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NOTICE OF APPEAL.

Filed March 2, 1927.

New Jersey Supreme Court

UNION COUNTY.

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LEE K. WARING and ROBERT S. BUNNELL, *Plaintiffs,* *vs.* WALTER E. JOBS and CORA B. JOBS, *Defendants.*	*Action at Law.* *Notice of Appeal.*

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To Koehler and Augenblick, attorneys of plaintiffs:

TAKE NOTICE that the defendants appeal to the Court of Errors and Appeals in the last resort in all causes in New Jersey from the whole of the judgment entered in this cause.

McCARTER & ENGLISH,
Attorneys of Defendants.

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GROUNDS OF APPEAL.

Filed March 29, 1927.

New Jersey Court of Errors and Appeals

LEE K. WARING and ROBERT S. BUNNELL, *Plaintiffs-Respondents,* *vs.* WALTER E. JOBS and CORA B. JOBS, *Defendants-Appellants.*	*On Appeal. Grounds of Appeal.*

The appellants state the following grounds of appeal:

1. The Supreme Court erroneously struck out the answers of the appellants.

2. The Supreme Court erroneously ordered final judgment to be entered in favor of respondents and against the appellants.

Dated March 22, 1927.

McCARTER & ENGLISH,
Attorneys of Appellants.

AMENDED COMPLAINT.

Filed January 6, 1927.

New Jersey Supreme Court

UNION COUNTY.

LEE K. WARING and ROBERT S. BUNNELL, *Plaintiffs,* *vs.* WALTER E. JOBS and CORA B. JOBS, *Defendants.*	*Action at Law. Amended Complaint.*

The plaintiff Lee K. Waring, residing in the Town of Westfield, in the County of Union and State of New Jersey, and the plaintiff Robert S. Bunnell, residing in the Township of Union, in the County of Union, and State of New Jersey, says:

1. That on or about the 12th day of April, 1926, and for a long time prior thereto, the plaintiffs were and still are duly licensed real estate brokers of the State of New Jersey.

2. At some time prior to the 12th day of April, 1926, the defendants Walter E. Jobs and Cora B. Jobs authorized the plaintiffs, real estate brokers, to sell certain real estate belonging to them, the said defendants, which real estate was located in the Township of Springfield, in the County of Union and State of New Jersey, more particularly described in a certain contract of sale hereinafter mentioned, and being

New Jersey State Library

the same lands and premises described in Book 453 of Deeds for Union County, on page 132, on file in the Register's Office of Union County.

3. Pursuant to said authorization, the plaintiffs proceeded to obtain a purchaser for the said premises belonging to the defendants, and as a result of their efforts, plaintiffs succeeded in procuring Archibald M. Henshaw to enter into a written contract with the defendants for the purchase of the said premises belonging to the defendants and mentioned aforesaid, for the sum of $118,500.

4. That at the time the said contract was entered into between the defendants and the said Archibald M. Henshaw the defendants agreed in writing to pay the plaintiffs the sum of $6,000 in full for their commissions as brokers in effecting this sale.

5. That in accordance with this agreement, it was stipulated and agreed in the written contract between the defendants and the said Archibald M. Henshaw as follows:

> "it is agreed that this sale was brought about by Lee K. Waring and Robert S. Bunnell, and that the seller will pay them the sum of $6,000 in full for their commissions."

6. That the said contract containing the above agreement, was signed by the purchaser and by the sellers, the defendant herein, to wit, Walter E. Jobs and Cora B. Jobs, his wife, and was duly acknowledged by the said Walter E. Jobs and Cora B. Jobs, on the 12th day of April, 1926.

7. The plaintiffs have often demanded from the defendants the said sum of $6,000 so earned by them at the time the aforesaid written contract between the defendants and the said Archibald M. Henshaw was entered into, but the defendants have refused and still refuse to pay the plaintiffs the said sum.

Plaintiffs demand of the defendants the sum of $6,000 together with interest thereon from the 12th day of April, 1926.

KOEHLER & AUGENBLICK,
Attorneys for Plaintiffs.

ANSWER TO AMENDED COMPLAINT.

Filed January 18, 1927.

NEW JERSEY SUPREME COURT.

UNION COUNTY.

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LEE K. WARING and ROBERT S. BUNNELL, *Plaintiffs,* vs. WALTER E. JOBS and CORA B. JOBS, *Defendants.*	*Action at Law.* *Answer to Amended Complaint.*

20 The Answer of the defendants, Walter E. Jobs and Cora B. Jobs, residing in Westfield, Union County, to the amended complaint of the plaintiffs says that:

They deny the truth of the matters contained in the amended complaint.

McCARTER & ENGLISH,
Attorneys of Defendants.

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NOTICE TO STRIKE OUT ANSWER AND FOR SUMMARY JUDGMENT.

Filed February 17, 1927.

NEW JERSEY SUPREME COURT.

UNION COUNTY.

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LEE K. WARING and ROBERT S. BUNNELL, *Plaintiffs,* vs. WALTER E. JOBS and CORA B. JOBS, *Defendants.*	*Action at Law.* *Notice.*

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To McCarter & English, attorneys for the defendants:

SIRS:

TAKE NOTICE that we will appear at the chambers of Justice Samuel Kalisch, 738 Broad St., Newark, N. J., on Saturday, February 26, 1927, at 10 A. M. in the forenoon or as soon thereafter as counsel can be heard, and apply for an order to strike out the answer filed by the de- 30 fendants in this cause, on the ground that the said answer is sham, and we will ask for a summary judgment; and we will base our motion on the affidavits annexed hereto.

KOEHLER & AUGENBLICK,
Attorneys for Plaintiffs.

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NEW JERSEY SUPREME COURT.

UNION COUNTY.

LEE K. WARING and ROBERT S. BUNNELL, *Plaintiffs*, vs. WALTER E. JOBS and CORA B. JOBS, *Defendants*.	*Action at Law.* *Affidavit.*

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

LEE K. WARING, of full age being duly sworn according to law on his oath deposes and says:

1. That on the 9th day of April, 1926, and for a long time prior thereto I and Robert S. Bunnell were and still are duly licensed real estate brokers of the State of New Jersey.

2. That some time prior to the 9th day of April, 1926, the defendants Walter E. Jobs and Cora B. Jobs authorized Robert S. Bunnell and myself to sell certain real estate belonging to them, and located in the Township of Springfield, in the County of Union and State of New Jersey, more particularly described in the contract, a copy of which is hereto annexed and made part hereof.

3. Pursuant to said authorization, Mr. Bunnell and myself set out to obtain a purchaser for the premises belonging to the defendants, and as a result of our efforts we succeeded in procuring one Archibald M. Henshaw a purchaser,

and through our efforts we succeeded in having the said Archibald M. Henshaw enter into a written contract with the defendants for the purchase of the said premises belonging to the defendants, for the sum of $118,500.00 A copy of said contract entered into between the said Archibald M. Henshaw and the defendants is annexed hereto and made part of this affidavit. The said Archibald M. Henshaw paid the defendants the sum of $5,000.00 on the signing of the contract.

4. That the said contract entered into between the defendants and the said Archibald M. Henshaw contains the following provision:

> "it is agreed that this sale was brought about by Lee K. Waring and Robert S. Bunnell and that the seller will pay them the sum of $6,000 in full for their commissions."

5. The contract containing this provision was signed by the said Archibald M. Henshaw and by the defendants Walter E. Jobs and Cora B. Jobs and was duly acknowledged by the said Walter E. Jobs and Cora B. Jobs on the 12th day of April, 1926.

6. I and the said Robert S. Bunnell have often demanded from the defendants the said sum of $6,000 earned by us at the time that the agreement annexed hereto was executed and delivered by the defendants and the said Archibald M. Henshaw, but the defendants have refused and still refuse to pay us the said sum.

7. The amount of $6,000 is due and owing to me and Robert S. Bunnell and I believe that there is no defense to this action.

LEE K. WARING.

Subscribed and sworn to before me
this 7th day of February, 1927.

ROSE F. LEE,
(SEAL) Notary Public of N. J.

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NEW JERSEY SUPREME COURT.

UNION COUNTY.

LEE K. WARING and ROBERT S. BUNNELL, *Plaintiffs,* vs. WALTER E. JOBS and CORA B. JOBS, *Defendants.*	*Action at Law.* *Affidavit.*

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

ROBERT S. BUNNELL, of full age being duly sworn according to law on his oath deposes and says:

1. That on the 9th day of April, 1926, and for a long time prior thereto I and Lee K. Waring were and still are duly licensed real estate brokers of the State of New Jersey.

2. That some time prior to the 9th day of April, 1926, the defendants Walter E. Jobs and Cora B. Jobs authorized Lee K. Waring and myself to sell certain real estate belonging to them, and located in the Township of Springfield, in the County of Union and State of New

Jersey, more particularly described in the contract, a copy of which is hereto annexed and made part hereof.

3. Pursuant to said authorization, Mr. Waring and myself set out to obtain a purchaser for the premises belonging to the defendants, and as a result of our efforts we succeeded in procuring one Archibald M. Henshaw a purchaser, and through our efforts we succeeded in having the said Archibald M. Henshaw enter into a written contract with the defendants for the purchase of the said premises belonging to the defendants, for the sum of $118,500.00. A copy of said contract entered into between the said Archibald M. Henshaw and the defendants is annexed hereto and made part of this affidavit. The said Archibald M. Henshaw paid the defendants the sum of $5,000.00 on the signing of the contract.

4. That the said contract entered into between the defendants and the said Archibald M. Henshaw contains the following provision:

> "it is agreed that this sale was brought about by Lee K. Waring and Robert S. Bunnell and that the seller will pay them the sum of $6,000, in full for their commissions."

5. The contract containing this provision was signed by the said Archibald M. Henshaw and by the defendant Walter E. Jobs and Cora B. Jobs and was duly acknowledged by the said Walter E. Jobs and Cora B. Jobs on the 12th day of April, 1926.

6. I and the said Lee K. Waring have often demanded from the defendants the said sum of $6,000 earned by us at the time that the agreement annexed hereto was executed and delivered

by the defendants and the said Archibald M. Henshaw, but the defendants have refused and still refuse to pay us the said sum.

7. The amount of $6,000 is due and owing to me and Lee K. Waring and I believe that there is no defense to this action.

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ROBERT S. BUNNELL.

Subscribed and sworn to before me
this 7th day of February, 1927.

LILA KNEEN,
(SEAL) Notary Public of N. J.

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NEW JERSEY SUPREME COURT.

UNION COUNTY.

LEE K. WARING and ROBERT S. BUNNELL, *Plaintiffs,* *vs.* WALTER E. JOBS and CORA B. JOBS, *Defendants.*	*Action at Law.* *Affidavit.*

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

EUGENE A. OTTO, of full age, being duly sworn according to law on his oath deposes and says:

1. I am a Notary Public of the State of New Jersey. I witnessed the signature of Walter E.

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Jobs and Cora B. Jobs to the contract, a copy of

which is annexed hereto and made part hereof, and the said Walter E. Jobs and Cora B. Jobs signed and acknowledged the said contract in my presence on the 12th day of April, 1926, as appears by said contract.

EUGENE A. OTTO.

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Subscribed and sworn to before me
this 20th day of December, 1926.

JAMES E. WALSH,
(SEAL) Notary Public of N. J.

ARTICLES OF AGREEMENT, made the day of April in the year of Our Lord One Thousand Nine Hundred and Twenty-six. BETWEEN Walter E. Jobs and Cora Jobs, his wife, of the Town of Westfield in the County of Union and State of New Jersey of the First Part;

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AND Archibald M. Henshaw, of Short Hills in the County of Essex and State of New Jersey, of the Second Part;

WITNESSETH That the said party of the first part, for and in consideration of the sum of One Hundred and Eighteen Thousand, Five Hundred Dollars ($118,500) to be paid and satisfied as hereinafter mentioned, and also in consideration of the covenants and agreements hereinafter mentioned, made and entered into by the said party of the second part, doth agree to and with the said party of the second part, that they the said party of the first part, will well and sufficiently convey to the said party of the second part, his heirs and assigns, by Deed of Warranty free from all encumbrance except rights of tenants now on the premises on or before the 1st day of July next ensuing the date hereof, all

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those lots, tracts, or parcels of land and premises, hereinafter particularly described, situate, lying and being in the Township of Springfield in the County of Union and State of New Jersey.

FIRST TRACT: BEGINNING at a black oak tree in Enoch Miller's corner; thence running South forty-eight degrees East twenty-one chains, and 10 forty-five links; thence North forty-nine degrees, east ten chains and twenty-five links; thence north forty-eight degrees west twenty chains and forty-five links to the road which leads from Springfield to Westfield; thence with said road south forty-nine degrees west ten chains and twenty-five links to the BEGINNING. Containing twenty-two acres of land be the same more or less. Bounded southwest, southeast and northeast by lands of Enoch Miller, and north- 20 west by said road, being the same premises conveyed to Silas Miller by deed of Starr Parsons and others, Commissioners, by deed dated February 17th, 1855 and recorded in Book 207 of Deeds for Essex County at page 470 etc.

SECOND TRACT: BEGINNING at a stone in the middle of the direct road from Westfield to Springfield, and being formerly a corner of John Clark deceased's land; thence running along 30 the middle of said Highway north forty-five degrees and thirty minutes east eleven chains and forty-one links to a stone in the middle of said highway, being Daniel Halsey's west corner; thence along his line south forty-one degrees and thirty minutes East fifteen chains and forty-eight links to a stone (said Halsey's south corner); thence South forty-five degrees and thirty minutes West nine chains and forty-three links to a stone; thence in a direct course fifteen chains 40 and forty-eight links to the place of BEGINNING.

Containing sixten acres and twenty square rods of land. Bounded Northwest by the middle of said road, northeast by said Halsey, southeast by said Enoch Miller and Southwest by Jacob Harsen's land, where he now lives. Reference same as found in first tract, above set forth.

THIRD TRACT: BEGINNING at a stone planted at 10 the southeast side of a road leading from Westfield to Springfield and a corner of land of said Silas Miller; thence south forty-two degrees east along the said Miller's line and binding thereon fourteen chains and ninety-six links to a stone; thence north thirty-eight degrees east along Jacob French's line and binding thereon seven chains and sixteen links and a half to a stone in said French's line; thence North forty-three degrees and thirty minutes West along said French's line and binding thereon fourteen chains and five 20 links to a stone by the side of said road; thence south forty-five degrees and ten minutes west along the side of said road six chains and sixty-three links and a half to the place of BEGINNING. Containing ten acres of land more or less.

Being the same premises conveyed to the said Silas Miller by deed of Daniel Halsey and wife, dated April 1, 1856 and recorded in Book 11 of Deeds for Union County at page 749, etc. 30

Being part of the residue and remainder of the Estate of Silas Miller, deceased, which by his will, recorded in Union County Clerk's office, was devised to his daughter said Sarah Elizabeth Miller. This deed is made to identify and assure to said Sarah Elizabeth Miller the lands and premises included in said residue and remainder of Silas Miller's Estate. The foregoing three tracts being the same premises conveyed to Sarah Elizabeth Miller by deed of Nicholas C. J. 40

English, Executor of Silas Miller, deceased, recorded in Book 453 of Deeds for Union County, page 132.

FOURTH TRACT: BEGINNING at a stone being the corner of Jacob Hanson's deceased land now owned and occupied by Silas Miller and from thence (1) running with said Miller's land and binding thereon south forty-six degrees west ten chains and ten links to the line of Rodney Winans land; thence (2) along the line of said Winans and others and binding thereon south fifty degrees east twenty-one chains and thirty-eight links to a stone being a corner of Enoch Miller Senior, deceased, land now E. G. Browns; thence (3) along said Brown's line south eighty-eight degrees east ten chains and fifty-two links to a stone in the line of land of said Winans; thence (4) along said Winans line and binding thereon northeast as the compass pointed April 1851 two chains and fifty-four links to a stone in line of land of Brooks Roll and others; thence (5) along the line of said Roll and others twenty-eight chains and fifty-three links in a direct course to the place of BEGINNING. Containing twenty-five acres of land.

Being the same premises conveyed by deed of Helen L. Parkhurst and others to Enoch D. Miller, recorded in Book 816 of Deeds for Union County, page 332.

AND the said Archibald M. Henshaw for himself, his heirs, executors and administrators, doth covenant, promise and agree to and with the said party of the first part, their heirs, executors, administrators and assigns, that they the said party of the second part, will pay and satisfy or cause to be paid and satisfied, unto the said party of the first part the said sum of Eighteen

Thousand, Five Hundred Dollars ($118,500) as and for the purchase money of the foregoing described land and premises, in the following manner, that is to say: $5,000 on the signing of this agreement, receipt of which is acknowledged; the balance of $113,500 to be paid on the closing of the title as follows:

$58,500 in cash, and the remaining $55,000 by the purchaser either assuming the title subject to an existing mortgage for that amount or by giving a purchase money mortgage for that amount, with interest at 6%, any mortgage given to provide for the payment of $2,000 per year on account of the principal for the period of five years, and to contain release clauses for the releasing of such parts of the property as may be sold from time to time.

Taxes, insurance, rents and interest are to be adjusted as of date of passing title.

AND IT IS FURTHER AGREED, by the parties to these presents, that the said party of the second part, his heirs and assigns, may enter into and upon the said land and premises on the 1st day of July next ensuing the date hereof, and from thence take the rents, issues and profits to his and their use.

AND IT IS FURTHER AGREED, by the parties hereto, that the said Deed shall be delivered and received at the office of McCarter & English, 765 Broad street, Newark, New Jersey, between the hours of 10 in the forenoon and 4 o'clock in the afternoon on the said 1st day of July, next ensuing the date hereof.

It is agreed that this sale was brought about by Lee K. Waring and Robert S. Bunnell, and that the seller will pay them the sum of Six

Thousand Dollars ($6,000) in full for their commissions.

And for the performance of all and singular the covenants and agreements aforesaid, the said parties do bind themselves and their respective heirs, executors and administrators; and 10 they hereby agree to pay, upon failure to perform the same, the sum of which they hereby fix and settle as liquidated damages therefor.

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

WALTER E. JOBS, (L. S.)
CORA B. JOBS. (L. S.)

20 Signed, Sealed and Delivered in the presence of

Eugene A. Otto,
(SEAL) Notary Public of N. J.

State of New Jersey, }
County of } ss.

30 Be It Remembered, That on this twelfth day of April in the year of Our Lord One Thousand Nine Hundred and Twenty-six before me, a Notary Public in and for the State of N. J. personally appeared Walter E. Jobs and Cora Jobs, his wife, who, I am satisfied are the Grantors in the within Agreement named; and I having first made known to them the contents thereof, they did acknowledge that they signed, sealed and delivered the same as their voluntary act and deed, 40 for the uses and purposes therein expressed:

And the said Cora Jobs being by me privately examined, separate and apart from her husband, did further acknowledge that she signed, sealed and delivered the same as her voluntary act and deed, freely, without any fear, threats or compulsions of her said husband.

EUGENE A. OTTO, 10
(SEAL) Notary Public of N. J.

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REPLY AFFIDAVITS.

Filed February 26, 1927.

NEW JERSEY SUPREME COURT.

UNION COUNTY.

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LEE K. WARING and ROBERT S. BUNNELL, *Plaintiffs,*
vs.
WALTER E. JOBS and CORA B. JOBS, *Defendants.*

Action at Law.
Affidavit.

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

MASON P. PRINGLE, being duly sworn according to law, upon his oath deposes and says:

I am secretary of the New Jersey Real Estate Commission which has its executive office at No. 1 Exchange Place, Jersey City, New Jersey.

Lee K. Waring Inc., a corporation by Lee K. Waring, is a licensed broker with office at No. 67 Elizabeth avenue, Newark, New Jersey. Lee K. Waring as an individual is not a licensed broker.

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MASON P. PRINGLE.

Sworn to and subscribed before me
this 27th day of January, 1927.

HERBERT R. BAER,
(SEAL) Notary Public of N. J.

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NEW JERSEY SUPREME COURT.

UNION COUNTY.

LEE K. WARING and ROBERT S. BUNNELL, *Plaintiffs,*
vs.
WALTER E. JOBS and CORA B. JOBS, *Defendants.*

Action at Law.
Affidavit.

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

WALTER E. JOBS, being duly sworn according according to law, upon his oath deposes and says:

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I am one of the defendants in the above entitled suit. The other defendants, Cora B. Jobs, is my wife.

Referring to paragraph 2 of the affidavit of Lee K. Waring, verified February 7, 1927, and to the affidavit of Robert S. Bunnell, verified the same day, it is not true that on April 9, 1926, or any other time, the said Cora B. Jobs and I licensed the plaintiffs to sell certain real estate belonging to us and located in Springfield Township, Union County, described in copy of the contract annexed to the said affidavit.

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Neither the said Cora B. Jobs nor I were, or now are, or any time have been owners of the said described property.

The property described in the said contract is owned by the Westfield Trust Company as Trus-

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tee under the Will of Enoch D. Miller, deceased, late of Springfield Township, Union County, New Jersey. At or about the time of the making of the contract referred to in the affidavits of the said Lee K. Waring and Robert S. Bunnell, the said Westfield Trust Company made a contract with me to sell to me the said described premises but was unable to convey to me title thereto so that neither I nor the defendant Cora B. Jobs are now or ever have been owners of the said described premises.

When it became apparent that the Westfield Trust Company could not convey to me a good title to the said premises as it had agreed to do, I returned to the said Archibald M. Henshaw, the party of the second part in the contract annexed to the affidavit of Lee K. Waring, the Five Thousand ($5,000.00) Dollars which he had previously paid me on the signing of the said contract as stated in paragraph 3 of the affidavits of the said Lee K. Waring and Robert S. Bunnell.

I deny that there is no defense to this action.

WALTER E. JOBS.

Sworn to and subscribed before me this 24th day of February, 1927.

GORDON T. PARRY,
(SEAL) Notary Public.

ORDER FOR SUMMARY JUDGMENT.

Filed February 28, 1927.

NEW JERSEY SUPREME COURT.

LEE K. WARING and ROBERT S. BUNNELL, *Plaintiffs,* vs. WALTER E. JOBS and CORA B. JOBS, *Defendants.*	*Action at Law.* *Order for Summary Judgment.*

It appearing by affidavit filed in the cause that the defense made by the defendants' answer is sham, and the defendants after due notice having failed to show such facts as entitled them to defend,

It is, on this 26th day of February, 1927, ORDERED, that the defense be struck out and that final judgment be entered for the plaintiff for the sum of $6,314.00, and costs.

SAMUEL KALISCH,
Justice of New Jersey Supreme Court.

On motion of

KOEHLER & AUGENBLICK,
Attorneys of Plaintiffs.

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

New Jersey Court of Errors and Appeals

LEE K. WARING and ROBERT S. BUNNELL, *Plaintiffs-Respondents,* *vs.* WALTER E. JOBS and CORA B. JOBS, *Defendants-Appellants.*	*Action at Law.* *On Appeal from Supreme Court.*

BRIEF FOR DEFENDANTS-APPELLANTS.

This case cames up on appeal from an order made by Justice Kalisch, striking out the answer and entering judgment for the plaintiffs.

The plaintiffs allege that they are duly licensed real estate brokers and sue for a commission alleged to be due them under an agreement for the sale of land alleged to belong to the defendants and made by the defendants with one Henshaw.

In this agreement (pp. 13-18) the defendants agreed to sell certain described premises in Springfield Township, Union County, to Henshaw, and it was stated in the agreement that the sale was brought about by the plaintiffs "and that the seller will pay them the sum of $6,000 in full for their commissions" (p. 17, l. 40).

The complaint declared against the defendants, as owners of the property mentioned and described in the contract between the defendants and Henshaw.

The defendants filed an answer denying the truth of the matters contained in the complaint, as they were privileged to do under the rules of

court, and thereafter the plaintiffs moved on affidavits to strike out this answer and enter judgment, which was done.

Throughout the complaint it is alleged that the defendants were the owners of the real estate described in the contract, and the whole theory of the plaintiffs' suit was that they had negotiated a contract for the owners of the property; that these owners had agreed to pay them a commission; and that, failing so to do, they were entitled to recover against the defendants, as owners, for this commission (pp. 3-5). These allegations were denied by the answer (p. 6).

On the motion to enter judgment, the two plaintiffs filed practically identical affidavits (pp. 8-12). Neither swears specifically that the defendants own the premises, although each plaintiff swears that they were authorized to sell certain real estate belonging to the defendants.

The defendants are husband and wife. The defendant Walter E. Jobs filed an answering affidavit, in which he specifically denied that he and his wife had ever licensed the plaintiffs to sell real estate belonging to them, for the excellent reason that neither of them at any time owned the described property (p. 21, ll. 30-40). The affidavit states further that the property belongs to the estate of Enoch D. Miller, deceased, and that at the time of making the contract the Westfield Trust Company, as executor, had made a contract with the defendant Walter E. Jobs to sell him the said described premises but were unable to convey title, and that when that situation developed the said defendant returned to Henshaw the $5,000 which he had paid on account of his contract to purchase the same property from him, and the sale never went through.

Furthermore, the defendant submitted the affidavit of the secretary of the New Jersey Real Estate Commission (p. 20), who swears that the plaintiff Waring is not a licensed real estate broker as is alleged in the complaint.

The answer was attacked as sham, and the motion was to strike it out on that ground (p. 7, l. 33). The answer joined issue on the complaint and was not sham, for while the making of the contract with Henshaw was not denied in the affidavit of Jobs, the proof of the making of the contract was not enough in itself, under the case as laid in the complaint. It was just here that Justice Kalisch fell into error.

The affidavit of Jobs raised an issue of fact on two questions which went to the foundation of the plaintiffs' case, as laid in their complaint: (1) on the question of the standing of the plaintiff Waring to sue, and (2) on the question of the ownership by the defendants of the land, described in the Henshaw contract.

Now, it is fundamental that the allegata and the probata must correspond. It must be equally fundamental that an answer pleading the general issue cannot be stricken out as sham and judgment entered, if the proofs submitted on the motion raise disputed questions of fact which should properly be passed upon by a jury.

Had the defendants been in fact the owners of the property, as the complaint alleged, such facts would have fitted the plaintiffs' case perfectly, for the plaintiffs would have had in the Henshaw contract an agreement to pay them a commission "signed by the owner." Plaintiffs laid their case in their complaint on that theory; but the fundamental fact of ownership was de-

nied, which was fatal on a motion to enter summary judgment.

Murphy v. *Lewis,* 76 N. J. L. 141;
Ryer v. *Winter,* 77 N. J. L. 441;
Kislac Inc. v. *Judge,* 4 N. J. Adv. Rep 778.

On the other hand, had the plaintiffs declared on a written promise of the defendants to pay them for their services in procuring Henshaw as a purchaser for the property described in the contract, the facts submitted in the affidavit of Jobs would have had no materiality, under the cases of *Sadler* v. *Young,* 78 N. J. L. 594; *Feist* v. *Gerolamon,* 81 N. J. L. 437; *Ryer* v. *Winter,* 81 N. J. L. 575; *Taub* v. *Shampanier,* 95 N. J. L. 349; *Posner* v. *Shapiro,* 4 N. J. Adv. Rep 508.

But the plaintiffs did not bring their case within the rule of those cases at all. The theory of their case was that the defendants were the owners of the land.

They were not the owners, and the plaintiffs were met squarely by the Tenth Section of the Statute of Frauds.

Murphy v. *Lewis,* 76 N. J. L. 141;
Ryer v. *Winter,* 77 N. J. L. 441.

The plaintiffs did not elect to amend to meet this situation and so bring themselves within the rule of *Sadler* v. *Young,* and the cases which follow it. On the argument before Justice Kalisch he gave the plaintiffs' attorney every opportunity to amend his complaint, but he declined to do so.

The result is, the judgment which was entered on a complaint alleging ownership by the defendants of the land is wrong in the face of the sworn denial of such ownership.

It is not enough to say that if the plaintiffs had either originally, or by amendment, brought their case within the rule of *Sadler* v. *Young,* they would have been entitled to a judgment. They did not do that, and their case cannot now be made any stronger for them, than they made it for themselves, particularly since they declined an opportunity to amend their complaint.

After all, the real question now before this Court is: what do the established rules of pleading and procedure, as they have been built up by long years of decisions, amount to? Is it any longer necessary that the allegata and the probata correspond? Is an orderly procedure according to fixed rules and precedents still necessary to the administration of justice through the courts of law, or can it now all be thrown overboard?

Only by ignoring all the established principles of pleading and orderly procedure, can the judgment be sustained.

We submit that the judgment was erroneously entered and should be reversed.

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New Jersey Court of Errors and Appeals

LEE K. WARING and ROBERT S. BUNNELL, *Plaintiffs-Respondents,* *vs.* WALTER E. JOBS and CORA B. JOBS, *Defendants-Appellants.*	*On Appeal from the Supreme Court.*

BRIEF OF PLAINTIFFS-RESPONDENTS.

Facts.

This is an appeal from an order made by Mr. Justice Kalisch striking out as sham the answer of the defendants and ordering that a judgment be entered for the plaintiffs. The complaint (S. C., pp. 3, 4, 5) alleges that the plaintiffs were at the time and still are duly licensed real estate brokers of the State of New Jersey, and that some time prior to April 12, 1926, the defendants authorized the plaintiffs "to sell certain real estate belonging to them, the said defendants," which land is described in the contract attached to the complaint, and that pursuant to said authorization, the plaintiffs proceeded to obtain a purchaser for the premises "belonging to the defendants," and as a result of their efforts, plaintiffs allege that they succeeded in procuring Alfred M. Henshaw to enter into a written contract with the defendant to purchase said premises "belonging to the defendants" and mentioned aforesaid, and that in the said contract so entered into between the defendants and the said Henshaw, there was contained the following covenant or agreement, "It is agreed that this

sale was brought about by Lee K. Waring and Robert S. Bunnell, and that the seller will pay them the sum of $6,000 in full for their commission." It is further alleged in the complaint that the contract containing the above agreement was signed by the purchaser and by the sellers, the defendants in this suit, and was acknowledged and that the defendants have failed to pay the said sum of $6,000 earned by the plaintiffs at the time the aforesaid written contract was entered into, although the same was demanded.

To this complaint the defendants filed a very laconic answer, as follows, after omitting the prefatory part: "They deny the truth of the matters contained in the amended complaint."

A motion to strike out the answer as sham and enter a summary judgment was made, upon proper notice, and attached to the notice of motion were affidavits by each of the plaintiffs respectively, verifying the cause of action and stating that they believe there is no defense to the action (S. C., pp. 8, 9, 10, 11 and 12). There was also an affidavit by one Eugene A. Otto attached to the notice (S. C., pp. 12-19 inclusive). In this affidavit Mr. Otto swears that he is a Notary Public and that he witnessed the signature of the defendant to the contract declared upon, a copy of which contract was attached to the notice. The defendants appeared in response to the notice of motion with two affidavits, one by the Secretary of the New Jersey Real Estate Commission (S. C., p. 20). From this affidavit, it appears that Lee K. Waring, Inc., a corporation, by Lee K. Waring, is a licensed broker with offices at No. 67 Elizabeth Ave., Newark, N. J. The affidavit also contains a statement that Lee K. Waring as an individual

is not a licensed broker. There was also submitted an affidavit (S. C., pp. 21-22) by Walter E. Jobs, one of the defendants, in which he says that it is untrue that either he or Cora B. Jobs at any time licensed the plaintiffs to sell certain real estate belonging to them and located in Springfield Township, County of Union, described in the copy of the contract annexed to the affidavit of Waring and of Bunnell, and then it says that neither Cora B. Jobs nor the deponent were or now are or at any time have been, the owners of the said property. Jobs does not deny that he or Cora B. Jobs authorized the plaintiffs to sell this property for them, but on the contrary, he says in this affidavit that the property referred to belonged to someone else and that at the time of the making of the contract referred to in the affidavits of Bunnell and Waring (which is the same contract declared on), the defendant Jobs had a contract with the Westfield Trust Company to sell him the said premises, but that he was unable to convey title to his purchaser, so that neither the deponent nor Cora B. Jobs are now or ever have been the owners of the property described; and he says that upon the failure of the Westfield Trust Company to convey a good title to the property as it had agreed with him to do, he, Jobs, returned to Henshaw the deposit paid under the contract referred to in the complaint.

Upon this state of facts the Justice before whom the motion was made struck out the answer as sham and we say that this action was proper.

The only attack that is made upon the action of the court below, is not that the defendants are not liable to the plaintiffs for the amount of the judgment, but that it being alleged in the complaint that the defendants were the owners of

the real estate described in the contract, and denied by the affidavit of the defendant Jobs, that there was raised a disputed question of fact which entitled, as we understand the argument, the defendants to go to trial before a jury. Another point was also raised; that is, the question of the standing of the plaintiff Waring to sue, but this point is not seriously argued in the brief.

POINT I.

If the facts as disclosed by the affidavits submitted, were such that the Court should have directed a verdict upon a trial at the Circuit, then the action of the Court in striking out the answer as sham was correct. This, we take it, is the very purpose and object of striking out sham pleas. It has been held that if the affidavits submitted on a motion to strike an answer as sham and enter summary judgment, present the situation which if presented at a trial would be such that the trial court should have directed a verdict for the plaintiffs, that then the answer should be striken out and summary judgment should be entered.

Rule 81 of the Supreme Court promulgated in accordance with section 15 of the 1912 Practice Act provides as follows:

> "When an answer is filed in an action brought to recover a debt or liquidated amount arising— (a) upon contract express or implied, sealed or not sealed; or * * * the answer may be struck out and judgment final may be entered upon motion and affidavit as hereinafter provided, unless the defendant by affidavit or other proofs shall show such facts as may be deemed by the judge hearing the motion sufficient to entitle him to defend."

The facts shown to Mr. Justice Kalisch by the affidavits submitted were, first, a general denial, which by our practice, denies each and every material allegation of the complaint; second, affidavits produced by the plaintiffs verifying in detail the cause of action as pleaded, which, concededly is a good cause of action. Third, affidavits produced by the defendants to the following effect: that Lee K. Waring, one of the plaintiffs, who describes himself as a licensed real estate broker, is not in fact a licensed real estate broker but that Lee K. Waring, Inc., by Lee K. Waring, is a licensed real estate broker, and also admitting the making of the contract and the agreement but denying the ownership of the legal title to the property which they contracted to sell.

POINT II.

Whether or not Lee K. Waring was a licensed real estate broker is immaterial. It is not a part of the cause of action of Waring and Bunnell that Lee K. Waring be a licensed real estate broker. This question has been disposed of in *Wensly* v. *Godby,* 3 N. J. Adv. 780; *Sattler* v. *Bernzweig,* 3 N. J. Mis. 391.

No attempt was made to prove that this was not an isolated transaction by an unlicensed broker nor to show that this case comes within the rule of the statute. In other words, it was an immaterial allegation in the complaint and the failure to prove it would not bar recovery. The complaint would have been just as good had it not said that Lee K. Waring was a licensed real estate broker. In addition to this a reading of the affidavit of the Secretary of the Real Estate Commission shows that Lee K. Waring,

Inc., by Lee K. Waring, was a licensed real estate broker. However, there was nothing in the affidavits submitted to the Court to show anything that would bar the right of Waring to maintain this action and whether or not he was a licensed real estate broker, we repeat, was immaterial.

POINT III.

A great deal of stress is laid by counsel for the appellants upon the fact that the complaint speaks of an agreement to sell lands "belonging to the defendants" and that upon the affidavits submitted it appeared that the lands did not belong to the defendants.

We respectfully submit that these words in the complaint "to sell certain real estate belonging to them, the said defendants," and the words "belonging to the defendants" are immaterial, and merely surplusage, which may be rejected without affecting the cause of action in the least.

It is true that if it were an essential part of the cause of action of the plaintiffs, that the defendants be the owners of the premises, the court should not have striken the answer as sham, but the affidavits submitted show conclusively by the oath of the defendant Jobs himself, that as to all the material allegations of the complaint the general denial which was interposed was false. As to the question of whether the property belonged to the defendants or whether it didn't, they raised a question. These people, according to Jobs' affidavit, were the real or equitable owners of the land and it does not require a great stretch of the imagination nor of legal terms to say that the land belonged to them. They had a contract for the

purchase of this land, according to Jobs' affidavit, and the holder of the legal title therefore by the well-established principles of law, was merely the trustee holding the naked title, while they, the defendants in this suit, were the real owners of the land.

Leaving this aside, however, we respectfully submit again, that whether or not the land belonged to the defendants, the cause of action as verified by the affidavits submitted by both of the parties, was complete, and we respectfully submit that had such a situation been presented by evidence upon a trial at the Circuit, the trial court would have had to direct a verdict in favor of the plaintiffs and against the defendants. If that be so, it necessarily follows that the action of the justice in striking out the answer as sham was proper. Counsel for the appellants seems to complain that we had too good a case. He cites cases, *Murphy* v. *Lewis*, 76 N. J. L. 141; *Ryer* v. *Winter*, 77 N. J. L. 441; *Keslac* v. *Judge*, 4 N. J. Adv. 788, which he says support the proposition that the plaintiffs laid their case in their complaint on the theory that the contract was "signed by the owner; but that the denial of the fundamental fact of ownership was fatal on a motion to enter summary judgment."

An examination of these cases will disclose that *Murphy* v. *Lewis* and *Ryer* v. *Winter* (which latter case was afterwards reversed upon the authority of *Sadler* v. *Young*, 78 N. J. L. 594), were overruled by this Court and the history thereof is stated in the case of *Keslac* v. *Judge*, 4 N. J. Adv. 788. As is pointed out in *Keslac* v. *Judge, supra*,

> "since the decision in Sadler *v.* Young, we understand the rule to be that if the employer of the broker is in fact 'owner,' the requirements of Section 10 (as later amended,

Pamph. L. 1911, p. 703; Pamph. L. 1918, p. 20), must be met in order to entitle the broker to commission; but if the employer is not 'owner' the broker who does the work is entitled to his pay without reference to the statute."

We respectfully submit that the cases cited in support of the proposition just referred to in the appellants' brief do not support the proposition at all. They are cases which have been expressly overruled by the decision of this Court with the exception of *Keslac* v. *Judge,* which follows the decisions of this Court.

It seems to us that the cases cited in the appellants' own brief support the action of the court below in striking out the answer. Counsel says, on the other hand, that had the plaintiffs declared on a written promise of the defendants to pay for their services in procuring Henshaw as a purchaser for the property described in the contract, the facts submitted in the affidavit of Jobs would have no materiality under the case of *Sadler* v. *Young,* etc. And then he goes on to say that we did not bring this case within the rule of those cases at all; that the theory of our case was that the defendants were the owners of the land and that as they were not the owners, the plaintiff was met squarely by the 10th section of the Statute of Frauds, and cites again *Murphy* v. *Lewis,* and the decision in *Ryer* v. *Winter,* 77 N. J. L. 441. Both of these decisions have been overruled, we repeat, by *Sadler* v. *Young.* It is well-established law that the Statute of Frauds is an affirmative defense which if not pleaded cannot be taken advantage of. Moreover, the Statute of Frauds has absolutely no bearing on this case since admittedly the contract in this case was in writing signed by the parties, nor is this case within the statute. We declared upon

a written promise by the defendants to pay a commission for negotiating the sale of certain lands, which lands we said belonged to the defendants. We should bear in mind that the defendants admitted that they were the equitable owners of this land, *they were the cestuis que trustents,* and in the eyes of the law, the real owners, at the time the contract was made. But, leaving this aside and assuming for the moment that they had absolutely no interest whatsoever in this property, the mere fact that we said in our complaint that the property belonged to them when in fact it did not, cannot in anywise operate to defeat our cause of action, because our cause of action is complete even if the property did not belong to them. Let us assume that in our complaint we said that the defendant being Hindus made the contract declared upon and it afterwards developed that instead of the defendants being Hindus, they were Chinamen, could it be said that our cause of action was not complete? Or, let us assume that our complaint had read that the defendants engaged the plaintiffs to sell certain lands in the Township of Springfield belonging to one John Smith, and described by metes and bounds, and it afterwards developed that the said lands did not belong to John Smith but belonged to one Edward Jones. Could that be said to affect the cause of action?

The appellants' argument in this case simmers down to one point, namely, that even though it is not material to the respondents' cause of action that they be licensed real estate brokers, and even though it be immaterial whether the appellants were the "owners" of the land, that, nevertheless, having alleged in the complaint that the lands belonged to the defendants, and the

proofs submitted showing that the lands did not belong to the defendants (assuming this for the sake of argument, although we insist that the lands did belong to them), that yet, nevertheless, since the *allegata* and the *probata* must correspond, therefore, the court should not have entered judgment against them. Of course, it is a fundamental rule that the *allegata* and the *probata* must agree *in all material matters in issue,* but it is equally fundamental that a variance in matters which are not material to the issue or a failure to prove matters alleged, without which the cause of action would have been complete, cannot operate to defeat the cause of action. The ownership of the land by the defendants as is admitted in the appellants' brief, is immaterial. The gravamen of the plaintiffs' cause of action, is that the defendants entered into a contract with a purchaser produced by the plaintiffs and the undertaking by the defendants to pay to the plaintiffs for their services in bringing about the contract. Whether they were the owners or whether they were not, here is an absolute undertaking by the defendants to pay a sum certain to the plaintiffs. True, if the defendants were the owners of the land, the contract is sufficient to satisfy the Statute of Frauds. But that is not what the appellants complain of. The appellants complain that we had a more binding contract than we needed. They say in effect that if they were the owners of the land we would have needed a written contract, and that they, not being the owners of the land, we did not need a written contract to support our cause of action but could have maintained it on a parole undertaking.

The cases cited by the appellants, *Sadler* v. *Young,* 78 N. J. L. 594, and numerous other

cases following the decision in that case all hold that even though the person who made the agreement to pay commission be not the owner of the land, that nevertheless he must pay a broker commission for the sale of land where there is an undertaking to do so. In the very case of *Sadler* v. *Young,* the suit was against one who was not the owner of the land, and the Court of Errors and Appeals unanimously reversed the court below, and said that they rejected the doctrine laid down in *Ryer* v. *Winter,* and said,

> "We, therefore, decline to adopt it, and hold that a written contract by the terms of which the party who signs it binds himself to pay a commission to a real estate broker or agent for procuring a purchaser for lands of which he (the signer) is not the owner, is not affected by the Tenth Section of the Statute of Frauds, and is valid and enforcible against him."

We submit to the court that the case of *Sadler* v. *Young, supra; Taub* v. *Shampier,* 95 N. J. L. 349; *Posnor* v. *Shapiro,* 4 Adv. Reports 508; *Kislac* v. *Judge, supra; Marcella* v. *Block,* 3 Adv. Reports 290; *Kruse* v. *Ferber,* 91 N. J. L. 470, and numerous other cases in this State, all establish the plaintiff's right to recovery in this suit.

In the appellants' brief, there are two statements which we desire to call the attention of the court to, which do not appear in the record, and which, therefore, of course, have no place in the argument. On page 4 of their brief, the appellants say, "On the argument before Justice Kalisch, he gave the plaintiff's attorney every opportunity to amend his complaint but he declined to do so." On page 5 of their brief, appellants say, "they did not do that, and their case cannot now be made any stronger for them

than they made it for themselves, *particularly since they declined an opportunity to amend their complaint.*" Now, if the court please, we respectfully submit that these statements are not supported by anything that appears in the record, and they should, therefore, not be in anywise considered. Moreover, if statements beyond the record are to be entertained by this Court, we say that these statements are not true.

POINT IV.

A variance which does not go to the gist of the plaint is immaterial and will be disregarded or amended by the appellate court.

The earliest case in this State seems to be *Hallack* v. *Insurance Company,* 26 N. J. L., page 268. In this case, the argument was made that since there was a variance between the policy of insurance declared on and the original policy produced as to the name of the officers who signed the policy and as to the time of payment, that the verdict should be set aside. This question of variance was disposed of by Justice Vredenburgh in the following language:

> "As to the variances, there is no proof, nor even any allegation that the defendants were misled, by them, to their prejudice, and that they must consequently under the 43rd section of the Act of 1855 (Nix. Dig. 641) be deemed to be immaterial."

Section 43 in the Act of 1855 is similar to what now appears as section 126 of the Practice Act of 1903, 3 Compiled Statutes, page 4091, which provides as follows:

> "In order to prevent the failure of justice by reason of mistakes and objections of form, the court or a judge at all times may amend all defects and errors in any proceeding in civil actions whether there is anything in writing to amend by or not and whether the defect or error be that of the party applying to amend or not, and all such amendments may be made without costs and upon terms; and all such amendments as may be necessary for the purpose of determining, in the existing action, the real question in controversy between the parties, shall be so made."

In American and English Encyclopedia of Law, Volume 28, under the title "Variance," it is laid down on page 53,

> "To constitute a variance between the allegations and the proofs, the difference must be *as to the substantial elements of the case,* and not as to the legal conclusions from the facts drawn by the pleader. Ordinarily the fact that the party has been misled due to a prejudice by a variance, must be made to appear by affidavit."

and in the footnote in the same work on page 54, note 5, it is laid down that

> "disregarding the variance is tantamount to the case and where the amendment could have been made on the trial, the appellate court would treat it as having been made or would allow the amendment *nunc pro tunc.*"

Under the same title on page 52 appears the following:

> "Where the variance is immaterial, there being no injury whatever done to the adverse party, costs are not imposed in allowing an amendment * * * These are beneficent provisions and should be, as they generally are, liberally construed and carried out. They were designed to correct a great evil and wrong in the old system; namely, the turning of a party out of court upon slight and non-essential mistakes in pleadings or variances between the pleadings and the proof."

Since the 1903 Practice Act, the rules of pleading and practice have become even more liberal

than before and it is the policy of the courts and of the law to try the real issue between the parties, and in order to accomplish it any amendment necessary will be made either at the trial or by the appellate court. To accomplish this very purpose the Practice Act of 1912 was enacted and section 27 of that act provides,

> "No judgment shall be reversed or a new trial granted on the ground of misdirection or the improper admission or exclusion of evidence, or for error as to method of pleading or procedure, unless after examination of the whole case it shall appear that the error injuriously affected the substantial rights of a party."

We respectfully submit that there is no question but that the defendants were not surprised by the variance, if in fact a variance exists, nor that their substantial rights have not been injuriously affected. They come into this court and say that they admit that they owe this money under the contract which we sue upon, but they say that we have in our complaint some six or eight descriptive words which are not true. They further say that these descriptive words are immaterial to our cause of action. Under the new practice, even under the old practice, this Court should either disregard the variance, treat the pleadings as amended or order them amended.

American Life Insurance Co. v. *Day,* 39 N. J. L., page 89. In this case, Chancellor Runyon, speaking for this Court, said,

> "The policy was under seal. The action should, therefore, have been covenant instead of assumpsit. It does not appear, however, and it is not even alleged, that the company, by reason of this error, have lost or been deprived of any right or advantage whatever, or have been in any way prejudiced. Their defense has not been in anywise abridged or limited or affected by it, nor has their adversary had any advantage on account of it. The objection, therefore, is purely technical. Inasmuch as it is so, and involves no merits, the power of amendment will be exercised. Ruckman *v.* Bergholz, 8 Vroom 437, 439.
>
> "The one hundred and thirty-eighth section of the practice act (Rev. 1874, p. 625) is of a highly remedial character, and should be so construed as, in its own language, 'to prevent the failure of justice by reason of mistakes and objections of form.' The power of amendment thereby conferred extends to this court, and in cases where no injury has been done to the party complaining, by or through error of mere form, it is incumbent on this court in the interest of justice, to exercise the power."

We respectfully urge that the quotation from this case of *American Life Insurance Co.* v. *Day* applies with equal force in the case under consideration. Assuming that there is a variance, it does not go to the real merits in this suit nor has the variance in any way affected adversely the substantial rights of the defendants nor has it in any way added to the rights of the plaintiffs. It is as Chancellor Runyon said in that case, "purely technical." Moreover, it has been decided in this Court that an appeal from an order striking out an answer as sham and entering summary judgment, by which the court adjudicates that there are not sufficient facts appearing before it entitling the defendant to defend, are governed by other rules than ordinarily govern the consideration of an appeal.

As was said in *Eisele & King* v. *Raphael,* 90 N. J. L. on page 221, by this Court, speaking through the late Justice Bergen,

> "Reading the rules to which the statute is subject, and the statute together, a plain-

tiff would be entitled to a summary judgment upon presenting an affidavit complying with Rule 81, which would set out fully the facts upon which the cause of action is based, unless the defendant by affidavit or other proof will show facts deemed by the judge hearing the motion, sufficient to entitle him to defend. This confers upon the judge the power to determine the sufficiency of the facts set up by the defendants and is conclusive that they are not sufficient and should not be set aside unless the sufficiency clearly appears."

Assuming for the moment that there is a variance between the matters pleaded and the proof, and assuming that the variance would have been fatal under the old practice before the enactment of the statutes concerning amendments and jeofails, Rule 81 of the Supreme Court, and the act by virtue of which it was promulgated, have vested in the judges of the courts of common law a sort of equitable power which they may in their sound discretion exercise, if they think that the affidavits submitted by a defendant in opposition to a motion for summary judgment are not sufficient to entitle the defendant to defend.

In conclusion, we respectfully urge that the plaintiffs in this case have proven before the justice on the motion every material allegation of the complaint; that it is admitted by the brief of the appellants and cannot be denied, that every material allegation of the complaint is, in fact, true. That whether or not the defendants were the owners of the land for the sale of which they agreed to pay a commission, that fact is immaterial and cannot affect the plaintiffs' right of recovery and whether or not the plaintiff Waring was licensed as a broker is likewise immaterial, and has no bearing on his right of

recovery, and that the Justice of the Supreme Court who heard the motion, had under the facts disclosed by the affidavits, no alternative but to say that the answer was sham; that it was, as to every material allegation, false and that, therefore, the defendants were not entitled to defend. Of course, if the answer was sham, summary judgment necessarily should have followed.

We respectfully submit that Mr. Justice Kalisch correctly and properly struck out the answer and ordered summary judgment to be entered, and that if this Court considers that there is a variance between the *allegata* and the *probata*, that this Court should either disregard the variance as immaterial or order an amendment *nunc pro tunc*, in accordance with the well-established rules to the end that justice may be done.

We, therefore, respectfully submit that the judgment of the Supreme Court should be affirmed.

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