \$11,500? A. He asked me—

Q. Did he make a sale of it; were you the successful bidder? A. Yes; the property was, as is usually said, knocked down to me, and Mr. Clement asked me to step up and sign the paper. I told him at the time that I did not have any check with me, but as soon as I went to the office I would see that he got one, and I was going to put the property in the name of Raymond J. Lee. He said, "You sign your name," and I signed my name to the paper he had there, and came to the office and made out a check and sent it over to Mr. Clement's office—made it out to Robert A. Clement and sent it to his office. 20

Q. Did you get a receipt from Mr. Clement? A. No. 30

Q. At any time, a receipt for the money? A. On the following day I called up Mr. Clement on the phone and told him that I thought I should have

John F. Lee—direct

some acknowledgment of my payment of \$1150, some agreement from the parties who owned the property, and he said, "That will be all right; I will see that you get one." So I waited two or three days and yet did not get any acknowledgment and then I called him up again and he gave me—put me off by saying, "I will take care of that;" so the following week I went to his office and I told him, I said, "Now, Mr. Clement, you have got \$1150 of my money and I haven't got a thing to show for it." I said, "We want something to show for this money." "Oh," he says, "if that is what you want," he says, "why, I will give you this," and he wrote out that postal card.

Q. This receipt? A. Yes. Well, I said—

Q. Just a minute. I am going to offer this.

(Paper marked "Exhibit P-2".)

20 A. He dated it back to the 21st of — the date of the auction sale.

Mr. Merrey—It reads: "Paterson, N. J., March 21, 1924, Received from Mr. Lee, \$1,150, R. A. Clement."

Q. Did you ever get any other paper signed by Mr. Clement? A. At the time he signed that—

Q. Did you ever get any other paper? A. No; never got any other paper.

30 Q. Did you ever get any papers or agreement in writing signed by those who purported to be the owners of this estate? A. That is the only paper I ever received, that paper there.

John F. Lee—cross

Q. Were you ready and willing to go through with your bargain? A. I was.

Q. Did you ask Mr. Clement for the money back? A. Yes; I went to Mr. Clement and told him I either wanted the property or my money back.

Q. Well, how often did you go to him, if more than once? A. Well, I think probably—I know I went not less than three or four times.

Q. Did he ever refer you to anybody? A. Yes.

Q. Who did he refer you to? A. He referred me to Judge Lewis. 10

Q. Did you see Judge Lewis? A. I did.

Q. What did he tell you? A. Judge Lewis told me he had a deed there, but he didn't know anything at all about any mortgages or taxes. I said there was taxes due on the property. He said he didn't know anything about the taxes.

Mr. Sumner—I object to this conversation with Judge Lewis. 20

The Court—Strike out what Judge Lewis said.

Q. Did you ever get the money back from Mr. Clement? A. Never got the money back.

Q. He still has it? A. He still has it.

Cross Examination by Mr. Sumner:

Q. Isn't it a fact, Mr. Lee, that you purchased this property for yourself? A. For myself? 30

Q. Yes, sir. A. I purchased it for my son.

Q. Isn't it a fact that you simply wished to keep from the public any knowledge that you had purchased this property which you wanted the deed

John F. Lee—cross

made in your son's name? A. That I wanted to keep it from the public?

Q. Yes. A. No.

Q. Didn't you make the same request that it should not be made public, that you had been the purchaser of this property? A. Never did.

Q. Of Mr. Clement? Didn't you ask Mr. Clement to keep it quiet that you bought this property?

A. I asked Mr. Clement to put it in the name of my son.

10

Q. You mean to put the deed in the name of the son? A. Yes. Yes; I told Mr. Clement at the same time "When you are publishing a statement of that sale, put it in the name of my son."

Q. Weren't there reasons why you did not want the title of this property to be made to you direct?

Mr. Merrey—I object to this.

The Court—I will permit it.

20

A. Well, the reason that I—for a number of years back, since my wife died, all the property that was bought was bought by Mr. Lee. When she died she left her property to him.

Q. Well, you have a good many properties in the name of your son, do you not, that really belong to you? A. Well, we both have an interest in them.

30

Q. Before your wife's death you used to carry them in her name? A. Yes.

Q. They are properties that really belong to you? A. They were bought with her money, most of them.

Q. Isn't it a fact that at the time of this sale

John F. Lee—cross

and up to the present time there are judgments outstanding against you that would become a lien on any property in Passaic County that you took title to?

Mr. Merrey—I object to that question as not proper cross examination and it is not evidential to this question.

Mr. Sumner—This is directed to his veracity.

10

The Court—I think it is permissible on that point.

Mr. Merrey—I object and ask an exception.

Q. Aren't there judgments unsatisfied of record outstanding here in Passaic County against you, Mr. Lee? A. May I explain that?

Q. Answer the question. A. Yes; there is one judgment.

Q. Aren't there two? A. No, sir.

20

Q. Which one is it, the People's Loan & Building Association of Paterson, is that the judgment you refer to?

Mr. Merrey—I object to this.

The Court—Yes, the fact that there is a judgment is enough.

Mr. Sumner—Very well.

The Witness—There is reasons for that I would like to explain, but of course I can't do it.

30

Mr. Merrey—It is not necessary, Mr. Lee, at all.

Raymond J. Lee—direct

Q. Is this the paper you signed on the day of the sale? A. Yes, that is the paper.

Q. I call your attention, Mr. Lee, to these signatures or what purport to be the signatures of Martha W. Perrine and Cornelius E. Morris. Have you any knowledge as to when they were signed? A. They were not on there when I signed it.

Q. You don't know when they were put on? A. I don't know when they were put on, no.

10

Mr. Sumner—I would like to have this paper marked for identification.

(Paper marked D-1 for identification.)

Q. You say, Mr. Lee, you gave Mr. Clement a check? A. Yes, sir.

Q. Have you that check with you? A. I haven't got it with me. I can get it in—

Q. It was your check? A. My check, yes.

20

By Mr. Merrey:

Q. Was this paper ever delivered to you which was marked for identification? A. Never.

Q. Never. Did you ever see those names on that paper before of Martha W. Perrine and Cornelius E. Morris? A. I never did.

30

RAYMOND J. LEE, the plaintiff called as a witness in his own behalf, being first duly sworn, testified as follows:

Raymond J. Lee—cross

Direct Examination by Mr. Merrey:

Q. Mr. Lee, are you the plaintiff in this case?

A. Yes.

Q. Did your father represent you at this sale?

A. Yes, sir.

Q. Did Mr. Clement ever return to you the money that was paid? A. No, sir.

Q. Did you ever get from him any agreement in writing to convey this property to you? A. No, sir.

10

Q. Did you ever see this paper which is marked "Exhibit B-1" for identification? A. No, sir.

Q. Were all the negotiations carried on by your father? A. Yes, sir.

Q. With your authority? A. Yes.

Mr. Merrey—That is all.

Cross Examination by Mr. Sumner:

Q. How old are you, Mr. Lee? A. 26.

20

Mr. Merrey—Just pardon me. Did you ever go to Mr. Clement's office in regard to this transaction?

The Witness—No, sir.

Mr. Merrey—With your father?

The Witness—Not to Mr. Clement's office, no.

Mr. Merrey—Did you ever see Mr. Clement anywhere about it?

30

The Witness—No, sir.

Q. How old are you, Mr. Lee? A. 26.

Q. What is your business? A. I am in business with my father, real estate and insurance.

Raymond J. Lee—cross

Q. What is the character of the business that you do yourself? A. I take care of the insurance business and any business that my father and I go in on together in regard to real estate.

Q. Have you ever before this transaction purchased property in your own name or for yourself?

A. No, sir, not directly.

Q. There are numerous cases, are there not, on record where property has been taken by your father in your name? A. Yes, sir.

10 Q. But which really belongs to him? A. No, sir.

Q. They belong to you, you mean? A. Father has bought it as agent for me.

Q. As agent? A. Yes.

Q. You mean to say the property is yours? A. Yes, sir.

Q. You get the proceeds? A. Yes, sir.

Q. Where the properties are sold? A. Yes, sir.

20 Q. As your own personal property? A. Well, father and I are in business together. That is, where the proceeds come in. I have an interest in the business.

Q. Take the case of a deed from Joseph D. Donis to you, dated May 8, 1920. Can you tell us what that property was?

Mr. Merrey—I object to that as not cross examination.

30 Mr. Sumner—I think it is testing his veracity.

The Court—I do not think it is cross examination.

Raymond J. Lee—cross

Q. On this particular property, Mr. Lee, when did you first get an interest in it? A. When we received this notice of the sale.

Q. When did you receive that notice? A. I could not say the exact date. The notices usually come in about a week ahead of the sale.

Q. What did you do about it when you got it? A. Why, father and I looked it over together.

Q. You what? A. My father and I looked this notice over together and he went up in the interest of both he and I to bid on this property. 10

Q. Then you decided after your father looked at it that you would go to buy it; is that it? A. Father bid on it, having my consent.

Q. Answer the question, please. When did you make up your mind that you wanted to buy this property? A. I left that in the interest of my father.

Q. You left that to your father. Didn't you ever make up your mind that you wanted it? A. I rely on my father's knowledge whether or not it was worth while. 20

Q. Did you know whether you had made up your mind or not before this sale? A. We made up our minds that if we could buy the property at the right price we would buy it.

Q. Had you come to any conclusion as to what the property was worth? A. No, sir; I had not personally.

Q. Had you fixed any price that you were going to pay for it? A. I relied on my father's knowledge of real estate, his being in business so long. 30

Q. Never go and look at the property yourself? A. Yes, sir, I did look at it the day of the sale.

Raymond J. Lee—cross

Q. What time of the day? A. About two o'clock in the afternoon.

Q. When you looked at it what did you think it was worth?

Mr. Merrey—I object to it. I do not think that this is cross examination.

10 A. I don't feel as though my knowledge of real estate is enough to estimate it.

Mr. Merrey—The question is, whether he had authorized his father to go there and whether he received the money back.

The Court—I will permit it.

(Answer repeated by the stenographer.)

Q. Did you furnish the \$1150 to your father?

A. No, sir.

20 Q. So it is not your money that you are suing for? A. It is money of the business.

Q. What business? A. My father and I.

Q. Is there a partnership there? A. There is nothing on record, but there is a partnership.

30 Q. Since the sale what have you done yourself, aside from your father, to get this title, a perfect title? A. Well, I have gone over all the papers with my father in regards to this title and I have kept in touch with him and I know that he is—
went over to Judge Lewis' office a number of times trying to straighten this out, and I attended at your office one night trying to straighten it out.

(Plaintiff rests.)

Motion for Non-Suit

Defendant motions for non-suit.

Mr. Sumner—I move for a non-suit, first, on the ground that the complaint does not set forth a good cause of action; second, on the ground that the cause as opened by counsel for the plaintiff varies from the cause set forth in his complaint; third, this is a case relating to the purchase and sale of real estate, and so far as the plaintiff himself is concerned there is nothing in writing on the subject; furthermore, it is an attempt to vary the terms of a written contract relating to the purchase and sale of real estate; the plaintiff's father, John F. Lee, has admitted he signed these conditions of sale, which indicate the sale to him, and they are attempting to show now that the property was not sold to John F. Lee but was sold to the plaintiff, Raymond J. Lee; then, furthermore, they are trying the issue on the theory that John F. Lee was acting as the agent of his son as an undisclosed principal, and where there is an agreement in writing signed by a party that discloses no agency, I understand that the law is that the undisclosed principal cannot sue on a written contract. The contract in writing is admitted by John F. Lee and signed by himself.

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The Court—There was no testimony of failure to procure such agreement.

30

Mr. Merrey—Yes; he promised to get the obligation in writing from the Morris Estate.

The Court—There seems to be no testi-

Motion for Non-Suit

mony that there was any such agreement at the time the money was paid.

10 Mr. Sumner—As a further ground, which I omitted to state, although it may have been covered by some of the other grounds, there is no evidence of a tender as I contend there should be in this case. Furthermore there is no evidence of any rescission of the contract. The evidence also shows that the pay-
ment was made by John F. Lee, not by the plaintiff; if anyone is entitled to recover in this suit it is John F. Lee, not the present plaintiff; and then we come to the point which your Honor raised, which I think is the strongest point probably in the case, and that is that there is no evidence of the special contract which they allege in their complaint.

20 The Court—The issue in this case is very narrow. The testimony on the part of the plaintiff, even in any other questions than the one there dealt with, shows that this property was purchased by the plaintiff or someone and \$1150 paid, Mr. Lee, Sr., signing the conditions, which are not in evidence. On the day after the payment of the deposit of \$1150 Mr. Lee, Sr., called upon Mr. Clement, stating that he thought he should have some agreement or writing from the owners of the premises, and the defendant on that
30 occasion promised to get such agreement. The basis of this suit and the only basis is a failure to deliver such obligation. In the opinion of the Court there was no consideration for this agreement to procure a certain

Motion for Non-Suit

agreement, the conversation taking place on the day subsequent to the signing of the conditions and the payment of the deposit. This case involves nothing concerning the title or tenders or any other question except the one specific question, and the plaintiff relying solely upon a breach of that agreement to procure a certain agreement from the owners. For those reasons, and not dealing with the others, the motion for non-suit will be granted, and you may have an exception. 10

Mr. Merrey—I pray an exception.

20

30

Exhibit P-1

EXHIBIT P-1

AUCTION SALE

OF

REAL ESTATE

t

and

Household Furniture

10

To be sold at

Public Auction

FRIDAY MARCH 21, 1924

At 1:30 P. M. Sharp

Positively Regardless of Weather

On the Premises

769 East 24th St., near Park Ave.

Property known as the Morris Residence

20

Real Estate consists of: One family dwelling, 14 rooms and baths, hardwood floors, on plot 69x100 feet, located in one of the best residential sections of Paterson, N. J.

30

Furniture consists of: Piano and stool, parlor suite, old Mahogany side board, Mahogany dining room table, Mahogany sofa, Mahogany card table, old chairs, Mahogany crib, Mahogany cradle; over 200 years old, Marble clocks, old vases, andirons, bric-a-brac, lot of oil paintings, books, carpets, hall and stair carpets, extension table and chairs, mirrors, center tables, beds, springs, hair mattresses, dressers, washstands, rockers, dishes and tinware and other articles too numerous to mention.

Terms of sale: 10 percent. down on day of sale,

Exhibit P-1 and P-2

20 per cent. in 30 days and 70 percent. can remain
on bond and mortgage. By order estate of
Martha W. Morris.

ROBERT A. CLEMENT & SON

Green Flag Auctioneers

Office 90 Washington Street

Clement Building

Rooms 1, 2, 3.

Tel. 2775 Lambert.

Paterson, N. J.

EXHIBIT P-2

10

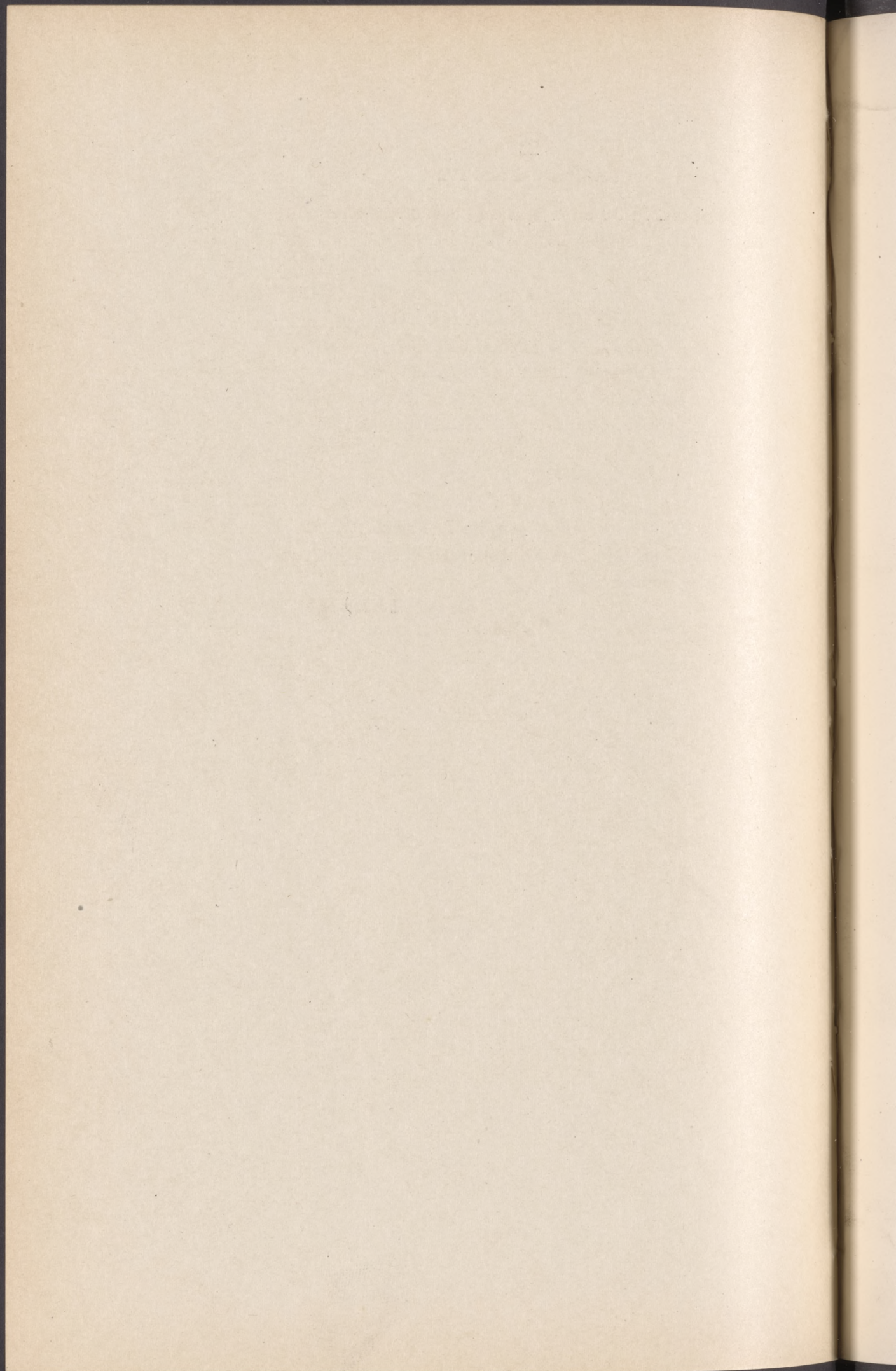
Paterson, N. J., March 21, 1924.

Received from Mr. Lee (\$1150.00) Eleven Hundred
and fifty Dollars.

R. A. CLEMENT.

20

30



New Jersey Court of Errors and Appeals

Raymond J. Lee, Plaintiff-Appellant, vs. Robert A. Clement, Defendant-Respondent.	}	On Appeal From New Jer- sey Supreme Court. Action-At-Law
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BRIEF ON BEHALF OF RESPONDENT.

This is an appeal by Raymond J. Lee from a judgment of non-suit entered July 1, 1925, in favor of defendant and against the plaintiff (State of Case, page 6). The opinion of Judge Newman, who tried the case for the Supreme Court, will be found in the State of the Case at page 20, line 18.

STATEMENT OF THE CASE.

The "outline of the facts" in appellant's brief, and some of the statements contained in the argument set forth in such brief, require, for the benefit of the court, that an independent statement of some of the facts should here be made.

The sole question determined by the Court below, when the motion for non-suit was made, was that there was no consideration for the alleged promise by the defendant made the day after the sale that he would obtain some acknowledgement of the payment of \$1150 (part of the purchase money)—some agreement from the grantors who owned the property, or, as the appellant puts it in his complaint, "thereupon said defendant promised to procure from

the owners of said premises an obligation on their part to convey said premises to plaintiff under the terms of said sale."

"The said defendant never procured from said owners any instrument in writing obligating them to convey said premises to plaintiff free and clear of all encumbrances, and **thereby became obligated to return to plaintiff said deposit.**" (State of Case, page 2, line 10-18).

The sole questions therefore involved in the non-suit were: (1) Was there any consideration for the alleged promise on the part of the respondent to procure such obligation from the owners of said premises? (2) If there was in fact any consideration for such promise, did the breach of that promise involve an obligation on the part of the defendant to return said deposit (\$1150)?

(That the owners did in fact agree to sell as owners of the property we ^{were} ~~are~~ prepared to prove by a production of the conditions of sale duly signed by them and by the respondent as their agent and by John F. Lee, who afterwards claimed to represent as agent his son, the appellant, but the judgment of non-suit rendered that unnecessary, and the present argument must therefore be confined to the facts as set forth in the State of the Case.)

An attempt was made by the appellant to introduce evidence into the case which would have been germane to the issues had the suit been one for

damages for breach of contract of sale brought against the vendors.

Mr. John F. Lee testified:

“Q. Were you ready and willing to go through with your bargain? A. I was.

Q. Did you ask Mr. Clement for the money back? A. Yes; I went to Mr. Clement and told him I either wanted the property or my money back. Q. Well, how often did you

go to him if more than once? A. Well, I think probably I know I went not less than three or four times. Q. Did he ever refer

you to anybody? A. Yes. Q. Who did he refer you to? A. He referred me to Judge

Lewis. Q. Did you see Judge Lewis? A. I did. Q. What did he tell you? A. Judge

Lewis told me he had a deed there, but he did not know anything at all about any mortgages or taxes. I said there was taxes

due on the property. He said he did not know anything about the taxes. Q. Did you ever

get the money back from Mr. Clement? A. Never got the money back. Q. He still has

it? A. He still has it.”

On cross-examination, when shown the conditions of sale, with what purported to be the signatures of Martha W. Perine and Cornelius C. Morris signed thereto, he stated that those signatures were not there when he signed the conditions. (State of Case, page 14, lines 1 to 10.)

In his brief counsel for the appellant says:

"The property was never conveyed to the plaintiff. Plaintiff or his agent several times asked the defendant to either convey the property or give the money back. The defendant refused to pay the money back, and from the testimony the property was never conveyed to the plaintiff, although the testimony shows that the plaintiff was ready and willing at all times to go through with his bargain." (See brief of Counsel, page 2, line 13-19.)

These remarks of counsel would seem to indicate that he, in some vague way, regards this suit as in the nature of a suit for damages for breach of contract to sell on the part of the owners of the property (Martha W. Perine and Cornelius C. Morris), in that they have not ever given to the appellant any deed for said premises. The slightest reference, however, to the complaint shows that this is not the nature of the suit, and had it been, the appellant could not have recovered (1) because such a suit should have been brought against the principals and not against the agent, and (2) because there was no evidence introduced whatever (nor could there have been under the facts of the case) of any tender of the \$2300, part of the purchase money which fell due on April 20, 1924, nor any tender of the mortgage for \$8050, which was due at the same time.

It is of course elementary that if vendor or vendee wishes to enforce a contract of sale of lands against the other, he immediately makes his part of

the agreement precedent; Long vs. Hartwell, Admr., 34 N. J. L., 116; and it needs no citation of authorities for the principle that to constitute a valid tender the money must be actually produced and offered in payment.

ARGUMENT

With the above preamble we pass to the only questions involved in this appeal.

POINT I.

THERE WAS NO CONSIDERATION FOR THE ALLEGED PROMISE ON THE PART OF RESPONDENT TO PROCURE THE OBLIGATION REFERRED TO IN THE BRIEF FROM THE OWNERS OF SAID PREMISES.

There was an obligation on the part of the respondent to disclose the names of his principals.

Mills vs. Hunt, 20 Wend. (N. Y. 431).

And there was no evidence whatever that the respondent failed in performing his duty in this respect. The advertisement of the sale expressly describes the property as the **Morris Residence**, and that the sale was to be made by the order of the estate of Martha W. Morris (State of the Case, pp. 22-23) and the first paragraph of the complaint alleges that "On the twenty-first day of March, Nineteen Hundred and Twenty Four, the defendant Robert A. Clement, held a public auction sale in the

City of Paterson, wherein he proposed to sell property claimed by the said Robert A. Clement to be the property of Martha W. Perine, substitutionary administrator with the will annexed of the last will and testament of Martha W. Morris, deceased, and Cornelius C. Morris." (State of the Case, page 1. line 20-28.)

If Mr. Lee did not himself know (as ^{he} ~~is~~ undoubtedly did) the addresses of Mrs. Perine and Cornelius C. Morris, he could, without the slightest difficulty, have ascertained these by personal inquiry. No authority is cited in counsel's brief for the necessity or duty resting on an auctioneer to procure from his principals a contract of sale. He is the agent of both parties, and his contract binds his principals. (Smith's Manual of Common Law, First American Edition, page 168).

Counsel for the appellant entirely overlooks the rule of law that it is not necessary that the authority of an agent to bind his principal by written agreement to convey lands shall be in writing. It is well settled that such an agreement may be by parol.

Long vs. Hartwell, Admr., 34 N. J. L., 116.

Milne vs. Kleb, 44 J. Eq., 378.

Tyrrel vs. O'Connor, 56 N. J. Eq., 444. 452.

Clearly the agreement of the respondent, if in fact given, to procure from the owners a contract to sell, was an agreement to do something entirely outside of his duties and was **nudum pactum**, and the promise was therefore without consideration.

POINT II.

But even if the alleged breach of this *nudum pactum* on the part of the auctioneer respondent conferred some legal cause of ~~action~~^{action} for damages on the part of the appellant against the respondent, it certainly conferred no right upon the appellant to receive from the respondent the \$1150 deposit which belonged to the owners of the property, and not to the respondent.

It is well settled that a *deposit* is a sum of money paid as a guaranty for the fulfillment of the contract of sale. It is not a mere pledge, but a first payment of the purchase price.

Palmer vs. Temple, 9 Ad. & El., 508.

And it has been held in this State in the case of *Stephens vs. Bacon*, 7 N. J. L., page 1, that: "Where A as the attorney-in-fact of B, receives money in which C. has the beneficiary interest, C. cannot maintain an action against A for the money so received; but must sue B., the principal—A mere agent, without suggestion of fraud, is answerable only to his principal."

If any liability rested upon anybody to return to the appellant the amount of his deposit (\$1150.) that liability rested upon the owners of the property, and not upon the respondent.

Assume, for the purposes of the argument, that there was a breach of a valid contract on the part

of the respondent to obtain from the owners of the property a contract to sell the property on the terms set forth in the conditions of sale, the measure of damages would certainly not have been the amount of the deposit, but possibly the cost which the appellant might have sustained in himself procuring this contract of sale from the owners.

The whole subject matter of this suit, its trial and outcome, clearly manifest lack of appreciation on the part of counsel for the appellant of the only issues which might have been raised in this case had proper tenders of the purchase money been made and a refusal to convey on the part of the owners communicated by them to the purchaser. But in lieu of this the contest has been over a chimerical cause of action, meaningless in its effects and which could only be disposed of intelligently (as it was) by a non-suit of the plaintiff. Of course, if proper tenders of the purchase money had been made, there would have been no refusal on the part of the owners to convey in pursuance of the contract.

It is true that there was no evidence in the case at the time the non-suit was granted that the respondent had ever signed the contract of sale composed of the advertisement and conditions of sale as agent for the owners, but neither was there any evidence to the contrary, and under the maxim of "*omnia presumuntur rite acta esse*" it should be presumed (as the fact was) that said signature of the auctioneer was attached to the contract. The burden of proof to the contrary lay on the appellant, because if the auctioneer had signed the contract that

was all sufficient, and there could not possibly be any consideration for the alleged promise of the respondent to procure a further contract to be signed by the owners. Therefore, before any consideration for such promise could be established, it was essential that it should be proven that the contract was not signed by the auctioneer.

Moreover, there was evidence that at the time of the trial the contract in fact bore the signature of both Martha W. Perine and Cornelius C. Morris, the owners of the property (State of the Case, page 14, line 1 to 9) and in the case of *White vs. Dahlquist Manufacturing Co.*, 179 Mass., 427, it was held that:

“Because an auctioneer is the agent of both seller and buyer for the purpose of signing a memorandum of a ^{sale}~~sale~~ made by him, it does not follow that his agency for the one is co-extensive in its nature and duration with that for the other. His agency for the buyer is usually conferred when the bid is accepted, and begins with the fall of the hammer. Such an authority must be exercised contemporaneously with the sale. But the auctioneer’s agency for the seller is generally more extensive, and may cover a time both before and after the sale. When such authority exists and is not revoked, the auctioneer may bind the seller by a memorandum signed within a reasonable time.”

Moreover, the non-suit was properly granted not only for the reasons stated by the trial judge, but because the present plaintiff had no interest in the

subject matter of the suit. There was no written evidence that the appellant was the real principal in the case.

“Employment of an agent to **purchase** lands as distinguished from an employment to sell lands is within the Statute of Frauds, which requires the contract to be in writing.”

Wallace vs. Brown, 10 N. J. Eq., 308.

For these reasons we respectfully submit that the judgment of non-suit below should be affirmed with costs.

Respectfully submitted,

Humphreys & Sumner,
Attorneys of Respondents.

John B. Humphres,
William A. Sumner,
Of counsel.

October Term, 1926.

New Jersey Court of Errors and Appeals

Raymond J. Lee,
Plaintiff-Appellant,
vs.
Robert A. Clement,
Defendant-Respondent

BRIEF OF EDWARD F. MERREY, OF COUNSEL WITH PLAINTIFF-APPELLANT

I.

STATEMENT OF THE CASE

The defendant was an auctioneer and advertised a public auction sale of property in the City of Paterson. The advertisement is offered as Exhibit P-1 and is found on page 22 of the Case.

On the date of the sale, Mr. John F. Lee, the father of the plaintiff, acting as the agent of the plaintiff, appeared at the sale and was the highest bidder. The real estate in question was knocked down to him by the auctioneer for Eleven Thousand, Five Hundred Dollars (\$11,500.00). He announced to the auctioneer that the property was bought in the name of the plaintiff, and went to his office and delivered a check to the defendant for Eleven Hundred and Fifty Dollars (\$1150.00). The auctioneer did not give a receipt for the money and on the date following the sale, Mr. Lee called up the defendant and told him that he thought he should have some acknowledgment for his payment of Eleven Hundred

and Fifty Dollars (\$1150.00), that is, some agreement from the parties who owned the property, and the defendant promised that he would get such an acknowledgment but did not do so and in fact from the evidence, he never delivered to either the plaintiff or his agent, any acknowledgment by the supposed owners of the property of the receipt of the money or any agreement on their part to convey the same.

Several days later, the defendant gave his own personal receipt for the Eleven Hundred and Fifty Dollars (\$1150.00) dating it back to the date of the sale. This is shown as Exhibit P-2 on page 23 of the Case.

The property was never conveyed to the plaintiff. Plaintiff or his agent several times asked the defendant to either convey the property or give the money back. The defendant refuses to pay the money back and from the testimony the property was never conveyed to the plaintiff, although the testimony shows that the plaintiff was ready and willing at all times to go through with his bargain.

The defendant moved for a non-suit and this was granted by the court. The plaintiff excepted to this ruling. Question as to whether non-suit was proper is the one that is presented to this court on this appeal.

II.

GROUND OF APPEAL RELIED UPON

The grounds of appeal relied upon are:

- (1) Because the court below non-suited the plaintiff.

(2) Because the court held that there was no consideration for the agreement by the defendant to procure a written agreement from the owners of land sold by the defendant to plaintiff.

III.

ARGUMENT

In granting the motion for non-suit, the court stated its reasons, which were as follows:

“The Court—The issue in this case is very narrow. The testimony on the part of the plaintiff, even in any other questions than the one there dealt with, shows that this property was purchased by the plaintiff or someone and \$1150 paid, Mr. Lee, Sr., signing the conditions, which are not in evidence. On the day after the payment of the deposit of \$1150 Mr. Lee, Sr., called upon Mr. Clement, stating that he thought he should have some agreement or writing from the owners of the premises, and the defendant on that occasion promised to get such agreement. The basis of this suit and the only basis is a failure to deliver such obligation. In the opinion of the Court there was no consideration for this agreement to procure a certain agreement, the conversation taking place on the day subsequent to the signing of the conditions and the payment of the deposit. This case involves nothing concerning the title or tenders or any other question except the one specific question, and the plaintiff

relying solely upon a breach of that agreement to procure a certain agreement from the owners. For those reasons, and not dealing with the others, the motion for non-suit will be granted, and you may have an exception."

It seems to me that the issue involved was, as the court said, very narrow. The ruling of the court was that there was no consideration for the agreement on the part of the defendant to procure the agreement binding the owners of the property to convey. The court seemed to put this upon the fact that the auctioneer made the promise on the date following the receipt of the money. I think that there was an implied promise on the part of the auctioneer to get this agreement on the very instant that he received the money and that his express promise on the following date was only a statement of what his implied obligation was when he received the money.

We think that if an intending purchaser attends an auction sale and the auctioneer knocks down the property and asks a ten per cent deposit, that upon his acceptance of the deposit, he becomes under obligation to the intending purchaser. Certainly, the auctioneer cannot put this money in his pocket and walk away and keep it. There must be a promise of some kind implied and that is either to carry out the advertised terms of the auction or to return the money.

The plaintiff knows nothing as to whether the auctioneer was authorized by the owners of the

property to sell the same. Under the decisions, the plaintiff could not enforce the sale of the property by the owners thereof, whoever they may be. He has nothing in writing signed which binds anybody to convey the real estate. Exhibit P-2, which is the only thing in writing which Mr. Lee received, does not indicate the purpose of which the money was received. This is a mere acknowledgment of the receipt of money.

“Paterson, N. J., March 21, 1924. Received from Mr. Lee (\$1150.00) Eleven Hundred and Fifty Dollars. R. A. Clement.”

“Payment of a part, or even of the whole, of the purchase-money, under an oral agreement for the sale of land, is not an act of part performance to take the contract out of the statute of frauds.”

Cooper vs. Colson, 66 N. J. Eq., 328.

We are therefore in the position of having attended an auction sale, bid upon a piece of property and paid the auctioneer the sum of Eleven Hundred and Fifty Dollars (\$1150.00) of our money. From the testimony, the auctioneer has neither arranged that we get the property we bid for, nor a binding agreement from the owners to us, nor has he returned our money.

Certainly, we have some remedy. Under the cases we cannot have the contract carried out and therefore we should be entitled to receive our money back.

I cannot understand the theory of the court in holding that there was no consideration on the part of the auctioneer for his promise.

Respectfully submitted,

EDWARD F. MERREY,

Of counsel with Plaintiff-Appellant.

REPLY TO BRIEF OF COUNSEL WITH DEFENDANT

Much of the brief of counsel for respondent is addressed to the proof that they might have put in had non-suit not been asked for and granted. In the beginning of the brief, it is stated that they were prepared to prove that the owners of the property did in fact agree to sell. It seems to me that a statement of this kind in a brief is not a proper statement as there is no evidence whatever of that fact.

Near the end of the brief, the following statement is made:

“Moreover there was evidence that at the time of the trial, the contract in fact bore the signature of both Martha W. Perine and Cornelius C. Morris, the owners of the property.”

I cannot agree with the above statement. There is no evidence whatever of any contract. At the point in the brief of counsel where the above statement is made, reference is made to page 14 of the Case, lines 1 to 9, which is as follows:

“Q. Is this the paper you signed on the day of the sale? A. Yes, that is the paper.

Q. I call your attention, Mr. Lee, to these

signatures or what purport to be the signatures of Martha W. Perine and Cornelius E. Morris. Have you any knowledge as to when they were signed? A. They were not on there when I signed it.

Q. You don't know when they were put on? A. I don't know when they were put on, no."

The only other statement concerning the paper that was signed is on page 9 of the State of the Case, which was as follows: Lines 18 to 29.

"Q. Did he make a sale of it; were you the successful bidder? A. Yes; the property was, as is usually said, knocked down to me, and Mr. Clement asked me to step up and sign the paper. I told him at the time that I did not have any check with me, but as soon as I went to the office I would see that he got one, and I was going to put the property in the name of Raymond J. Lee. He said, 'You sign your name,' and I signed my name to the paper he had there, and came to the office and made out a check and sent it over to Mr. Clement's office—made it out to Robert A. Clement and sent it to his office.

Q. Did you get a receipt from Mr. Clement? A. No."

With this evidence, I cannot understand why counsel should make a statement that the contract was signed. Had this defendant put us in a position whereby we could have sued the owners of the property, we would have done so, but this wily auctioneer

put us in a position where we had absolutely nothing in writing to show that he had the authority of the owners to sell this property, nor did he put us in any position to start suit against them.

Had we started suit against the two owners whom we believe to be Martha W. Perine and Cornelius C. Morris, we probably would have been non-suited.

Exhibit P-2 on page 23 of the State of the Case shows how careful and indefinite this auctioneer was. After we had frequently demanded from him a statement in writing, we received a mere acknowledgment of the receipt of a certain sum of money.

If the defendant had been put to his defense in the above case and if he had full authority to sell the property, he could have proven it and if his defense was good, we could have then sued the owners, but under the circumstances, we have been driven to sue this defendant.

Respectfully submitted,
EDWARD F. MERREY,
Of counsel with Plaintiff-Appellant.

