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NOTICE OF APPEAL.

New Jersey Supreme Court

JACOB K. SAFRIS and HARRY LESSER, *Plaintiffs-Respondents,* vs. THOMAS F. SOMERS, JR., Executor and Trustee of the Estate of Thomas F. Somers, deceased, *Defendant-Appellant.*	*In Attachment.* *Action at Law.* *Notice of Appeal.*

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To Messrs. Zucker & Goldberg, attorneys of plaintiffs-respondents, 24 Branford Place, Newark, N. J.

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SIRS:

PLEASE TAKE NOTICE, That the defendant in the above-entitled cause hereby appeals from the judgment heretofore entered in this court on December 6, 1930 for five thousand six hundred twenty-five dollars and twenty-nine cents ($5,-625.29) damages and costs and from every part thereof to the New Jersey Court of Errors and Appeals in the last resort in all causes.

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Dated December 29, 1930.

Yours, etc.,

LIONEL P. KRISTELLER,
Attorney for Defendant-Appellant.

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GROUNDS OF APPEAL.

NEW JERSEY COURT OF ERRORS AND APPEALS.

10 *Between* JACOB K. SAFRIS and HARRY LESSER, *Plaintiffs-Respondents,* *and* THOMAS F. SOMERS, JR., etc., *Defendants-Appellants.*	*In Attachment.* *Grounds of Appeal.*

To Zucker & Goldberg, Esqs., attorneys of plain-
20 tiffs-respondents, 24 Branford Place, Newark, N. J.

SIRS:

The appellant specifies the following as the grounds of appeal in the above-entitled cause:

1. The Court below erred in denying to the appellant his right to have a jury determine under all the evidence supporting the defenses of waiver and estoppel whether or not the appel-
30 lant or the respondents breached the contract referred to in the pleadings.

2. The separate defenses of waiver and estoppel set up by the appellant in his answer constituted valid legal defenses, and being supported by affidavit and exhibits, could not be stricken out and judgment entered under Rules 80 and 84 of the Supreme Court.

3. The controverted affidavits raised questions of fact and supported the pleadings filed herein,
40 which could only be determined by a jury, and

the striking of the answer deprived the defendant of a trial by jury, to which he was entitled under the issue raised therein.

4. The Supreme Court erred in summarily determining upon controverted affidavits that the appellant was unable to deliver the title required under the contract alleged in the complaint. 10

5. The complaint was deficient, and did not warrant the entry of a summary judgment, in that, it failed to allege readiness and willingness on the part of the respondents to perform their obligations, under the contract alleged in the complaint.

6. There was no proof before the Court that the respondents were ready and willing to perform their obligations at the time, and in the manner prescribed by the contract alleged in the complaint. 20

7. The Supreme Court erred in striking the answer and counter-claim filed by appellant, and entering a summary judgment for a portion of a single count in the complaint, and referring the balance to a jury for assessment.

LIONELL P. KRISTELLER,
Attorney of Defendant-Appellant. 30

Dated: January 6, 1930.

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COMPLAINT.

NEW JERSEY SUPREME COURT.

Essex County.

10 Jacob K. Safris and Harry Lesser, *Plaintiffs*, *vs.* Thomas F. Somers, Jr., Executor and Trustee of the Estate of Thomas F. Somers, deceased, *Defendant*.	*In Attachment.* *Action at Law.* *Complaint.*

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Plaintiffs residing in the City of Newark, County of Essex and State of New Jersey, say that:

1. On August 11, 1925, the plaintiffs entered into a contract with Thomas F. Somers, now deceased, to purchase premises located in the Borough of Bradley Beach, Monmouth County, New Jersey for the sum of sixty thousand dollars ($60,000), a true copy of which contract is an-
30 nexed hereto and marked Exhibit "A."

2. After the making of the said contract and its full execution, the plaintiffs immediately thereafter caused an examination of the title to be made of the premises which they agreed to purchase from the said Thomas F. Somers, now deceased.

3. By the terms of said contract, the premises were to be conveyed to the plaintiffs herein, free
40 and clear of all liens or encumbrances.

Complaint.

4. Plaintiffs have caused an examination of the title to the premises described in said agreement to be made and that such an examination has disclosed the following conditions of record affecting the premises mentioned in Schedule A annexed hereto, which appear in deed recorded in Book 506 of Deeds for Monmouth County on page 486: 10

"That no house, cottage or other building, shall ever be erected on said premises nearer the line of said Ocean and Godfred Avenues, than fifteen feet (15), (Godfred Avenue is now Fifth Avenue); and that said premises shall never be used for a livery stable or manufacturing purposes, that no intoxicating liquors shall be sold on said premises, and no pig stys shall ever be erected or maintained thereon." 20

5. That in deed recorded in Book 618 of Deeds for Monmouth County on page 172, which affect the premises purchased by the plaintiffs from the defendant, there appears the following clause:

"This conveyance is made subject to the covenants, conditions and restrictions contained in said deed (Book 506 of Deeds for Monmouth County on page 486), which by reference thereto or record thereof may more fully appear." 30

6. That in deed recorded in Book 621 of Deeds for Monmouth County on page 447, which affect the premises purchased by the plaintiffs from the defendant, there appears the following clause:

"This conveyance is made however and received expressly subject to the following conditions and restrictions: 40

That no house, cottage or other building shall ever be erected on said premises nearer the line of said Ocean Avenue than fifteen feet (15), and that said premises shall never be used for a livery stable or manufacturing purposes, and that no intoxicating liquors shall be sold on said premises and that no pig sty shall be erected or maintained thereon.''

7. That in deed recorded in Book 671 of Deeds for Monmouth County on page 324, which affect the premises purchased by the plaintiffs from the defendant, there appears the following clause:

''Subject to covenants, conditions and restrictions contained in deed from Andrewetta L. Brinley.''

8. That in deed recorded in Book 652 of Deeds for Monmouth County on page 199, which affect the premises purchased by the plaintiffs from the defendant, there appears the following clause:

''This conveyance is, however, made subject to the following conditions: That no house, cottage or other building ever be erected upon said premises nearer the line of said Rowlett or Godfrey avenues, than fifteen feet and that said premises shall never be used for livery stable or manufacturing purposes and that no intoxicating liquors shall be sold upon said premises and no pig stys shall be maintained or erected thereon.''

9. That in deed recorded in Book 713 of Deeds for Monmouth County on page 349, which affect the premises purchased by the plaintiffs

from the defendant, there appears the following clause:

> "This conveyance is made subject to the following restrictions: That no house, cottage or other building shall be erected upon said lots nearer the lines of said Rowlett and Malbone Avenues than fifteen (15) feet; and that said premises shall never be used for livery stable or manufacturing purposes; that no intoxicating liquors shall be sold upon said premises, nor shall any pig stys or hog pen be erected thereon."

10. That in deed recorded in Book 791 of Deeds for Monmouth County on page 365, which affect the premises purchased by the plaintiffs from the defendant, there appears the following clause:

> "This conveyance is made subject, nevertheless, to certain restrictions contained in said Deed substantially in words following, to wit: 'this conveyance is made subject to the following restrictions: that no house, cottage or other building shall be erected upon the said lots nearer the lines of Rowlett and Malbone Avenues than fifteen feet (15); and that said premises shall never be used for livery stables or manufacturing purposes; that no intoxicating liquors shall be sold upon the said premises, nor shall any pig stye or hog pen be erected thereon,' as reference to said deed will more fully appear."

11. That in deed recorded in Book 906 of Deeds for Monmouth County on page 132, which affect the premises purchased by the plaintiffs

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from the defendant, there appears the following clause:

> "Said premises are hereby conveyed subject to certain restriction in deed from Godfrey M. Brinley *et al* to the said Amelia F. Carter deed dated July 29th, 1903 and recorded in said Clerk's Office in Book 713 of Deeds for Monmouth County on page 349, &c."

12. Upon the plaintiffs discovering the restrictions affecting the premises, which they agreed to purchase from the said Thomas F. Somers, now deceased, they immediately notified the said Thomas F. Somers, now deceased, that they would refuse to accept title to the premises aforesaid unless the said restrictions aforesaid were removed as an encumbrance from the premises which the plaintiffs agreed to purchase from the said Thomas F. Somers, now deceased.

13. The said Thomas F. Somers, now deceased, refused to comply with the terms of his contract although the plaintiffs notified him that they were ready, willing and able, at any time that he would produce releases removing the restrictions affecting said premises from said premises, or make a proper allowance to them on their contract because of said restrictions, but the said Thomas F. Somers, now deceased, at all times refused to do the same and was never ready, willing or able to comply with the terms of his contract. The plaintiffs gave to the defendant, a deposit of four thousand dollars ($4,000.00) on account of the purchase price of the premises aforementioned.

14. The plaintiffs demanded the return of the said sum of four thousand dollars ($4,000.00)

which they paid as such deposit on account of the purchase price of the aforesaid premises, but the said Thomas F. Somers, now deceased, and his executor and trustee, Thomas F. Somers, Jr., refused to return said sum.

15. Plaintiffs in examining the title to the aforementioned premises incurred costs of three hundred seventy-five dollars ($375.00), which they paid.

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16. Annexed hereto and marked Schedule "A" is the agreement which was entered into between the plaintiffs and Thomas F. Somers, now deceased.

Plaintiffs demand of the defendant, the return of the aforementioned deposit of four thousand dollars ($4,000.00) and the payment of the sum of three hundred seventy-five dollars ($375.00) expended in examining the title to the aforementioned premises besides interest from August 11, 1925 and costs of this action.

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ZUCKER & GOLDBERG,
Attorneys for Plaintiffs.

"SCHEDULE A."

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This agreement made this 11th day of August, 1925, between Thomas F. Somers, Widower, party of the first part and Jacob K. Safris and Harry Lesser, party of the second part:

Witnesseth, the party of the first part for and in consideration of the sum of Sixty Thousand ($60,000) Dollars to be paid to him in the manner hereinafter enumerated does hereby agree to grant, sell, convey and confirm to the

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said party of the second part and to their heirs and assigns, forever, on or before the 15th day of September, 1925.

All those certain lots, tract or parcels of land and premises, hereinafter particularly described, situate, lying and being in the Borough of Bradley Beach in the County of Monmouth and State of New Jersey, more particularly described as follows: Known and designated as lots numbered Fifty-two, fifty-three, fifty-four and fifty-five (#52, 53, 54 and 55) on a map of Bradley Beach, N. J. of the Brinley Tract entitled "Map of property situated at Bradley Beach, Ocean Township, Monmouth County, N. J."

Beginning at the intersection of the westerly line of Ocean Avenue, and the southerly line of Fifth Avenue; thence running West and along the said side of Fifth Avenue 209-72 feet to the westerly line of Lot #52 aforesaid; thence running Southerly and at right angles of Fifth Avenue 150 feet; thence running easterly at right angles to the second course 54.82 feet; thence running north and along the easterly line of Lot #72, 4.74 feet; thence running east and at right angles to Ocean Ave., 150 feet to the west line of Ocean Avenue; and thence running North along said side of Ocean Avenue 150.16 feet to the point and place of BEGINNING.

The above described premises are the same premises conveyed to the party of the first part by Deed recorded in Book 791 of Deeds for Monmouth County on page 365 and by Deed recorded in Book 671 of Deeds for Monmouth County on page 324.

The said premises are to be conveyed subject to the terms of a lease made by THOMAS F.

SOMERS to LOUIS FROST which lease becomes void if the property is sold at the option of the Lessor, also subject to the rights of the New York Telephone Company in the cables and conduits layed in said premises which must be removed if necessary on notice to the New York Telephone Company. This conveyance is not to include any buildings or chattels which are now upon the premises herein described and the party of the second part does hereby agree to pay the said sum of Sixty Thousand ($60,000) dollars as and for the purchase price aforesaid in the following manner: 10

By deposit, the receipt of which is hereby acknowledged, Four Thousand Dollars ($4,000).

By cash at closing of Title and delivery of deed, Sixteen Thousand ($16,000) Dollars. 20

By the party of the second part executing their mortgages in the sum of Thirty-five Thousand ($35,000) dollars, together with their bond in double said sum to be as first lien upon said premises to the party of the first part to bear interest at the rate of six (6%) per cent payable semi-annually, the entire mortgage to be due in three years (3) from the date of the execution of the same with the privilege of prepayment with interest to the date of payment. 30

By executing a second mortgage containing the same terms and conditions as the above mortgage with the exception that it shall be for the sum of Five Thousand ($5,000) dollars and shall be due in six (6) months from the date of the execution of the same.

Taxes, if any, shall be apportioned and allowed as of the date of closing of title. 40

The Deeds of conveyance shall be a Warranty Deed conveying the premises free and clear of any and all encumbrances, except those mentioned in this contract and said Deed of Warranty shall be delivered and the said cash paid and Mortgages delivered on or before the fifteenth day of
10 September, 1925 at the office as THOMAS F. SOMERS, eleven east forty-second street, New York City.

The party of the first part does hereby agree to pay VIOLA AQUERA and WILLIAM H. MCBRIDE, share and share alike, the total sum of Three Thousand Dollars ($3,000), as commission for negotiating the sale of the premises herein said commission to be paid, if, when and only upon the closing of title and delivery of deed and the
20 payment of the balance of the purchase price as called for herein.

In Witness Whereof, the said party of the first part have hereunto set their hands and seals the day and year first above written.

THOMAS F. SOMERS (L. S.)
JACOB K. SAFRIS (L. S.)
HARRY LESSER (L. S.)

Signed, Sealed and Delivered in
30 the presence of

M. J. ZUCKER

40

Complaint—Schedule A.

State of New York, } ss.
County of Manhattan. }

Be it remembered, that on this 11th day of August, 1925, before me, a Master in Chancery of New Jersey, personally appeared Thomas F. Somers who, I am satisfied is the grantor mentioned in the within Indenture, and to whom I first made known the contents thereof, and thereupon he acknowledged that he signed, sealed and delivered the same as his voluntary act and deed, for the uses and purposes therein expressed.

MAURICE J. ZUCKER,
Master in Chancery.

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DEMAND FOR BILL OF PARTICULARS.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

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JACOB K. SAFRIS and HARRY LESSER, *Plaintiffs,* *vs.* THOMAS F. SOMERS, JR., Executor and Trustee of the Estate of Thomas F. Somers, deceased, *Defendant.*	*In Attachment.* *Action at Law.* *Demand for Bill of Particulars.*

20

To: Zucker & Goldberg, Esqs., attorneys of Plaintiffs, 24 Branford Pl., Newark, N. J.

SIRS:

The defendant demands that the plaintiffs file within the time prescribed by law, particulars of their complaint as follows:

1. When did the plaintiffs cause an examination to be made of the title to the premises de-
30 scribed in the contract annexed to the complaint filed herein as alleged in paragraph 2 of the complaint.

2. When did the plaintiffs discover the restrictions affecting said premises as mentioned in paragraphs 4, 5, 6, 7, 8, 9, 10, and 11?

3. When and in what manner did the plaintiffs notify Thomas F. Somers, now deceased, that they would refuse to accept title to said premises unless the said restrictions were re-

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moved. If in writing, annex a copy thereof, and if verbally, state the time, place and in whose presence such notifications was given.

4. Did Thomas F. Somers, now deceased, refuse to comply with the terms of his contract verbally or in writing? If in writing, annex a copy of his refusal to this Bill of Particulars and if orally, state the time, place and in whose presence said refusal was made.

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5. When and in what manner did the plaintiffs notify Thomas F. Somers, now deceased, that they were ready, willing and able to comply with the terms of the contract? If said notification was in writing, annex a copy thereof to this Bill of Particulars, and if verbally, state the time, place and in whose presence said notification was made.

20

6. When and where did the plaintiffs demand the return of the sum of four thousand dollars ($4,000.00) which they alleged was paid as a deposit on account of the contract annexed to the complaint; if said demand was in writing, annex a copy thereof, and if oral, state the time, place and in whose presence said demand was made.

7. State the items making up the incurred costs of $375.00 for the examination of title, as alleged in paragraph 15 of the complaint.

30

8. To whom did the plaintiffs pay the $375.00 as set forth in paragraph 15 of the complaint? If payment was made by check, annex a copy of the check to this Bill of Particulars, and if in cash, annex a copy of the receipt.

Dated: August 12, 1930.

LIONEL P. KRISTELLER,
Attorney of Defendant.

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BILL OF PARTICULARS.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

10 JACOB K. SAFRIS and HARRY LESSER, *Plaintiffs,* *vs.* THOMAS F. SOMERS, JR., Executor and Trustee of the Estate of Thomas F. Somers, deceased, *Defendant.*	*In Attachment.* *Action at Law.* *Bill of Particulars.*

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To Lionel P. Kristeller, Esq.,
Attorney of Defendant,
Or To Whom It May Concern:

DEAR SIR:

The following is a Bill of Particulars made pursuant to Demand of the defendant, served upon the attorneys of the plaintiffs, by service duly acknowledged on the twelfth day of August, 1930.

30

ANSWER TO QUESTION NO. 1.

1. The plaintiffs caused an examination to be made of the title to the premises described in the contract annexed to the complaint shortly after the contract was signed.

ANSWER TO QUESTION NO. 2.

2. Some time around October 6, 1925, the attorneys for the plaintiffs herein called to the at-

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tention of the plaintiffs, the restrictions mentioned in the paragraphs referred to in question No. 2, which notice to the plaintiffs was a preliminary notice until a more detailed explanation was given to them.

ANSWER TO QUESTION NO. 3. 10

3. Correspondence ensued between Thomas F. Somers, now deceased, and the attorneys of the plaintiffs, which correspondence took place between the attorneys for the plaintiffs, and Thomas F. Somers, now deceased, and John P. Broomell, who was the attorney for Thomas F. Somers, now deceased, which correspondence continued until the death of Mr. Somers on February 5, 1926. The letters in the case are:

Letter of October 6, 1925, addressed to Thomas F. Somers. Letter of October 17, 1925, addressed to Thomas F. Somers. Letter of October 17, 1925, addressed to John P. Broomell. Letter of October 26, 1925, from John P. Broomell to Maurice J. Zucker. Letter of October 27, 1925, from Zucker & Goldberg to John P. Broomell. Letter of November 10, 1925, from Zucker & Goldberg to John P. Broomell. Letter from John P. Broomell to Maurice J. Zucker, dated November 13, 1925. Letter from Zucker & Goldberg to John P. Broomell, dated November 14, 1925. Letter from Zucker & Goldberg to John P. Broomell, dated January 13, 1926. Letter from John P. Broomell to Maurize J. Zucker, dated January 15, 1926. Letter from Zucker & Goldberg to John P. Broomell, dated January 19, 1926. Letter from John P. Broomell to Maurice J. Zucker, dated January 21, 1926, which last mentioned letter is the last letter between either

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Thomas F. Somers, now deceased, or his attorney, John P. Broomell.

In addition thereto, the attorneys of the plaintiffs called Thomas F. Somers, now deceased, on the telephone and demanded of him that he either convey the title to the plaintiffs as he agreed in his contract or return the deposit, both of which he refused to do. The letters above referred to are annexed to this Bill of Particulars and made a part hereof.

ANSWER TO QUESTION NO. 4.

4. Defendant is referred to answer to question No. 3 in Demand for Bill of Particulars.

ANSWER TO QUESTION NO. 5.

5. Defendant is referred to answer to Question No. 3 in Demand for Bill of Particulars.

ANSWER TO QUESTION NO. 6.

6. Defendant is referred to answer to Question No. 3 in Demand for Bill of Particulars.

ANSWER TO QUESTION NO. 7.

7. Said charge of three hundred seventy-five dollars ($375.00) includes drawing of the agreement, examination of the title, the various conferences in regards to the title, checking up of the same, examining the law in regard to questions raised by the title, ordering tax search, Supreme and U. S. District Court search.

ANSWER TO QUESTION NO. 8.

8. Plaintiffs paid the three hundred and seventy-five dollars ($375.00) to Zucker & Goldberg.

The payment was made on November 4, 1926, and amounted to nine hundred sixty-seven dollars and eight cents ($967.08), which included said sum of three hundred seventy-five dollars ($375.00), and other bills due and owing from the plaintiffs to Zucker & Goldberg. Said payment was by check drawn on the North Ward National Bank, dated November 1, 1926, No. 589. The original check cannot be located, but if found, will be produced when found, although diligent search has been made for the check. 10

Yours truly,

ZUCKER & GOLDBERG,
Attorneys of Plaintiff.

Dated: August 14, 1930.

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"A"

October 6th, 1925

Mr. Thomas F. Somers,
11 East 42nd Street,
New York City.

Dear Sir:

In regard to the property purchased of you by Harry Lesser and Jacob K. Safris at the corner of Fifth avenue and Ocean avenue, Bradley Beach, New Jersey, I desire to make the following report of my examination of the title: 30

1. My tax search shows 1925 taxes amounting to $623.36, no part of which has been paid.

My title abstract shows the following restriction against the use of said land which you have agreed to sell:

"That no house, cottage or other building shall ever be erected on said premises nearer the line 40

of said Ocean and Godfred avenues, then fifteen (15) feet and that said premises shall never be used, etc.''

I also find on record a mortgage in the sum of $13,000 held by the Asbury Park Building and Loan Association, which appears to cover a portion of the premises you have agreed to convey.

10

I have informed my clients of the condition of this title and they inform me that they had no knowledge of the fact that there was a fifteen (15) foot set back as recited to you above, and were never informed of this condition.

Due to this fact they are hesitating to close title with you.

I will get in touch with you in the course of the next few days and let you know what their final decision will be.

20

Yours truly,

ZUCKER & GOLDBERG.
per

MJZ:EG

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40

"B"

Law offices of
ZUCKER & GOLDBERG
Chamber of Commerce Building
24 Branford Place.

Newark, New Jersey, Oct. 17, 1925 10

File No. X 525
in re: Lesser-Somers.

Mr. Thomas F. Somers,
11 East 42nd Street,
New York, New York.

Dear Sir:

Since writing my letter of October 14, 1925, I had a conference with my clients, at which time I went through the search with them and 20 explained all the facts to them.

I desire to call your attention to the fact that in the title to this property there appears a deed from Andrewetta S. Brinley to Albert C. Taylor, dated October 3, 1892 and recorded in Book 506 of deeds for Monmouth County on page 486. Said deed contains the following clause: "This conveyance is, however, made and received expressly subject to the following conditions that no house, cottage or other building shall ever be 30 erected on said premises nearer the line of Ocean or Gottfred avenues, then fifteen feet, etc."

In the next deed on record in this title in book 618 of deeds on page 172, the following recital appears: "This conveyance is made subject to convenants, conditions and restrictions contained in the Brinley Deed."

In my letters to you heretofore, I have referred to restrictions only as being on this property.

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New Jersey State Library

Since writing to you, I have made an examination of the law in this case and I find that where a conveyance has been made subject to a condition, a violation of said condition defects the conveyance and the person or persons who have given the deeds subject to the said conditions
10 have the right to bring an action to have their property, which they have sold on condition returned to them upon the condition being violated.

I desire to inform you that I have had a similiar matter such as this with the Mutual Benefit Life Insurance Company of Newark, New Jersey, who turned down an application for a loan because of the fact that a deed on record used the word "condition" as it is used here and informed me that unless I procured a release
20 of said condition or a new deed changing the condition to a restriction, that their legal department would not permit them to give a loan under the circumstances which I have just recited.

It would make no difference to my clients whether you agree to make an allowance or not and I have informed them that they cannot accept the title as it stands and they have informed me to demand from you, the return of their deposit with interest and the costs they have entailed.

30 If I do not hear from you within the course of five days, that you will comply with their request, I will bring an action against you to recover the same. These are my instructions and I will be obliged to follow them.

Yours very truly,

ZUCKER & GOLDBERG,

By

MJZ.C

40

"C"

Oct. 17, 1925

John P. Broomell,
17 East 42nd St.,
New York, New York.

Dear Sir: 10

In reply to your letter of October 16, 1925, in regard to the sale of property of Thomas F. Somers to Jacob K. Safris and Harry Lesser, at Bradley Beach, New Jersey, I desire to state that your inference in paragraph two of your letter, is incorrect and a deduction that you should not have made without making sure of your ground.

Mr. Safris and Mr. Lesser have now received and have had their money for over a week or 20 ten days on their Kearney property, as they received a $50,000.00 payment on the same.

I have written a letter to Mr. Somers today, which letter I dictated beforeI received your letter and from that letter you will note that the question of a concession on the fifteen foot set back restriction, though an important one, is offset by another question in the title.

I know that Mr. Somers was not represented by an attorney, but Mr. Somers will tell you that 30 I was badly handicapped in not having a stenographer, as I had to dictate to a girl who could not take short hand. I could not make a search and then dictate an agreement, but my agreement was dictated from surface impressions obtained from examining the papers that Mr. Somers had and I can honestly state to you that I do not remember anything about a fifteen foot set-back. I will not say that I did not see the same, but I had no intention of leaving it out 40

for if I had seen it, I would have called it to the attention of my clients.

I have a complete search on this property from the Monmouth Title Company from whom I ordered this search and not only does the set-back exist on Ocean avenue but it also exists on
10 Fifth avenue.

There is another point, more important than the set-back, which I have more fully set forth in my letter to Mr. Somers, a copy of which I am sending to you. This fifteen foot set-back is not a restriction, it is a condition and if you are familiar with the decisions where deeds are given with conditions, you know as well as I do that a violation of that condition puts the vendor in a position where he may take his property
20 away from the person or persons who own the property when that condition is broken.

You will note from my letter to Mr. Somers that I had an occasion where a client of mine was attempting to get a mortgage from the Mutual Benefit Life Insurance Company and in the title appeared a deed with a condition in the same, somewhat similiar to this condition and the legal department of said insurance company refused to grant a loan on the property.

30 This is the position that my clients have taken and I have advised them not to take the title under any circumstances whatever.

As stated in my letter, if Mr. Somers does not return the deposit together with interest and costs, I will without further delay commence suit against him.

40

If there is anything you desire to say to me or to discuss this matter, I will be only too glad to take the matter up with you.

Yours very truly,

ZUCKER & GOLDBERG,

By

MJZ.C

10

"D"

JOHN P. BROOMELL
Counsellor at Law
National City Building
17 East 42nd Street
New York

20

October 26, 1925

Maurice J. Zucker, Esq.,
24 Branford Place,
Newark, N. J.

Dear Sir:

I received your favor of 17th inst. relative to the sale of property at Bradley Beach, N. J. to your clients Safris and Lesser. Mr. Somers has also handed me your letter to him of that date, in which your objections to the title are set forth in greater detail.

30

I have been out of town for the past few days, but am now making an investigation of the points which you have raised, and will let you hear from me regarding them in a few days.

In the meantime I remain

Very truly yours,

(Signed) JOHN P. BROOMELL.

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"E"

October 27th, 1925

John P. Broomell, Esq.,
17 East 42nd Street,
New York City.

10 Dear Sir:

Your letter of October 26th, 1925 in the above matter received. Due to the fact that I received no reply to my letter of the 17th instant I have prepared my pleadings for procedure against Mr. Somers in this matter.

However, your letter was received by me before I had checked the same and I am now holding up this matter pending further information from you.

20 Should you desire, I would be only too glad to show you my abstract of this title which I received from the Monmouth Title Company.

There is one thing that I desire to have Mr. Somers and yourself realize and that is that my clients are not endeavoring to back out of this deal. What they are concerned with is that should they attempt to build an apartment hotel or any other building if they were held up in the least in obtaining mortgage loans it would ruin

30 them.

Will you kindly let me hear from you as soon as possible on all the points I have raised in my previous letter to Mr. Somers and to you?

Yours truly,

ZUCKER & GOLDBERG,

Per

40

"F"

November 10th, 1925

John P. Broomell, Esq.,
17 East 42nd Street,
New York City.

Dear Sir: 10

I have not heard from you since my last telephone conversation in the above matter.

My clients have requested me to wait no longer. I therefore wish to inform you that I will commence proceedings in this matter on Monday, November 16th, 1925 unless the matter is settled by that time.

Yours truly,

ZUCKER & GOLDBERG, 20

per

"G"

JOHN P. BROOMELL
Counsellor at Law
National City Building
17 East 42nd Street
Telephone New York 30
Murray Hill 5306

November 13, 1925

Maurice J. Zucker, Esq.
24 Brandford Place
Newark, N. J.

Re Somers-Lesser contract.

Dear Sir:

I acknowledge receipt of your letter of 10th inst. advising that you will commence proceed- 40

ings in the above matter on Monday next unless the matter is settled by that time. My purpose in now writing you is to review the situation, and to explain clearly the position of Mr. Somers in the hope that expensive litigation may be avoided.

10 The contract which you prepared distinctly provides that title is to close on September 15th at Mr. Somers' office in New York. If you will read your letters of September 17, 18 and 29 you will observe that the only reason assigned for your clients' failure to comply with the terms of the contract was the fact of their inability to procure the cash which they were to pay on the delivery of the deed.

Subsequently, in your letter of October 6th, 20 you raised the point of the 15 foot set-back restriction on the property, and in your letter of October 17th you took the further position that this provision was a "condition" rather than a "restriction," and that you had advised your clients not to accept the title under any circumstances.

With regard to the contention that the set-back provision is a "condition" rather than a "restriction" I wish to say that I am satisfied, 30 from an examination of the authorities, that the court would hold that, notwithstanding the use of the word "condition," it was not the intention of the grantors that it should operate as such, with right of re-entry for condition broken. This fact is emphasized by the repetition of this alleged "condition" in successive deeds in the chain of title, and by the further fact that although this same provision occurs in all of the deeds to the numerous lots in the Brinley Tract, the conten-

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tion which you now raise has never been raised by any of the many grantees or mortgagees.

However, as I stated to you over the telephone some days ago, it will be a simple matter to procure from the former owners of the property, releases stating that the provision is a restriction and not a condition, and waiving all right of re-entry, and I am now engaged in procuring such releases, so as to avoid any further argument on this point. 10

It is my understanding of our last telephone conversation, however, that your clients will not be satisfied to have the matter cleared up in that way, and that they demand that an allowance be made on the purchase price because of the 15 foot set-back restriction. In this connection I would call your attention to the fact that there is an ordinance in Bradley Beach which requires any building on the streets in question to be set back 15 feet from the building line, so that even if there were no restrictions in the deeds, your clients would not be able to erect a building within the inhibited area. 20

But still more important is the fact, as mentioned in my letter of October 16th, that my client was not represented by an attorney at the time you prepared the contract of sale, and that he delivered to you at that time his deeds of the premises so that you might ascertain the exact state of his title and make suitable provision therefor in the contract. These deeds, which were in your hands when you drew up the contract, clearly set forth in *haec verba* the restrictions on the property. In fact, these restrictions follow immediately after the description of the premises which you copied into the contract. 30

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Under these circumstances you will readily understand that the demand of your clients for an allowance on the purchase price by reason of this set-back restriction cannot be entertained, and the fact that they make such a demand casts serious doubt upon their good faith in raising such a question at the present time.

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In conclusion let me say that Mr. Somers has no desire to be arbitrary in this matter, and is entirely willing to convey this property to your clients even though the time stated in the contract has long since expired, but it will be necessary to ask your clients to come to a decision on this point within the next ten days.

I remain

Very truly yours,

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John P. Broomell

"H"

November 14th, 1925

John P. Broomell, Esq.,
National City Building,
17 East 42nd Street,
New York City.

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Dear Sir:

I have read your lengthy letter of November 13th, 1925. I believe that I have answered every question you have raised in said letter heretofore.

As far as the deeds are concerned, if you will look in the contract in your possession you will note that I do not use the description in the deed. I was more interested in the survey and it is from the survey that I drew my description.

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In order to make sure that the premises described in said agreement were the correct premises I referred to the deeds. I did not examine the interior of the deeds, but only looked at the record of the same and referred to said record in the agreement.

I have told you heretofore that I have no recollection of the restriction and I have closely questioned my clients to determine whether they had any knowledge of the same, and they inform me that they did not have any knowledge. 10

I notice from the tone of your letter that you are trying to place the present predicament of Mr. Somers on me. This I think you would not do, as I endeavored to give Mr. Somers as fair a contract as I would have drawn had I represented myself. 20

You do not seem to appreciate the fact that my clients purchased the property for the purpose of erecting an apartment house on the same, and as far as the question of the Ordinance of the Town of Bradley Beach, that Ordinance would not affect my clients, for if Bradley Beach refused to allow my clients to build on the building line on Fifth Avenue, they could not go into our Supreme Court and compel Bradley Beach to permit them to erect the building on the line. 30

You must also understand that the nature of the building that my clients had contemplated erecting and the only kind that would pay on the basis of the lot in question, would be such a structure.

I for one would not allow them to take title to any property where there is the slightest doubt as to their ability to procure mortgages on the same.

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I still maintain that the title is defective and without going into details again my reasons for saying so is contained in my former letters.

From the contents of your letter I see no other course than to commence proceedings and I am doing so. However, if Mr. Somers will acknowl-
10 edge service of summons in this matter, he will greatly expedite the matter and if he does not I will have to start my action by attachment and this will tie up all other property owned by Mr. Somers in New Jersey.

I shall extend the time that I intend to commence proceedings until Wednesday, November 18th, 1925, and if I do not hear from you by that time as to whether Mr. Somers will accept service and acknowledge the same, I will commence
20 proceedings in attachment.

This is final notice and I will not discuss the matter further unless it be for the purpose of ascertaining whether Mr. Somers will acknowledge service.

I am sorry this condition has arisen but it is my duty to my clients and if I do not do something they will have someone else do it.

Yours truly,

30 ZUCKER & GOLDBERG,

per

MJZ:EG

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"I"

January 13th, 1926

John P. Broomell, Esq.,
17 East 42nd Street,
New York City.

Dear Sir: 10

My clients have been endeavoring since I last wrote you to see if they could not get someone interested in this property who would not be concerned in regard to the conditions and restrictions against this property, even going to the extent of offering it for less money then they agreed to pay, figuring that your client would perhaps be willing to accept a smaller sum for the property if he could get it sold.

My clients have been unsuccessful in obtaining 20 anyone who would be interested in this property and have instructed me to notify you that you return the deposit and costs without any further delay.

As I wrote you heretofore, if Mr. Somers does not feel disposed to return the deposit and pay the costs entailed I would appreciate it if you would let me know whether you will accept service for Mr. Somers in this matter. If you do not care to accept service, it will mean that I will 30 have to bring a suit through attachment and this will tie up all property in New Jersey belonging to Mr. Somers.

Yours truly,

ZUCKER & GOLDBERG,

per

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"J"

JOHN P. BROOMELL
Counselor at Law
National City Building
17 East 42nd Street
New York

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Telephone
Murray Hill 5306 — January 15, 1926.

Maurice J. Zucker, Esq.
24 Branford Place
Newark, N. J.

Re: Somers-Lesser contract.

Dear Sir:

Your favor of the 13th inst, which I beg to acknowledge, is the only communication which I
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have had from you in more than two months.

During the intervening period I have procured from the former owners of the property in question formal releases of the so-called "condition" contained in their respective deeds. The effect of these releases is to remove all question as to this particular provision being a condition rather than a covenant, and the objection which you originally raised on that score has been finally disposed of.

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This leaves only the question of the 15 foot set-back provision, which was set forth in the deeds Mr. Somers handed to you at the time you prepared the contract.

In this connection I wish to call attention to the fact that Mr. Somers, in anticipation of the title closing, paid off the mortgage on the property which was held by the Asbury Park Building and Loan Association. In order to pay off the mortgage at that time Mr. Somers was re-

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quired to take a loss of $881.40 on the face of the mortgage. This loss would not have occurred had your clients been ready to close the title at the time appointed.

After going over the entire situation with Mr. Somers, I have been authorized to make the following proposition to your client, which is submitted entirely without prejudice to any further proceedings which either party may take. Mr. Somers will repay the sum of $3,000. to your clients on account of the deposit which they paid him, and will call off the entire deal provided this proposition is accepted within ten days. On the other hand, he is willing to close the title even at this late date, provided your clients signify their desire to do so within the like period.

On receipt of your reply I will take up with Mr. Somers the question of appearing in any suit which you may desire to institute in this connection.

Very truly yours,

John P. Broomell

"K"

January 19th, 1926

John P. Broomell, Esq.,
17 East 42nd Street,
New York City.

Dear Sir:

In reply to your letter of January 15th, 1926 in regard to the above matter, I desire to state that I have taken up the question with my clients as to the offer you make in said letter.

My clients are not interested in your offer of $3,000. and they have authorized me, however, to make you this offer, which offer is made without prejudice in an endeavor to settle this matter without the necessity of Court action.

They will accept the amount of their deposit, to wit, the sum of $4,000 and will waive interest and attorney's fees which they have incurred in this matter.

If this is not acceptable to your client, will you kindly advise me when you can accept service of summons in suit. I shall expect Mr. Somers to acknowledge service of summons personally in this matter, otherwise it will be necessary for me to start suit in attachment.

Awaiting your early reply, I am

Yours truly,

ZUCKER & GOLDBERG.

"L"

JOHN P. BROOMELL
Counsellor at Law
National City Building
17 East 42nd Street
New York

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Telephone
Murray Hill 5306 January 21, 1926.

Maurice J. Zucker, Esq.
24 Branford Place
Newark, N. J.

Re: Lesser-Somers-matter.

Dear Sir:

I have for acknowledgement your favor of 19th inst,. the contents of which have been carefully noted. 20

I regret to advise you that my client Mr. Somers went into the hospital on Wednesday for a very serious intestinal operation, and his condition is so critical that I am not permitted to see him. For this reason I have been unable to submit to him the proposition contained in your letter, but will do so at the earliest possible moment.

I remain 30

Very truly yours,

JPB/F John P. Broomell

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AMENDED BILL OF PARTICULARS.

NEW JERSEY SUPREME COURT.

Essex County.

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Jacob K. Safris and Harry Lesser, *Plaintiffs,* *vs.* Thomas F. Somers, Jr., Executor and Trustee of the Estate of Thomas F. Somers, deceased, *Defendant.*	*In Attachment.* *Action at Law.* *Amended Bill of Particulars.*

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To Lionel P. Kristeller, Esq., attorney for defendant, or To Whom It May Concern:

Dear Sir:

The following is an amended bill of particulars furnished to you by the plaintiff.

AMENDED ANSWER TO QUESTION NO. 1.

The plaintiffs caused an examination to be made of the title to the premises described in

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the contract annexed to the complaint, within one month after the making of the contract.

Very truly yours,

ZUCKER & GOLDBERG,

Dated August 20, 1930.

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ANSWER AND COUNTER-CLAIM.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

JACOB K. SAFRIS and HARRY LESSER, *Plaintiffs,* vs. THOMAS F. SOMERS, JR., Executor and Trustee of the Estate of Thomas F. Somers, deceased, *Defendant.*	*In Attachment.* *Action at Law.* *Answer and Counter-Claim.*

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The defendant, answering the complaint herein, says:

1. He admits paragraph 1.

2. He denies each and every other allegation contained in the complaint.

FIRST SEPARATE DEFENSE.

1. That at no time were the plaintiffs ready, willing and able to take or accept the deed referred to in the contract annexed to and made part of the complaint; nor were they ready, willing and able to pay the money required of them to be paid as and for the consideration or purchase price as provided in said contract.

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SECOND SEPARATE DEFENSE.

1. That the plaintiffs waived and abandoned any and all alleged restrictions and conditions

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respecting the premises in question, and waived and abandoned any and all obligations thereto.

THIRD SEPARATE DEFENSE.

1. That the plaintiffs agreed to and with the said Thomas F. Somers, in his lifetime, that they would take and accept such title to the premises in question as was held and enjoyed by said Thomas F. Somers, in his lifetime.

2. That the plaintiffs herein, in and by their conduct, have waived and abandoned any and all alleged restrictions and conditions, if any, and have waived and abandoned any and all objections thereto, if any; and by reason of their conduct as aforesaid, are estopped from urging or maintaining any or all alleged objections with respect thereto.

FOURTH SEPARATE DEFENSE.

1. That on the fifteenth day of September, nineteen hundred and twenty-five, which was the date when plaintiffs should have taken title to the premises in question, and should have paid the balance of the purchase price called for by the contract aforementioned, the said plaintiffs were not ready, willing and able to consummate or perform the terms of the contract, on their part to be performed, and did not perform or offer to perform or tender performance of the terms thereof on their part to be performed, all in violation and in breach of the terms of the contract mentioned in the complaint.

FIFTH SEPARATE DEFENSE.

1. That the plaintiffs were at no time ready, willing and able to perform or tender perform-

ance under the contract aforesaid, nor were they ready, willing and able to perform the terms thereof on their part to be performed as provided in the contract.

BY WAY OF COUNTER-CLAIM.

1. That heretofore and on the eleventh day of August, nineteen hundred and twenty-five, one Thomas F. Somers, in his lifetime, entered into an agreement with the plaintiffs herein, wherein and whereby, among other things, the plaintiffs agreed to pay to said Thomas F. Somers, the sum of sixty thousand dollars ($60,000.00), pursuant to and in accordance with the terms of a written contract, bearing date the eleventh day of August, nineteen hundred and twenty-five, as and for the consideration and purchase price for the conveyance to them by said Thomas F. Somers, on or before the fifteenth day of September, nineteen hundred and twenty-five, at the office of said Thomas F. Somers, located at 11 E. 42nd street, in the City, County and State of New York, of certain lands and premises, situate in the Borough of Bradley Beach, County of Monmouth, State of New Jersey, which said premises are more fully described in the contract annexed to the complaint, and made part thereof, and which said contract is hereby referred to and made part hereof as if fully incorporated herein.

2. That on the fifteenth day of September, nineteen hundred and twenty-five, the plaintiffs unlawfully, and without any justification whatsoever, breached the contract mentioned in the preceding paragraph marked 1 hereof, in that they failed to perform or tender performance there-

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under; nor were said plaintiffs ready, willing and able to consummate or to perform the terms of the aforesaid contract on their part to be performed.

3. That on the fifth day of February, nineteen hundred and twenty-six, the aforementioned Thomas F. Somers died, leaving a last will and testament which was duly probated in the Surrogate's Court of the State of New York, County of New York. That in and by the terms and provisions contained in the last will and testament of the said Thomas F. Somers, deceased, the defendant was duly appointed executor and trustee of the estate of said Thomas F. Somers. That the defendant has duly qualified as such executor and trustee, and has been and is now acting as such.

4. That by reason of the plaintiffs' breaching of the contract aforesaid, and their failure to perform the terms thereof on their part to be performed, the said Thomas F. Somers, deceased, and the defendant, as executor and trustee of the estate of Thomas F. Somers, deceased, were damaged in the sum of twenty-five thousand dollars ($25,000.00).

Wherefore, defendant demands judgment dismissing the complaint and for affirmative judgment against the plaintiffs, in the sum of twenty-five thousand dollars ($25,000.00) on the counter-claim, together with the costs of suit to be taxed.

Dated September 2, 1930.

LIONEL P. KRISTELLER,
Attorney of Defendant.

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NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

JACOB K. SAFRIS and HARRY LESSER, *Plaintiffs,* *vs.* THOMAS F. SOMERS, JR., Executor and Trustee of the Estate of Thomas F. Somers, deceased, *Defendant.*	*In Attachment.* *Action at Law.* *Notice of Motion to Strike Out Answer and Counterclaim and for Entry of Summary Judgment.*

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To: Lionel P. Kristeller, Esquire, attorney for Defendant, and/or Thomas F. Somers, Jr., executor and trustee. Under the last will and testament of Thomas F. Somers.

PLEASE TAKE NOTICE, that on Saturday, the Eighteenth day of October, 1930, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, at the Essex County Court House, Newark, New Jersey, before the New Jersey Supreme Court, the Honorable William S. Gummere, Chief Justice thereof, presiding thereat, or such Justice of said Court as shall then and there preside, we shall move for an order to strike out the answer of the defendant for the following reasons:

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1. In paragraph 2 of the answer, which is in answer to paragraphs 2 to 16, both inclusive of the allegations in the complaint, the defendant

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denies the allegations contained in said paragraphs 2 to 16 both inclusive in the complaint in this cause. The answer to said paragraphs 2 to 16, both inclusive, is made for the purpose of delaying the trial of this cause and embarrassing the plaintiffs, and in fact, the denial as made of the allegations in said paragraphs 2 to 16, both inclusive, is untrue, and the said answer so denying paragraphs 2 to 16, both inclusive, of the complaint, is sham in parts and frivolous in other parts, and does not set forth a defense, for the following reasons:

A. Paragraph 2 of the complaint sets forth that the plaintiffs caused an examination of the title to the premises contracted to be purchased from Thomas F. Somers, now deceased, to be made after the making of said contract, and its full execution, and this is shown by letter dated October 6, 1925, addressed to Thomas F. Somers, 11 East 42nd Street, New York City, which letter is attached to the Bill of Particulars as requested by the defendant from the plaintiffs, which letter addressed to the said Thomas F. Somers, now deceased, was acknowledged by the said Thomas F. Somers, now deceased, on October 7, 1925, by a letter in his own handwriting.

B. The defendant denies the allegations contained in paragraph 3 of the complaint, which sets forth that the premises which were to be conveyed by Thomas F. Somers, now deceased, to the plaintiffs, were to be conveyed free and clear of all liens and encumbrances, yet the defendant admits paragraph 1 of the complaint, which sets forth the contract referred to in para-

graph 3. Said contract contains among its various covenants, the following:

> "The deed of conveyance shall be by Warranty Deed, conveying the premises free and clear of any and all encumbrances except those mentioned in this contract."

and the only encumbrances mentioned in the contract, is a lease from Thomas F. Somers to Louis Frost, which is to become void if the property is sold, and also subject to the rights of the New York Telephone Company in the cables and conduits laid in said premises, which must be removed if necessary on notice to the New York Telephone Company, and therefore, the answer denying that the contract contains said allegations is untrue and nowhere in this suit is there any question of the same raised by the defendant.

C. Paragraph 4 to 11, both inclusive, of the complaint contain allegations setting forth that the deeds in the chain of title to the premises agreed to be conveyed by Thomas F. Somers, now deceased, to the plaintiffs, contained restrictions of record, which are more specifically set forth in said paragraphs of the complaint. The defendant, in the answer, denies those paragraphs of the complaint in which said restrictions are set forth. Said answer and denial of the existence of said restrictions are untrue, for the said restrictions appear in deeds of record in the Monmouth County Clerk's Office and are so known to be there filed by the defendant as can be ascertained by an examination of the records therein set forth.

D. Paragraph 12 of the complaint sets forth that the plaintiffs notified Thomas F. Somers, now deceased, of the restrictions set forth in

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paragraphs 4 to 11, both inclusive of the complaint, and that they would refuse to take title to the premises until such restrictions were removed. The defendant denies this allegation, yet the Bill of Particulars sets forth the letter of October 6, 1925, sent to Thomas F. Somers, now deceased, mentioning said restrictions, and which letter was acknowledged by a reply from Thomas F. Somers on October 7, 1925, wherein he did not deny the existence of said restrictions, a copy of which letter is annexed to the affidavit accompanying the notice. On October 17, 1925, plaintiffs again wrote to Thomas F. Somers, setting forth in detail the various restrictions and conditions affecting the premises which Thomas F. Somers, now deceased, agreed to convey to the plaintiffs, which letter of October 17, 1925, is attached to the bill of particulars filed in this cause and to the affidavit accompanying this notice.

E. Paragraph 13 of the complaint, sets forth that Thomas F. Somers, now deceased, refused to comply with the terms of his contract. The defendant in the answer denies this allegation. On October 17, 1925, a letter was written to John P. Broomell, attorney for the said Thomas F. Somers, now deceased, in which the plaintiffs expressly set forth that they were prepared to close title to the premises, and to which letter plaintiffs more specifically refer. On October 26, 1925, a letter was received from the said John P. Broomell, which letter is annexed to the Bill of Particulars, and to which reference is herein made. On October 27, 1925, another letter was written to the said John P. Broomell, who endeavored to clear up the subject of the restric-

tions. On November 10, 1925, another letter was written to John P. Broomell which was followed by a letter on November 13, 1925, from John P. Broomell to Maurice J. Zucker and then another letter from Maurice J. Zucker to John P. Broomell on November 14, 1925, and another from Maurice J. Zucker to John P. Broomell on January 13, 1926, and another from John P. Broomell to Maurice J. Zucker on January 15, 1926, and another from Maurice J. Zucker to John P. Broomell on January 19, 1926, and another from John P. Broomell to Maurice J. Zucker on January 21, 1926, all of which letters refute the denial on the part of the defendant as to the statement contained in said paragraph 13 of the complaint, and all of which letters are contained in the bill of particulars filed in this cause, copies of which are annexed to the affidavit filed in this cause. The defendant further denies the allegations contained in said paragraph 13 of the complaint, that the plaintiffs gave to the said Thomas F. Somers, now deceased, a deposit of $4,000.00, notwithstanding the fact that the contract set forth in Schedule A of the complaint, expressly acknowledges the receipt of $4,000.00 deposit, and which contract is admitted in paragraph 1 of the answer.

F. Paragraph 14 of the complaint recites that demand was made for the return of $4,000.00 paid as a deposit. Notwithstanding the fact that letters were sent to Thomas F. Somers, now deceased, and to his attorney, John P. Broomell, demanding a return of the deposit paid, John P. Broomell, by his letter of January 15, 1926, admits that his client, Thomas F. Somers, now deceased, would not return the deposit paid by the

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plaintiffs to Thomas F. Somers, now deceased, and on January 19, 1926, Maurice J. Zucker answered the said John P. Broomell, which letter is annexed to the bill of particulars in this cause, stating that the plaintiffs would only accept $4,000, and nothing else, and copies of which are
10 annexed to the affidavits filed in this cause.

G. In paragraph 16 of the complaint, the plaintiffs allege that annexed to the complaint and marked Schedule A is the agreement which was entered into between plaintiffs and Thomas F. Somers, now deceased. The defendant denies the said allegation, notwithstanding the fact that paragraph 16 of the complaint and paragraph 1 of the complaint are exactly the same and the defendant admits paragraph 1, yet denies para-
20 graph 16.

2. In the answer, the defendant sets up the first separate defense and alleges that the plaintiffs were at no time ready, willing and able to accept the deed referred to in the contract annexed to the complaint, and that they were never ready, willing and able to pay the money required of them to be paid as and for the consideration or purchase price, as provided in said
30 contract. This statement is untrue in fact and said first separate defense is set up merely for the purpose of delay. In the bill of particulars filed in this cause, it sets forth a letter received by John P. Broomell, attorney for Thomas F. Somers, now deceased, dated October 17, 1925, in which the plaintiffs informed the attorney for Thomas F. Somers, now deceased, that they were ready with the funds to close the title, but the plaintiffs, notwithstanding the fact that they were
40 ready, expressly state that they were under no

obligation to be ready to close the title referred to because the said Thomas F. Somers was in no position to comply with the terms of his contract, and therefore, plaintiffs were under no legal obligation to make themselves ready, willing and able to accept the deed, or to offer any money to the said Thomas F. Somers, now deceased, as it would be a useless act. 10

3. The defendant, in his second separate defense, alleges that the plaintiffs waived and abandoned the alleged restrictions and conditions respecting the premises in question, and waived and abandoned any and all objections thereto. Notwithstanding the fact that by the letters set forth in the bill of particulars, which letters continue down to a day or two before the death of Thomas F. Somers, there is no indication anywhere of any such waiver, which letters specifically set forth that the plaintiffs were endeavoring to have Thomas F. Somers, now deceased, either close title in accordance with the terms of his contract or return the deposit made by the plaintiffs, and further, said second separate defense is not sufficient in law to plead estoppel and waiver on the part of the plaintiffs. 20

4. In the third separate defense contained in the answer, the defendant, in paragraph 1 of said defense, says that the plaintiffs agreed to and with Thomas F. Somers, in his lifetime, that they would take and accept such title to the premises in question as was held and enjoyed by Thomas F. Somers, in his lifetime. This paragraph of said third separate defense, is not a good and legal defense to this cause, and is insufficient in law to endeavor to vary the terms of a written contract for the sale of real estate. 30

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In paragraph 2 of the third separate defense, the defendant alleges that the plaintiffs in and by their conduct, waived and abandoned any and all alleged restrictions and conditions, and any and all objections thereto, and that by reason of such conduct are estopped from alleging or maintaining any and all alleged objections with respect thereto, notwithstanding the fact that all the letters which passed between the plaintiffs, Thomas F. Somers, now deceased, and his attorney, John P. Broomell, all set forth that negotiations were continued up to the time of the death of Thomas F. Somers, for an endeavor on the part of the plaintiffs to have Thomas F. Somers comply with the terms of his agreement and in an endeavor upon Thomas F. Somers' part to either clear the objections of title, or to have the plaintiffs accept a settlement of the claim of the plaintiffs. Plaintiffs further allege that the said second paragraph of said third separate defense, is insufficient in law and does not set forth a legal reason as a defense to the action brought by the plaintiffs.

5. Paragraph 1 of the fourth separate defense sets forth that the plaintiffs on the date set forth in the contract, were not prepared to consummate the contract or perform the terms of the same. The letters set forth in the bill of particulars clearly indicate that the said Thomas F. Somers, now deceased, at no time made any tender to the plaintiffs or that he was in any position to perform the terms of his contract. That negotiations continued up to the time of the death of Thomas F. Somers, in an endeavor to have Thomas F. Somers, now deceased, put his property in such condition so that he could be in a position to comply with the terms of his contract.

6. As to paragraph 1 of the fifth separate defense, in which the defendant alleges that the plaintiffs were at no time ready, willing and able to perform or tender performance under the contract aforesaid, nor that they were ready, willing and able to perform the terms of the contract aforesaid, nor that they were ready, willing and able to perform the terms of the contract on their part to be performed, reference is expressly made to the letter of October 17, 1925 to John P. Broomell, attorney for Thomas F. Somers, now deceased, and the plaintiffs repeat the allegations contained in paragraph 2 of this notice.

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And Please Take Further Notice, that at the time of the hearing of the above motion, we shall move for the entry of summary judgment.

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And Please Take Further Notice, that at the hearing of the above motion, we shall move to strike out the counter-claim as alleged in said answer and counter-claim on the following grounds:

1. That the said counter-claim does not set forth a cause of action against the plaintiffs.

2. That Thomas F. Somers, now deceased, was at no time in a position to make a tender nor had he made a tender to the plaintiffs of a deed to the premises set forth in the contract annexed to the complaint, so as to comply with the terms of said contract, and convey to the plaintiffs such a title as the plaintiffs agreed to purchase from the defendant.

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And Take Further Notice, that annexed hereto are the affidavits and copies of the letters upon which the plaintiffs will rely to strike out

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the answer and counter-claim in this cause and enter a summary judgment against the defendant.

Very truly yours,

....

Attorneys for Plaintiffs.

10 10/8/30.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

JACOB K. SAFRIS and HARRY LESSER, *Plaintiffs,* *vs.* THOMAS F. SOMERS, JR., Executor and Trustee of the Estate of Thomas F. Somers, deceased, *Defendant.*	*In Attachment.* *Action at Law.*

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STATE OF NEW JERSEY, COUNTY OF ESSEX. } *ss.*

JACOB K. SAFRIS, being duly sworn according to law, upon his oath deposes and says:

I am one of the plaintiffs in the above-entitled cause.

I have read the complaint and answer filed in this cause.

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As to the complaint, paragraph 1 of the same is true. I was present when the contract was drawn and signed the contract, a copy of which is annexed to the complaint.

Upon my attorney informing me of the restric tions appearing of record affecting the premises which I and Harry Lesser had contracted to pur- chase, which premises was a corner lot and by the terms of which restrictions, no building could be erected within fifteen feet of the two avenues on which the premises fronted and because of the conditions which the title was subject to, I in- formed my attorney that I would not accept the title unless these matters were cleared and the premises conveyed to us in accordance with the terms of the contract and that unless the prem- ises were so conveyed to us, we would not take title and would demand a return of our deposit paid.

We paid the sum of four thousand dollars ($4,000.00) to Thomas F. Somers, now deceased, which sum was paid by us to him on August 11, 1925 and upon which sum there is now due to us the whole amount of four thousand dollars ($4,000.00) besides interest from August 11, 1925 to October 18, 1930, the day upon which I am informed this case is to be argued, making a total of fifty-two hundred forty-four dollars and sixty-six cents ($5,244.66), in addition thereto there is due to us for moneys we paid out to our attorney, the sum of three hundred seventy-five dollars ($375.00), which sum was paid on November 1, 1926 and interest on said sum, making a total of four hundred sixty-three dol- lars ($463.00). There is due and owing to us the total of five thousand seven hundred seven dollars and sixty-six cents ($5,707.66).

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Demand was made upon Thomas F. Somers, now deceased, for the return of the deposit, but the same was never returned.

We were ready, willing and able to close title, provided Thomas F. Somers, now deceased, was in a position to deliver title to us in accordance
10 with our contract, we at no time waived or abandoned any of the restrictions that encumbered the title and I verily believe that there is no defense to this action and that the defenses alleged by the defendant are merely filed for the purpose of hindrance and delay.

JACOB K. SAFRIS.

Sworn and subscribed to before
me this 9th day of October,
20 1930.

LEONARD H. GOLDBERG,
An Attorney at Law of N. J.

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NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

JACOB K. SAFRIS and HARRY LESSER, *Plaintiffs,* *vs.* THOMAS F. SOMERS, JR., Executor and Trustee of the Estate of Thomas F. Somers, deceased, *Defendant.*	*In Attachment.* *Action at Law.*

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STATE OF NEW JERSEY, COUNTY OF ESSEX. } *ss.*

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MAURICE J. ZUCKER, being duly sworn, according to law, upon his oath deposes and says:

I am the attorney for Jacob K. Safris and Harry Lesser, in the above-entitled cause and I am the attorney who drew the contract set forth in the complaint filed in this cause, and the copy of the contract marked Exhibit A annexed to the complaint is a true copy of the contract which I drew and which was signed by the plaintiffs and Thomas F. Somers, now deceased.

30

Some time after the making of the contract and before the date set for the closing of title, I caused an examination of the title to the premises described in said contract to be made and a complete examination of the title to the premises described in said contract going back a period of sixty years, together with a tax search was made and received by me.

I examined my title abstract and found restrictions and conditions appearing of record,

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which affected the premises which were to be conveyed to my client.

Upon my having read the title to said premises, I notified Thomas F. Somers, now deceased, that my clients would refuse to accept title to the premises which they had agreed to purchase
10 unless the restrictions were removed as an encumbrance, but Thomas F. Somers, now deceased, refused to comply with my request made in behalf of my clients and at their instructions, and in behalf of my clients, I demanded a return of the deposit paid by my clients to the said Thomas F. Somers, now deceased. Said deposit was delivered by me, personally, to Thomas F. Somers, now deceased.

For all the work performed by me, I charged
20 my client three hundred and seventy-five dollars ($375.00), which charge is a reasonable charge for the work performed in examining the title, drawing agreement in connection therewith and for disbursements which I incurred in connection therewith.

And that annexed hereto are copies of letters which passed between myself and Thomas F. Somers, now deceased and his attorney, John P. Broomell.

30 MAURICE J. ZUCKER.

Sworn and subscribed to before me, this 9th day of October, 1930.

SIGMUND N. EPSTEIN,
A Notary Public of N. J.

Exhibits (letters) annexed to these affidavits are the same letters annexed to the answers to defendant's demand for Bill of Particulars (pp.
40 19 to 37 of this State of Case).

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

JACOB K. SAFRIS and HARRY LESSER, *Plaintiffs,* vs. THOMAS F. SOMERS, JR., Executor and Trustee of the Estate of Thomas F. Somers, deceased, *Defendant.*	*In Attachment.* *Action at Law.* *Affidavit.*

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STATE OF NEW YORK,
COUNTY OF } *ss.*

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WILLIAM H. SOMERS, being duly sworn, on his oath, according to law, deposes and says:

That he is the son of Thomas F. Somers, deceased, and for many years prior to the death of the said Thomas F. Somers, deponent was associated with said decedent in business, and prior to decedent's death, deponent was in charge of the real estate referred to in the contract annexed to the complaint filed herein, and was familiar with all decedent's real estate transactions, and the sales of his properties, and particularly the one referred to in said contract.

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That he has read the answer filed on behalf of Thomas F. Somers, Jr., executor and trustee of the estate of Thomas F. Somers, deceased, and says that the facts contained therein are true, and that said answer was not filed for the pur-

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pose of delay, and said answer and all its parts are not sham or frivolous.

That said contract, by its terms, referred to the sale of decedent's property, consisting of a tract of ground at the southwest corner of Ocean avenue and Fifth avenue, Bradley Beach, New
10 Jersey, upon which decedent had laid out tennis courts.

That the agreement of sale annexed to the complaint was entered into during the boom period in the real estate market in 1925, and the plaintiffs were anxious to speculate with said property.

That said agreement, by its terms, provided that title was to pass on or before September
20 15, 1925, at the office of decedent, 11 E. 42nd street, New York City.

That on September 15, 1925, plaintiffs failed to put in their appearance at the aforesaid office of the decedent, and consequently decedent, on September 17, 1925, wrote a letter to Maurice J. Zucker, the attorney of the plaintiffs, notifying him that the plaintiffs had forfeited their deposit, a copy of which said letter is hereto annexed and made part hereof, and marked
30 "Schedule 1."

That on September 17, 1925, the said Maurice J. Zucker, as attorney of the plaintiffs, wrote to decedent, stating that the reason for the failure to pass title on the day set, was that the plaintiffs were not in sufficient funds to do so, a copy of which letter is hereto annexed and made

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part hereof, and marked "Schedule 2," a portion of which is as follows:

> "It will only be a matter of a few days for me to finish this title, as it is practically finished now, but the reason I am not finishing it so as to be ready to close is because of the fact that Mr. Lesser and Mr. Safris purchased this property because a piece of property owned by them in Kearny, New Jersey, which was sold for $85,000, and on which they should have received their mortgage money, should have closed to the prospective purchaser."

That on September 18, 1925, the said Maurice J. Zucker, as attorney of plaintiffs, wrote to decedent, acknowledging receipt of decedent's letter to him of September 17, 1925, and also reiterating that the reason for the plaintiffs not accepting title on the date set was that they were out of funds, a copy of which letter is annexed hereto and made part hereof, and marked "Schedule 3."

That on September 28, 1925, decedent wrote a letter to the said Maurice J. Zucker, repeating that the plaintiffs failed to keep their agreement, which letter was acknowledged by a letter to decedent from the said Maurice J. Zucker, dated September 29, 1925, in which the said Maurice J. Zucker again repeated that the plaintiffs were not in possession of sufficient cash to pass title, and that the title search on said property had not been read by him, a portion of which letter is as follows:

> "I explained to you that my clients are at the present time tied up in a piece of property which they have sold on Kearny Avenue, Kearny, New Jersey. The cash with

> which they intended to close title to your property was to come out of the proposition and they have been held up by the prospective purchaser. It is due to this fact that they have not closed title.
>
> Furthermore, although my search has been completed, I have not as yet examined the same nor do I intend to until my clients inform me that they are ready to close, by that I mean, that they have the cash.
>
> I do not see why you should be so impatient in this matter. As soon as my clients are ready, I will immediately get in touch with you and inform you as to the hour and day that I will close title,''

which said letters are hereto annexed and made part hereof, and are respectively marked ''Schedule 4,'' and ''Schedule 5.''

That at or about October 1, 1925, the boom in real estate values had subsided, and the plaintiffs having been unable to dispose of the property, which they had agreed to purchase, endeavored to obtain the deposit money which they had already forfeited.

The contract was breached by the plaintiffs because they failed to accept title and pay the consideration monies on September 15, 1925, giving as their only reason for so doing, that they did not have available funds.

That prior to September 15, 1925, the date on which the plaintiffs had agreed to accept title and the aforesaid contract had been entered into, decedent had received a bona fide offer of $75,000.00 for the premises mentioned in question, and the counter-claim filed in this suit is a just one and not filed for the purpose of delay.

I deny that plaintiff's costs of $375.00 in examining title is reasonable.

WILLIAM H. SOMERS.

Subscribed and sworn to before me, a Notary Public, in and for the City, County and State of New York, this 6th day of November, 1930.

MARY E. MCLAUGHLIN,
A Notary Public in and for the City, County and State of New York.

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"SCHEDULE 1."

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Sept. 17, 1925.

Mr. Maurice J. Zucker
Counsellor at law
Chamber of Commerce
24 Branford Place
Newark, N. J.

Dear Sir:

Your clients did not call September 15, as per the agreement and contract.

30

This is to notify you that they have forfeited their deposit. If they want me to extend the time until September 23, to close the matter at 12 o'clock at this office I will do so on their making me a payment of two thousand dollars ($2,000.) which is the usual penalty in such cases. Check must be certified.

I had an offer of $75,000. which I showed you the day you visited this office. I have acted in

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good faith, but I do not intend to be held up in this matter, and unless I hear from you promptly, I will close with the other people.

Awaiting your prompt reply, I remain

Yours truly,

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"SCHEDULE 2."

September 17th, 1925.

Mr. Thomas F. Somers
11 East 42nd Street
New York City

Dear Sir:

20 I wrote you a few days ago addressing a letter to 107 East 42nd Street, New York City, and as the letter has not been returned, I presume you received it.

However, I have been receiving telephone calls from Mr. Wright, the agent, who seems to be more concerned in this title than you are. It will only be a matter of a few days for me to finish this title, as it is practically finished now, but the reason I am not finishing it so as to be ready to close

30 is because of the fact that Mr. Lesser and Mr. Safris purchased this property because a piece of property owned by them in Kearny, New Jersey, which was sold for $85,000., and on which they should have received their mortgage money, should have closed to the prospective purchaser.

However, they still hold title to this Kearny property and have not received any money on the same, but I expect this thing to be closed very soon, and as soon as the same is closed, I will im-

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mediately get in touch with you and arrange for day for the closing of this title.

Thanking you for your past courtesies, I am

Yours truly,
ZUCKER & GOLDBERG
By MAURICE J. ZUCKER.

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"SCHEDULE 3."

September 18th, 1925.

Mr. Thomas F. Somers
11 East 42nd Street
New York City

Dear Sir:

I have your letter of September 17th, 1925, which must have crossed mails with my letter to you of the same date which you should have received by this time.

20

I will get in touch with you some day next week in regard to the closing of the title to the Bradley Beach property.

My clients are absolutely responsible and will take this property and a delay of a week or so will not in any way jeopardize anybody's right. I explained to you in the letter above mentioned why my clients were unable to complete this transaction on the 15th.

30

There is no need of your worrying about the closing of this matter. I am sorry that appear to be under the impression that my clients are not acting in good faith, but I want to assure you that they are.

Yours truly,
ZUCKER & GOLDBERG
per MAURICE J. ZUCKER.

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"SCHEDULE 4."

Sept. 28, 1925.

Mr. Morris J. Zucker
Chamber of Commerce Building
24 Branford Place
10 Newark, N. J.

Dear Sir:

I request that you return me my deed and other papers connected with my Bradley Beach property, as I am concluding a sale with other people.

Your clients failed to keep their agreement.

Yours truly,

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"SCHEDULE 5."

September 29th, 1925.

Mr. Thomas F. Somers
11 East 42nd Street
New York City

Dear Sir:

Your letter of September 28th, 1925 is rather a
30 surprise to me.

I explained to you that my clients are at the present time tied up in a piece of property which they have sold on Kearny Avenue, Kearny, New Jersey. The cash with which they intended to close title to your property was to come out of the proposition and they have been held up by the prospective purchaser. It is due to this fact that they have not closed title.

Furthermore, although my search has been
40 completed. I have not as yet examined the same

nor do I intend to until my clients inform me that they are ready to close, by that I mean, that they have the cash.

I do not see why you should be impatient in this matter. As soon as my clients are ready, I will immediately get in touch with you and inform you as to the hour and day that I will close title. 10

In accordance with your request, in your letter of September 28th, 1925, I am returning you herewith the papers which you gave me, as I have no further use for the same.

Thanking you for loaning me the same, I remain

Yours truly,

ZUCKER & GOLDBERG.
Per MAURICE J. ZUCKER. 20

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ORDER STRIKING OUT PART OF ANSWER AND COUNTER-CLAIM AND ENTERING JUDGMENT INTERLOCUTORY.

NEW JERSEY SUPREME COURT.

10 ESSEX COUNTY.

JACOB K. SAFRIS and HARRY LESSER, *Plaintiffs,* *vs.* THOMAS F. SOMERS, JR., Executor and Trustee of the Estate of Thomas F. Somers, deceased, *Defendant.*	*In Attachment. On Motion to Strike Out Answer and Counter-claim. Order Striking Out Part of Answer and Counter-claim and Entering Judgment Interlocutory.*

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The plaintiffs having given the defendant due notice that they would move before this Court for an order striking out the answer and counter-claim filed by the defendant in this cause and for the entry of summary judgment, for the reasons set forth in said notice of motion to strike out said answer and counter-claim, and for the entry of summary judgment, which was duly served upon said defendant, and the Court having heard the arguments of Zucker & Goldberg, attorneys for the plaintiffs in behalf of said motion, and of Lionel P. Kristeller, attorney for defendant,

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contra, and the Court being satisfied from the affidavits and proofs filed in this cause, that the defenses set forth by the defendant's answer, fail to show such facts as entitle him to defend, with the exception of defendant's answer to paragraph fifteen (15) of the complaint, the answer to which paragraph is hereby allowed to stand, and that the counter-claim sets forth a cause of action which cannot be sustained, it is, on this 15th day of November, 1930,

ORDERED, that the answer filed by the defendant, except the answer to paragraph No. 15 of the complaint, be struck out, and the counter-claim be struck out, and that Judgment Interlocutory be entered for the plaintiffs and against the defendant, in the sum of $5,260 and costs to be taxed and that the answer to paragraph No. 15 of the complaint be allowed to stand and that the parties hereto proceed as to said paragraph 15 of the complaint in accordance with the rules and practice of this Court.

Let this rule be entered on the minutes.

WM. S. GUMMERE,

Chief Justice.

11/15/30.

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Opening.

NEW JERSEY SUPREME COURT.

ESSEX CIRCUIT.

Tuesday, November 25, 1930.

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JACOB K. SAFRIS and HARRY LESSER, *vs.* THOMAS F. SOMERS, JR., Executor and Trustee of the Estate of Thomas F. Somers, deceased,	*Action at Law.*

Before Hon. William A. Smith, *J.*, and a jury.

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For plaintiffs appear Zucker & Goldberg (by Maurice J. Zucker and Leonard H. Goldberg.)

For defendant appears Lionel P. Kristeller.

(A jury is called and sworn.)

Mr. Zucker opens for plaintiffs as follows:

Sometime in 1925, Thomas F. Somers, then alive, made a contract to sell some property which he owned in Bradley Beach, New Jersey, for $60,000. A deposit of $4,000 was paid to him. This suit was instituted for the return of the $4,000 deposit with interest and search fees. The Court struck out the defense as to the deposit and ordered the defendant to return the deposit.

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As to the question of the search fees, the plaintiffs in this case were called upon to pay to their attorney $375 for the charge made for examining the title to this property, and this action is being brought against the defendant for those

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search fees. The question is up to the jury as to whether the charge of $375 in this transaction was a reasonable charge or not.

Mr. Kristeller opens for defendant as follows:

The only questions for you gentlemen to decide are two: First, whether or not the amount asked is the amount permitted by the statute; and secondly, whether that amount is reasonable. 10

The only reason we are here is that I represent a deceased's estate, and as such, it becomes my duty to make the estate as large as possible for the heirs, and to insist upon formal proof of any claim that is made.

The statute under which the claim is made is Chapter 159 of the laws of 1915, which reads as follows: "Whenever any person shall contract to sell real estate or any interest therein, and shall not be able to carry out such contract because of a defect in the title to such real estate or interest therein, the person with whom such contract was made, or his legal representatives or assigns, shall be entitled to recover from such vendor, in an action for the breach of such contract, not only the deposit money, with interest and costs," with that you are not concerned at this time; "but also the reasonable expenses of examining the title and making the survey, except where the contract shall provide otherwise * * *" 20 30

The plaintiffs made this contract with Mr. Somers while he was alive. He has since died. In the complaint it is alleged that the plaintiffs in examining the title to the aforementioned premises incurred costs of $375 which they paid. A demand was made on the plaintiffs through the estate, for a bill of particulars: "State 40

the items making up the incurred costs of $375 for the alleged examination of title as alleged in paragraph 15 of the complaint.'' In answer to that, the plaintiffs stated: ''Answer to question 7: Said charge of $375 includes drawing of the agreement, examination of the title, the various conferences in regard to the title, checking up the same, examining the law in regard to the questions raised by the title, ordering tax search, Supreme and United States District Court searches.''

That is the evidence in the case as far as the papers are concerned, and it is up to the plaintiffs to show what this $375 is made up of. If it is more than allowed by the statute, the estate does not have to pay it; they have to pay the reasonable charge and the reasonable expenses of examining the title and making the search.

MAURICE J. ZUCKER, sworn in behalf of plaintiffs.

Direct examination by Mr. Goldberg.

Q Mr. Zucker, what is your profession? A Attorney of the State of New Jersey.

Q How long have you been practicing in this State? A Thirteen years.

Q During the thirteen years you have been practicing law, what branch of the profession have you been practicing mostly? A Real estate and commercial matters.

Q I call your attention to the date of August 11, 1925. Did you draw a contract between James F. Somers, widower, and Jacob K. Safris and Harry Lesser, and is this your signature as a witness and as the person who took the acknowl-

edgment? A Yes, but I didn't draw the contract; the contract was drawn in New York.

Mr. Goldberg: I offer it in evidence.

(The same is received in evidence and marked Exhibit P. 1.)

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Q Did you take any part in the drawing of that contract? A I was present at its drawing in New York.

Q Whom did you represent at that time? A Jacob K. Safris and Harry Lesser.

Q As a result of the drawing of that contract did you examine the title? A I ordered a chain of title for the past sixty years, representing the owners of that property and encumbrances on that property described in the contract during the sixty years prior to the date of the contract.

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Q Will you tell the Court and jury exactly what work you did with reference to this title? A I ordered a chain of title of the property to give me a complete record of every deed, mortgage or other encumbrance during the sixty years, which chain of title gave me the facts in the various instruments. Upon receiving that I took each instrument, read it, plotted the description in that instrument, took down the facts that were pertinent to the title, and did that with every instrument in the chain to make sure that each deed conveyed exactly the same piece of property. I found while examining the chain of title that a number of the deeds contained certain restrictions; other deeds contained the words "condition and restrictions." I went to the County Clerk's office in Freehold, New Jersey, and examined the records there to determine whether these restrictions were a community

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scheme or whether they were simply restrictions on this one piece of property, because of the fact that the attorney who represented Mr. Somers agreed to get releases—

Mr. Kristeller: I object to that unless we know who it is.

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The Court: I think it is admissible. Objection overruled.

The Witness: (Continuing.) I received a letter from an attorney who represented Mr. Somers, in which letter he told me that he would obtain releases—

Mr. Kristeller: I object to what the letter told him. If he has the letter he can produce it. The very point upon which the Chief Justice struck the answer was that lawyers' and attorneys' letters are not binding upon their clients.

20

The Court: Don't tell us the contents of the letter.

The Witness: (Continuing.) As a result of this letter I received from this attorney, I went to Freehold and examined various deeds in the vicinity of the property in question, and finding that this restriction was contained in all the deeds in that vicinity, I refused to take a release. I also found that some of the deeds contained the word "condition" as well as "restriction" and I made an examination of the law to determine how far the courts would go in regard to a condition in a title. I had communication directly with Mr. Somers and also his attorney on that question. I ordered tax searches on the property; I ordered Supreme Court searches and U. S. District Court searches

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for judgments. I did not bill my clients, I think, until almost a year later, when it was very apparent that the title might not close, and due to the fact that I did not have to guarantee anything I made my bill $375 for all the work that I had done in this matter, and that bill was paid, I believe, sometime about a month or two after I billed it. 10

By the Court.

Q When was it paid? A About two or three months, or maybe a month and a half after I billed it. I billed it about a year later; sometime in October, 1926. We were paid either in November or December, 1926.

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By Mr. Goldberg.

Q Did you have any conferences with either the vendor or the vendees with reference to this tract of land at the time? A When I received my search or chain of title and had gone over it, or studied it, I then sent for the buyers of the property and went over the various restrictions, telling them what it meant. As a result of my conference with them a letter was sent to the defendant, Mr. Somers. 30

Q Did you ever have any correspondence with Mr. Somers himself or his agents or representatives or attorneys with reference to this title? A I did.

Q I call your attention to this batch of letters. Can you identify these as letters you sent or received from Mr. Somers, his agents or attorneys, and are all those letters pertaining to the contract and title in question? A On October 16, 1925— 40

Q Are you reading from a letter sent to you— A (Interrupting.) I received a letter from John P. Bromell—

Mr. Kristeller: I object to his reading a letter from anybody unless it is proved that he was authorized to act for Mr. Somers. That is the very point that the Chief Justice struck the answer out on.

The Court: Don't argue it now.

The Witness: (Continuing.) On October 17, 1925—

Q Are you reading from a letter you sent or from a letter you received? A I sent a letter to Thomas F. Somers on October 17, 1925, in which letter—

Mr. Kristeller: I object to that.

The Court: Don't give us the contents of the letter.

The Witness: (Continuing.) I sent another letter to John P. Bromell in accordance with this title on October 17, 1925, and correspondence continued between myself and John P. Bromell until sometime in either January or February, 1926, when I was informed by the attorney that Mr. Somers had died, and from that time on I had one or two more letters and Mr. Bromell then told me he did not know whether he would represent the estate or not. And then I received letters from some other attorneys who told me that they represented the estate of Thomas F. Somers.

Q Did you make a charge for all the work you did in reference to this contract and the

title? A My charge was simply made in the event that the title was not closed.

Mr. Kristeller: I object to that. There is no allegation as to that; there is an allegation in the complaint that there was a charge of $375.

10

The Court: He is testifying to the basis of the charge.

By the Court.

Q You mean if you had closed the title it would have been larger? A Yes, sir; it would have been considerably larger because I would have had to assume the responsibility to my clients. The $375 included the drawing of the contract in New York, the examination of the title, the various conferences I had with him in going over the title and ordering the tax search and paying for it, and the Supreme Court search and the U. S. District Court search.

20

By Mr. Goldberg.

Q What was the purchase price called for? A $60,000.

Q What was the charge you made? A $375.

Q Was that in your estimation a reasonable charge for the services rendered by you in this matter? A It was a very reasonable charge.

30

By the Court.

Q I understand you to say that you attended when the contract was drawn but did not draw it? A No, sir; I did not draw it.

Q Then your charge is for services in appearing there? A Yes, sir.

40

Q Was that necessary in order to see that the contract was properly drawn? A No, that was not necessary.

By Mr. Goldberg.

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Q I call your attention to a provision in the contract which reads as follows: "The deed of conveyance shall be a warranty conveying the premises free and clear of all encumbrances except those mentioned in this contract." Would it be necessary for you to be at the drawing of this contract in order to protect your clients and have a clause in the contract to that effect? A Yes, that was necessary.

Q As a result of that clause you were unable to close title?

20

Mr. Kristeller: I object to that.

The Court: Sustained.

Cross examination by Mr. Kristeller.

Q You say you didn't draw the contract? A No, the contract was drawn by some girl in the office of Thomas F. Somers.

30

Q You were the only attorney present, weren't you? A I was the only attorney present.

Q Who dictated the contract? A I did and Mr. Somers.

Q You had part in the dictating of the contract then? A Oh, yes.

Q I understood you to say you had no part in it. A We were both present.

Q What was the date of this contract? A I don't remember.

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Maurice J. Zucker, cross.

Mr. Goldberg: The contract speaks for itself. I think it was August 11, 1925.

The Court: It is in evidence.

Q And the contract, I suppose, states that the conveyance shall be closed on September 15, 1925, at the office of Mr. Somers in New York. A Correct.

10

Q You testified to a trip you made to Freehold, New Jersey. A Yes.

Q Was that before or after September 15th, the date fixed for closing? A It was made nearer November 1st. I didn't make it until I received a letter in which they stated that they would get releases of the restrictions.

Q It wasn't made until after you had advised Mr. Somers that you would not close this title because your clients did not have the cash. Isn't that so?

20

Mr. Goldberg: I object to that.

The Court: Sustained.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

30

Q You did write to Mr. Somers in New York, didn't you, that you were not ready to close the title because your clients did not have the cash?

Mr. Goldberg: I object to that.

The Court: Sustained. I don't see that that has anything to do with the reasonableness of the fee.

Mr. Kristeller: Part of this examination was made in November—

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The Court: It doesn't make any difference. The title was not closed at that time.

Mr. Kristeller: I would like to get that part on the record, that part of this examination was after—

10 The Court: You can show when the matter was finally disposed of as not going to be closed. You are trying to put in some question of fact, when you mean to fix the time.

Mr. Kristeller: I think I am entitled to do that in this case as showing when these services were rendered. Suppose they were rendered last week?

The Court: You have to show first when the deal fell through.

20 Q Was the title closed on September 15th?
A It was not.

Q And on September 15th your clients did not appear at the place fixed for closing, did they?
A They did not.

Q And on September 17th did you write this letter to Mr. Somers (handing paper to witness)?
A Yes, that is my letter.

30 Mr. Kristeller: I ask that it be marked for identification.

(The same is marked Exhibit D. 1 for identification.)

Q And the facts stated in this letter are true, aren't they?

Mr. Goldberg: The contents of the letter are not binding on the plaintiff. It has no reference to the reasonableness of the fee.

40 The Court: I will allow it.

A As far as I know the contents of the letter were true.

Q So that the reason your clients did not close this title on September 15, 1925, was that your clients did not have the cash, isn't that so? A If I said so in that letter, that's the reason they did not close on that day. 10

Q And any examination that you made of the title in October or November was subsequent to this letter. A Any work that I did on the title after that day was subsequent to that letter, yes.

Q And you started the examination of the title, as you say in your bill of particulars, within one month of the date of the contract, is that right? A I did not do that, but I did within one month of the date that contract order a chain of title from the Monmouth Title Company. 20

Q You started the examination of the title within one month after the date of this contract. A Correct.

Q How much of this $375 is for your services in dictating the contract and appearing in the making of the contract? A My charge for the drawing of this contract would have been $25.

Q How much of the $375 charge is for conferences in regard to the title and checking up, and various conferences with regard to the title? 30 I mean conferences with your clients or with the deceased? A That's a question I could not answer; I never itemized that at all.

Q About how much? A I couldn't give any answer because it was all part of the work that I had to do in order to try to bring about a closing of this matter to get rid of the questions in the title.

Q How much of that $375 is for the expenses in examining the title? 40

The Court: What do you mean by expenses in examining the title? Do you mean services in examining the title or disbursements?

Mr. Kristeller: Services and expenses.

The Witness: I couldn't differentiate. One was just as necessary as the other and one could not be done without the other.

10

Q Conferences with your clients or the deceased were not services in examining the title. A Certainly, when I knew what was in it I had to go over it and explain it to them.

Q Had you examined the title at that time? A I went over the title explaining to them page by page what was in that instrument.

Q So that you can't separate the conferences from the services and expenses in examining the title? A I cannot.

20

The Court: I don't think he has to do that.

By Mr. Goldberg.

Q Has that fee which you testified to been paid? A It has been paid.

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PLAINTIFFS REST.

Mr. Kristeller: The defendant offers in evidence the demand for the bill of particulars and the answers thereto, the amended bill of particulars and the letter marked Exhibit D. 1. for identification.

(The letter is received in evidence and marked Exhibit D. 1.)

DEFENDANT RESTS.

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Summation.

Mr. Kristeller sums up for defendant.

(In his summation, Mr. Kristeller states as follows: "He testified that most of this work was done after the time fixed for closing. I will read you the letter.")

Mr. Zucker: I object to that. There is no letter in evidence. 10

Mr. Kristeller: I offered the demand for the bill of particulars and the answer thereto, the amended bill of particulars and the letter marked Exhibit D. 1. for identification, and the letter was marked in evidence.

The Court: I will allow it. There was no objection made and the letter was marked in evidence and the case closed.

Plaintiffs' counsel prays an exception to this ruling of the Court. 20

Exception noted as ground of appeal.

(Mr. Kristeller continues summation.)

Mr. Zucker sums up for plaintiffs.

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The Court charges the jury as follows:

SMITH, *J.* Members of the Jury:

The plaintiffs brought a suit against the defendant to recover the return of a deposit of $4,000 made on the signing of an agreement for
10 the purchase of real estate from the defendant's testator, he having died since the making of the contract. A defense was interposed in that suit and the Court has stricken out that defense and allowed judgment to be entered for the $4,000, which has already been done.

The statute in a case like that permits the additional recovery by the plaintiffs, in addition to the deposit he has made, where the title that the seller is to give him is not a good title. It
20 permits the recovery of the "reasonable expenses of examining the title and making the survey." Those are the words of the statute.

To examine the title, the plaintiffs here employed Mr. Zucker, who has been on the stand. He made a charge of $375 for his services and expenses, and that has been paid. At least, Mr. Zucker billed the plaintiffs in November, and it was paid by December, 1926. The plaintiffs now seek to recover it against the defendant as part
30 of their damage.

The question presented to you is whether or not what Mr. Zucker has charged is reasonable for the services which he rendered which are permitted to be recovered for under the statute. As I said, he has charged $375 and he has included $25 for the drawing of the contract of sale. That is not recoverable under the statute, so I will deduct the $25 from the amount he has charged, making the charge $350. They are entitled to interest from the time of payment to
40

today, which amounts to about $85, making a total of $435. It is for you gentlemen to decide whether or not his charge is a reasonable one.

Some question has been brought up as to the services rendered after the date of closing that was fixed. The services rendered up to the time when the contract was disposed of—if it was disposed of—in the examination of the title and for the purpose of deciding whether or not to close, would be a proper service if it was rendered; in other words, the date of closing is not final if the parties allow the time to be extended. The fact that the plaintiffs may not have been financially able at that time to close, if that date was not made specific where the closing had to be made or the contract breached, does not make any difference.

I think that covers the case, gentlemen. You may retire.

(The jury retires.)

Defendant's counsel prays an exception to that portion of the Court's charge wherein the Court stated that the services rendered up to the time that the contract was disposed of could be recovered. Exception requested on the ground that there is nothing in the case which shows when the contract was disposed of, and being at law, the date in the contract is the date for the closing.

Exception noted as ground of appeal.

Defendant's counsel prays an exception to that portion of the Court's charge wherein the Court stated that the date of the closing is not vital unless it was made specific in the contract. Exception requested on the ground that there is

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Verdict.

no evidence as to why the contract was not closed and the law date having passed according to the evidence in the case.

Exception noted as ground of appeal.

(The jury returns into court.)

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(The foreman of the jury announces the verdict as follows: "We find for the plaintiffs in the sum of $200 plus interest.")

The Court: Gentlemen, I think you had better retire and figure the interest.

A Juror: Up until what date, your Honor?

The Court: It would be roughly four years.

(The jury again retires.)

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POSTEA.

NEW JERSEY SUPREME COURT.

Essex County.

Jacob K. Safris and Harry Lesser, *Plaintiffs,* *vs.* Thomas F. Somers, Jr., Executor and Trustee of the Estate of Thomas F. Somers, deceased, *Defendant.*	*Action at Law.* *Postea.*

10

20

This case was tried before Judge William A. Smith, to whom it had been referred for trial, with a jury, at the Essex Circuit on November 25, 1930.

The jury rendered a general verdict against the defendant and in favor of the plaintiffs for two hundred forty-eight dollars ($248.00).

WM. A. SMITH,
Circuit Court Judge.

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11/26/30.

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JUDGMENT.

Filed December 6, 1930.

NEW JERSEY SUPREME COURT.

Essex County.

10

Jacob K. Safris and Harry Lesser, *Plaintiffs,* vs. Thomas F. Somers, Jr., Executor and Trustee of the Estate of Thomas F. Somers, deceased, *Defendant.*	*Action at Law.*

20

Afterwards upon proceedings duly had according to the statute the Court ordered that said answer filed by the defendant, except the answer to paragraph 15 of the complaint be struck out, on the ground that it failed to show such facts as entitle said defendant to defend, and also ordered the counterclaim stricken out on the ground that said counterclaim sets forth a cause of action which cannot be sustained, and ordered 30 judgment interlocutory entered for the plaintiffs and against the defendant in the sum of $5,260 and costs, and the court having ordered that the parties hereto proceed as to paragraph 15 of the complaint in accordance with the rules and practice of this court, and the court having on November 24, 1930 ordered that the plaintiffs proceed to assess their damages before a jury taken from the general panel before the Honorable William A. Smith, one of the Circuit Court

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Judgment.

Judges, to whom the above entitled was referred for trial to try the reasonableness of the amount claimed by the plaintiffs in said paragraph 15 of the complaint, and said cause having been tried before the Honorable William A. Smith, to whom it had been referred for trial with a jury,
10 on November 25, 1930, and the jury having rendered a verdict in favor of the plaintiffs and against the defendant, in the sum of two hundred and forty-eight dollars ($248).

And the Court having ordered final judgment to be entered in favor of the plaintiffs and against the defendant in the sum of $5,508 being the total of the two amounts as above set forth, together with costs.

20 Whereupon it is adjudged that the plaintiffs Jacob K. Safris and Harry Lesser do recover of the said defendant Thomas F. Somers, Jr., Executor and Trustee of the Estate of Thomas F. Somers, deceased the sum of five thousand five hundred and eight dollars dam-
$5,508.00 ages together with their costs which have been taxed at the sum of one
117.29 hundred seventeen dollars and twenty-
——— nine cents making in the whole the
30 $5,625.29 sum of five thousand six hundred twenty-five dollars and twenty-nine cents.

Judgment signed and entered December 6, 1930.

WM. S. GUMMERE,
C. J.

40

59 MAY.T.1931

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

JACOB K. SAFRIS and HARRY LESSER, *Plaintiffs-Respondents,* vs. THOMAS F. SOMERS, JR., Executor and Trustee of the Estate of Thomas F. Somers, deceased, *Defendant-Appellant.*	*On Appeal from Supreme Court.*

BRIEF ON BEHALF OF APPELLANT.

(Italics ours unless otherwise noted.)

Statement.

This is an appeal from a judgment of the New Jersey Supreme Court, entered upon an order made by Chief Justice Gummere at the Essex Circuit on November 15, 1930, striking the answer and counter-claim of the defendant, excepting the answer to paragraph 15 of the complaint which was allowed to stand. As to the latter issue, the parties were permitted to go to a jury. The aforesaid order summarily directed an interlocutory judgment in favor of the plaintiff and against the defendant for $5,260.00. Subsequently a verdict of $248.00 was rendered by a jury, and final judgment was thereafter entered for $5,508.00 damages and $117.29 costs (S. C., 86).

Facts.

On August 11, 1925, Thomas F. Somers, widower (the appellant's testator), entered into a written agreement with the respondents to sell to them certain real estate located on the southwest corner of Ocean and Fifth avenues, in Bradley Beach. The consideration was $60,000.00, to be paid in the manner provided in the contract (exhibit annexed to complaint, S. C., 9-12).

$4,000.00 was paid as a deposit upon the signing of the agreement (which sum is the subject matter of this litigation); $16,000.00 was to be paid in cash at the time of passing of title; $35,000.00, by a purchase money mortgage maturing in three years, and $5,000.00, by a second purchase money mortgage maturing in six months.

The contract was made in New York at Somers' office. It was prepared and dictated by Maurice J. Zucker, the attorney for the respondents. Somers was not represented by counsel. The contract was based upon data taken from deeds in Somers' possession, after an examination and inspection thereof by Zucker. It was from these deeds that Zucker dictated and prepared the agreement. After the execution of the agreement, Zucker took the deeds with him for the purpose of making a search; and were retained by him until the 29th day of September, 1925 (S. C., 64-65).

The agreement provided that the conveyance was to be subject to certain easements and encumbrances, as appeared in the deeds from which Zucker prepared the agreement. These easements and encumbrances are more specifically set forth in the agreement. Title was to be conveyed

by warranty deed at Somers' office in New York, on September 15, 1925.

On September 15, 1925, the respondents failed to appear at the office of the vendor. No word having been received from them or from their attorneys, the appellant's testator notified the respondents (S. C., 61) by mail, that they had breached their contract and that the same was considered at an end. Between September 17, 1925, and some time late in January, 1926, considerable correspondence was exchanged between the appellant's testator and the law firm of Zucker & Goldberg, the attorneys for the purchaser (respondents).

At this point it is important to note that neither in the answers to the demand for a bill of particulars, nor in the exhibits annexed to the moving papers used upon the application to strike the appellant's answer, do the respondents submit or even refer to any correspondence prior to October 6, 1925, altho it is obvious from the answering affidavit and the exhibits annexed thereto that several letters passed between the parties during that period. *These letters furnish not only persuasive proof of the bona fides of the defenses interposed, but cogent evidence in determining who breached the agreement; to put it more concisely, which party was in default when performance was due under the contract. Furthermore, in and of themselves, these letters present a clear issue of fact which should have been determined by a jury.*

The following are chronological excerpts from the correspondence which passed between the parties:

On September 17, 1925, appellant's testator wrote to the attorneys of the respondents (S. C., 61):

> "* * * Your clients did not call September 15, as per the agreement and contract.
>
> This is to notify you that they have forfeited their deposit. * * *
>
> I had an offer of $75,000. which I showed you the day you visited this office. * * *"

On September 17, 1925, the attorneys of the respondents wrote to appellant's testator (S. C., 62):

> "* * * It will only be a matter of a few days for me to finish this title, as it is practically finished now, *but the reason I am not finishing it so as to be ready to close is because of the fact that Mr. Lesser and Mr. Safris purchased this property because a piece of property owned by them in Kearny, New Jersey, which was sold for $85,000., and on which they should have received their mortgage money, should have closed to the prospective purchaser.*
>
> However, they still hold title to this Kearny property and have not received any money on the same, but I expect this thing to be closed very soon, and *as soon as the same is closed, I will immediately get in touch with you and arrange for day for the closing of this title. * * *"*

On September 18, 1925, respondents' attorneys wrote to appellant's testator (S. C., 63):

> "* * * *I will get in touch with you some day next week in regard to the closing of the title to the Bradley Beach property.*
>
> My clients are absolutely responsible and will take this property and a delay of a week or so will not in any way jeopardize anybody's right. *I explained to you in the letter above mentioned why my clients were unable to complete this transaction on the 15th.*

> *There is no need of your worrying about the closing of this matter.* I am sorry that you appear to be under the impression that my clients are not acting in good faith, but I want to assure you that they are. * * *"

On September 28, 1925 appellant's testator wrote to respondents' attorneys (S. C., 64):

> "* * * I request that you return me my deed and other papers connected with my Bradley Beach property, as I am concluding a sale with other people.
>
> Your clients failed to keep their agreement. * * *"

On September 29, 1925, the respondents' attorneys wrote to appellant's testator (S. C., 64):

> "Your letter of September 28th, 1925 is rather a surprise to me.
>
> I explained to you that my clients are at the present time tied up in a piece of property which they have sold on Kearny Avenue, Kearny, New Jersey. *The cash with which they intended to close title to your property was to come out of the proposition and they have been held up by the prospective purchaser.* **It is due to this fact that they have not closed title.**
>
> *Furthermore, although my search has been completed, I have not as yet examined the same* **nor do I intend to until my clients inform me that they are ready to close, by that I mean, that they have the cash.**
>
> I do not see why you should be impatient in this matter. *As soon as my clients are ready, I will immediately get in touch with you and inform you as to the hour and day that I will close title.*
>
> In accordance with your request, in your letter of September 28th, 1925, I am returning you herewith the papers which you gave me, as I have no further use for the same.
>
> Thanking you for loaning me the same, I remain."

This correspondence sets forth clearly and unmistakably the evidence sustaining the defense that *the respondents were not ready, able and willing at the time fixed in the contract to pay the consideration moneys* as provided therein *and were consequently in default. The respondents had made their title search upon the property prior to the closing date.* That fact is clearly established by their own letters, as well as by the answers to the demand for a bill of particulars.

Not only had the search been completed but *the respondents and their attorneys had knowledge of the existence of the alleged restrictions from the date of the signing of the contract to September 28, 1925, by reason of having in their possession the deeds which specifically set forth the very restrictions now complained of.* The reason advanced for the failure to close title was not the alleged restrictions upon the property which merely provided for a set-back in building, but the lack of funds to complete the transaction.

The respondents could not pay the balance of the consideration money. Not having the money on hand they did not tender themselves at the office of the vendor, nor did they request an adjournment of the closing date; nor did they inform the vendor of any alleged defects in the title, which they now interpose as the excuse for refusing to consummate the transaction. Meticulous care was observed by respondents' counsel in inserting every other exception in the agreement. The language in the deeds was closely followed. Thruout the correspondence from September 17, 1925, to October 6, 1925, it is insisted that the *only reason* the respondents did not close title *was because they did not have the cash.* It

was not until long after the law day, to wit: on October 6, 1925, that the respondents, for the first time, set up the other alleged defects as the reason for their refusal to take title (S. C., 19). *It was an excuse and not a reason.* The defects were patently frivolous and immaterial. Having lulled the vendor into believing that the respondents had no objection to the title of appellant's testator and desiring to retain their right to purchase notwithstanding a dearth of the necessary funds, the respondents repeatedly stated in their letters to appellant's testator that lack of funds was *the only reason* for not completing the purchase. As an afterthought and in an attempt to escape responsibility under their contract respondents then proceed to set up "restrictions" as an excuse for not performing. This, respondents cannot do under the doctrine of equitable estoppel, which applies and controls in such a situation.

After a lapse of five years, and within the shadow of the statutory limitational bar, this suit was instituted to recover the down money of Four Thousand Dollars ($4,000.00) paid under the contract, together with alleged costs in the examination of the title, etc. During this interim, and on the fifth day of February, Nineteen Hundred and Twenty-six, the appellant's testator died.

Before answering the complaint, the appellant demanded a bill of particulars (S. C., 14), which was duly answered (S. C., 16 to 37). Appellant considered the answer to question 1 of the demand as insufficient and demand was made for a more specific answer. An amended bill of particulars (S. C., 38) was served. A wilful suppression of certain correspondence was obvious from the answers. Correspondence between the parties prior to October 6, 1925, was omitted. To have

included it, would have been fatal to the respondents' cause. A frank disclosure of the entire correspondence would have disclosed no cause of action and resulted in a dismissal.

Answer was made to the complaint. The making of the agreement was admitted. Every other allegation was denied, thus leaving for the proper time the test of the legal sufficiency of the complaint. In addition thereto five separate defenses and a counter-claim were pleaded in the answer, viz:

> 1. That respondents were not ready, able and willing to take a conveyance of the premises; and were not ready, willing and able to pay the consideration moneys pursuant to the contract.
>
> 2. That the alleged restrictions, if any, were abandoned by the respondents.
>
> 3. That respondents agreed to and with the deceased during his life that they would take and accept such title as was held and enjoyed by the said deceased; and that by their conduct the respondents waived and abandoned any and all alleged restrictions or conditions, were and are estopped thereby from urging or maintaining any objection in respect thereto.
>
> 4 and 5. That the respondents did not perform the conditions on their part to be performed and breached the contract by failing to tender performance under the contract on the day therein provided for; and that they were neither able, ready nor willing to pay the balance of the consideration money pursuant to the contract.
>
> The counter-claim set forth that by reason of the contract, the appellant's testator lost a sale of the property for $75,000.00; and by reason of respondent's breach of the contract has since sustained a depreciation loss of $25,000.00.

This answer and counter-claim were stricken by the Chief Justice, who entered an order for summary judgment. It is from this order and judgment that the present appeal is taken.

The appellant maintains for the reasons hereinafter assigned that the answer and counter-claim were fully substantiated by the affidavit and exhibits submitted in opposition to the motion to strike; and the proofs raised triable issues of fact requiring the submission thereof to a jury; and that the motion to strike and enter summary judgment should have been denied.

POINT I.

The Court below erred in striking the answer of the appellant and entering summary judgment against him, since the evidence disclosed meritorious questions of fact for submission to a jury.

The answer filed by the appellant admitted the existence of the contract, but denied each and every other allegation set up in the complaint.

The separate defenses relied upon were substantially:

1. That respondents were not ready, able and willing to take a conveyance of the premises; and were not ready, willing and able to pay the consideration moneys pursuant to the contract.

2. That the alleged restrictions, if any, were abandoned by the respondents.

3. That respondents agreed to and with the deceased during his life that they would take and accept such title as was held and enjoyed by the said deceased; and that by their conduct the respondents waived and abandoned any and all alleged restrictions or conditions, were and are estopped thereby from urging or maintaining any objection in respect thereto.

4 and 5. That the respondents did not perform the conditions on their part to be performed and breached the contract by failing to tender performance under the contract on the day therein provided for; and that they were neither able, ready nor willing to pay the balance of the consideration money pursuant to the contract.

These defenses were fully supported by the affidavit and the exhibits submitted in opposition to the motion to strike.

It is respectfully and strenuously insisted that this answer constituted a valid, legal and sufficient defense, which, if supported at the trial, would entitle the appellant to present his case to a jury for their deliberation.

In the very recent case of *Engler* v. *Buesser, et al.*, 106 N. J. E. 173, the Court of Errors and Appeals speaking thru Wells, *J.*, said:

> "This court has held that to warrant the court, however, in striking out a plea as false or sham, it must be so palpably false or insufficient in law as to enable the Court to conclude that the defendant is seeking delay or trifling with the process of law."

See also:

Smith v. *Hopping*, 88 N. J. L. 195;

South Camden Trust Co. v. *Stiefel*, 101 N. J. E. 41.

The bona fides of the appellant's position in respect to the defenses set forth in the answer (S. C., 39-42) is amply corroborated by the correspondence between the parties. The suspicion is strong that the respondents entered into the contract of purchase as a speculative venture. The correspondence not only warrants the suspicion but justifies the inference. A depression set in and an excuse was sought for escaping

the consequences of the contract. The alleged "restrictions" were seized upon as the avenue of escape.

The appellant submits that the order of the court below striking the answer and counterclaim, and entering summary judgment, constituted error.

POINT II.

The complaint was devoid of any allegation of actual tender of the balance of the consideration as per contract; moreover respondents offered no proof whatsoever of this fact.

There was neither allegation nor proof of excuse or waiver by respondents of actual tender. Assuming even that tender had been excused or waived, there was neither allegation nor proof that respondents were ready, able and willing to perform on their part.

The appellant maintains that before a motion to strike an answer is granted, the complaint in the first instance, must disclose a valid cause of action, and be supported by legal evidence, irrespective of any insufficiency in the answer.

In a suit to recover the down money in question, it was incumbent upon the respondents, as purchasers, to prove that they actually made a tender, or if actual tender was excused, that they were ready, able and willing to complete their part of the transaction; these essential facts must appear in the complaint.

The complaint was wholly barren of an affirmative allegation that the respondents did, at the time and in the manner provided in the contract, tender the balance of the consideration moneys, and that the seller refused to deliver his deed.

Failing to allege this essential fact, the complaint was defective, unless as a substitute therefor, it set forth that actual tender was waived or excused. No facts are pleaded to show waiver or excuse. Consequently, the complaint is deficient and no cause of action is set out.

Not only is the complaint bad for failure to allege either tender or excuse for non-tender, but assuming, tho not admitting, that this failure is not fatal, the complaint is devoid of any allegation that respondents *were able and ready to perform on their part.* This was absolutely necessary to sustain the cause of action. Likewise, on the motion to strike, there is an utter lack of any proof of any of these essential facts. *Under no circumstances can proof of readiness and willingness to perform on the part of the respondents be dispensed with.*

In contra distinction to this failure on the part of the respondents, is the affidavit submitted by appellant, corroborated and supported by the correspondence, from which it affirmatively appears that respondents were not ready, able and willing. The letters to appellant's testator, from respondents' attorneys, are conclusive on this point.

In the letter of September 17, 1925, written two days *after* title was to have passed, the attorneys for the respondents wrote as follows (S. C., 62):

> "* * * It will only be a matter of a few days for me to finish this title, as it is practically finished now, but the reason I am not finishing it so as to be ready to close is because of the fact that Mr. Lesser and Mr. Safris purchased this property because a piece of property owned by them in Kearny, New Jersey, which was sold for $85,000., and

on which they should have received their mortgage money, should have closed to the prospective purchaser.

However, they still hold title to this Kearny property and have not received any money on the same, but I expect this thing to be closed very soon, and as soon as the same is closed, I will immediately get in touch with you and arrange for day for the closing of this title. * * *''

On September 29, 1925, the respondents' attorneys wrote to the appellant's testator, as follows (S. C., 64):

''* * * I explained to you that my clients are at the present time tied up in a piece of property which they have sold on Kearny Avenue, Kearny, New Jersey. The cash with which they intended to close title to your property was to come out of the proposition and they have been held up by the prospective purchaser. It is due to this fact that they have not closed title.

Furthermore, although my search has been completed, I have not as yet examined the same nor do I intend to until my clients inform me that they are ready to close, by that I mean, that they have the cash. * * *''

Their failure to allege and prove their actual readiness, willingness and ability to perform at the time fixed by their contract is fatal to the respondents' position.

The time fixed for performance was September 15, 1925, and at law that date was of the essence:

''As I hold it, *the time fixed for the performance, is at law deemed of the essence of the contract.* It is true that it is not, generally, so considered in equity, unless the parties have expressly so treated it, or it necessarily follows from the nature and circumstances of the contract. Courts of equity, for the most part, have regard to time only so far as it respects the good faith and dili-

gence of the parties. Thus courts of equity, sometimes, will not decree a specifice performance, though damages may be recovered at law. So those courts frequently decree a specific performance, when the action at law has been lost, by the default of the very party seeking the specific performance, if it be notwithstanding conscientious that the agreement should be performed. It is thus, in cases where the terms of the agreement have not been strictly performed on the part of the person, seeking specific performance; *though to sustain an action at law, performance must be averred according to the very terms of the contract.* * * *''

" 'The general opinion,' says Sir Edward Sugden, 1 Vol. 294, 'has always been, that the day fixed was imperative on the parties at law. This was so laid down by Lord Kenyon, and has never been doubted in practice. The contrary rule would lead to endless difficulties.' "

"* * * It is hardly necessary to multiply authorities. *It may be laid down as the settled rule, that where time enters into the performance of a condition precedent, the plaintiffs must aver accordingly, unless strict performance is waived or otherwise discharged by the defendant.*"

Shinn v. *Roberts,* 20 N. J. L. 435, at p. 445.

In *Caporale* v. *Rubine,* 92 N. J. L. 463, Justice Kalisch, speaking for the Court of Errors and Appeals, held:

"Counsel of respondent claims that the plaintiff was not legally obligated to be in a position to convey a good title at the time fixed in the contract, but only that he should be able to convey a good title at the time of performance; and, as it appeared that the defendant had divested himself of the title to the property which he had agreed to convey to the plaintiff, the plaintiff was relieved from carrying out his part of the agreement, and was therefore entitled to bring his action for damages.

The latter part of this contention is obviously unsound.

The defendant's act in conveying the title to his property to a third person had no other legal effect than to relieve the plaintiff from making a tender of a deed of his property to the defendant.

But the plaintiff was not relieved from establishing, in order to recover damages for a breach of contract, that he was able and ready to perform his part of the undertaking.''

The same position was maintained by this court in *Bernstein* v. *Kohn*, 96 N. J. L. 223 where the facts were very similar to the instant case. There, too, plaintiff sued to recover down money deposited on an agreement to purchase real estate by reason of the seller's alleged failure to make good title. The defense was that in the absence of an actual tender of the balance of the purchase price by the plaintiff, the defendant was under no obligation to return the deposit money. While the upper court held that where a seller's title failed, the purchaser was under no obligation to *tender* the balance of the consideration, *the doctrine was clearly recognized that proof of readiness, willingness and ability on the part of the purchaser to perform was necessary to* sustain the plaintiff's case.

An excerpt of the opinion follows:

''* * * The case of Caporale *v.* Rubine, supra, relied upon by the respondent as supporting the legal propriety of the action of the trial judge in granting the non-suit, does not do so in fact. In that case the plaintiff, who was the vendor, had at no time a clear title to the property which he agreed to convey to the vendee in exchange of property of the latter. Before the time fixed for the performance of the agreement the vendee had parted with his property to another.

> This court held, in reversing a judgment by the vendor against his vendee in an action for a breach of the contract, that *the fact that the vendee was unable to perform his agreement at the time fixed for performance went only to the extent to relieve the vendor from tendering performance, but did not relieve him from establishing, in order to recover damages for a breach of the contract, that he was able and ready to* perform his part of the undertaking, namely, by conveying the property to the vendee 'absolutely free and clear of all incumbrances' except such as stated in the agreement.
>
> In the present case there was proof that the plaintiff vendee was able and ready to perform, and that the defendant vendor never was at any time. * * *''

Judgment for defendant in the lower court was reversed because it was based upon failure by the plaintiff to prove actual tender. The case was *sent back for a new trial however, on the theory that only proof of readiness and willingness were requisite, and that this had been amply shown.*

It is very important to observe the distinction drawn by the courts between those cases where proof of actual tender of the consideration is necessary, and those in which proof of ability, readiness and willingness to perform are required. Where a seller's title is deficient the necessity of actual tender by the purchaser to the seller is dispensed with, but *under no circumstances is the necessity of proof of readiness and willingness to perform excused.*

The case of *Herman* v. *Ebert,* 98 N. J. L. 653, at first blush would seem to give the impression the other way; but a careful examination of the opinion in that case discloses a state of facts in which there was a complete failure of title as distinguished from a title subject to an encumbrance.

The point is also respectfully made that *Herman* v. *Ebert, supra,* was decided by an intermediate appellate court and one of the judges of that court dissented from the prevailing opinion in *Bernstein* v. *Kohn, supra,* which latter case, decided in this court, clearly states the law in this State respecting the question under discussion.

It should be noted also that the *Herman* v. *Ebert* case does not appear to have been cited in any subsequent opinion, while the case of *Berstein* v. *Kohn* has been cited and followed on a number of occasions, viz:

Naugle v. *McVoy,* 96 N. J. L. 515;
Sobo v. *Hammer,* 97 N. J. L. 276;
Safris v. *Fleischmann,* 105 N. J. L. 468.

The respondents omitted from the complaint, an allegation of actual tender of the balance of the consideration money and a refusal to deliver a deed by the appellant's testator, or that such actual tender was waived or excused, and likewise omitted an allegation of readiness, willingness and ability to perform on their part. Therefore the respondents' complaint was deficient in law, failed to state a cause of action, and precluded recovery in this suit.

POINT III.

The separate defenses of waiver and estoppel set up in the answer constitute valid and legal defenses which were supported by affidavit and exhibits, and it was error to strike the answer and enter summary judgment.

The appellant's affidavit and the exhibits annexed thereto, established that respondents failed to put in an appearance at the office of the ap-

pellant's testator, on September 15, 1925, or at any other time to accept title pursuant to the contract.

On September 17, 1925, appellant's testator wrote a letter to respondents' attorneys terminating respondents' contract.

Subsequent letters followed from respondents' attorneys to appellant's testafor, dated respectively September 17 and September 29, 1925 (S. C., pp. 62-64). In these letters, respondents set forth clearly and unmistakably that their only reason for not closing title was the lack of the requisite cash.

This case presents a perfect example of waiver and estoppel in respect to any alleged claim of restrictions. The correspondence is conclusive. No suggestion of any objection to the title was offered. On the contrary it is clearly shown that the impediment in the way of closing title was the respondents' inability to provide the requisite funds.

In *Dooley* v. *Cushing,* 105 N. J. L. 595, this Court recently disposed of a case quite parallel to the one at bar. The case was tried at circuit and judgment rendered for defendants. All the evidence was presented to a jury. The facts in that case disclosed that the contract of sale of real estate was to close on January 5, 1926:

> "but Dooley (*vendee*) was unable to gather his funds for the final settlement, and on January 5, 1926, he made urgent appeal for an extension, first to the vendors' attorney and then to the vendors themselves."

The extension was granted to expire March 5, 1926, with the condition that the vendee pay an additional deposit of $25,000.00 on or before

January 15, 1926. To further quote from the statement of facts in the opinion:

> "Without notice, explanation, or rescission, Dooley did not pay the money due January 15, 1926, or any part thereof. He never demanded title nor tendered himself ready to take."

The plaintiff claimed that his failure to make the payment due on January 15, 1926, was because he had *"lately"* learned that the vendors were unable to make good title. This court, in an opinion by Justice Case, said that alleged defects in the title disclosed to the vendors after the closing date might have been cleared by the vendors, had the vendee made timely disclosure.

> "It does not appear that one or another of several alternatives might not have been availed of to clear the title or to satisfy the title company had Dooley at any time tendered himself ready to make settlement. As the settlement period fixed in the original instrument approached, Dooley indicated no desire or intention to cooperate in the three-way transaction to which his bargain bound him. His outstanding desire was to retain his right to purchase, notwithstanding a serious dearth of the necessary funds. He wanted the extension and got it. He sought no information regarding the title. He obviously was content to let the question of title await its own day. He did not place the vendors in a position where it was their duty to speak."

The language of Justice Case in the second paragraph from the end of the opinion is precisely in point and is dispositive of the question in the case at bar:

> "Before the settlement day fixed in the latter instrument arrived, the vendee by his default deprived himself of any further rights thereunder. He cannot, either in conscience or in law, convert his own default

> into a default by his vendors, either under the extension or the original contract."

In the instant case, the evidence of the respondents' inability to make the payment required by the contract is unimpeached and uncontroverted, standing therefore as an admitted fact.

If any question on the title had been raised, the appellant was entitled to an opportunity to clear up or correct any defect or question respecting the title. This opportunity was denied appellant—no question was raised.

Not alone do their letters constitute a waiver of any alleged defect, but by their conduct have placed themselves beyond a recovery of their down money at law under the doctrine of equitable estoppel. This principle of law is directly applicable by reason of the fact that it was in reliance upon the respondents' conduct, that appellant's testator assumed that no question existed in respondent's mind respecting the title.

The doctrine of equitable estoppel has been repeatedly recognized and followed in the law courts. In *Gold* v. *Schneider,* 2 Misc. 179, the Court held a purchaser to be estopped from claiming that the seller had not strictly complied with the terms of his written contract in offering a title, subject to mortgages held by individuals instead of by banks, where the purchaser had, by his conduct and statements, altho oral, approved the change. In affirming a judgment denying the purchaser the return of his down money, the Court said:

> "Manifestly the trial court was correct in invoking the doctrine of estoppel against him, for, as was declared in Thorne *v.* Mosher, 20 N. J. Eq. 257, a party is not allowed to take advantage of an act done,

> or the omission to do it, where such act or omission was designedly caused by himself."

The doctrine of equitable estoppel was again approved and applied in the law court in *Dunn* v. *Cutley,* 8 Misc. 677, where the Supreme Court on plaintiff's rule to show cause why a judgment for defendant should not be set aside, said:

> "In 10 R. C. L. 697, it is stated that the final element of an equitable estoppel is that the person claiming it must have been mislead into such action that he will suffer injury if the estoppel is not declared. That is, the person setting up the estoppel must have been induced to alter his position in such a way that he will be injured if the other person is not held to the representation or attitude upon which the estoppel is predicated. An equitable estoppel protects the party setting it up from a loss which, but for the estoppel, he could not escape. We consider that this is a sound legal principle and that it is applicable to the present case."

These cases amply demonstrate the recognition by the law courts of the doctrine of estoppel. In the case, *sub judice,* appellant having pleaded waiver and estoppel in his answer, supported by affidavits and exhibits, the order striking the defense and entering summary judgment, clearly was error.

This doctrine is also followed by the English courts and is very ably expressed in *Soper* v. *Arnold,* L. R. 14, App. Cas. 429. The facts in the latter case were these: the purchaser of real estate, under a written contract, accepted and approved the abstract of title offered by the seller. Being unable to pay the balance of the purchase moneys, he suffered the contract to go into default. After notice of forfeiture was given him by the seller, the latter agreed to convey to a third person, who refused to take title because

of defects. Litigation ensued, and the position of this third person was sustained. He was relieved from accepting the title. Subsequently the original purchaser sued to recover his down money on the ground that the vendors' title was bad. Relief was denied. The Court held:

> "The defect in the title was apparent when it was approved.
>
> There can be no doubt that if he had possessed the money and had been in a position to pay it, the residue of the purchase money would have been paid and a conveyance executed notwithstanding the defect. I apprehend that it is clear that if that had taken place, no objection afterwards could have been taken to the title such as is now suggested, and no relief could have been obtained on account of the defect to which I have alluded. How does the matter then stand with regard to the deposit? The deposit is given as a security for the performance of the contract. The appellant admittedly cannot recover that deposit if it was thru his fault that the transaction was not completed. And, under the circumstances which I have detailed I cannot doubt that it must be regarded as a contract uncompleted thru the default of the appellant. As I have said, he took no exception to the title—he was willing to take that title—he had intimated his willingness to take it by accepting and approving it, and the vendors were willing to convey him that title which he had so intimated his willingness to accept. Thereupon they, after due notice, determined the contract as against him.
>
> Now, my lords, when an action is brought by the appellant to recover the deposit and the objection is taken that the vendors were not able to make out what is in law a complete and perfect title, the answer seems to me to be this, that the vendors were perfectly ready and willing to convey to the appellant that title which he had accepted and

approved and declared himself willing to take, and the contract went off only because he afterwards was not in position or prepared to carry it out on his part. That seems to show that it was owing to his default that the contract came to an end; and I venture very much to doubt whether, under the circumstances such as I have described, if the vendors had brought an action for specific performance to compel him to complete the purchase and to pay the residue of the purchase money, he could have resisted such an action on the ground, even if he had then ascertained the fact that there was some defect in the title. No authority has been cited to show that under such circumstances where a purchaser has accepted and approved a title, all the facts being known to him at that time, he can resist a decree for specific performance and claim to have the title investigated. If that be the case, it seems to me that it would be out of all reason to suppose that he could recover the deposit on the ground that the contract had come to an end not thru his default, but thru that of the vendors when the circumstances were such that they could have compelled him specifically to perform the contract. But I do not think it necessary to determine this point, because for the reason which I have stated, it seems to me that he was in default, that the contract went off owing to his default, and that under those circumstances he cannot recover the deposit. Any other decision would lead to most inconvenient consequences, because under circumstances such as these, where trustees were selling, the deposit might have been distributed by them among their beneficiaries, and yet at any time within six years afterwards, if the purchaser discovered that there was some defect which would have prevented their making out a perfect conveyancing title, he could bring an action against the trustees to recover back the deposit which he had so paid tho he had ac-

cepted and never taken any objection to the title. That would be a result which would be productive of the gravest inconvenience. I know of no authority in point of law to warrant it, and I therefore move your Lordships that this appeal be dismissed.''

CONCLUSION.

The Supreme Court erred in striking the answer of the appellant and entering summary judgment in that

(a) The evidence produced upon the argument of the motion to strike, disclosed meritorious questions of fact requiring their submission to a jury; and

(b) The complaint was defective and respondents' proof was insufficient, there being neither allegation nor proof,

(1) That the respondents actually tendered the balance of the consideration money and that the appellant's testator refused to deliver a deed or that such actual tender was waived or excused; and

(2) That the respondents were ready, able and willing to perform, pursuant to the contract; and

(3) The separate defense of waiver and estoppel raised by the appellant constituted valid legal defenses.

Therefore the judgment below should be reversed to the end that the issues raised by the pleadings should be determined by a jury.

Respectfully submitted,

LIONEL P. KRISTELLER,
Attorney of Defendant-Appellant.

Jacob L. Newman,
George H. Rosenstein,
On the Brief.

May Term, 1931.

59 MAY.T.1931

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

JACOB K. SAFRIS and HARRY LESSER, *Plaintiffs-Respondents,* *vs.* THOMAS F. SOMERS, JR., Executor and Trustee of the Estate of Thomas F. Somers, deceased, *Defendant-Appellant.*	*On Appeal from Supreme Court.*

BRIEF ON BEHALF OF RESPONDENTS.

(Italics ours unless otherwise noted.)

Statement of Facts.

Plaintiffs-respondents, on August 11, 1925, entered into a written contract with the defendant-appellant's testator, whereby defendant-appellant's testator agreed to convey to plaintiffs-respondents, the premises described in said written contract, a copy of which contract appears in the State of Case, pages 9-12.

Plaintiffs-respondents, by the terms of said contract, agreed to pay for the premises therein described, the sum of Sixty Thousand Dollars ($60,000). By the terms of said contract, Four Thousand Dollars ($4,000) was required to be paid upon the signing of the said contract, which sum was paid and the receipt of said sum was acknowledged by the defendant-appellant's testator.

The contract, as appears on page 23 of the State of Case, lines 29 to 40, was drawn in New York, at the office of the defendant-appellant's testator,

by a typist in his office, who typed the contract as it was dictated and was drawn from surface impressions obtained from examining the papers with the papers defendant-appellant's testator presented at the time.

The contract provided, *inter alia*, that the conveyance was to be made, as appears State of Case, page 10, lines 39-40, page 11, lines 1-15, and quoting from the same, it appears that the only encumbrances on the property, are definitely stated in said lines, and are as follows:

> "The said premises are to be conveyed subject TO THE TERMS OF THE LEASE MADE BY THOMAS F. SOMERS TO LOUIS FROST, which lease becomes void if the property is sold, at the option of the Lessor, also SUBJECT TO THE RIGHTS OF THE NEW YORK TELEPHONE COMPANY IN THE CABLES AND CONDUITS LAYED IN THE SAID PREMISES which must be removed if necessary on notice to the New York Telephone Company."

State of Case, page 12, lines 1 to 4, states the following:

> "The Deed of conveyance shall be a Warranty Deed conveying the premises FREE AND CLEAR OF ANY AND ALL ENCUMBRANCES EXCEPT THOSE MENTIONED IN THE CONTRACT * * *."

However, the briefer for the defendant-appellant, in the brief of the defendant-appellant, on page 2, at the bottom of the page in the brief filed on behalf of the defendant-appellant, makes this statement to the Court:

> "The agreement provided that the conveyance was to be subject to certain easements and encumbrances, as appeared in the deeds from which Zucker prepared the agreement."

The briefer for the defendant-appellant cannot show this Court the existence of any such covenant in the contract (State of Case, pages 9 to 12) because the contract contains no such covenant, nor is this question raised anywhere in the case at bar, and is a question now raised by the briefer on the appeal only.

In making such statements to the Court, there appears to be an attempt to mislead this Court, perhaps due to the zeal of the briefer in preparing the brief, and whereby he injected into the case a premise that does not exist. This is very apparent from the affidavit of the defendant presented to the Court below contra to the affidavits of the respondents on motion to strike the answer. (See State of Case, pages 57-61.) The contract in question provided that the title was to close on or before the 15th day of September, 1925, but the title was not closed on that date and could never have been closed on that date, because the vendor could not deliver such a title as he had covenanted to convey.

Considerable correspondence passed between the vendor and the vendees' attorney, most of which correspondence is set forth in the Bill of Particulars (State of Case, pages 16-37), and the affidavit on behalf of the defendant-appellant (State of Case, pages 57-65).

It is pertinent to note from the correspondence, that notwithstanding the fact that time was not of the essence, that on September 17, 1925, the defendant-appellant's testator wrote to the attorney for the respondents, that he wanted to hear immediately as to whether the respondents were going to close title (State of Case, pages 61-62), and that that letter was immediately answered (State of Case, pages 62-63), and that

letter says specifically, it coming from the correspondents' attorneys, that the condition of the title was not known to the correspondents' attorneys and surely not to the respondents at that time.

Again (State of Case, pages 64-65), the defendant-appellant's testator was notified that the condition of the title was not examined as yet.

On October 6, 1925 (State of Case, pages 19-20), and the letters which follow in the State of Case, indicate clearly the reasons why the respondents would not take the title, but they all show that the respondents were ready, willing and able to take title as soon as the defendant-appellant's testator was in a position to comply with the terms of the contract, and where the briefer for the defendant-appellant draws the following conclusion,

> "These letters furnish not only persuasive proof of the bona fides of the defenses interposed, but cogent evidence in determining who breached the agreement; to put it more concisely, which party was in default when performance was due under contract."

it is impossible for respondents to determine. It appears to be mere idle statements which are not borne out by the concrete facts in the case.

The respondents in their complaint asserted that the following restrictions affected the premises which the defendant-appellant's testator had agreed to convey to respondents, and they are as follows:

> "That no house, cottage or other building, shall ever be erected on said premises nearer the line of said Ocean and Godfred avenues, than fifteen feet (15), (Godfred avenue is now Fifth avenue); and that said premises shall never be used for a livery stable or

> manufacturing purposes, that no intoxicating liquors shall be sold on said premises, and no pig stys shall ever be erected or maintained thereon'' (State of Case, page 5).

The same premises which the defendant-appellant's testator agreed to convey to respondents, also were further encumbered by the following covenants:

> ''This conveyance is made however and received expressly subject to the following conditions and restrictions:
>
> That no house, cottage or other building shall ever be erected on said premises nearer the line of said Ocean avenue than fifteen feet (15), and that said premises shall never be used for a livery stable or manufacturing purposes, and that no intoxicating liquors shall be sold on said premises and that no pig sty shall be erected or maintained thereon.''

The defendant-appellant's testator was notified of these restrictions on October 6, 1925 (State of Case, pages 19-20) and on October 17, 1925 (State of Case, pages 21-22).

Throughout the defendant-appellant's brief, there is an attempt to bring the breach of the contract as of September 15, 1925. That on that day, the defendant-appellant desires to make it appear that the defendant-appellant's testator unequivocally declared a forfeiture. However, as late as November 13th of that year, the then attorney of the defendant-appellant's testator, says.

> ''In conclusion let me say that Mr. Somers has no desire to be arbitrary in this matter, and is entirely willing to convey this property to your clients even though the time stated in the contract has long since expired, but it will be necessary to ask your clients to come to a decision on this point within the next ten days'' (State of Case, page 30, lines 11-17).

The correspondence throughout indicates clearly that the respondents were ready to perform their portion of the contract, on their part required to be performed, if the defendant-appellant's testator could deliver a title in compliance with the requirements of the contract in this case, but it appears conclusively that the vendor refused to attempt to clear the title and convey the property in question in the manner in which he had agreed to before by the terms of the contract in this case, and after waiting for some time after the death of the vendor, this suit was instituted for the return of the deposit moneys only, and for reasonable fee for search fees expended in the examination of the title of the premises which the vendor had agreed to convey.

This case must be distinguished from one where damages as a result of the breach are sought. Nothing more was asked in this case, but that the vendees be placed in status quo, and that they be returned that money which they had expended to determine the condition of the title of the vendor.

Respondents are again at loss to understand where appellant's briefer obtained the information contained in page 7 last paragraph of appellant's brief, in which briefer states,

> "That an amended Bill of Particulars was served. A wilful suppression of certain correspondence was obvious from the answers. Correspondence between the parties prior to October 6, 1925, was omitted. To have included it, would have been fatal to the respondents' cause. A frank disclosure of the entire correspondence would have disclosed no cause of action and resulted in a dismissal."

It appears that the appellant's attorney, not being satisfied with the answer to Question No. 1

of the Demand for Bill of Particulars, must have made an oral request to answer Question No. 1 more fully, for in the respondents' State of Case, page 38, there appears to be an Amended Bill of Particulars containing an amended answer to Question No. 1 of the original Bill of Particulars filed by the appellant, without any demand for the same appearing of record, and it appears that the answers were totally satisfactory to the appellant's attorney, for he did not apply to the Court for more specific answers.

To make a statement that there was a wilful suppression of certain correspondence in a brief which this Court is to read, is not fair or just to the attorney of the respondents, where the attorney for the appellant never made an application for more specific answers, and where the very letters which he referred to, were correspondence in his possession. Is it not an attempt upon his part to abuse the purposes of a Bill of Particulars which is to enable the defendant to intelligently draw an answer to a complaint, and surely, when he has this information in his possession, there is absolutely no reason why he should attempt, by a Bill of Particulars, to waste the Court's time and to litter the files of this Court with information which he has, and we must assume that appellant's attorney is fully acquainted with these provisions of a Bill of Particulars, and again we must state that it is a rank injustice to counsel to accuse counsel of wilfully suppressing correspondence or evidence, and should not have been set up in appellant's brief.

An answer and counter-claim was filed by appellant, which answer and counter-claim was stricken out by order of the Honorable William S. Gummere, Chief Justice, on the return day

of a Notice of Motion to strike the answer and counter-claim, and for the entry of summary judgment, the Chief Justice, however, sending to the trial court the only issue that then remained, and that is, the reasonableness of the search fees, and a trial was had by the Court and jury, and the jury's verdict was Two Hundred and Forty-eight Dollars ($248), so that the judgment as it now stands, is for the return of the deposit of Four Thousand Dollars ($4,000), together with interest, and a search fee of Two Hundred and Forty-eight Dollars ($248).

Appellant now appeals from this judgment entered by the Honorable William S. Gummere, Chief Justice and from the jury's verdict.

LAW.

Respondents' answer to Point 1 set forth in appellant's brief.

Was the Court below wrong in striking the answer of the appellant and entering summary judgment against him?

Appellant claims that there was evidence which disclosed the meritorious questions of fact for submission to a jury.

Let us see what the answer of appellant is.

The first paragraph of the answer admits the first paragraph of the complaint. There can then be no question raised as to the contract which appears on pages 9-12, State of Case.

Paragraph two of the answer denies each and every other allegation contained in the complaint. Is there any meritorious question of fact to be submitted to the jury set forth by paragraph two of the complaint, which is denied in the an-

swer? The affidavits on the motion to strike out specifically prove that allegation, and the defendant did not produce any evidence to contradict the same.

Paragraph three of the complaint sets forth, that by the terms of the contract, the premises were to be conveyed to the plaintiff herein, free and clear of all liens and encumbrances. The defendant denies this, but has already admitted in his answer, the making of the contract set forth in paragraph one of the complaint. Has he forgotten this? Is there any meritorious question of fact for submission to a jury on the denial of this allegation? The jury would have to brand the defendant a liar in the admittance of either paragraph one of the complaint, or the denial of paragraph three of the complaint. The Court had a contract, and could see for itself that there was no question of fact for submission to a jury.

Paragraph four of the complaint sets forth certain restrictions that appear in a certain deed duly recorded in the Clerk's Office of Monmouth County, and the defendant denies this. The Court had before it certified copies, which are of record in this cause, and which certified copies show that exactly what is alleged in paragraph four of the complaint, is true, and the affidavits by the defendant do not deny the same. Then what meritorious question of fact is there for submission to a jury?

The same thing is true of paragraphs five, six, seven, eight, nine, ten and eleven of the complaint, all of which paragraphs are denied, and all of which restrictions appear of record in the County Clerk's Office, certified copies of which deeds were presented to the Court, by agreement

with the attorney, and all of which restrictions are reiterated in the affidavits filed in this cause, and none of which are denied by the appellant. Then what meritorious question of fact is there for submission to a jury?

Paragraph twelve of the complaint simply sets forth what is contained in letters which passed between the plaintiffs' attorney and the defendant, and simply reiterates what is contained in said letters, and the affidavits of the defendant, in reply to the affidavits of the plaintiffs, do not deny that these letters passed between the parties. Then again, what meritorious question of fact was there for submission to the jury?

Paragraph thirteen of the complaint simply sets forth, that the plaintiffs notified the defendant that they were ready, willing and able at any time that he would produce releases removing restrictions affecting the premises, or make a proper allowance to them on their contract because of said restrictions, to take title, and that the defendant refused. This is exactly what the letters that passed between the parties disclose, and they are reiterated in the affidavits filed in behalf of the plaintiffs, and they are not denied by the affidavits filed by the defendant. Could there be any question then to submit to a jury? Could there be a meritorious question of fact?

Paragraph fourteen alleges that a demand was made for the return of the deposit of Four Thousand Dollars ($4,000), and this is denied, notwithstanding the fact that the letters are replete with this phase of the case, after it became apparent that title could not be closed by the defendant, and it is borne out amply by the affidavits of the plaintiffs, and not denied by the defendant, so that there is not a single answer to the

defendant which discloses a meritorious question of fact for submission to the jury, beyond any question of doubt. It so impressed the Chief Justice, and rightly so. The only question that required a jury to act, was that in which the plaintiffs claimed Three Hundred and Seventy-five Dollars ($375.00) incurred in examining the title, which included, as the proofs later on brought out, a charge for drawing of contract and representation in the matter, and the jury cut this down to Two Hundred and Forty-eight Dollars ($248.00), so that on Point 1, the answers themselves do not disclose any meritorious question of fact for submission to a jury.

We then come to the separate defenses which the defendant relies upon.

The first separate defense raises the question that there is no proof that the plaintiffs were ready, willing and able to accept the deed referred to in the contract annexed to and made part of the complaint. Does the defendant intend to infer, that on September 15, 1925, he had ready a deed conveying the property described in the contract, by a Warranty Deed, free and clear of all encumbrances; a deed that was conveying the property free of the restrictions referred to in the complaint? To make the example more specific, does the defendant infer that had he made a contract to sell to the plaintiff, the City of New York, title to close on January 5th, that even though he never owned the City of New York, the mere fact that the buyer did not know it on that day, and did not show up on that date to close, meant that the seller could pocket the money he had received as a deposit from the buyer? That is practically what the Court would have to find in this case, without

going in to any further facts which are in this case, because it has been held in this state, in *Bernstein* v. *Kohn,* 96 Law, page 223, at page 266, Court of Errors and Appeals, that:

> "In the present case it appeared that the defendant vendor was not at any time in a position to convey a good title, and it would therefore have been an idle ceremony for the vendee to go through with a tender of performance on his part. The law does not lend its sanction to such mummery."

In quoting from the syllabus of said case, which contains a clear and concise statement of the facts involved,

> "Where there are concurrent covenants to be performed by vendor and vendee, the universal legal rule is that before the latter is enabled to rescind and sue for a breach of the contract he must show tendered performance of such concurrent covenants on his part and that he had demanded performance by the vendor of concurrent covenants on his part, but *an equally well recognized exception to this general rule is that in case a vendor is unable to perform at the time agreed upon for the passing of the title, tender of performance by the vendee is not required in order to enable him to rescind and to sue his vendor for a breach of the contract.*"

Let us suppose that the plaintiffs had gone through this idle ceremony of a tender of performance on their part on September 15, 1925, and had been an actor in this mummery. What kind of a title could the defendant have tendered? The affidavits of the plaintiffs prove conclusively, and it is not denied by the defendant, that the defendant could not give such title as he covenanted in his contract to deliver, and the case at bar falls clearly within the case decided by this

Court in 91 Law, page 262, at page 264, *Reutler* v. *Ramsin*, in which the Court says:

> "The title which the defendant tendered, and which is all she can convey, is subject to this recognized grant of a part of the premises which she agreed to sell, and is therefore an encumbrance upon it, and the plaintiff is not required to accept the title tendered as an execution of the defendant's agreement. Where a party contracts to sell a tract of land free from all encumbrances, as to part of which there is an outstanding title in a third party, such outstanding title is an encumbrance which justified the proposed purchaser in refusing to accept it and entitles him to repayment of any part of the purchase price paid on account of an agreement for an unencumbered title."

In *Moran* v. *Borrello*, 4 Misc. page 344, the Court held, that tender of a bond and mortgage called for in a contract of sale, is waived where vendor is unable to perform.

In the case at bar, the respondents reiterated in their letters, time and again, that if the vendor would comply with his contract and was prepared to deliver title in accordance with the terms of his contract, that they, the vendees, plaintiffs in this cause, were ready, willing and able to at any time that such title could be conveyed to them, to take the premises, but the vendor, the defendant in this cause, refused to comply and was never ready, willing and able to comply with the terms of his contract, nor could he be in such a position.

The second separate defense alleges a waiver and abandonment of the restrictions and conditions respecting the premises in question, and a waiver and abandonment of any obligations thereto in this cause. Waiver means the giving up of something for which a consideration has been

paid; accepting less than had been bargained for; a direct and unequivocal surrender. Where does any such action on the part of the plaintiffs appear in this cause? Their affidavits show conclusively, on page 52, State of Case, at page 54,

> "*We were ready, willing and able to close title,* provided Thomas F. Somers, now deceased, was in a position to deliver title to us in accordance with our contract, we at no time waived or abandoned any of the restrictions that encumbered the title * * *"

The letters specifically show that immediately upon the plaintiffs discovering the restrictions and conditions, that they notified defendant's testator.

In order that there be a waiver, there must be a voluntary surrender of a right. 40 Cyc. page 256; 135 Atl. page 83; 136 Atl. page 339; 27 R. C. L. page 905.

> "Waiver must be manifested in some unequivocal manner and to operate as such it must in all cases be intentional."
> 40 Cyc. page 261:
>
> "There can be no waiver unless if intended by one party and so understood by the other as one party has so acted as to mislead the other." 40 Cyc. pages 261-262.

Was there any unequivocal and manifested intention in this case? There is no question, upon examining the evidence, that no reasonable man could be in doubt on the answer to this question. Of course there was no waiver.

In *Aron* v. *Rialto Realty Co.,* 136 Atl. page 339, at 341, the Court quoting from 27 R. C. L. 909, says:

> "To make out a case of waiver of legal right, there must be a clear unequivocal and decisive act of the party showing such a purpose or acts amounting to an estoppel on

> his part. A waiver, to be operative, must be supported by an agreement found as the valuable consideration or the act relied on as a waiver must be such as to estop a party from insisting on performance of the contract or forfeiture of the condition."

Has there been abandonment of the conditions and restrictions by the plaintiffs? In 1 Corpus Juris, page 6, paragraph 7, abandonment is defined as,

> "Abandonment is made up of two elements, Act and Intention. It includes both the intention to abandon and the external act by which the intention is carred into effect."

Bouvier's Law Dictionary, 3rd Ed. defines "abandonment" as,

> "A transaction which fails as a sale cannot be converted into an abandonment." (*Watts* v. *Spencer*, 51 Or. 262; 94 Pac. 39.)

In addition to waiver and abandonment, the defendant sets up the defense of estoppel. Is this plea available to the defendant? This is a special plea in bar, which happens where a man has done some act or executed some deed which precludes him from averring anything to the contrary. What is this estoppel? What does it consist of? A mere naked statement that the plaintiffs are estopped from urging or maintaining any or all of the objections, should have no weight with this Court, for in 21 *Corpus Juris*, page 1247, paragraph 260, we have the following statements:

> "Where an estoppel is relied upon it must be pleaded with particularity and precision, every essential fact being set forth, nothing can be supplied by inference or intendment and indeed it is said where there is a ground for inference or intendment it will be against and not in favor of the estoppel. The pleading must be certain in every particular and

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> to every intent, or no estoppel can be adjudged. In order to plead an equitable estoppel, it is necessary to allege that the acts and representations or conduct constituting the alleged estoppel were done or made with intent that the person claiming the estoppel should act thereon."

The appellant has quoted from *Dooley* v. *Cushing,* 105 N. J. Law, page 595, very voluminously, and states that that case is quite parallel to the one at bar, and he attempts to invoke the doctrine of waiver of the alleged defect and the doctrine of estoppel by applying the law in that case to the case at bar. Is there such similarity? In that case, the vendee knew that the vendor had no title to the premises which the vendor agreed to convey to the vendee, and it is specifically stated that the vendee's agreement was subject to the terms contained in the agreement that the vendee's vendor had with his vendor, and made time of the essence. In other words, when Dooley's vendor took title, Dooley must take title. Unless he took title when his vendor took title, he was out. Time was of the essence. He asked for something more than he had bargained for. He asked his vendor to surrender a right which his vendor had, and his vendor accepted a consideration for surrendering that right, and for surrendering that right, Dooley had to pay on Jan. 15, 1926, an additional deposit of Twenty-five Thousand Dollars ($25,000), and if he did that, the contract which he forfeited by his inability to close title on the day set, where time was of the essence, would not be ratified unless, on or before January 15, 1926, he pay an additional deposit of $26,000.00, and if he made that payment, then he was entitled to receive his contracts, and again, Dooley's grantor made time of the essence, that if the $25,000 was not paid on

January 15, 1926, he was to forfeit all the money he paid before that date, as liquidated damages. Then, without notice, explanation or rescission, Dooley did not pay the money due on January 25, 1926, or any part thereof, and lost his contract.

The Court says at page 599,

> "The clear intent of the extension agreement was that the vendee, Dooley, was to pay $25,000 at or before the hour of two o'clock in the afternoon of January 15, 1926, failing which the moneys theretofore paid should become forfeited and be detained as liquidated damages by the vendors, at their option."

What question could Dooley have raised on January 15, 1926? He asked and received an extension agreement, extending the date for closing of title on his part, until March 5, 1926. **On January 15, 1926, the condition of the title** had nothing to do with the case. Neither his vendor had to be ready to deliver title, nor was he on that day obligated to accept title, and the Court says so on page 600.

On page 20 of the Appellant's brief, he says:

> "If any question on the title had been raised, the appellant was entitled to an opportunity to clear up or correct any defect or question respecting the title. This opportunity was denied appellant—no question was raised."

We agree with the appellant that the defendant was entitled to an opportunity to clear up or correct any defect or question respecting the title, and if the briefer, who has so aptly referred to the letters in the cause, will examine said letters, he will find that that was the purpose of the communications that were passing back and forth, and that finally the defendant's

testator died, and that thereafter nothing further was done to clear up the title. There was no attempt to deny the defendant's testator the opportunity to clear up the tile. Then where, and from what source, does the briefer rely upon to have this Court believe that not alone do the letters constitute a waiver of any alleged defect, but that the conduct of the plaintiffs have placed them beyond a recovery of their down money, at law, under the principle of equitable estoppel? Did the plaintiffs refuse to give the defendant every bit of information? Did they refuse to afford him every opportunity to clear his title? An examination of the evidence in this case will prove to the contrary.

The appellant appears to rely upon *Gold* v. *Schneider*, a Supreme Court case reported in 2 Misc. page 179, and attempts to invoke the doctrine of estoppel which was invoked in that case against the plaintiffs in this case. In that case, however, the testimony is direct, that the plaintiff-vendee agreed with the defendant-vendor, after contracts had been entered into, that the mortgages recited in the contracts as "bank mortgages" be mortgages to individuals, and that the defendant, although he had arranged for bank mortgages, made the change by having mortgages made to individuals in accordance with the plaintiff's request, and the language of the Court, "that a party is not allowed to take advantage of an act done, or the omission to do it, where such act or omission was designedly caused by himself," must be correct.

In the case at bar, plaintiffs and defendant's testator entered into a contract. No favors were asked from the defendant to make any changes in the contract, nor did the defendant ask the plaintiff to make any changes in the contract,

in other words, there was no agreement to make any changes, nor is any agreement alleged anywhere, and as stated in 3 *Blackstone Commentaries,* 308, 3 A. L. R. 205,

> "Where there is an attempt to apply the doctrine of estoppel, one essential in such case is that the party in whose favor it is invoked must himself act in good faith."

To prove estoppel against the plaintiffs, the defendant further appears to rely on the case of *Dunn* v. *Cutley,* 8 Misc. 677, and cites from the Court's opinion in that case. How does that opinion apply to the case at bar? Was the defendant misled by the plaintiffs? Was the defendant induced to alter his position in such a way that he would be injured if the plaintiffs insisted upon the defendant complying with his contract, as stated in said case? An equitable estoppel protects the party setting it up from a loss which, but for the estoppel, he could not escape. The defendant it appears desires to invoke this doctrine to destroy an original contract and compel the parties to alter their contract and have plaintiffs accept something that they did not contract for.

Respondents contended that this doctrine does not in any way apply to the case at bar, and that the order striking the above defense and entering a judgment for the return of the deposit paid by the plaintiffs was not error.

The appellant further cites the case of *Soper* v. *Arnold,* L. R. 14, App. Cas. 429. In the above case the purchaser of real estate, under a written contract ACCEPTED AND APPROVED the abstract of title offered by the seller. Without going any further into the facts of that case, that element is lacking in the case at bar. Nowhere does there appear to be an acceptance and ap-

proval of any abstract of title offered by the seller, and the Court in its opinion says in that case,

> "He took no exception to the title—he was willing to take that title—he had intimated his willingness to take it by accepting and approving it."

In the case at bar, again every element mentioned above is lacking.

The third separate defense of the appellant recites that the plaintiffs agreed with the defendant's testator, that the plaintiffs would take and accept the title to the premises in question, as was held and enjoyed by the appellant's testator. In other words, this defendant asserts that the contract is entirely to be disregarded and held for naught, and that the plaintiffs, notwithstanding the contract, made a separate and different contract, and that is to take not the title that the written contract said they were to take, but another title. For the Court to support this defense, it would be necessary to overthrow a long standing principle of law in this state, which was most impressively set forth in *Naumberg* v. *Young,* 44 N. J. L. page 331, and which was more recently followed in the case of *Drill Construction Co.* v. *Rosenthal,* 8 Misc. page 666, which is as follows:

> "Where the parties have put their contract in writing, the written contract shall be the only evidence of the contract as finally concluded and oral testimony will not be admitted to contradict it."

To compel the plaintiffs-respondents to accept such a title as the defendant-appellant's testator had in his lifetime, would result in the plaintiffs-respondents being required to accept an unmarketable title, a title which they had not contracted

to purchase. They are entitled to a marketable title in fee simple, free from encumbrances, without restrictions as to the use to which the premises may be put or to the location, character, kind of building, depth of foundation which may be erected in or upon the land, and unless such a title could be conveyed, the title which the defendant-appellant would tender to the plaintiffs, would not be such as the plaintiffs are entitled to under their contract. 57 A. L. R. page 1414.

In the case at bar, there were restrictions as to the location, character and type of building to be erected on the land which the plaintiffs had agreed to purchase.

In *Trindel* v. *Den,* 20 N. J. L. page 214, cited in 57 A. L. R. page 1276, the Court says:

> *"A contract to convey by warranty implies a warranty of title in fee simple of the land and not merely title to such an estate as the vendor may have therein."*

In *Krah* v. *Wassmer,* 75 Equity, page 109, affirmed in 78 Equity, page 305, the Court says:

> "Under a contract to convey title to property free and clear of all encumbrances, the vendee is entitled to insist upon a conveyance without restrictions as to the use of the property or location of building which might be erected thereon."

The Court further says,

> "I am therefore of the opinion that when the complainant bargained for the premises in question, he did so with the idea that he was to receive the title to the property free and clear of all encumbrances, and that he is now entitled to insist upon a conveyance without the restrictions which the defendants are attempting to impose upon him."

In 57 A. L. R. 1273, we find the following annotation:

> "But the implication of law, that the vendor is to convey a good title free from encumbrances cannot be contradicted by parol evidence, that the vendee was given to understand that the only title the vendor could give was such as it had, and no more. And, even though the contract expressly provides that there shall be no covenant of title in the deed, the vendee, nevertheless, is entitled to a perfect title to the land. To excuse the vendor from conveying free from defects in the title, the contract must contain express provisions that the title shall be subject to the specific defects, and the vendee is bound to take subject only to such defects as are thus specified. As to these matters, the Court will interpret a contract for the sale of real estate in view of the custom prevailing in transfers of real estate of which it has knowledge, and of which it will take notice. It is to be noted, however, that even where the contract is construed to impose upon the vendor the duty of conveying a certain quality of title, the title tendered need not in fact be bad in order to relieve the vendee of his obligation to purchase, but it must either be defective in fact, or so clouded by apparent defects, either in the records or by proof outside the records, that prudent men, knowing the facts, would hesitate to take it."

In *Eisler* v. *Halpern,* 89 N. J. L. page 278, the Court of Errors and Appeals said:

> "The rule is elementary that, in the absence of any qualifying condition in the sale (and there were none in this case) the purchaser is entitled to a good title. If the title be not such as the purchaser is entitled to under his contract, he may, after a proper tender, or without it in cases where it is waived or excused, rescind the contract and recover back in an action at law what he

has paid on it. 28 Encycl. L. (2nd Ed.) 619; Meyer *v.* Madreperla, 68 N. J. L. page 258 at page 266; Werman *v.* Fath, 43 *Id.* 1 and Mangaro *v.* Karl, 84 *Id.* 408."

In 57 A. L. R. 1279, the term "Warranty Deed" is defined as follows:

> "The term 'Warranty Deed' in a contract for sale and conveyance of land has in law the clear and definite meaning that the vendor will convey the title to the premises by deed containing the usual covenants generally inserted in a Warranty Deed, which includes the covenant that the land is free and clear from encumbrances."

Incumbrance as defined by our Court of Errors and Appeals in *Bier* v. *Walbaum,* 131 Atl. page 888, 102 N. J. Law, page 368, is as follows:

> "Incumbrance means a right to or an interest in an estate to the diminution of its value."

Under a contract to convey real estate by good and marketable title, free and clear of all encumbrances, the vendor is bound to have and tender title free from encumbrances. *Garber* v. *Stern,* 135 Atl. page 550, 100 N. J. E. page 470.

The fourth and fifth defenses are similar, since they both allege that the plaintiffs were not financially able to consummate the transaction and did not make a tender. To these allegations we must but refer this Court to the earlier part of this brief, and add but a few more adjudications as made in this State to establish conclusively that the tender of performance was made, and if not made was as decided by our Courts waived by the vendor.

In *Walls* v. *Christors,* 139 Atl. page 3:

> "The case is replete with proof that they made every reasonable effort to meet the defendant in his effort to unravel the titular

knot, and that his failure so to do rendered a formal tender a mere perfunctory performance, which would be ineffectual as a means of producing the desired result." A directed verdict for the plaintiff was upheld.

Lunde, et al. v. *Minch,* 136 Atl. page 553 (Conn.). The Court in dealing with the case which facts were similar to ours, said:

> "The excuse upon which the plaintiffs (vendees) rely (for the failure to make a tender) is the inability of the defendants to convey the premises free and clear of all encumbrances by reason of the existence of certain restrictions upon the use of the property. *If, being aware of the restrictions upon the premises which would prevent their performance of their agreement, the defendants failed to remove them, and so continued unable to perform, any offer to perform by the plaintiffs would have been as unnecessary as it would have been unavailing, and so they would have been excused from making it.* 109 Atl. page 724. While we have usually been called upon to apply this principle in cases where there has been a rescission of the contract and the claim is for the recovery of money paid, yet it controls also in actions brought for breach of the agreement. 26 Conn. page 110; 200 Mich. page 415; 166 N. W. page 863; 126 G. A. 167; 54 S. E. page 949; 38 Cyc. page 1544-2089."

From the above cases we also have the rule that a purchaser's notice of readiness and ability to perform is tantamount to tender of performance. That the vendees, the plaintiffs herein, were ready and able to perform, can be seen by the copies of the letters as annexed to the Notice of Motion to Strike Out, more particularly referring to the letter dated October 17th, 1925 addressed to John P. Broomell, attorney for Thomas F. Somers, now deceased.

In *Grivakis* v. *Topf,* 105 Law, page 632, in an action at law wherein the lower court directed a verdict in favor of the (vendee) plaintiff, the Court said:

> "My view, therefore, is that this restrictive covenant (that there shall not be erected on the side or any part thereof any brewery * * * any beer saloon, beer cellars or any place where beers, wines or liquors shall be sold, or any building in which there shall be carried on any business offensive, noxious or detrimental to the use of the said land or adjoining land * * *), in this agreement of sale and those in P. 2 and P. 3 constitute an incumbrance upon this property which justified the plaintiffs in refusing to take title, and I, therefore, direct the jury to find a verdict for the plaintiffs." The Court of Errors and Appeals by a *per curiam* opinion adopted this rule. (The contents of the brackets are those of this writer.)

In *Planter* v. *Zintz,* 5 Misc. 495, the Court held that generally the purchaser is entitled to reject title and recover deposit where substantial defect is shown.

Appellant complains that the complaint was devoid of any allegation of actual tender in compliance with the contract and that there was no proof of waiver by respondents of actual tender. He also contends that assuming that tender had been excused or waived by himself, that we must show we were ready, willing and able to perform on our part.

As mentioned before in this brief, our complaint paragraphs 12 and 13 sets forth we were ready, willing and able to perform our contract. The complaint is not wholly barren of such allegations as the appellant would lead this Court to believe and again we must refer this Court

to the affidavit of Jacob K. Safris, pages 52-54 of the State of Case, where he says that they were ready, willing and able, provided that title would be delivered in the manner specified in the contract.

According to the law in this State, the burden is upon the vendor to tender title in the manner described in the contract before there is a duty cast upon the vendee to show he is ready, willing and able. In the event that the vendor is unable to perform at the time agreed upon, in the manner agreed for the passing of title, *tender of performance is not required in order to enable him (vendee) to rescind and sue his vendor for breach of his contract. Bernstein* v. *Kohn, supra, Ruetler* v. *Ramsin, supra.*

In *Herman* v. *Ebert,* 98 Law, page 653, at pages 655 and 656, the Court followed a principle laid down in *Lawrence* v. *Taylor,* 5 Hill (N. Y.) 115, this is as follows:

> "The vendor was not able to comply and suit was brought by vendee to recover $1,500. paid on account of the purchase price at the execution of the agreement, the defendants being unable to convey the lands to the vendee according to the contract. In disposing of this case, the Court said, 'there may be circumstances there which would excuse a party from such performance and enable him to take advantage of the default of the other party although he has not performed or offered to perform on his own part.' *A tender of performance need not be made when it will be wholly nugatory."*

The appellant contends that we should show a tender, but this is not necessary since we are not suing for damages as was asked for in the *Caporale* v. *Rubine* case, 92 Law 463, as in that

case, the Court of Errors and Appeals speaking through the late Mr. Justice Kalisch, said:

> "But the plaintiff was not relieved from establishing, in order to RECOVER DAMAGES for a breach of contract, that it was able and ready to perform his part of the undertaking."

In that case there was a SUIT FOR DAMAGES as a result of the breach of contract, in addition to the return of the deposit, but this is not our case, FOR HERE WE ASK BUT FOR THE RETURN OF OUR DEPOSIT AND IN HERMAN *v.* EBERT, THE COURT MAKES THIS VERY DISTINCTION.

With reference to the counter-claim, the same must fall in view of the law as adjudicated in our State.

In *Grossman* v. *Buck, et al.*, 139 Atl. page 409:

> "In a case wherein the vendee sued for return of deposit and search fees, and the vendor counter-claimed for damages the Court held,"
>
> "The counter-claim must stand or fall on the defendants' inability to carry out their contract. If as has been shown, the record discloses that the defendants were unable by reason of defect in their title to convey in accordance with the terms of their agreement, obviously a counter-claim based upon the plaintiff's refusal to take title cannot be sustained."

In *Caporale* v. *Rubine*, 92 N. J. L. 463, the plaintiff brought an action against the defendant for damages for the failure of the defendant to comply with the terms of a contract which had been entered into between the parties. The plaintiff had agreed to convey certain premises to the defendant, and in consideration thereof, the defendant agreed to convey certain premises to

the plaintiff. It appeared that the defendant breached the contract, and that because of said breach, the plaintiff brought an action, not for the return of the deposit, as the only consideration in that case was the mutual agreement to exchange properties and at the time of closing of title, to either pay certain amounts in cash or execute mortgages in favor of that person who had the greater equity. The Court in that case, however, held, that before the plaintiff could exact damages from the defendant, for the defendant's breach, the plaintiff must establish the fact that he was able to and ready to perform his part of the undertaking.

Quoting from the case, at page 466:

> "The plaintiff was not relieved from establishing in order to recover damages for a breach of contract that he was able to and ready to perform his part of the undertaking. The measure of the plaintiff's legal obligation in the present case was to establish by competent proof that he was able and ready to convey title such as would comply with the requirements of the agreement."

It is, therefore, respectfully submitted, that the judgment in favor of the plaintiffs, and against the defendant, entered in the Court below, should be affirmed.

Respectfully submitted,

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Maurice J. Zucker,
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On the Brief.

May Term, 1931.