COMPLAINT.

(Filed Feb. 24, 1926.)

NEW JERSEY SUPREME COURT.
CAMDEN COUNTY.

MITCHELL BLANK,
Plaintiff,
v.
SAMUEL BERGER, and
LENA BERGER,
Defendants.

Action at Law.
Complaint.

Summons issued Feb. 11, 1926

STARR, SUMMERILL & LLOYD,
Attorneys of Plaintiff,
WILLIAM T. BOYLE,
Attorney for Defendants.

Plaintiff, residing in the City of Camden, County of Camden and State of New Jersey, says that:

1. On or about the 30th day of September, 1925, plaintiff paid to defendants the sum of twenty-five hundred dollars ($2500.), upon the agreement of the defendant that they would, at a future date, enter into a formal written contract with plaintiff, or his nominee, for the sale, by the defendants to plaintiff, of certain real estate known and designated as

No. 601 Broadway, in the City aforesaid; said formal contract to be given by defendants also to provide that the sale price be fifty-five thousand dollars ($55,000.) and that settlement should be made on or about January 15, 1926; that at the time of settlement defendants should take back a thirty thousand dollars ($30,000) mortgage for a period of four years, and the balance of twenty-two thousand five hundred dollars ($22,500.) should be paid in cash.

2. Plaintiff thereafter often requested and demanded that defendants execute and deliver such formal written contract, in accordance with the agreement with plaintiff as aforesaid, which defendants have refused to do.

3. Thereupon plaintiff demanded of the defendants the return to plaintiff of the said sum of twenty-five hundred dollars ($2500.), paid to defendants under said agreement, but defendants have refused, and still do refuse to return the aforesaid sum of money to plaintiffs, or any part thereof, wherefore a right of action has accrued to plaintiff to recover the same.

4. Plaintiff demands as damages the sum of twenty-five hundred dollars ($2500.) with interest from September 30, 1925.

STARR, SUMMERILL & LLOYD,
Attorneys for Plaintiff.

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TRANSCRIPT OF PLEADINGS FOR TRIAL.

SUBSTITUTION OF ATTORNEY.

(Filed August 27, 1927.)

NEW JERSEY SUPREME COURT.
CAMDEN COUNTY.

MITCHELL BLANK, *Plaintiff*, v. SAMUEL BERGER, *et al.*, *Defendants.*	Action at Law. Substitution of Attorney.

We hereby consent to the substitution of Powell K. Martin as attorney of record of the above named plaintiff.

Dated August 25, 1927.

STARR, SUMMERILL & LLOYD.

NOTICE OF APPEAL.

(Filed August 27, 1927.)

NEW JERSEY SUPREME COURT.
CAMDEN COUNTY.

MITCHELL BLANK, *Plaintiff*, v. SAMUEL BERGER, *et al.*, *Defendants.*	Action at Law. Notice of Appeal.

To William T. Boyle, Esq.,
Attorney for Defendants.

Take notice that the plaintiff, Mitchell Blank, hereby appeals to the Court of Errors and Appeals of the State of New Jersey, from the whole of the judgment rendered in the above stated action on the 13th day of October, 1926.

POWELL K. MARTIN,
Attorney for Plaintiff.

GROUNDS OF APPEAL.

(Filed September 17, 1927.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

MITCHELL BLANK, *Plaintiff-Appellant*, v. SAMUEL BERGER, *et al.*, *Defendants-Appellees.*	On Appeal From New Jersey Supreme Court. Grounds of Appeal.

The appellant states the following ground of appeal in this cause:

Because the court granted the defendants' motion for a non-suit upon the evidence given at the trial.

Dated, September 16, 1927.

POWELL K. MARTIN,
Attorney of Plaintiff-Appellant.

ANSWER.

(Filed Mar. 4, 1926.)

NEW JERSEY SUPREME COURT.
CAMDEN COUNTY.

MITCHELL BLANK, *Plaintiff*, v. SAMUEL BERGER, and LENA BERGER. *Defendants.*	Action at Law. Answer.

Defendants, Samuel Berger and Lena Berger, of the City and County of Camden, answering say:

1. They deny paragraphs 1 and 2 of the complaint.

2. They admit that plaintiff demanded the sum of $2500. from them but they deny the other allegations of paragraph 3 of the complaint.

FIRST DEFENSE.

1. On the 23rd day of September, 1925, plaintiff paid to defendants the sum of $2500. as a deposit on the purchase price of property, 601 Broadway, Camden, New Jersey, owned by defendants, and defendants entered into a written contract with the said plaintiff, a copy whereof is as follows:

601 Broadway: Camden, N. J., Sept. 30, 1925.

Received of Mitchell Blank the sum of twenty-five hundred ($2500.00/100) dollars as a deposit on property 601 Broadway, Camden, N. J., purchase price being fifty-five thousand ($55,000.00/100) dollars. Balance to be paid at date of settlement on or before January 15th, 1926, as follows: First mortgage of ($30,000.00/100)thirty thousand dollars to remain for a period of four years from date of settlement and balance of twenty-two thousand five hundred ($22,500.00/100) in cash.

Witness
Hubert N. Murphy.

S. Berger,
Lena Berger.

2. Said agreement bound defendants to convey said property to plaintiff on or before January 15th, 1926, and ever since the making of said contract, defendants have been ready and willing and up to the time fixed for the settlement aforesaid, were ready and willing to make settlement in accordance with the terms of said agreement..

3. Defendants have performed everything that was required to be done by them under the terms of said agreement and plaintiff failed and refused to carry out the terms of said agreement and pay to defendants the balance in cash and mortgage set forth in said agreement, although the deed was tendered to him for the said property.

WM. T. BOYLE,
Attorney for *Plaintiff*.

REPLY.

(Filed Mar. 11, 1926.)

NEW JERSEY SUPREME COURT.
CAMDEN COUNTY.

MITCHELL BLANK, *Plaintiff*, v. SAMUEL BERGER, and LENA BERGER, *Defendants.*	Action at Law. Reply.

Plaintiff denies each and every of the allegations contained in the defendants' answer.

STARR, SUMMERILL & LLOYD,
Attorneys of Plaintiff.

I, Edward J. Kelleher, Clerk of the Supreme Court 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 second day of August, A. D., nineteen hundred and twenty-six.

EDWARD J. KELLEHER,
(Seal) *Clerk.*

TESTIMONY.

NEW JERSEY SUPREME COURT.
CAMDEN COUNTY.

MITCHELL BLANK, *Plaintiff.* v. SAMUEL BERGER, *et al.*, *Defendants.*	Action at Law.

October 13, 1926.

APPEARANCE:
For the plaintiff, STARR, SUMMERILL & LLOYD, ESQS.
For the defendant, WILLIAM T. BOYLE, ESQ.

Before DONGES, J., and a jury.

(Mr. Lloyd opens the case for the plaintiff to the jury.)

(Mr. Boyle opens the case for the defendants to the jury.)

THE CASE FOR THE PLAINTIFF.

MITCHELL BLANK, sworn.

By Mr. Lloyd:

Q. Where do you live, Mr. Blank?
A. 457 Lansdowne Avenue, Camden.
Q. You are the plaintiff in this suit?
A. Yes, sir.
Q. Do you know Mr. and Mrs. Berger?
A. I do.
Q. On the 29th of September last, did you have a talk with Mr. and Mrs. Berger?
A. If I recall correctly, it was only Mrs. Berger. Mr. Berger wasn't there that evening.

The Court: Keep your voice up so the jurors can hear you.

The Witness: If I recall correctly, Mr. Berger wasn't there. Mrs. Berger was there. It was in the evening.

Q. What took place there that evening?
A. Why, we got talking about the property 601 Broadway. That was the property I was into that evening, and finally she told me what she wanted for the property and I told her I would see my people and let her know in the morning.
Q. Did you see her the next morning?
A. I did, and Mr. Berger was also there in the morning.
Q. What took place there the next morning?
A. Why, we spoke for a short time and then I

says "Well, my people is agreeable to give—to adhere to the terms we talked about last evening, $55,000., deposit of $2500. to be given," and they said, "All right." I said, "Well, here's a check for $2500. You write out a receipt and I will sign it," and we also agreed we were to bring around another agreement.

Mr. Boyle: I object. Let him state what happened, not any conclusions.

Mr. Lloyd: May I hear what is objected to?

The Court: The objection, as I understand it, is to the witness stating his conclusion as to what was to follow, instead of stating what took place.

Q. State what took place.
A. Well, that's just what took place. We had that understanding.

The Court: Strike it out. What was said between you and these people, to bring about that understanding on your part, is what you are asked.

Q. What, if anything, did you say about drawing up a formal agreement?
A. Will you repeat that question?

(Question repeated.)

The Witness: Why, I told them that I would have another agreement. I have an agreement around. I asked them for a receipt for the $2500, and Mr. Berger said, "Well, you write the receipt out and I will sign it," which was done.

Q. Yes.

A. And I said, "I will have another agreement around today or tomorrow," I said, "I will try to get it around this afternoon, if possible, just as soon as I can draw one up."

Q. You would have an agreement around there?

A. Yes, sir.

Q. Did you bring an agreement around there to be signed?

A. I brought an agreement around the following morning, at Berger's home, which happens to be a little below, on Broadway.

Q. Was that agreeable to Mrs. Berger?

Mr. Boyle: I object.

(Objection sustained.)

Q. Did Mrs. Berger say anything about this agreement that you were going to bring around to have signed?

A. I saw Mr. Berger there at the time; not Mrs. Berger.

Q. I am speaking of the day you paid the $2500.

A. She was agreeable to then.

The Court: That isn't what you are asked.

Q. What, if anything, did she say about this agreement that was to be brought around?

A. Well, she said she would sign it. Well, no, one second. I was under the impression Mr. Berger.

Q. No.

A. Mr. Berger said he would sign it. Mrs. Berger didn't say anything.

Q. The next day what did you do?

A. I brought the agreement around in the morning.

Q. What sort of agreement was this?

A. A regular Camden Real Estate Board agreement, filled out with all the provisions.

Q. Did Mr. and Mrs. Berger say anything about that agreement?

A. Mr. Berger didn't even look at it. He came down and said ——

Mr. Boyle: That wasn't the question. I move that be stricken out.

The Court: Strike it out. Repeat the question.

(Question repeated.)

By the Court:

Q. Do you understand the question

A. I am trying to give the answers as best I can, your Honor.

By Mr. Lloyd:

Q. Did they sign that agreement there that morning?

A. No, sir.

Q. Why not?

Mr. Boyle: That is quite a general question. I object to that.

Q. Well, what, if anything, did they say about it?

A. Mr. Berger said ——

Mr. Boyle: I object. There is no question pending as to that.

The Court: Yes, that is embraced in the question.

A. Mr. Berger said he would have to see his attorney before he signed any agreement. Mrs. Berger wasn't there then.

Q. Then what did you do?

A. I asked him when he could arrange to go up to the attorney's.

Q. Did he say who his attorney was?

A. Mr. Siris.

Q. Did you go up to the attorney?

A. I—when I was called, yes, sir.

Q. When was that?

A. That was several days later.

Q. In the meantime, had you attempted to get this agreement signed by Mr. and Mrs. Berger?

A. I did.

Q. How did you do it?

A. I called them up several times.

By the Court:

Q. To whom did you talk?

A. I talked to Mr. Berger and I also went there in person and I called the office of Mr. Siris up.

The Court: Let me understand, Mr. Lloyd. Do you say that the agreement should have included a provision that subsequent to the payment of the $2500. and the entering into of this written paper, a formal and more extensive agreement was to be entered into?

Mr. Lloyd: No, sir. My contention is, this is not

any agreement at all. This is merely a receipt for money paid and this receipt merely embodies an outline that was to be followed in the drawing up of the contract of sale.

The Court: Aren't you bound to go to the Court of Chancery? Haven't you got there a paper which, upon its face, purports to be an agreement?

Mr. Lloyd: No, sir.

The Court: Aren't you obliged to go to the Court of Chancery and re-form it, if part of your contract to be entered into that day was for the execution subsequently of an agreement?

Mr. Lloyd: No, sir; I think not.

The Court: All right, go ahead.

Q. You mentioned Mr. Siris and I recall you mentioned a little while ago, in your testimony, that you saw them in Mr. Siris' office.

A. I did.

Q. How did you happen to do that?

A. Why, someone in Mr. Siris' office called me and told me to come up there, they were ready.

Q. As a result of that phone call, what did you do

A. I went up there, accompanied by my brother.

Q. Anybody else with you?

A. No, sir.

Q. Who was there?

A. Mr. and Mrs. Berger and Mr. Siris.

Q. What, if anything, did you do there?

A. Why, they refused to sign the agreement that I had left, that I had given.

Q. Did they give any reason for it?
A. Yes, sir.
Q. What did they say about it?
A. Why, Mr. Siris said that he wouldn't allow any of his clients to sign an agreement that they could record.
Q. Did they present another agreement to you?
A. He told me he would have to draw up another agreement.
Q. Did he draw it up?
A. He did.
Q. And did he present it to you?
A. Yes, sir.
Q. What did that agreement provide?

Mr. Lloyd: Have you that agreement, Judge Boyle?

Mr. Boyle: Yes. (Hands agreement to Mr. Lloyd.)

Q. I show you an agreement that is undated but signed by Mr. and Mrs. Berger, and ask you if that is the agreement that was presented to you at Mr. Siris' office?
A. Yes, sir.
Q. And that agreement wasn't satisfactory to you?
A. No, sir.
Q. Did you try to get one that was satisfactory to you?
A. I did.
Q. What was objectionable about that agreement to you?
A. Why, the recording feature; the recording clause in there.
Q. Clause number ten, "This agreement shall not

be recorded in the Register of Deeds of Camden County or any official to whom same may be presented for recording is hereby expressly directed, ordered and authorized to refuse to record the same and in the event this agreement is recorded, this agreement may, at the option of the sellers, become null and void and no force and effect." Is that the objection you had to it?
A. Yes, sir.
Q. And did you try to get an agreement without that clause in it?
A. I did.
Q. In accordance with the receipt which you had received?
A. Yes, sir.
Q. Were you ever able to get such an agreement?
A. No, sir.
Q. Were you ever able to agree upon any terms for purchase satisfactory to both of you, to purchase this property?
A. We agreed upon the terms there. Those terms are the terms we agreed upon.
Q. Did you ever agree on a contract to enter into a contract?
A. Well, the only contract I tried to enter into was the purchase of the property.

The Court: No. That is a perfectly plain question. Did you ever reach an agreement that was executed?

The Witness: No, sir.

Q. After this meeting in Mr. Siris' office, did you try to get an agreement or come to an understanding to have a written agreement?

A. Tried on several occasions. Every time I met Mr. Berger, I would speak about it.

Q. What, if anything, would he say?

A. I met Mr. Berger one time, right in front of Mr. Abbott's office, on Market street, and he said, "I will give you an agreement, the kind you want, if you will give me an additional deposit of $2500."

Q. Did you give him the additional deposit?

A. No. I told him I could sell the property for a thousand dollars additional, "but I can't give you $2500, if all I can make is $1000 on the sale."

Q. When you found that you couldn't arrive at any definite terms, did you demand your money back?

A. I did.

Q. Did you get it?

A. No, sir.

Cross-examination.

By Mr. Boyle:

Q. Did you want the property?

A. I did.

Q. Was it offered to you?

A. No, it wasn't offered to me.

Q. Didn't Mr. Siris come and offer you the deed for the property—Raymond Siris?

Mr. Lloyd: That is objected to, if your Honor please. It is immaterial and has no bearing on this.

The Court: Well, I suppose the necessity for an agreement might be obviated. I think he may answer.

Mr. Lloyd: If your Honor please, an agreement

for the sale of land must be in writing and there is no agreement here.

The Court: Don't you think you have an enforceable agreement here?

Mr. Lloyd: No, sir; I don't.

The Court: I have some doubt about that. I think you could enforce it in the Court of Chancery.

Mr. Lloyd: I hope to convince your Honor a little later on.

The Court: I think he may answer the question.

(Exception noted for plaintiff.)

(Question repeated.)

A. He did.

Q. And you wouldn't take it?

A. Well, I had already written him that I wanted the money back then. We had made other arrangements.

Q. Who drew the original memorandum of this matter?

A. I did, at the suggestion of Mr. Berger.

Mr. Boyle: Aren't you going to offer it?

Mr. Lloyd: Yes, I will offer it.

The Witness: I did, at the suggestion of Mr. Berger. He says, "You write out the receipt and I will sign it." Those were the words he used.

Q. And you wrote it out?
A. Yes, sir.
Q. I want to call your attention to that receipt. It shows, first, "Received of Mitchell Blank the sum of $2500." Was that true?
A. A check for that amount; yes, sir.
Q. "As deposit on property 601 Broadway, Camden, New Jersey." That is true?
A. Yes, sir.
Q. It was 601 you wanted?
A. Yes, sir.
Q. And it was the deed to 601 Broadway that Mr. Siris offered to give you?
A. I believe it was.

Mr. Lloyd: That is objected to, if your Honor please.

The Court: It may stand.

(Exception noted for plaintiff.)

Q. This agreement further says, "the purchase price being $55,000."
A. Yes, sir.
Q. That is all you were to pay for it?
A. That's correct.
Q. Nothing more, nothing less?
A. That's correct.
Q. "Balance to be paid at date of settlement on or before January 15, 1926."
A. That's also correct.
Q. When were you offered this deed from Mr. Siris, for this property?

Mr. Lloyd: Objected to.

(Objection overruled.)

(Exception noted for plaintiff.)

A. I believe it was on that date.
Q. "The balance as follows: First mortgage of $30,000 to remain for a period of four years." You didn't want a mortgage for a longer period, did you?
A. That's the—no, sir. That was perfectly satisfactory.
Q. You didn't want one for any longer?
A. No, sir.
Q. "From date of settlement, and balance of $22,500 in cash."
A. That's also correct.
Q. That was signed by S. Berger and Lena Berger?
A. Yes, sir.
Q. Who witnessed it?
A. Mr. Groff.
Q. Is he here?

(A voice answers "Yes, sir.")

Q. That gentleman?
A. Yes, sir.
Q. And was Mrs. Berger there?
A. Yes, sir.
Q. And Mr. Berger?
A. Yes, sir.
Q. What was left out of that agreement?
A. The understanding that was no agreement, just that's a receipt.
Q. Well, whatever you call it.
A. Well, I can't answer that question. That's no agreement.

Q. What was left out of this paper that was drawn in your own handwriting?

A. The fact I was to bring around a formal agreement.

Q. What had been said about that to Mr. and Mrs. Berger that day?

A. Mr. Berger, I gave him the check for $2500 and I said, "Now, you will give me a receipt for it and we will enter into the agreement later, we will sign the agreement." Words was said, "We will sign the agreement later," and Mr. Berger says ——

Q. Did Mr. Groff hear this part of the talk?

A. He was there.

Q. Did he hear it?

A. I don't know.

Q. How near was he?

A. He was close enough to hear it. He said, "You write out the receipt, I will sign it and I will sign the agreement later," beacuse I didn't have the regular agreement form with me.

Q. Why didn't you put it in here? You covered everything else very well. Why didn't you put it in this paper?

Mr. Lloyd: That is immaterial. It is objected to, why anything isn't in this receipt.

The Court: I will permit it.

(Exception noted for plaintiff.)

A. Well, I guess I forgot to put that in, that's all.

Q. If you had remembered it that day, you would have put it in?

A. If I knew who I was dealing with, I would have put it in.

Q. You merely forgot to put it in?

A. I didn't put it in, that's all.

Q. What was your objection to taking the property upon the price and terms set forth here, when it was offered to you?

Mr. Lloyd: I object. Immaterial.

The Court: I will permit it.

(Exception noted for plaintiff.)

A. That time I made arrangements with other things.

Q. The time for settlement hadn't arrived?

A. At the time?

Q. The deed was offered to you?

A. I think it was on the date of settlement he offered the deed.

Q. The time hadn't arrived yet when you could go and make any other bargain?

A. We purchased other stuff.

Q. You notified him in advance that you were not going through with it?

A. Yes, sir.

Q. Was anything said that day as to what was to be in the other agreement?

A. What day is this?

Q. Are you fencing with me? Just simply answer my questions.

Mr. Boyle: Put the question to him.

(Question repeated.)

A. The day of the thirtieth, there was no other agreement. There was an agreement and it was to contain these terms and nothing else.

Q. Those terms and nothing else? And you got a deed in accordance with those terms?

A. He offered me a deed. I didn't go through it. I just looked over it hurriedly.

Q. Well, you didn't object to it because it didn't set forth the terms?

A. I objected to it because I notified him we wouldn't go through the deal.

Mr. Boyle: Repeat the question.

(Question repeated.)

A. I didn't offer any objection.

Q. I ask you again. You didn't object to it because it didn't set forth the terms of this agreement or memorandum, whatever you call it?

A. I didn't go through it enough to see whether it had all those in. I didn't offer any objection whatever.

Q. You didn't want the property at that time?

A. Not at that time. We made other arrangements.

Q. Was Mrs. Berger present that day?

A. She was present the day this receipt was signed; yes, sir.

MARK MARRITZ, sworn.

By Mr. Lloyd:

Q. Mr. Marritz, do you know Mitchell Blank?
A. I do.
Q. Do you know Lena and Samuel Berger?
A. I do.

Q. Did you ever go with Mitchell Blank to the store of the Bergers?

A. I did.

Q. When was that?

A. The only way I can designate it, it was the day after this thing happened, because then Mr. Blank came after me that same day to go down to see the Bergers, to take the acknowledgment to the agreement, and I couldn't go, I was very busy in the office, and he asked me if I couldn't make it the next day and he stopped for me at my home and we went to the Bergers.

Q. Did you have a formal agreement at that time?

A. We had a regular real estate board agreement.

Q. Are you a notary public?

A. I am.

Q. Did Mr. and Mrs. Berger sign that agreement?

A. No, they didn't.

Q. What, if anything, did they say concerning it?

A. The only person that I saw there was Mr. Berger at that time and Mr. Blank offered him the agreement and asked him if he would sign it and he looked at it for a while and then he said he wanted to see Mrs. Berger. He went in the back. We didn't see Mrs. Berger. Then he came back and said Mrs. Berger and himself were satisfied the agreement was all right but they wanted their attorney to look it over before they would sign it and they would see their attorney and their attorney would get in touch with Mr. Blank and turn the agreement over to him.

Q. Did you ever have any other conversation with them?

A. No, sir.

Cross-examination.

By Mr. Boyle:

Q. They said they would see their attorney about it?

A. No. That was only Mr. Berger said he would see his attorney.

Q. Mrs. Berger didn't say anything?

A. I didn't see Mrs. Berger.

NATHAN BLANK, sworn.

By Mr. Lloyd:

Q. Mr. Blank, you are a brother of Mitchell Blank?

A. I am.

Q. And you are studying law, I understand?

A. Yes, sir.

Q. Did you go to Mr. Siris' office and there have a conversation with your brother and Mr. Siris and Mr. and Mrs. Berger?

A. Yes, sir.

Q. Tell me what took place there.

A. I went up with my brother and Mr. and Mrs. Berger were there with Mr. Siris and Mr. Siris said that the agreement that we had brought around, or that my brother brought around to them signed, didn't suit him and that he had drawn up another agreement and he showed the agreement to my brother and my brother looked it over and passed it over to me and the two of us commented upon an extra clause put in that agreement, and after we talked it over between the two of us, we said, or I

said, to him, that "the agreement isn't any good."

Q. Was this agreement that Mr. Siris prepared the same as your agreement except for the tenth paragraph in it?

A. If that's the agreement, that was the same with the exception of that tenth paragraph.

Q. And that is the paragraph pertaining to it not being recorded and if it were recorded it would be null and void?

A. That's right.

Q. And your brother wouldn't accept?

A. That's right.

Q. This agreement?

A. That's right.

The Court: May I see that agreement, Mr. Lloyd?

(Mr. Lloyd hands agreement to the Court.)

Cross-examination.

By Mr. Boyle:

Q. You are the brother of the plaintiff in this case?

A. The brother, yes, sir.

Q. Were not you and Mr. Siris trying to come to an arrangement of compromise in this matter, negotiating for another agreement?

A. I can't recall with the exception we might have been compromising to get that clause out.

Q. Compromising?

A. To get that clause out.

Q. But your negotiations fell through?

A. It did.

Mr. Lloyd: If your Honor please, I offer this receipt in evidence. It is admitted in the pleadings.

(Said receipt marked Exhibit P1.)

Mr. Lloyd: I also offer in evidence the agreement.

Mr. Boyle: If your Honor please, I want to offer a formal objection to that last agreement, as the result of negotiations for the compromise. If he offers one, he ought to offer both of them.

Mr. Lloyd: If you have the other agreement, I will be glad to offer it.

Mr. Boyle: I am giving you all I have here. Those were negotiations of compromise, of those subsequent transactions.

The Court: I understand the agreement here offered is identical, one of the witnesses or more said, with the one tendered by the plaintiff, with the exception of clause ten.

Mr. Lloyd: That is right.

Mr. Boyle: If your Honor please, that isn't so. This is simply a compromise arrangement, if your Honor please. This, as I am informed, also provides that my clients, as an inducement to enter into a new agreement, should hold over for a certain time.

The Court: It is perfectly apparent there are conditions in that agreement differing from the receipt, embodying terms not in the receipt.

Mr. Boyle: If your Honor please, I want to call your attention to it, and we have got to get back to the pleadings.

The Court: I think, however, I shall permit it to be marked.

(Said agreement marked Exhibit P2.)

Mr. Lloyd: We rest, if your Honor please.

MOTION FOR NON-SUIT.

Mr. Boyle: If your Honor please, I would like to make a motion for non-suit in this case, based upon Johnson v. Buck, 35 N. J. L., 343. The first ground of the motion is that the evidence doesn't support the allegations in the complaint, that a more formal agreement was to be made with the plaintiff or his nominee in addition to the receipt signed at the time of the agreement. The second ground is, that the plaintiff testified that he had forgotten to include in the signed paper the fact that a more formal agreement was to have been executed in the future. If that was a part of the one arrangement at that time, it all should have been incorporated into the agreement that was signed, and not having been incorporated into the agreement that was signed, of course you can't go outside the agreement, for the basis of any relief. I also rely upon the fact that the paper offered in evidence as the receipt signed is a perfectly legal agreement in accordance with Johnson v. Buck.

(Mr. Lloyd replies.)

(At this point the noon recess was taken.)

AFTERNOON SESSION.

The Court: This case is brought upon the theory that the defendants being under a contract to make and execute a formal agreement for the sale by them and purchase by the plaintiff of the property in question, and it appearing that the paper which the plaintiff says evidences the terms of the agreement is complete as to the agreement with the exception that it fails, by inadvertence, to state that a more formal agreement is to be entered into, it appears that the plaintiff never tendered an agreement nor did he demand, so far as the proofs show, the execution of an agreement by the defendants which embodied the terms of the paper signed on the 30th of September, 1925. Inasmuch as the suit must be upon a right of action accruing because of the failure of the defendants to enter into an agreement, and not by reason of a refusal of the defendants to convey the property in question, and it appearing that no such agreement was ever tendered, and it further appearing that the plaintiff demanded the execution of an agreement embodying terms not only at variance with those set forth in the paper in evidence but imposing upon the defendants conditions and limitations not in contemplation when the agreement was entered into, it seems to me that in the present state of the proofs plaintiff must fail, if it be assumed that the paper offered by the plaintiff and upon which his right to recover is based, requires the defendants to formally engage, by written agreement, executed and acknowledged in accordance with the terms of the statute, still it doesn't appear that the plaintiff ever tendered himself as

willing to accept such agreement and never demanded it, and the defendants, so far as the proofs show, never declined to enter into such an agreement. It seems to me, therefore, that there is a failure of proof and the motion to non-suit must prevail. This is without considering the question of whether or not the plaintiff is bound, under the authority of Wineberg v. Young and the more recent case of Shinn v. Black, by the terms of the paper itself, but is based upon the broader question that it does not appear that the defendants ever declined to do what by the written evidence and the parol testimony in this case the plaintiff says they engaged to do.

(Exception noted for plaintiff.)

EXHIBIT P1.

Bell Phone, 3648-R
S. BERGER
Classical Toggery Shop
601 Broadway : Camden, N. J.

Men's
and Boys'
Furnishings

Fashionable
Tailor

Sept. 30, 1925.

Received of Mitchell Blank the sum of Twenty-five Hundred ($2500 00/100) Dollars as a deposit on property 601 Broadway, Camden, N. J., purchase price being Fifty-five Thousand ($55,000 00/100) Dollars. Balance to be paid at date of Settlement on or before January 15th, 1926, as follows: First Mortgage of ($30,000 00/100) Thirty Thousand Dollars to remain for a period of Four years from

date of settlement and balance of Twenty-two Thousand Five Hundred ($22,500 00/100) in cash.

S. Berger,
Lena Berger.

Witness
Hubert N. Murphy.

EXHIBIT P2.

THIS AGREEMENT, MADE THE day of A. D. 1925.

BETWEEN SAMUEL BERGER and LENA BERGER, his wife, of the City and County of Camden and State of New Jersey, of the first part, hereinafter called the "SELLERS," and MITCHELL BLANK and NATHAN BLANK, of the same place. of the second part, herein after called the "BUYERS."

WITNESSETH, That the "SELLERS" agrees to sell and convey and the "BUYERS" agrees to buy all that certain lot , tract , or parcel of land and premises situate in the City of Camden, County of Camden, and State of New Jersey, more particularly described as follows: Being the Southwest corner of Broadway and Royden Street, known as No. 601 Broadway, for the price or sum of FIFTY-FIVE THOUSAND ($55000.00), Dollars, under and subject to the following forms and conditions:

1. A first payment of TWENTY-FIVE HUNDRED ($2500.00), Dollars, receipt of which is hereby acknowledged by the "SELLERS."

2. The balance of the purchase price shall be paid in the following manner: the sum of THIRTY THOUSAND DOLLARS by a purchase money first

mortgage for that amount, to be executed by the parties of the second part at the time of final settlement, conditioned for the payment thereof within four years from the date thereof, with interest at the rate of six per cent. per annum, payable semi-annually, said mortgage to be of the usual tax and insurance form used in Camden County, and to be accompanied by the usual proper bond and warrant; the balance in cash at the time of final settlement, which shall be made at the office of Raymond L. Siris, 535 Federal Street, Camden, New Jersey, on or before January 15th, 1926, or the deposit made herewith, at the option of the "SELLERS," may be applied on account of the purchase price or be forfeited as liquidated damages to the "SELLERS," 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 of all incumbrances, including municipal liens and assessments, except municipal improvements in the course of construction and not assessed, obvious easements, usual restrictions running with the land tenancy hereinafter mentioned, 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 "BUYER."

4. All adjustments shall be made as of date of settlement, and possession shall be given the "BUYERS" subject to the option of the sellers, as hereinafter provided.

5. The "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 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:

(9) The sellers shall have the option of either giving possession of the premises at the time of settlement, or may remain in possession therein for a period of one month from date of settlement, and shall be considered a tenant for that month and shall pay a rental for each day for which said sellers occupy said premises at the rate of Five Hundred dollars per month.

(10) This agreement shall not be recorded, and the Register of Deeds of Camden County or any official to whom the same may be presented for recording is hereby expressly directed, ordered and authorized to refuse to record the same, and in the event that this agreement is recorded, this agreement shall thereby, by reason of this breach of this contract, at the option of the sellers, become null and void and of no force and effect.

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

Samuel Berger [L. S.]
Lena Berger [L. S.]

Signed, Sealed and Delivered
in the Presence of

Agreement
For Sale of Land
SAMUEL BERGER and LENA
BERGER, his wife,
to
MITCHELL BLANK and NATHAN
BLANK.

DATED: 1925.

NOTE: This agreement is not to be recorded, and the Register of Deeds or any other official is expressly, directed, ordered and authorized to refuse to record the same by the terms of the agreement.

POSTEA.

(Filed Oct. 19, 1926.)

NEW JERSEY SUPREME COURT.
CAMDEN COUNTY.

MITCHELL BLANK,
Plaintiff,
v.
SAMUEL BERGER and LENA BERGER,
Defendants.

Action at Law.
Postea.

This case was tried before Judge Ralph W. E. Donges with a jury at the Camden Circuit, on October 13th, 1926.

And the plaintiff having submitted his evidence, and the Court, being of opinion that it was not sufficient to entitle him to recover, ordered judgment of non-suit to be entered against him.

RALPH W. E. DONGES,
Judge.

A true copy
EDWARD J. KELLEHER,
Clerk.

JUDGMENT.

NEW JERSEY SUPREME COURT.

MITCHELL BLANK,
Plaintiff,
v.
SAMUEL BERGER, *et al.,*
Defendants.

Whereupon it is adjudged that the complaint of the plaintiff be dismissed and that the defendants Samuel Berger and Lena Berger do recover of the said plaintiff Mitchell Blank their costs which have been taxed at the sum of Thirty-nine dollars and ten cents.

Costs $39.10

Judgment entered October 19, 1925.

A true copy
EDWARD J. KELLEHER,
Clerk.

ENTRY OF JUDGMENT ON POSTEA.

NEW JERSEY SUPREME COURT.

SAMUEL BERGER and LENA BERGER, *Defendants,* v. MITCHELL BLANK, *Plaintiff.*	Action at Law. On Postea.

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

Entered October 19, 1926.

On motion of
WM. T. BOYLE,
Attorney.

Costs
$39.10
A true copy
EDWARD J. KELLEHER,
Clerk.

NEW JERSEY COURT OF ERRORS
AND APPEALS.

MITCHELL BLANK,
Plaintiff-Appellant.
v.
SAMUEL BERGER, *et al.*,
Defendants-Appellees.

ON APPEAL FROM NEW JERSEY SUPREME COURT.

BRIEF OF PLAINTIFF-APPELLANT.

STATEMENT OF FACTS.

This is an action brought to recover a deposit paid. On September 30, 1925, the plaintiff-appellant deposited with the defendants-appellees the sum of $2500.00 to be applied to the purchase price of the property known and designated as 601 Broadway, Camden, New Jersey (State of Case, page 10, lines 27 to 37; page 11, lines 1 to 7). The defendants-appellees executed a written receipt, both of them signing the receipt (State of Case, page 31, lines 21 to 36; page 32, lines 1 to 6). At the time the receipt was signed, the defendants-appellees accepted said sum with the understanding that an agreement would be entered into in a day or two

(State of Case, page 11, lines 26 to 36; page 12, lines 1 to 5). At the time the receipt was signed it was also agreed between the parties that the formal agreement for the sale of the property, which was to be entered into in a day or two, should include, besides the items mentioned in the receipt, a clause giving the defendants-appellees the option of either giving up possession of the premises at the time of settlement or remaining in possession of the premises for one month after settlement as a tenant and should pay a rental for each day which said defendants-appellees occupied said premises at the rate of $500.00 per month—these terms to be embodied in the printed approved form of agreement of sale adopted by the Camden Real Estate Board. Mr. Berger, one of the defendants-appellees, said he would sign this agreement (State of Case, page 12, lines 29 to 34). The following morning, the plaintiff-appellant brought the agreement for the sale of the property to the defendants-appellees (State of Case, page 12, lines 8 to 12). This agreement contained all the provisions for the sale of the property (State of Case, page 13, lines 3 to 5). Mr. Berger, one of the defendants-appellees, said he would have to see his attorney before he signed any agreement (State of Case, page 14, lines 6 and 7; page 25, lines 1 to 30). Mr. Berger said his attorney was Mr. Siris. Several days later, Mr. Siris called the plaintiff-appellant to come to his office. In the meantime, the plaintiff-appellant attempted to get the agreement signed by the defendants-appellees (State of Case, page 14, lines 12 to 28). As a result of a 'phone call from Mr. Siris asking the plaintiff-appellant to come to Mr. Siris' office as they, meaning the defendants-appellees, were ready, the plaintiff-appellant, accompanied by his brother, went to

Mr. Siris' office. When he arrived there, he found Mr. and Mrs. Berger, the defendants-appellees, and their attorney, Mr. Siris, waiting there for him. At that time, the defendants-appellees informed the plaintiff-appellant that they refused to sign the agreement that he had left with them. The reason for refusing to sign the agreement was that Mr. Siris, the defendants-appellees' attorney, would not allow any of his clients to sign an agreement that could be recorded. Mr. Siris, the defendants-appellees' attorney, told the plaintiff-appellant that he would draw another agreement, which he did, and which agreement he offered to the plaintiff-appellant. This agreement was not accepted by the plaintiff-appellant because it contained certain terms which neither party had previously intended should be part of the proposed agreement. The plaintiff-appellant tried to get a satisfactory agreement from the defendants-appellees but was unable to do so (State of Case, page 15, lines 21 to 36; page 16, lines 1 to 37, and page 17, lines 1 to 17). The plaintiff-appellant, seeing that he and the defendants-appellees could not arrive at any definite terms, demanded from the defendants-appellees the return of his deposit, but this he did not get (State of Case, page 18, lines 12 to 17). He made continued demands for the money and after continued refusals brought this suit to recover the sum of $2500.00 deposited.

POINT I.

The instrument marked "Exhibit P1" (State of Case, page 31, lines 21 to 36; page 32, lines 1 to 6) **is a mere receipt and not a contract.**

Under the decisions in this State "the construction and effect of a written instrument is a matter of law to be determined by the Court."

Geiger v. Waldron, Inc., 100 N. J. L. 93.

The main question presented is whether the trial Court was in error in holding that the instrument marked "Exhibit P1" (State of Case, page 31, lines 21 to 36; page 32, lines 1 to 6) was a contract. This instrument reads as follows:

"Sept. 30, 1925.

Received of Mitchell Blank the sum of Twenty-five Hundred ($2500.00) Dollars as a deposit on property 601 Broadway, Camden, N. J., purchase price being Fifty-five Thousand ($55,000.00) Dollars. Balance to be paid at date of Settlement on or before January 15th, 1926, as follows: First Mortgage of ($30,000.00) Thirty Thousand Dollars to remain for a period of Four Years from date of settlement and balance of Twenty-two Thousand Five Hundred ($22,500.00) in cash.

S. Berger,
Lena Berger.

Witness
Hubert N. Murphy."

It is definitely settled in this State that these deposit receipts do not constitute contracts:

Thompson v. Killheffer, 99 N. J. L. 439;
Kurtz v. Busch, 128 Atl. Rep. 552;

Tansey v. Suckoneck, 98 N. J. Eq. 669;
Kuskin v. Guttman, 98 N. J. Eq. 617;
Bettcher v. Knapp, 94 N. J. Eq. 433;
Schneider v. Crawford, 131 Atl. Rep. 687;
Korflage, et al. v. Kahrs, 94 N. J. Eq. 440;
Donnelly v. Currie Hardware Co., 66 N. J. L. 338;
Water Commissioners v. Brown, 32 N. J. L. 504;
Stallings v. Eypper & Beckman, Inc., 5 N. J. Misc. Rep. 671.

In *Thompson v. Killheffer,* 99 N. J. L. 439, a case exactly the same as the one at bar was decided.

In that case, the plaintiff owned a farm and the defendant deposited his check for $500.00 with the plaintiff's agent, who gave him the following receipt:

"May 29, 1920.

Received as a deposit from Dr. Elvin H. Kilheffer five hundred dollars ($500) to apply on purchase price of the Payson Thompson farm at or near Ladentown, Haverstraw Road, consisting of 80 acres more or less including furniture owned by Mr. Thompson. Also all farming tools, etc. Purchase price fifteen thousand dollars ($15,000), half cash, mortgage for $7,500 for five years at six per cent, with privilege to pay off $500 or more on an interest day.

Alfred Hall, Pres.
Alfred Hall Realty Corp.
Authorized agents for owners."

The defendant stopped payment on the check and the plaintiff sued in the District Court to recover on the check, and contended that the receipt was a con-

out and I will sign it,' which was done." (State of Case, page 4, lines 10 to 12.)

It is also apparent that the memorandum was intended as a receipt and not as a final agreement between the parties by the fact that the defendants-appellees, after refusing to sign the formal agreement left with them by the plaintiff-appellant the day after receipt was signed, tendered the plaintiff-appellant another agreement, which agreement is in evidence, marked Exhibit P2, and which agreement was the same in all respects as the agreement tendered by the plaintiff-appellant with the exception that it contained an extra clause, clause number 10.

It is a well-settled rule that a married woman cannot convey land except by a duly acknowledged deed:

Whalen v. Manchester Land Company, 65 N. J. L. 206;

And she cannot bind herself to convey land except by a contract in writing, duly acknowledged:

Corby v. Drew, 55 N. J. Eq. 387, 36 At. 827;
Goldstein v. Curtis, 63 N. J. Eq. 454, 52 Atl. 218;
Saldutti v. Flynn, 72 N. J. Eq. 157;
Chassman v. Wiese, 90 N. J. Eq. 108, 106 Atl. 19;
Crandall v. Graham, 93 N. J. Eq. 675, 115 Atl. 178, 117 Atl. 926;
Rittenhouse v. Swieciki, 94 N. J. Eq. 36, 118 Atl. 261;
Kotok v. Rossi, 94 N. J. Eq. 327, 120 Atl. 208;
Kolinsky v. Pilz, 94 N. J. Eq. 796, 125 Atl. 102;
Calendano v. Blazejewski, et al., N. J. L. , 129 Atl. 708.

Applying this rule, it is clear that this receipt, Exhibit P1, is not a contract.

In *Butcher v. Knapp,* 94 N. J. Eq. 433, the Court held:

"Where the parties to a contract for sale of lands make it an essential part of their agreement that it be embodied in a formal written instrument, the matter remains in *fieri* until the written instrument has been delivered."

In the case at bar, the memorandum itself was not meant to be the agreement; an essential part of the agreement was that the memorandum should be embodied in a formal agreement, to wit: An approved form of agreement for the sale of real estate adopted by the Camden Real Estate Board. The matter remained in abeyance until the formal Camden Real Estate Board Agreement, embodying the complete agreement, became binding by the signing of all the parties. So the plaintiff-appellant thought. He prepared the formal agreement that was to be signed and anxiously expected to have it signed by the defendants-appellees. The reason for his anxiety is clear. He wanted the formal agreement so that he could record it, so as to be notice to all the world of his rights, and he could rely upon nothing in that respect except a formal agreement duly acknowledged. He, nor the defendants-appellees, could have felt that the contract was complete until the memorandum was embodied in the Camden Real Estate Board's adopted form of agreement.

In the case of *Water Commissioners v. Brown,* 32 N. J. L. 504, Mr. Justice Elmer, speaking for the Court of Errors and Appeals, said:

"If it appears that the parties, although they have agreed on all the terms of their contract,

mean to have them reduced to writing and signed before the bargain shall be considered as complete, neither party will be bound until that is done, so long as the contract remains without any acts done under it on either side."

It is, therefore, respectfully submitted that in view of the evidence adduced showing that there was no meeting of the minds of the parties hereto, there could be no contract, and the plaintiff-appellant was justified in refusing any deed at any time tendered by the defendants-appellees.

POINT II.

The trial Judge erred in his reasons for non-suit in that he, inadvertently, failed to consider the testimony of the witnesses.

The trial Judge, in his non-suit, said, *inter alia*:

"It appears that the plaintiff never tendered an agreement nor did he demand, so far as the proofs show, the execution of an agreement by the defendants which embodied the terms of the paper signed on the 30th of September, 1925. Inasmuch as the suit must be upon a right of action accruing because of the failure of the defendants to enter into an agreement, and not by reason of a refusal of the defendants to convey the property in question, and it appearing that no such agreement was ever tendered, and it further appearing that the plaintiff demanded the execution of an agreement embodying terms not only at variance with those set forth in the

paper in evidence but imposing upon the defendants conditions and limitations not in contemplation when the agreement was entered into, it seems to me that in the present state of the proofs plaintiff must fail, if it be assumed that the paper offered by the plaintiff and upon which his right to recover is based, requires the defendants to formally engage, by written agreement, executed and acknowledged in accordance with the terms of the statute, still it doesn't appear that the plaintiff ever tendered himself as willing to accept such agreement and never demanded it, and the defendants, so far as the proofs show, never declined to enter into such an agreement."

The trial Judge erred in his reasons for non-suit in that he, inadvertently, failed to consider the testimony of the witnesses, Mitchell Blank and Mark Marritz, which showed that the plaintiff-appellant did tender an agreement in the presence of Mark Marritz, a disinterested person, which agreement established mutuality and contained all the terms discussed when the receipt was signed (State of Case, page 12, lines 29 to 36; page 13, lines 1 to 5; page 15, lines 21 to 36; page 16, lines 1 to 37; page 17, lines 1 to 9, and page 25, lines 1 to 30). The defendants-appellees said they were satisfied with the agreement tendered at that time but stated they wanted to see their attorney before signing (State of Case, page 25, lines 1 to 30).

POINT III.

The trial Judge excluded testimony which was prejudicial to the plaintiff-appellant's case.

The trial Judge excluded testimony which would have shown the state of minds of the parties at the time the receipt was signed (State of Case, page 10, lines 36 and 37; page 11, lines 1 to 24), which was evidenced by an agreement with the complete terms of the contract being tendered to the defendants-appellees the morning after the receipt had been signed and the defendants-appellees stating that said agreement was satisfactory to them but stated further that they wanted to see their attorney before signing (State of Case, page 25, lines 1 to 30).

It is submitted that in view of the facts in the case at bar, supported by the decisions in this State, the motion for the direction of a non-suit should have been denied.

It is, therefore, respectfully urged that the judgment of the Supreme Court should be reversed with costs and that judgment in favor of the plaintiff-appellant be awarded.

Respectfully submitted,
POWELL K. MARTIN,
Counsel for Plaintiff-Appellant.

NEW JERSEY COURT OF ERRORS AND APPEALS.

MITCHELL BLANK,
Plaintiff-Appellant,
v.
SAMUEL BERGER, *et al.*,
Defendants-Appellees.

ON APPEAL FROM NEW JERSEY SUPREME COURT.

BRIEF OF DEFENDANTS-APPELLEES.

STATEMENT OF FACTS.

The statement of facts appearing in the brief of plaintiff-appellant is incorrect. There is nothing in the evidence to justify the statement of the brief of plaintiff-appellant: "At the time the receipt was signed it was also agreed between the parties that the formal agreement for the sale of the property, which was to be entered into in a day or two, should include, besides the items mentioned in the receipt, a clause giving the defendants-appellees the option of either giving up possession of the premises at the time of settlement or remaining in possession of the premises for one month after settlement as a tenant

and should pay a rental for each day which said defendants-appellees occupied said premises at the rate of $500.00 per month—these terms to be embodied in the printed approved form of agreement of sale adopted by the Camden Real Estate Board." (p. 2 of brief of plaintiff-appellant.) It follows, therefore, that it is also untrue that Mr. Berger said he would sign such an agreement.

Moreover, attention is called to the complaint. (pp. 4-5, State of the Case.) The allegations therein are based upon the provisions of Exhibit P1. (p. 31 of State of the Case, l. 20, *et seq.*) Plaintiff alone testified to what occurred at the time the receipt was signed and he is quite positive in his testimony that the only terms of the contract agreed upon were as set forth in the writing Exhibit P1. (p. 31, State of the Case.)

The plaintiff had assumed to prepare and tender the formal agreement to defendant (p. 12, ll. 1 and 2). The agreement brought around the morning following the signing of Exhibit P1 (p. 12, l. 10) was a regular Camden Real Estate Board agreement filled out with all the provisions (p. 25, l. 17), (p. 27, l. 5) identical with Exhibit P2 (p. 32, *et seq.*) with the exception of clause 10 (p. 28, l. 20, *et seq.*). The dedefendants did not sign the tendered agreement, Exhibit P2, but consulted their attorney. The latter agreed to allow the defendants to execute an agreement in the form submitted by plaintiff provided the tenth clause was added. The plaintiff would not consent to this clause and the negotiations of the parties ended. The plaintiff, however, never did carry out the promise made by him to prepare and tender defendants for execution an agreement embodying only the terms set forth in Exhibit P1.

The defendants, however, on the day fixed for settlement did tender to the plaintiff a deed for the property and it was refused, not because it did not conform to the terms agreed upon (p. 24, l. 12), but because he did not want the property at the time, having made other arrangements (p. 24, l. 22).

The trial Judge based his ruling on the motion for non-suit upon the single ground of the failure of plaintiff to prove that he had tendered a contract, as he had agreed to do embodying only the terms set forth in Exhibit P1. There was only one ground of appeal, the ruling of the trial Judge granting the motion of non-suit. (State of the Case, p. 3, ll. 23-24.)

POINT I.

The trial Court did not rule that the instrument marked Exhibit P1 was a contract. (pp. 30-31, State of the Case.)

First: It is my contention, that when the receipt was signed and the deposit money paid, the parties had agreed upon all the terms essential to an agreement for the sale of real estate. The property was definitely described—the purchase price was agreed upon—the date of settlement was fixed and the amount to be paid in cash and mortgage, as well as the terms thereof, were set forth. It was not necessary to state the rate of interest; the legal rate was implied. A deposit having been paid and the writing signed by the defendants, everything was completed. The bargain was completely determined and the terms definitely ascertained. There were no negotiations pending over matters relating to the contract. The plaintiff emphasizes this point. The

day of the thirtieth (date of Exhibit P1) there was no other agreement. There was an agreement and it was to contain these terms and nothing else. (p. 23, ll. 32, *et seq.*, State of the Case.) The only provisions left out of Exhibit P1, according to plaintiff, was in the fact he was to bring around a formal agreement. (p. 22, ll. 3-4, State of the Case.) Therefore, everything had been agreed upon and there was nothing left open for negotiation. Giving the plaintiff the benefit of every favorable inference from his testimony, the formal agreement to be prepared by him was to contain only the terms set forth in Exhibit P1.

Thompson v. Killheffer, 99 N. J. L. 439, cited by appellant was not like the case at bar. The agent had no authority to bind the owners and that was the ground of the decision.

The distinction between the cases cited by the appellant and the one under discussion is very lucidly set forth in an opinion of Justice Swayze in *Trenton &c. Co. v. Trenton,* 90 N. J. L. 378, affirmed 91 N. J. L. 103, from which I quote the following language:

> "As Lord Cranworth said in Ridgeway v. Wharton, 6 H. of L. Cases, 238, at 268, the fact that the parties intend a subsequent agreement to be made is strong evidence to show that they did not intend the previous negotiations to amount to an agreement; but at the same time he protested against its being supposed because persons wish to have a formal agreement drawn up that therefore they cannot be bound by a previous agreement if it is clear that such an agreement had been made."

The defendants regarded Exhibit P1 as binding

them and tendered a deed to the plaintiff on the date fixed for settlement. The plaintiff refused to make settlement not because the deed did not set forth the terms in Exhibit P1, but because the plaintiff had made "arrangements with other things" (p. 23, l. 12). The plaintiff had "purchased other stuff" (p. 23, l. 21) and notified defendants in advance that he was not going through with the deal. The plaintiff did not offer the excuse that he was unable for lack of time to complete the settlement, but simply that he had made other purchases.

If, as already contended, Exhibit P1 fixed definitely all the terms of the agreement both parties were bound in law until the date fixed for the settlement. Neither party had any right either in advance of this date or on this date to be relieved from its obligations. Even were it proved that the property belonged to the defendant's wife, she was answerable in a court of law in case she breached the contract (*Wolf v. Meyer,* 75 N. J. L. 181). The act of the plaintiff under the circumstances constitutes him the defaulting party, aside from his default in never having prepared and tendered for execution a formal agreement embodying the terms set forth in Exhibit P1.

Secondly: Plaintiff testified that Exhibit P1 contained all of the agreement except "the fact I was to bring around a formal agreement" (p. 22, l. 1, *et seq.*).

The plaintiff had drawn up in his own handwriting Exhibit P1 and gave as a reason for the omission to insert such a clause that he had forgotten to do so. (p. 22, l. 30, *et seq.*, State of the Case.) The writing signed by the defendants, Exhibit P1, was to have contained all of the agreement of the parties.

The plaintiff was asked: "Was anything said that day as to what was to be in the other agreement?" (p. 23, l. 25).

And he answered: "The day of the thirtieth (date of Exhibit P1) there was no other agreement. There was an agreement and it was to contain these terms and nothing else" (p. 23, l. 21, *et seq.*).

As Exhibit P1 purported on its face to be a record of the transaction between the parties, oral testimony was, therefore, inadmissible to supply terms with respect to which it was silent.

Naumberg v. Young, 44 N. J. L. 331;
Castelbaum v. Wolfson, 92 N. J. L. 165; 104 Atl. 84;
Green v. Green, 76 N. J. L. 187; 68 Atl. 1070.

It is rather significant that in four of the cases cited by the appellant (p. 5 of brief of plaintiff-appellant)

Tansey v. Suckoneck, 98 N. J. Eq. 669;
Kuskin v. Guttman, 98 N. J. Eq. 617;
Schneider v. Crawford, 131 Atl. Rep. 687;
Stallings v. Eypper & Beckman, Inc., 5 N. J. Misc. Rep. 671;

there was evidence in writing that a formal agreement was to be subsequently executed. In each of these cases, as a part of the original written memorandum, there was a provision of this character. The plaintiff-appellant, in the instant case, is attempting to prove an agreement part of which is evidenced by writing and the remainder depending upon parol testimony.

POINT II.

Assuming that plaintiff had proved that defendants had promised to sign a formal agreement embodying the terms set forth in Exhibit P1, prepared and brought to them by the plaintiff, then plaintiff failed to establish a breach of the agreement in this respect.

The plaintiff brought to the defendants the next morning "a regular Camden Real Estate Board agreement filled out with all the provisions" (p. 13, ll. 3-4). What this agreement was is shown in the offer of counsel of the agreement Exhibit P2. (p. 32, State of the Case.) There was an objection upon the part of counsel for defendants that the agreement signed by defendants and offered in evidence as Exhibit P2 was the result of negotiations of compromise.

Addressing counsel for plaintiff, the trial Judge said: "I understand, the agreement here offered is identical, one of the witnesses or more said, with the one tendered by the plaintiff, with the exception of clause ten" (p. 28, l. 20).

Counsel for plaintiff answered: "That is right."

An agreement, therefore, identical with Exhibit P2 with clause ten left out is the one that was brought around by the plaintiff to the defendants to sign. The plaintiff cannot escape the force of this admission. And this agreement the plaintiff requested the defendants to execute was not in accordance with the writing, Exhibit P1. In a discussion of this point it is first necessary to examine the pleadings.

The complaint (pp. 4-5, State of the Case) alleged that defendants were paid $2,500 upon the agree-

ment of the defendant that they would, at a future date, enter into a formal agreement with plaintiff or *his nominee* for the sale by the defendants to plaintiff, of certain real estate known and designated as No. 601 Broadway, Camden, "said formal contract to be given by defendants also to provide that the sale price be $55,000 and that settlement should be made on or about January 15, 1926; that at the time of settlement defendants should take back a thirty thousand dollars ($30,000) mortgage for a period of four years, and the balance of twenty-two thousand five hundred dollars ($22,500) should be paid in cash." This allegation of the complaint is based verbatim on Exhibit P1. (p. 31, l. 20, State of the Case.)

The complaint further alleged that plaintiff had demanded that defendant execute such formal written contract in accordance with the agreement with plaintiff as aforesaid, which defendants have refused to do. (p. 5, l. 10 of State of the Case.)

To support the first paragraph of the complaint, attention is called to all the testimony in the case bearing upon this point. Plaintiff was alone when he made the agreement claimed, and, therefore, is the only witness who testified upon this branch of the case.

Plaintiff: "Why, I told them that I would have another agreement. I would have an agreement around. I asked them for a receipt for the $2,500 and Mr. Berger said, 'Well, you write the receipt out and I will sign it,' which was done (p. 11, ll. 31-35). * * * "And I said, 'I will have another agreement around today or tomorrow,' I said, 'I will try to get it around this afternoon, if possible, just as soon as I can draw one up' " (p. 12, ll. 2-6).

The plaintiff failed to sustain the allegation in the

second count of the complaint (p. 5, ll. 10-15, State of the Case) that plaintiff demanded that defendants execute such formal written contract in accordance with the agreement aforesaid. The plaintiff did prepare and submit to defendants for execution an agreement, but in the language of the trial Judge, it embodied terms not only at variance with those set forth in the paper in evidence, but imposed upon the defendants conditions and limitations not in contemplation when the agreement was entered into. (p. 30, l. 25, *et seq.*, State of the Case.) Attention is called to certain of the provisions of the tendered agreement, Exhibit P2 (p. 32).

The buyer was given the privilege, in case of delay not his fault, in the procuring of searches, to extend the time of final settlement. (p. 33, l. 18, second paragraph of Exhibit P2.)

Time was made the essence of the agreement. (p. 34, l. 8, seventh paragraph of Exhibit P2.) No concession was given to the defendants to extend the agreement.

The title of the premises was to be "free and clear of all incumbrances, including municipal liens and assessments, except municipal improvements in the course of construction and not assessed, obvious easements, usual restrictions running with the land tenancy hereinafter mentioned, and shall be a marketable title." (p. 33, l. 23, *et seq.*, third paragraph of Exhibit P2.)

It also provided that the seller should tender a special warranty deed. (p. 33, l. 30, third paragraph of Exhibit P2.) There were other provisions in this agreement, Exhibit P2 as to fixtures, possession and the amount of rent to be paid in case of a holding over after the time fixed for settlement (p. 34, l. 9, *et seq.*, eighth and ninth paragraphs of Exhibit

P2) that are not within the scope of the terms of the agreement as testified to upon the part of the plaintiff.

The defendants were only obliged to convey a title good at law and, therefore, the plaintiff, in demanding that defendants execute an agreement calling for marketable title, was seeking to impose a limitation not contemplated by the parties.

In *Meyer v. Madreperla,* 68 N. J. L. 258, 53 Atl. 477, Chancellor Magie, delivering his opinion for the Court of Errors and Appeals, pointed out the distinction between a title good at law and a marketable title. In the case before the court upon an action at law to recover a deposit upon an implied agreement for title, it was held that no recovery could be had, unless it was shown that the title tendered was not a title good at law. The plaintiff below sought to raise the question of the marketability of the title and this defense was not allowed, the implied agreement only calling for a title good at law.

In Exhibit P1, the guide and basis of the agreement, there was no provision that time should be the essence of the agreement.

In Exhibit P2 there was such a provision. The defendants were not obliged to subscribe to such in view of its omission from Exhibit P1.

Jeffries v. Charlton, 74 N. J. Eq. 430;
Cranwell v. Clinton Realty Co., 67 N. J. Eq. 540.

Neither did the plaintiff have a right to ask for an agreement requiring defendants to sign a warranty deed. Covenants for title are not essential to a conveyance. A deed of bargain and sale without covenants would be performance of a contract to convey

where the agreement for sale does not call for covenants in the deed.

Lounsberry v. Locander, 25 N. J. Eq. 554;
Thayer v. Torrey, 37 N. J. L. 339;
Howe v. Harrington, 18 N. J. Eq. 495;
Randolph v. Rafferty, 92 N. J. Eq. 428; 113 Atl. 233.

POINT III.

There was only one ground of appeal "Because the Court granted the defendants' motion for a nonsuit." (p. 3, l. 20, State of the Case.) It is unnecessary, therefore, to reply to the third point of the appellant as to the rulings upon the exclusion of evidence.

The ruling of the trial Judge upon the motion for non-suit was correct, and the judgment should be affirmed.

Respectfully submitted,
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