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NEW JERSEY Court of Errors and Appeals.

JULIUS TAYLOR AND JOSEPH L. SOLOFF, PARTNERS, TRADING AS TAYLOR & SOLOFF,
Plaintiffs-Respondents,

vs.

HARRY GARBER,
Defendant-Appellant.

10

THE STATE OF NEW JERSEY TO HARRY GARBER :

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You are summoned to answer the [L. s.] annexed complaint of Julius Taylor and Joseph L. Soloff, partners, trading as Taylor & Soloff, in an action at law in the Atlantic County Circuit Court. And take notice that unless you file your answer to the said complaint with the clerk of the Atlantic County Circuit Court, at Mays Landing, New Jersey, within twenty days after service upon you of this writ and the annexed complaint the plaintiff may proceed in the suit and judgment may be entered against you.

30

Witness, Honorable Theo. W. Schimpf, Judge of the Atlantic County Circuit Court at Mays Landing, this twenty-eighth day of July, nineteen hundred and twenty-six.

THOMPSON & HANSTEIN,
Attorneys.

WILLIAM A. BLAIR,
Clerk.

ATLANTIC COUNTY CIRCUIT COURT.

JULIUS TAYLOR AND JOSEPH L. SOLOFF, PARTNERS, TRADING AS TAYLOR & SOLOFF,	} Plaintiffs,	} Action at Law.
vs.		
HARRY GARBER,	} Defendant.	

10

COMPLAINT.

(Filed March 22, 1928.)

The plaintiffs, Julius Taylor and Joseph L. Soloff, partners trading as Taylor & Soloff, of the city of Atlantic City, county of Atlantic, and State of New Jersey, say that:

20 1. They are, and at the time hereinafter referred to, were duly licensed real estate brokers, doing business in the city of Atlantic City aforesaid.

2. That on the fifteenth day of April, 1926, plaintiffs entered into an agreement with the defendant, a copy of which is attached hereto and made a part hereof and marked Exhibit A.

30 3. Under the terms of said agreement the defendant agreed to pay plaintiffs, in consideration of their having procured a purchaser for certain land referred to in an agreement of sale between Harry Garber et al. and Jacob Stern, the sum of \$7,000.00 as a commission to be paid on or before June 14, 1926, when final settlement was to be made. Said agreement further provided that in the event that settlement was not made due only to a defect in the title of the owners, then defendant agreed to pay the same amount of money received by the owners from the purchaser.

4. A copy of said agreement between defendant and the other owners of the land in question and the pur-

chaser is attached hereto and made a part hereof and marked Exhibit B.

5. Defendant and the other owners of said land referred to in said agreement received the sum of \$5,000.00 on account of the purchase price.

6. At the time fixed for settlement under said agreement defendant and the other owners were unable to deliver title because of certain defects in their title to said land, a list of which is attached hereto and made a part hereof and marked Exhibit C.

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7. Said settlement was not made due only to said defects in the title.

8. Plaintiffs have demanded of the defendant, Harry Garber, said sum of \$5,000.00 so received by the owners of said land, but the said defendant has refused and still does refuse to pay the same.

Judgment will, therefore, be claimed in the sum of \$5,000.00, together with interest from June 14, 1926, and costs of suit.

THOMPSON & HANSTEIN,

20

Attorneys of Plaintiffs.

To the Within Defendant:

The following are copies of the exhibits referred to in the foregoing complaint and upon which the same, in whole or in part, is founded:

EXHIBIT A.

April fifteenth, 1926.

30

Messrs. Taylor & Soloff:

For and in consideration of your having procured a purchaser for all that certain land, as more specifically outlined in an Agreement of Sale between Harry Garber, et al and Jacob Stern, we hereby agree to pay you the sum of seven thousand (\$7,000.00) dollars as and for your commissions, fees, etc. Said commission to

be paid on or before the fourteenth day of June, 1926, when final settlement is made.

In the event settlement is not made, due only to a defect in the title, then we agree to pay you the same amount of moneys received by us from the purchasers in said agreement.

FRANK T. PERONE
HARRY GARBER [SEAL]

10

EXHIBIT B.

Articles of Agreement, made this fourteenth day of April, in the year of our Lord, one thousand nine hundred and twenty-six, between Harry and Lena Garber, his wife, and Harry Latt and Jennie Latt, his wife, all of the city of Atlantic City, county of Atlantic and State of New Jersey, parties of the first part and Jacob Stern of the city and county of Philadelphia, and State of Pennsylvania, party of the second part:

20

Witnesseth, that the said parties of the first part, for and in consideration of the sum of eighty-three thousand (\$83,000.00) dollars to be paid and satisfied as hereinafter mentioned and also in consideration of the covenants and agreements hereinafter mentioned, made and entered into by the said party of the second part do agree to and with the said party of the second part that they the said parties of the first part, will well and sufficiently convey to the said party of the second part, his heirs and assigns by Deed of General Warranty free from all incumbrance except as hereinafter mentioned, on or before the fourteenth day of June, 1926 all that lot, tract or parcel of land and premises hereinafter particularly described, situate, lying and being in the township of Mullica, in the county of Atlantic and State of New Jersey and lying between Second Street and Seventh Street (or Hammonton Avenue) and north of the Camden and Atlantic Railroad, now known as the West Jersey and Seashore Railroad and

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as also shown on plan of lots in Division H, East Hammonton, Atlantic county, New Jersey, which plan of maps is attached hereto and is to be considered a part hereof, said lands to be more particularly bounded and described as follows:

Beginning at the point of intersection of the center line of Camden and Atlantic Railroad now the West Jersey and Seashore Railroad with the center line of Second Street and extending thence (1) in a northeasterly direction in and along the center line of said Second Street six hundred (600) feet more or less to the center line of the State highway (or White Horse Pike or Agazziz Street) thence (2) in and along the center line of the road as aforesaid and in a northwesterly direction four thousand (4,000) feet more or less to a point of the center line of Seventh Street (Hammonton Avenue); thence (3) in a southwesterly direction in and along the said center line of the said Seventh Street (Hammonton Avenue) six hundred (600) feet, more or less to the center line of the said railroad, thence (4) along the said center line of the said railroad in a southeastwardly direction four thousand (4,000) feet more or less to the point of beginning.

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It is hereby agreed and understood that the following lots as shown on the plan of lots above referred to, are excepted from the above described lands and are not to be included in the within agreement and or conveyance.

Block No. 3—Lots No. 13, 14, 15, 16 and 17.

Block No. 5—Lots No. 13, 14, 15, 16 and 17.

Block No. 6—Lots No. 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 and 20.

Block No. 12—Lots No. 11, 12, 13, 14, 15, 16, 17, 18 and 19.

Block No. 13—Lots No. 1, 2, 3 and 17.

Block No. 14—Lots No. 1, 2, 4, 12, 17, 26, 28 and 29.

30

Block No. 15—Lots No. 1, 3, 4, 5, 6, 7, 13, 14, 15, 16, 17, 23, 24, 25, 26, 27, 28 and 29.

Block No. 16—Lot No. 1.

together with all of the improvements and hereditaments now contained upon the said premises.

And the said party of the second part, for himself, his heirs, executors and administrators or assigns, does covenant, promise and agree to and with the said parties of the first part their heirs or assigns that he, **10** the said party of the second part, will pay and satisfy or cause to be paid and satisfied unto the said parties of the first part, the said sum of eighty-three thousand (\$83,000.00) dollars as and for the purchase money of the foregoing described land and premises in the following manner, that is to say:

\$1,500.00 upon the signing of this agreement, the receipt whereof is hereby acknowledged.

\$3,500.00 by the party of the second part, paying that amount on or before the fourteenth day of May, 1926 **20** at 3 P. M.

\$28,000.00 by the party of the second part making, executing and delivering at the time of settlement, his purchase money mortgage in that amount, covering the premises above described, accompanied by his usual bond for twice the amount. Said mortgage payable at any time within two years from the time of settlement bearing interest at the rate of six per cent per annum, payable semiannually.

\$38,000.00 by the party of the second part, making, executing and delivering at the time of settlement, an **30** assignment of an existing mortgage in that amount. Said mortgage payable within two years from January twenty-fifth, 1926, and covering premises hereinafter described and which mortgage is subject to an existing first mortgage in the sum of thirty thousand (\$30,000.00) and an existing second mortgage in the sum of thirty-two thousand (\$32,000.00) dollars, also covering premises hereinafter described, situate, lying and being in the city of Atlantic City, county of

Atlantic, and State of New Jersey, being bounded and described as follows:

Beginning at a point at the southeast corner of Arkansas and Arctic Avenues, extending thence (1) eastwardly, in and along the south line of Arctic Avenue forty six (46) feet and six (6) inches; thence (2) southwardly, parallel with Arkansas Avenue ninety (90) feet; thence (3) westwardly, parallel with Arctic Avenue forty six (46) feet and six (6) inches to the easterly line of Arkansas Avenue; thence (4) north- **10** wardly, in and along the same ninety (90) feet to the place of beginning.

Beginning in the southerly line of Arctic Avenue forty six (46) feet and six (6) inches east of the easterly line of Arkansas Avenue; extending thence (1) eastwardly in and along the southerly line of Arctic Avenue thirty (30) feet; thence (2) southwardly, parallel with Arkansas Avenue ninety (90) feet; thence (3) westwardly parallel with Arctic Avenue thirty (30) feet; thence (4) northwardly parallel with Arkansas **20** Avenue ninety (90) feet to the place of beginning.

Beginning in the easterly line of Arkansas Avenue ninety (90) feet south of Arctic Avenue and extending thence (1) south, along the east line of Arkansas Avenue (20) feet, by eas between parallel lines of that width at right angles to Arkansas Avenue in length eighty one (81) feet on the south side and eighty two (82) feet on the north side.

Twelve thousand (\$12,000.00) dollars by the party of the second part paying that amount at the time of settlement. **30**

Settlement to be held at the office of the Land Title Guaranty Company, New Jersey of Camden, New Jersey, or any other reputable Title Company in the State of New Jersey, on or before the fourteenth day of June, 1926.

Title to be good and marketable and such as will be insured by the Title Company or companies as above stated.

All adjustments of taxes and interest on the mortgage to be assigned to the parties of the first part to be made as of time of settlement.

Time is the essence of this agreement.

It is hereby agreed and understood by and between the parties hereto that the above referred to purchase money mortgage which the party of the second part agrees to execute and deliver at the time of settlement shall contain a provision, whereby the parties of the first part hereto will release any block from the above described premises upon the payment of Twenty eight hundred (\$2800.00) dollars by the party of the second part hereto. A block shall be construed to mean two hundred (200) feet front on Agazziz Street or White Horse Pike and running between parallel lines of that width to the middle line of the Railroad above referred to.

It is hereby expressly agreed and understood that in the event the parties of the first part are unable to deliver until the party of the second part, the exact amount of land fronting on the White Horse Pike) Agazziz Street) as above described, then and in that event the party of the second part agrees to accept the amount of land fronting on said White Horse Pike (or Agazzia Street) providing however that he be allowed a reduction from the hereinabove stated consideration, at the rate of twenty five (\$25.00) dollars per front foot.

And it is further agreed by the parties to these presents that the party of the second part, his heirs and assigns may enter into and upon the said land and premises on the day of settlement and from thence take the rents, issues and profits to and their use. And for the performance of all and singular the covenants and agreements aforesaid the said parties do bind themselves, and their respective heirs, executors, and administrators and they hereby agree to pay, upon failure to perform the same the sum of which they hereby fix and settle as liquidated damages thereof.

In Witness Whereof the said parties have hereunto interchangeably set their hands and seals the day and year first above mentioned.

HARRY GARBER [SEAL]

LENA GARBER [SEAL]

HARRY LATT [SEAL]

JENNIE LATT [SEAL]

Signed, sealed and delivered in the presence of
IRVIN SHERMAN 10

State of New Jersey, Atlantic County, ss.

Be It Remembered that on this day of April, in the year of our Lord one thousand nine hundred and twenty six, before me a Notary Public personally appeared Harry Garber and Lena Garber his wife and Harry Latt and Jennie Latt, his wife, who I am satisfied are the vendor mentioned in the above deed or conveyance and I having first made known to them the contents thereof, they acknowledged that they signed, sealed and delivered the same as their voluntary act and deed. All of which is hereby certified.

EXHIBIT C.

To rights of Delaware & Atlantic Telegraph & Telephone Company to construct and operate lines, erect poles, etc as granted by Annie M. Coughlin to said Company, September 15, 1916 Deed Book 577 page 42, on and alongside of premises in question.

Rights of the public in all streets, avenues or roads running through or abutting premises in question. 30

Rights of way of Camden & Atlantic Railroad, now the West Jersey & Seashore Railroad.

The interest of Stephen Colwell which became vested in Abraham Browning through declaration of trust dated April 27, 1866 and recorded in Deed book 28 page 481, still outstanding in said Browning or his successor in trust.

Mortgage—Garber (Harry) to James Ruberton, Jr. and Rose Ruberton, his wife, dated April 28, 1926 recorded May 3 1926 to secure \$30,000. payable within two years, with interest at 6% per annum payable semi-annually which covers premises in question.

Judgment—North Jersey Quarry Co. v. W. J. Coughlin, entered in New Jersey Supreme Court March 11, 1915 in the sum of \$2294.36 which is a lien on the premises in question.

10 Judgment—Alfred W. Booth & Bros. v. William Coughlin et al, New Jersey Supreme Court, docketed from Hudson County Circuit Court on January 28, 1926 amounting to \$897.14 which is a lien on the premises in question.

Recognizance—William Coughlin as surety to United States to secure \$1000. entered July 10, 1923 which is a lien on the premises in question.

20 Recognizance—William Coughlin as surety to the United States to secure \$1000. entered July 12, 1923 which is a lien on the premises in question.

To the within named Defendant:

In case the within summons and complaint are served upon you personally, then take notice that if you intend to make a defense to this action, you must file an affidavit of merits within ten days from the date of the notice hereof upon you and that unless you file such affidavit, judgment by default will be entered against you at the end of said ten days; and that, in case you file said affidavit, unless you file an answer within twenty days from the date of service hereof upon you,

30 judgment by default will in such case be entered against you at the end of said twenty days.

In case the within summons and complaint are served upon you by the leaving of a copy at your dwelling house or place of abode, then take notice that unless you appear and file an answer within twenty days after the date of service hereof upon you, judgment will be entered against you.

THOMPSON & HANSTEIN,
Attorney.

Received Jul 30, 1926. Sheriff.

I hereby deputize and appoint Charles Walters to serve the within writ.

Witness my hand and seal this thirtieth day of July, 1926.

HOWARD R. CLOUD [L. S.]
Sheriff of Atlantic County.

I hereby certify that on July 30th, 1926 I had Cole & Cole, Esqs., acknowledge service of the within for Harry Garber.

10

HOWARD R. CLOUD, Sheriff, by
CHARLES WALTERS
Special Deputy Sheriff.

Shffs fees \$5.22.

Service acknowledged this thirtieth day of July, 1926.

COLE & COLE
Attys for Deft.

Filed Aug. 3, 1926 at 9 A. M.

WM. A. BLAIR, 20
Clerk.

ATLANTIC COUNTY CIRCUIT COURT.

TAYLOR & SOLOFF,

Plaintiff,

vs.

HARRY GARBER,

Defendant.

Action at Law.

ANSWER.

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(Filed March 22, 1928.)

Harry Garber, of Atlantic City, New Jersey, answering the complaint says:

1. Paragraph 1 is admitted.
2. Paragraph 2 is admitted.
3. Paragraph 3 is admitted.
4. Paragraph 4 is admitted.

- 5. Paragraph 5 is admitted.
- 6. Paragraph 6 is denied.
- 7. Paragraph 7 is denied.
- 8. Paragraph 8 is admitted.

AFFIRMATIVE DEFENSE.

First Defense:

1. Defendant says that the sellers in said articles of
 10 agreement with Jacob Stern were able and willing on
 the date named to perform and to well and sufficiently
 convey to the said Jacob Stern, his heirs and assigns
 by deed of general warranty free from encumbrance
 except as stated the premises described therein. If
 there were any encumbrances of record or other things
 in the way of the making of such a conveyance they
 could have been and would have been removed by the
 title company at the time and place named for final
 settlement.

20

COLE & COLE,
Attorneys of Defendant.

Filed August 24, 1926, at 9 A. M.

WILLIAM A. BLAIR,
Clerk.

File No. 18384.

30

ATLANTIC COUNTY CIRCUIT COURT.

JULIUS TAYLOR AND JOSEPH L.
 SOLOFF, TRADING AS TAYLOR
 & SOLOFF,

Plaintiffs,

vs.

HARRY GARBER, LENA GARBER,
 HARRY LATT AND JENNIE
 LATT,

Defendants.

Action at Law.

10

ORDER TO AMEND.

(Filed March 22, 1928.)

On motion of Thompson & Hanstein, attorneys of
 plaintiffs, it is on this day of 1927, ordered
 that the complaint filed in the above entitled cause be
 amended by filing a supplemental count to be known
 as Count Two, to be in the following form:

20

COUNT TWO.

1. The plaintiff repeats all the allegations of the
 first count as fully as though the same were herein set
 forth at length.

2. That on or about July 8th, 1926, the defendants
 herein filed a bill in the Court of Chancery of New
 Jersey against Jacob Stern to compel the specific per-
 formance of the agreement made between said defend-
 ants herein and Jacob Stern bearing date, April 14th,
 1926, and referred to in paragraph 2 of the first count,
 a copy of which agreement these plaintiffs stand ready
 to produce in court. That under the terms of said
 agreement the premises described therein were to be
 sold to the said Jacob Stern free and clear of all
 encumbrances and he was to receive a good and market-
 able title, such as would be insured by the Chelsea Title
 and Guaranty Company.

30

3. The said Jacob Stern filed an answer to said bill of complaint, denying all the allegations of the same, except that he admitted that he agreed to accept title insurance from the Chelsea Title and Guaranty Company, pursuant to a verbal understanding between to the agreement above referred to. Said answer also set up that at the time of the settlement the parties to said agreement appeared and that the said Jacob Stern was ready, willing and able to make said settlement, but

10 the defendants herein were not ready, able and willing to make settlement in that the Chelsea Title and Guaranty Company refused to insure the title to said premises, and that the title to said premises was not free and clear of all encumbrances and was not good and marketable; that the land was subject to the interest of one Abraham Browning, trustee, or his successors in trust for Stephen Colwell; said premises were also subject to the rights of the Delaware & Atlantic Telephone and Telegraph Company to construct and operate lines, erect poles &c., as granted by Annie M.

20 Coughlin to said company, September 15th, 1916, Deed Book 577, page 42; said premises were also subject to the rights of the public in all streets, avenues or roads running through or abutting said premises; said premises were also subject to a right of way of the Camden & Atlantic Railroad, now the West Jersey & Seashore Railroad Company; said premises were also subject to a certain mortgage made by Harry Garber to James Ruberton, Jr., and Rose Ruberton, his wife, dated April 28th, 1926, recorded May 3d, 1926, to secure the sum of \$30,000.00 payable in two years; said premises

30 were subject to a judgment of the New Jersey Quarry Co., against W. J. Coughlin, entered in the New Jersey Supreme Court, on March 11th, 1915, in the amount of \$2,294.36; said premises were also subject to a judgment of Alfred W. Booth & Bro., against William Coughlin et al., entered in the New Jersey Supreme Court, docketed from Hudson County Circuit Court in the amount of \$887.14; and said premises were also

subject to a recognizance entered into by the said William Coughlin as surety to the United States, dated July 10th, 1923, in the amount of \$1,000.00 and another recognizance entered into by the said William Coughlin as surety to the United States on July 12th, 1923, in the amount of \$1,000.00. For the particulars of said answer reference is made thereto and the plaintiffs herein stand ready to produce the same at the time of the trial of this cause.

4. Upon the issue so joined a hearing was had before 10 Honorable Robert H. Ingersoll, one the Vice-Chancellors of this State. As a result of said hearing conclusions were filed by the said Vice-Chancellor, finding that the defendants herein were unable to make a good and marketable title, free from all encumbrances except the mortgages referred to in the agreement and based upon said conclusions, a final decree was entered on January 22d, 1927, adjudicating that the title of the defendants herein was not such as the contract called 20 for, and that the defendants herein were unable to make a good and marketable title free from all encumbrances, except the mortgages and decreeing that the bill in that suit should be dismissed, a copy of which said conclusions and decree plaintiffs stand ready to produce at the trial of this cause.

Judgment will, therefore, be claimed on this count in the sum of \$5,000.00, together with interest and costs of suit.

On motion of Thompson & Hanstein, attorneys of plaintiffs, we consent to the entry of the above order. Subject to right to move to strike. 30

COLE & COLE,
Attorneys of Defendants.
W. F. SOOY,
C. C. J.

Filed and entered February 5th, 1927, at 9 A. M.

WILLIAM A. BLAIR,
Clerk.

ATLANTIC COUNTY CIRCUIT COURT.

	JULIUS TAYLOR AND JOSEPH L. SOLOFF, TRADING AS TAYLOR & SOLOFF,	} Plaintiffs,	} Action at Law.
	<i>vs.</i>		
10	HARRY GARBER, LENA GARBER, HARRY LATT AND JENNIE LATT,	} Defendants.	

ANSWER TO AMENDED COMPLAINT.

(Filed March 22, 1928.)

20 Defendants, Harry Garber, Lena Garber, Harry Latt and Jennie Latt, all of Atlantic City, New Jersey, answering the amended complaint in this cause, say:

1. Defendants admit so much of the amended complaint as is not denied. They deny that the premises were subject to a mortgage of \$30,000.00 or any other sum, the judgment of New Jersey Quarry Co. vs. W. J. Coughlin, the judgment of Alfred W. Booth & Bro. vs. the same, or the recognizance to the United States entered into by the same.

2. The decree of the Court of Chancery referred to in the amended complaint has been appealed from to the Court of Appeals.

30 3. After the execution of the agreement referred to in the complaint, plaintiff took possession of the premises described therein and still remains in possession and has not yet surrendered the same to defendants.

4. All of the exceptions to the title referred to in the amended complaint were waived by the plaintiff.

NOTICE.

To the Within Named Plaintiff:

Notice that when this cause is reached for hearing defendants will move to strike the amended complaint upon the ground that conceding to be true all the facts well pleaded they afford no cause of action against the defendants.

COLE & COLE,
Attorneys for Defendants. 10

Filed February 9th, 1927, at 2 P. M.

WILLIAM A. BLAIR,
Clerk.

ATLANTIC COUNTY CIRCUIT COURT.

	JULIUS TAYLOR AND JOSEPH L. SOLOFF, TRADING AS TAYLOR & SOLOFF,	} Plaintiffs,	} Action at Law.
	<i>vs.</i>		
	HARRY GARBER, LENA GARBER, HARRY LATT AND JENNIE LATT,	} Defendants.	20

CONSENT TO SUBSTITUTION OF ATTORNEY.

(Filed March 22, 1928.)

We hereby consent to the substitution of Isadore Sacks as attorney of record of the above named defendants. 30

Dated December 20th, 1927.

COLE & COLE,
Attorneys.

Filed January 21st, 1928, at 9 A. M.

WILLIAM A. BLAIR,
Clerk.

NEW JERSEY CIRCUIT COURT, ATLANTIC COUNTY.

JULIUS TAYLOR AND JOSEPH L. SOLOFF, TRADING AS TAYLOR & SOLOFF,
Plaintiffs,
vs.
 HARRY GARBER,
Defendant.

10

The above entitled case was tried March 1st, 1928, before Honorable William Frank Sooy, Judge, and a jury.

Appearances:

MESSRS. THOMPSON & HANSTEIN,
For the Plaintiffs.
 EMERSON L. RICHARDS, ESQ.,
For the Defendant.

20

TESTIMONY.

The Court: You are willing to stipulate that a judgment was obtained against them for \$6,000?

Mr. Hanstein: Yes.

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

Mr. Richards: I want to know from the opening who is being sued. Garber is the only one mentioned.

The Court: All he said was that there were other defendants in the suit.

30

Mr. Hanstein: The reason for that is that this amended order sets out other names than Harry Garber. They were never made parties to the suit.

The Court: So that we will enter an order now that the other three names be omitted from the order to amend in so far as they appear as defendants.

Mr. Hanstein: Yes. They were inserted merely through inadvertence.

The Court: Well, that was because of the title in the other suit, unquestionably.

Mr. Hanstein: Oh, yes.

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

Mr. Hanstein: I offer the commission agreement which has been admitted.

(The paper offered is received in evidence and marked as an exhibit for the plaintiff, P-1).

Mr. Richards: No objection to the formal proof. 10

Mr. Hanstein: And I offer my old friend here, record of the Court of Chancery.

Mr. Richards: That is objected to for the same reasons as in the other case.

The Court: And admitted for the same reasons.

Mr. Richards: Exception. I think also it is quite irrelevant in this transaction.

The Court: No. I think it is material for the purpose of showing that the Court of Chancery decreed that the title was defective. 20

(The offer is received in evidence and marked as an exhibit for the plaintiff, P-2).

Plaintiffs rest.

DEFENDANT'S CASE.

Mr. Richards: Now, if your Honor please, we offer first of all the judgment just entered in the previous case, amounting to \$6,512.50.

Mr. Hanstein: Now I want to object and will make no point of the formality of the proof, as to its relevancy and competency, and my objection is that in the first place it is not pleaded; in the second place they admit the receipt of \$5,000.00 on account of the purchase price, and in the third place it would not matter whether they returned the money or whether they didn't; and further than that, there is, of course, nothing before the court for anybody to determine that this money is going to be returned. A judgment is 30

nothing until you collect it. A judgment of a million dollars as against me, for instance, would not be worth very much.

The Court: I am going to accept the offer.

Mr. Hanstein: I ask an exception.

The Court: Yes. The pleadings admit the money has not been paid back.

Defendant rests.

10
PLAINTIFF'S MOTION FOR A DIRECTION
OF VERDICT.

Mr. Hanstein: I move for a direction of verdict in favor of the plaintiff.

Mr. Richards: And there is a counter motion. We submit that the uncontradicted proof is that we have not legally received this money; that as the proof now stands we have been directed by the court to return the down payment and that the effect of this agreement
20 is that we have not received the money; just as if we had never received it; and not having received the money, we, of course, have nothing to pay back.

The Court: My interpretation of the agreement is that at the time of the signing thereof, Garber agreed to pay \$7,000.00 in the event that the title was passed; that in the event title did not pass by reason of defective title he would pay \$5,000.00. It clearly appears that title did not pass by reason of the fact that the title was defective and that the vendors in that agreement could not convey in accordance with the
30 terms thereof; that the fact that in a subsequent suit for the return of the deposit plaintiff has been successful does not in any way affect the terms of the commission agreement.

So that there is due to Taylor & Soloff under the terms of the commission agreement, \$5,000.00, which was received by the vendors at the time the agreement of sale was executed between the parties.

Mr. Hanstein: Together with interest.

The Court: Together with interest, of course.

Mr. Hanstein: \$1,028.32.

Mr. Richards: When is that from?

Mr. Hanstein: The 14th of June, 1926. This is the date on which they said they would pay it.

The Court: The payment was to be made on the 14th day of June, the day of settlement, either of the \$7,000.00 or of the \$5,000.00, whichever they might be entitled to.

Ladies and gentlemen of the jury, I direct that you bring in a verdict in favor of the plaintiffs, against
10 the defendant, in the sum of \$5,512.50.

Mr. Richards: Exception.

(The jury found as directed).

ATLANTIC COUNTY CIRCUIT COURT.

JULIUS TAYLOR AND JOSEPH L. }
SOLOFF, PARTNERS, TRADING AS } 20
TAYLOR & SOLOFF, }
Plaintiffs-Respondents, } Action at Law.
vs. }
HARRY GARBER, }
Defendant-Appellant. }

NOTICE OF APPEAL AND GROUNDS

(Filed March 22, 1928.)

To Thompson & Hanstein, attorneys of plaintiffs or to
whom it may concern: 30

GENTLEMEN—Please take notice that the defendant, Harry Garber, in the above entitled cause, appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey, from the whole of the judgment entered in this cause, on the following grounds, to wit:

1. Because the court erred in directing a verdict for the plaintiffs-respondents.

2. Because the court erred in admitting the record of the proceedings in the Court of Chancery by these parties, said proceedings not having been properly pleaded by the plaintiffs-respondents.

3. Because the court erred in admitting the record of the decree made in the Court of Chancery to prove the defect in the title to the property, said decree simply dismissing the bill filed in the Court of Chancery by the defendant-appellant.

4. Because the court erred in refusing to allow the motion of the defendant-appellant for a direction of a verdict due to the lack of sufficient evidence to support the allegations of the plaintiffs-respondents.

5. Because the court erred in its construction of the contract to pay commission, in that judgment had already been recovered against the defendant-appellant for the return of the deposit so that as a matter of fact the defendant-appellant had received no moneys as a deposit from the purchasers in the original agreement of sale.

ISADORE SACKS,
Attorney for Defendant-Appellant.

Service of the within notice of appeal and grounds acknowledged this 5th day of March, 1928.

THOMPSON & HANSTEIN,
Attorney of Plaintiffs-Respondents.

Filed March 9th, 1928, at 9 A. M.

30

WILLIAM A. BLAIR,
Clerk.

STATE OF NEW JERSEY.

COUNTY OF ATLANTIC.

I, William A. Blair, Clerk of the County of Atlantic, and also Clerk of the Circuit, etc., Courts holden therein,

said court being a court of record, having a common seal, do hereby certify, that the foregoing is a true copy of a certain Notice of Appeal and grounds in the case of Julius Taylor and Joseph L. Soloff, partners, trading as Taylor & Soloff, plaintiffs-respondents vs. Harry Garber, defendant-appellant, as the same is filed in my said office.

In testimony whereof, I have hereunto
[L. S.] set my hand and affixed my Official Seal
at Mays Landing, New Jersey, this 14th
day of March, A. D. 1928.

WILLIAM A. BLAIR,
Clerk.

NEW JERSEY
Court of Errors and Appeals.

JULIUS TAYLOR AND JOSEPH L. }
SOLOFF, Partners, Trading as }
Taylor & Soloff, }
Plaintiffs-Respondents, } On Appeal.
vs. }
HARRY GARBER, }
Defendant-Appellant, }

BRIEF OF DEFENDANT-APPELLANT

STATEMENT OF FACTS.

The plaintiffs, real estate brokers of Atlantic City, New Jersey, secured for the defendant, a purchaser of certain land, in consideration of which the said plaintiffs were to receive a commission of seven thousand dollars (\$7,000.00). The agreement for commission is as follows:

April 15th, 1926.

Messrs. Taylor and Soloff:

For and in consideration of your having procured a purchaser for all that certain land, as more specifically outlined in an Agreement of Sale between Harry Garber *et al.* and Jacob Stern, we hereby agree to pay you the sum of seven thousand dollars (\$7,000.00), as and for your commissions, fees, etc. Said commission to be

paid on or before the fourteenth day of June, 1926, when final settlement is made. In the event settlement is not made, due only to a defect in the title, then we agree to pay you the same amount of moneys received by us from the purchasers in said agreement.

FRANK T. PERONE,
HARRY GARBER [SEAL].

At the time set for settlement the purchaser through one of the plaintiffs, one Julius Taylor, refused to accept title to property on the ground that said title was not good and marketable. The sum of five thousand dollars (\$5,000.00) had been paid to the defendant on account of the purchase price.

The plaintiffs instituted suit in the Atlantic County Circuit Court for said sum of five thousand dollars (\$5,000.00), and judgment was directed in favor of the plaintiffs and against the defendant for the said sum of five thousand dollars (\$5,000.00), together with interest and costs. At the trial of this case the defendant objected to the admission of the record of the Court of Chancery in a matter wherein Harry Garber and others filed a bill for specific performance against one Jacob Stern, the purchaser produced by the plaintiffs and said record was admitted over the objection of the defendant and an exception allowed. Proof was adduced of the entry of a judgment against the defendant and in favor of one Jacob Stern for the sum of five thousand dollars (\$5,000.00), deposit as well as for certain expenses. On a motion by the plaintiffs there was a direction in their favor and against the defendant, the Court interpreting the above agreement to mean that if title did not pass by reason of the fact that title was defective; that the fact that in a subsequent suit the defendant had a judgment recovered against him for the return of the deposit does not in any way effect the terms of the commission agreement. An exception was taken to the ruling of the Court. Defendant-appellant has appealed from the judgment.

LAW.

The Court erred in admitting the record of the proceedings in the Court of Chancery in as much as these proceedings were not properly pleaded by the plaintiffs-respondents. The record of the Court of Chancery showed that a bill for specific performance had been filed by the defendant-appellant and others against one Jacob Stern and did not show in any respect the applicability of the decree rendered in the Court of Chancery to the suit instituted by the plaintiffs-respondents against the defendant-appellant. There was no testimony on the part of the plaintiffs-respondents to show the nature of the former decision nor was there any testimony to show that there was a former judgment by the same parties as involved in this Circuit Court action, the decree as a matter of fact being entered against the defendant-appellant as one of the complainants in the Court of Chancery suit and in favor of one Jacob Stern. "A plea of former adjudication must aver that the parties are the same in the two suits, or allege facts that would show that the relation of the pleader to the former action was such as to make the judgment conclusive in his favor, or that the party against whom the *estoppel* is alleged, if not directly a party to the former suit, was so connected with it in interest as to be bound by the result." 23 Cyc. 1527. Obviously a bill for specific performance and a decree thereunder has no relation to a suit by a real estate broker for the purpose of collecting his commission nor was this real estate broker in any way bound by the result of the decree in the Court of Chancery.

The contract for the payment of commission was certainly such that required evidence as to the intentions of the parties who entered into this agreement. No such evidence was adduced at the trial of the case nor was the jury allowed to determine the meaning of this agreement. At the time of the trial of this case a judgment had already been entered against the defendant-appellant for the return by him of the deposit to the purchaser and

it is the contention of this defendant that under such circumstances, he not having received any money from the purchaser, said deposit merely being held by the defendant for the purchaser, was in no way responsible under this agreement to the plaintiffs-respondents, it being the intention of the parties that if under any circumstances there was no final settlement under the contract of sale that the vendor, in this case the defendant-appellant, was to pay to the broker whatever money he had in his possession so that the said defendant would have no benefit of any money left with him in the event of a default.

Wherefore defendant-appellant prays that judgment may be reversed.

ISADORE SACK,
Attorney for Defendant-Appellant.

NEW JERSEY COURT OF ERRORS
AND APPEALS.

JULIUS TAYLOR and JOSEPH L. SOLOFF,
PARTNERS, TRADING AS TAYLOR & SOLOFF,
Plaintiffs-Respondents,

v.

HARRY GARBER,
Defendant-Appellant.

ON APPEAL.

BRIEF OF PLAINTIFFS-RESPONDENTS.

The plaintiffs' suit was based upon a commission agreement which is in the following form:

"April 15th, 1926.

Messrs. Taylor and Soloff:

For and in consideration of your having procured a purchaser for all that certain land, as more specifically outlined in an Agreement of Sale between Harry Garber, et al., and Jacob Stern, we hereby agree to pay you the sum of seven thousand dollars (\$7,000.00) as and for your commissions, fees, etc. Said commission to be paid on or before the fourteenth day of June,

1926, when final settlement is made. In the event settlement is not made, due only to a defect in the title, then we agree to pay you the same amount of moneys received by us from the purchasers in said agreement.

FRANK T. PERONE,
HARRY GARBER, (Seal)."

It will be observed that the consideration for the agreement was the fact that the plaintiffs had already procured a purchaser for the land. The amount agreed to be paid for commission was the sum of \$7,000.00, to be paid on the fourteenth of June, 1926. The agreement further provided that in the event that the settlement was not made because of a defect in title, then instead of paying \$7,000.00 the defendant was to pay only the amount received from the purchaser.

Settlement was not made at the appointed time, because the purchaser found the title to be defective. The sellers in the agreement of sale, the defendants in this case, filed a bill in Chancery for specific performance against the purchaser, which was defended on a number of grounds, one of which was that the title was defective. The matter was heard before Vice-Chancellor Ingersoll, who in his conclusions found that there were encumbrances upon the title, and concluded his opinion in the following language:

"It follows, therefore, that the bill must be dismissed. The complainants were unable upon the day fixed for final settlement to give a good and marketable title, free from all encumbrances, except the mortgages,"

and in pursuance thereof, the Court of Chancery entered a final decree reciting the same facts as to title. An appeal was taken by the seller to the Court of Errors and Appeals, which affirmed the decree of Vice-Chancellor Ingersoll.

There having been an adjudication by a court of competent jurisdiction in a suit in which the defendant in this suit was a party, that the title was defective, the suit of the plaintiff in this case was brought only for \$5,000.00. After the decision of the case by the Vice-Chancellor, the complaint in this suit was amended setting forth the adjudication in the Court of Chancery.

At the trial, the plaintiffs below offered the commission agreement in evidence, and also the record of the Court of Chancery and rested.

The only defense interposed was a judgment entered a few minutes before in a suit by the purchaser against the seller (the defendant herein) for the return of the \$5,000.00 deposit money paid on account of the purchase price. The defendant thereupon rested his case and a judgment was directed in favor of the plaintiffs below in the sum of \$5,000.00 with interest.

The appellant argues that the record of the proceedings in the Court of Chancery in the suit by Garber against Stern was not admissible.

It seems to us to be perfectly obvious that the decree of the Court of Chancery was so conclusive upon the defendant in this suit that it was not possible for the defendant to deny it. At any rate, the testimony having been admitted, no testimony was offered to off-set it and it, therefore, stands conclusively as an estoppel against the defendant. It was, therefore proper, competent and the best evidence, and there being nothing to off-set it the Court was certainly justified in directing a judgment in favor of the plaintiff.

The appellant states in his brief that the fact that a judgment was rendered against the defendant herein awarding the return of the deposit money to the purchaser created such a situation that the defendant

stood in the same position as if he had received no money. There is certainly no merit to that contention. It should be noted that the commission agreement does not oblige the defendant to pay the same money received from the purchaser in the event that the settlement did not go through because of a defect in title, it merely obligates him to pay the same amount of money. The mere rendering of a judgment against the defendant in the suit of Stern against him does not, of course, mean that it will be paid. It might very well be reversed, or it might be that the defendant is financially unable to pay the money back, in which event, of course, the rendering of the judgment would be a futile thing, and would in no sense operate as a return of the \$5,000.00 deposit money.

If the settlement in this case had fallen through for some reason, that was the fault of the seller and not because of a defect in title, then, of course, the plaintiff in this case would have been entitled to receive the full sum of \$7,000.00 and that without regard to whether the \$5,000.00 would have been ordered to be paid back or not.

The agreement is an absolute promise to pay and contains in it no limitations upon the duty to pay by reason of the fact that the defendant might be obligated to return the money, and it must have been obvious to the sellers when entering into the agreement that if the title was defective, they would be obliged to return the money.

There being no other points argued in appellant's brief, none of the other grounds of appeal are, therefore argued by us in our brief.

It is respectfully submitted that the judgment of the Court should be sustained.

THOMPSON & HANSTEIN,
*Attorneys for Plaintiffs-
Respondents.*