INDEX.

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NEW JERSEY
Court of Errors and Appeals.

JACOB STERN,
Plaintiff-Respondent,
vs.
HARRY GARBER, LENA GARBER, HARRY LATT AND JENNIE LATT,
Defendants-Appellants.

STATE OF NEW JERSEY, TO

HARRY GARBER, LENA GARBER, HARRY LATT and JENNIE LATT. You are hereby summoned to answer the annexed complaint of Jacob Stern in an action at law in the Atlantic County Circuit Court. And take notice that unless you file your answer to the said complaint with the Clerk of Atlantic County Circuit Court at Mays Landing, New Jersey, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

[SEAL]

Witness Honorable Theo. W. Schimpf, Judge of the Atlantic County Circuit Court, at Mays Landing, this twenty-eighth day of July, 1926.

WILLIAM A. BLAIR,
Clerk.

THOMPSON & HANSTEIN,
Attorneys.

ATLANTIC COUNTY CIRCUIT COURT.

JACOB STERN,
Plaintiff,
vs.
HARRY GARBER, LENA GARBER, HARRY LATT AND JENNIE LATT,
Defendants.
} Action at Law.

COMPLAINT.

(*Filed March 22*, 1928.)

Plaintiff, Jacob Stern, of the City and County of Philadelphia, State of Pennsylvania, says that:

1. On the fourteenth day of April, 1926, he entered into an agreement with the defendants, Harry Garber, Lena Garber, Harry Latt and Jennie Latt, a copy of which agreement is attached hereto and made a part hereof.

2. Under the terms of said agreement the said defendants agreed, in consideration of the sum of $83,000 to be paid by the plaintiff, to convey to said plaintiff by deed of general warranty, free from all encumbrance, except the encumbrances set forth in said agreement, on or before June 14th, 1926, all the tract of land described in said agreement, and the said plaintiff agreed in said agreement to pay said sum of $83,000 in the following manner:

$1,500. on signing said agreement;
3,500. by the payment of that amount on or before May 14th, 1926, at 3 P. M.;
28,000. by the making, executing and delivery at the time of settlement of the plaintiff's purchase money mortgage in that amount covering the premises described in said agreement;

38,000. by the plaintiff making, executing and delivering at the time of settlement, an assignment of an existing mortgage in that amount covering certain premises referred to in said agreement;
12,000. in cash at the time of settlement.

Said agreement also provided that the title was to be good and marketable and such as would be insured by the Land Title Guaranty Company, New Jersey, of Camden, New Jersey, or any other reputable title company in the State of New Jersey.

3. Plaintiff paid the sum of $1,500, receipt of which is acknowledged in said agreement, and on May 14th, 1926, paid the further sum of $3,500, as per the terms of said agreement, making in all a total payment of $5,000.

4. Defendants suggested the Chelsea Title and Guaranty Company, of Atlantic City, a title company of New Jersey, as the place at which plaintiff should make application for title insurance, and plaintiff accordingly made application at said Chelsea Title and Guaranty Company for title insurance upon said premises, and by agreement between the plaintiff and defendants said Chelsea Title and Guaranty Company was fixed as the place of settlement under said agreement.

5. On the fourteenth day of June, 1926, the plaintiff appeared at the time and place so agreed upon for the settlement, and in all things tendered himself ready, willing and able to perform his said agreement, but defendants at that time failed and refused to deliver to plaintiff a deed for premises referred to in said agreement free and clear of all encumbrances, except those referred to in said agreement and conveying a good and marketable title, such as would be insured by said Chelsea Title and Guaranty Company, in that said premises were subject to the interest of Abraham Browning, as Trustee, or his successors in trust, for Stephen Caldwell, which interest became vested in said Abraham Browning through a declaration of trust dated April 27th, 1866, and recorded in the Atlantic County Clerk's Office in

Deed Book 28, page 481, which said interest of the said Abraham Browning, trustee as aforesaid, or his successors in trust was an outstanding interest or encumbrance upon said lands not mentioned in said agreement and as a result of which said title was not good and marketable.

6. Said Chelsea Title and Guaranty Company, by reason of the said outstanding interest in said Abraham Browning, Trustee, or his successors, refused to insure said title.

7. Plaintiff has demanded from defendants the return of his deposit money, but the defendants have refused and still do refuse to pay the same to him.

8. That by reason of the failure of the defendants to perform their said agreement, plaintiff has been injured in that he has lost the benefit of his bargain, to wit, the difference between the reasonable value of said premises and the contract price of the same; has lost the sum of $5,000 paid as herein set forth, together with interest on $1,500 from April 14th, 1926, and interest on $3,500 from May 15th, 1926, together with search fees and expenses to which he has been put in order to prepare for the settlement under said agreement.

Judgment will, therefore, be claimed in the sum of $25,000 together with costs of suit.

THOMPSON & HANSTEIN,
Attorneys for Plaintiff.

EXHIBIT "A".

Articles of Agreement, made this fourteenth day of April in the year of our Lord one thousand nine hundred and twenty-six.

Between Harry Garber and Lena Garber, his wife, and Harry Latt and Jennie Latt, his wife, all of the City of Atlantic City, County of Atlantic and State of New Jersey, parties of the first part, and Jacob Stern, of the

City and County of Philadelphia, and State of Pennsylvania, party of the second part;

Witnesseth, that the said parties of the first part, for and in consideration of the sum of Eighty-three thousand ($85,000.00) Dollars to be paid and satisfied as hereinafter mentioned and also in consideration of the covenants and agreements hereinafter mentioned, made and entered into by the said party of the second part, do agree to and with the said party of the second part, that they, the said parties of the first part, will well and sufficiently convey to the said party of the second part, his heirs and assigns, by Deed of General Warranty free from all incumbrance, except as hereinafter mentioned. On or before the fourteenth day of June, 1926 all—lot, tract or parcel of land and premises hereinafter particularly described, situate, lying and being in the Township of Mullica in the County of Atlantic and State of New Jersey, and lying between Second Street and Seventh Street (or Hammonton Avenue), and north of the Camden and Atlantic Railroad, now known as the West Jersey and Seashore Railroad and as also shown on plan of lots in Division H—East Hammonton, Atlantic County, New Jersey, which plan of maps is attached hereto and is to be considered a part hereof. Said lands to be more particularly bounded and described as follows:

Beginning at a point of intersection of the center line of Camden and Atlantic Railroad, now the West Jersey and Seashore Railroad with the center line of Second Street and extending thence (1) in a northeastwardly direction in and along the center line of Second Street, Six hundred (600) feet more or less to the center line of the State Highway (or White Horse Pike or Agazziz Street) thence (2) in and along the center line of the road as aforesaid and in a northwestwardly direction, Four thousand (4,000) feet more or less to a point of the center line of Seventh Street (Hammonton Avenue) thence (3) in a southwestwardly direction in and along the said center line of the said Seventh Street (Hammonton Avenue) six hundred (600) feet more or less to the

center line of the said Railroad; thence (4) along the said center line of the said Railroad in a southeastwardly direction, four thousand (4,000) feet, more or less to the point of beginning.

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

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

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

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

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

Block No. 13—Lots Nos. 1, 2, 3, and 17.

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

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

Block No. 16—Lot No. 1.

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

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

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

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

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

$38,000.00 by the party of the second part, making, executing and delivering at the time of settlement, an assignment of an existing mortgage in that amount. Said mortgage payable within two years from January 25th, 1926 and covering premises hereinafter described and which mortgage is subject to an existing first mortgage in the sum of Thirty thousand ($30,000.00) dollars and an existing second mortgage in the sum of Thirty-two thousand ($32,000.00) dollars, also covering premises hereinafter described, situate, lying and being in the City of Atlantic City, County of Atlantic and State of New Jersey, being bounded and described as follows:

Beginning at a point at the southeast corner of Arkensas and Arctic Avenues and extending thence

(1) Eastwardly, in and along the south line of Arctic Avenue, forty-six (46) feet and six (6) inches; thence (2) southwardly parallel with Arkansas Avenue, ninety (90) feet; thence (3) westwardly parallel with Arctic Avenue forty-six (46) feet and six (6) inches to the easterly line of Arkansas Avenue; thence (4) northwardly in and along the same ninety (90) feet to the place of beginning.

Beginning in the southerly line of Arctic Avenue forty-six (46) feet and six (6) inches east of the easterly line of Arkansas Avenue, extending thence (1) eastwardly in and along the southerly line of Arctic Avenue thirty (30) feet; thence (2) southwardly parallel

with Arkansas Avenue ninety (90) feet; thence (3) Eestwardly parallel with Arctic Avenue (30) feet; thence (4) northwardly parallel with Arkansas Avenge ninety (90) feet to the place of beginning.

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

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

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

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

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

Time is the essence of this agreement.

It is hereby agreed and understood by and between the parties hereto that the above referred to purchase money mortgage, which the party of the second pat zagrees to execute and deliver at the time of settlement, shall contain a provision, whereby the parties of the first part hereto will release any block from the above described premises upon the payment of Twenty-eight hundred ($28,800.00) dollars by the party of the second part hereto. A block shall be construed to mean two hundred (200) feet front on Agazziz Street or White Horse Pike and running between parallel lines of that width to the middle line of the railroad above referred to.

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

And it is further agreed, by the parties to these presents, that the said party of the second part, heirs and assigns, may enter into and upon the said land and premises on the day of settlement and from thence take the rents, issues and profits to and their use .

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

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

HARRY GARBER (Seal)
LENA GARBER (Seal)
HARRY LATT (Seal)
JENNIE LATT (Seal)

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

STATE OF NEW JERSEY, ATLANTIC COUNTY, } *ss.:*

Be it remembered, that on this day of Apri. in the year of our Lord one thousand nine hundred and twenty-six before me, a Notary Public personally appeared Harry Garber and Lean Garber, his wife, and Harry Latt and Jennie Latt, his wife, who I am satisfied are the vendor mentioned in the above deed or convey-

ance, and I having first made known to them the contents thereof, they acknowledged that they signed, sealed and delivered the same as their voluntary act and deed. All of which is hereby certified.

Received Jul. 26, 1926. Sheriff.

Duly served within Summons and Complaint, July 28th, 1926, personally on Harry Garber and personally on Lena Garber at 108 South Rhode Island Avenue, Atlantic City, Atlantic County, New Jersey, July 28th, 1926 personally on Jennie Latt ay 819 Atlantic Avenue, Atlantic City, Atlantic County, New Jersey; July 28th, 1926 on Harry Latt, by leaving a copy at his residence 819 Atlantic Avenue, Atlantic City, Atlantic County, New Jersey, with a member of his family above the age of fourteen yrs. to wit: his wife.

HOWARD R. CLOUD,
Sheriff.
By ROBERT C. MILLER,
Under Sheriff.

Sheriff's fees, $8.22.
Filed July 31, 1926 at 9:00 A. M.

WILLIAM A. BLAIR,
Clerk.

ATLANTIC COUNTY CIRCUIT COURT.

JACOB STERN,
Plaintiff,
vs.
HARRY GARBER *et al.*,
Defendants.
Action at Law.

ANSWER.

(*Filed March 22, 1928.*)

Harry Garber, Lena Garber, his wife, Harry Latt and Jennie Latt, his wife, all of Atlantic City, New Jersey, answering the complaint, say:

1. Paragraph 1 is admitted.
2. Paragraph 2 is admitted.
3. Paragraph 3 is admitted.
4. Paragraph 4 is admitted.
5. Paragraph 5 is denied.
6. Paragraph 6 is denied.
7. Paragraph 7 is admitted.
8. Paragraph 8 is denied.

COLE & COLE,
Attorneys for Defendants.

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

WILLIAM A. BLAIR,
Clerk.

ATLANTIC COUNTY CIRCUIT COURT.

JACOB STERN,
Plaintiff,
vs.
HARRY GARBER, LENA GARBER, HARRY LATT AND JENNIE LATT,
Defendants.
} Action at Law.

ORDER.

(*Filed March 22*, 1928.)

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

COUNT TWO.

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

2. That on or about July 8th, 1926, the defendants herein filed a bill in the Court of Chancery of New Jersey, against the plaintiff herein to compel the specific performance of the agreement made between said parties bearing date April 14th, 1926, and referred to in paragraph 1 of the first count, a copy of which agreement this plaintiff stands ready to produce in court. That under the terms of said agreement the premises described therein were to be sold to this plaintiff free and clear of all encumbrances and he was to receive a good and marketable title, such as would be insured by the Chelsea Title and Guaranty Company.

3. This plaintiff filed an answer to said bill of complaint denying all the allegations of the said bill of complaint, except that he admitted that he agreed to accept title insurance from the Chelsea Title and Guaranty

Company, pursuant to a verbal understanding between the parties, said answer also set up that at the time of the settlement the parties appeared and that the plaintiff was ready, willing and able to make said settlement, but the defendants herein were not ready, able and willing to make settlement in that the Chelsea Title and Guaranty Company refused to insure the title to said premises, and that the title to said premises was not free and clear of all encumbrances, and was not good and marketable, that the land was subject to the interest of one Abraham Browning, trustee, or his successors in trust for Stephen Colwell, said premises were also subject to the rights of the Delaware & Atlantic Telephone and Telegraph Company to construct and operate lines, poles, &c., as granted by Annie M. Coughlin to said company, September 15th, 1916, Deed Book 577, page 42; said premises were also subject to the rights of the public in all streets, avenues or roads running through or abutting said premises;

Said premises were also subject to a right of way of the Camden & Atlantic Railroad, now the West Jersey & Seashore Railroad Company;

Said premises were also subject to a certain mortgage made by Harry Garber to James Ruberton, Jr., and Rose Ruberton, his wife, dated April 28th, 1926, recorded May 3d, 1926, to secure the sum of $30,000 payable in two years;

Said premises were subject to a judgment of the New Jersey Quarry Co., against W. J. Couglin entered in the New Jersey Supreme Court on March 11th, 1915, in the amount of $2,294.36.

Said premises were also subject to a judgment of Alfred W. Booth & Brother against William Coughlin *et al.*, entered in the New Jersey Supreme Court, Docketed from Hudson County Circuit Court, in the amount of $887.14;

And said premises were also subject to a recognizance entered into by the said William Coughlin, as surety, to the United States dated July 10th, 1923, in the amount

of $1,000, and another recognizance entered into by the said William Coughlin, as surety, to the United States on July 12th, 1923, in the amount of $1,000.

For the particulars of said answer reference is made thereto and the plaintiff herein stands ready to produce the same at the time of the trial of this cause.

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

Judgment will, therefore, be claimed on this count in the sum of $25,000 together with interest and costs of suit.

On motion of

THOMPSON & HANSTEIN,
Attorneys for Plaintiff.

I consent to the entry of the above order.

Subject to the right to move to strike.

COLE & COLE,
Attorneys for Defendants.

W. F. SOOY,
Judge.

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

Wm. A. Blair,
Clerk.

Atlantic County Circuit Court.

Jacob Stern,
Plaintiff,
vs.
Harry Garber *et al.*,
Defendants.
} Action at Law.

CONSENT TO SUBSTITUTION OF ATTORNEY.

(*Filed March 22, 1928.*)

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

Dated December 20th, 1927.

COLE & COLE,
Attorneys.

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

William A. Blair,
Clerk.

ATLANTIC COUNTY CIRCUIT COURT.

JACOB STERN,
Plaintiff,
vs.
HARRY GARBER, LENA GARBER, HARRY LATT AND JENNIE LATT,
Defendants.
} Action at Law.

ANSWER TO AMENDED COMPLAINT.

(*Filed March 22*, 1928.)

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

1. Defendants admit so much of the amended complaint as is not denied. They deny that the premises were subject to a mortgage of $30,000 or any other sum, the judgment of New Jersey Quarry Co. vs. W. J. Coughlin, the judgment of Alfred W. Booth & Bro. vs. the same, or the recognizance to the United States entered into by the same.

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

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

NOTICE.

To the within named plaintiff:

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

ISADOR SACKS,
Attorney of Defendants.

We hereby consent to the filing of the within answer to the amended complaint, out of time.

THOMPSON & HANSTEIN,
Attorneys for Plaintiff.

Filed March 2, 1928, at 9 A. M.
WILLIAM A. BLAIR,
Clerk.

ATLANTIC COUNTY CIRCUIT COURT.

JACOB STERN,
Plaintiff,
vs.
HARRY GARBER *et al.*,
Defendants.

RULE FOR JUDGMENT.

(*Filed March 22*, 1928.)

This action was tried before Judge W. Frank Sooy, with a jury, at the Atlantic County Circuit on March 1st, 1928.

The cause having been heard the Judge directed a verdict as follows: Judgment in favor of the plaintiff and against the defendants in the sum of $6,728.32;

Whereupon it is adjudged that the plaintiff recover of the defendants the sum of $6,728.32 and his costs, which are taxed at the sum of $74.20.

Judgment entered March 5th, 1928.

W. F. SOOY,
C. C. J.

Filed and entered March 6th, 1928, at 9 A. M.
WILLIAM A. BLAIR,
Clerk.

ATLANTIC COUNTY CIRCUIT COURT.
January Term, 1928.

JACOB STERN,
Plaintiff,
vs.
HARRY GARBER, LENA GARBER, HARRY LATT AND JENNIE LATT,
Defendants.

Action at Law.
On Verdict.

Thompson & Hanstein, Attorneys.

Judgment entered March 6, 1928 at 9 A. M.

Damages,	$6,728.32
Costs,	74.20
Total,	$6,802.52

This action was tried before Judge W. F. Sooy, with a jury, on March 1, 1928.

The cause having been heard and submitted to the jury, they returned their verdict, by direction of the Court, in favor of the plaintiff and against the defendants.

Whereupon, it is ordered that the plaintiff, Jacob Stern, recover of the defendants, Harry Garber, Lena Garber, Harry Latt and Jennie Latt, the sum of six thousand seven hundred twenty-eight dollars and thirty-two cents, damages, and seventy-four dollars and twenty cents, costs of suit.

WILLIAM A. BLAIR,
Clerk.

NEW JERSEY CIRCUIT COURT.
ATLANTIC COUNTY.

JACOB STERN,
Plaintiff,
vs.
HARRY GARBER *et al.*,
Defendants.

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

Appearances:

MESSRS. THOMPSON & HANSTEIN, for the Plaintiff.

MESSRS. COLE & COLE, ISADORE SACKS AND EMERSON L. RICHARDS, for the Defendants.

TESTIMONY.

Mr. Richards—If your Honor please, I move to strike the amendment contained in this order. The copy I have is not dated. The order consists in a new count to the answer called Count Two.

The Court—I would think, without any authority being quoted to the contrary, that this amended complaint is sufficient in that it sets forth the various allegations and then refers to the pleadings themselves, and says that they are ready and willing to produce at the time of trial the entire record which I assume they have here.

Mr. Hanstein—Well, we may have an agreement that we may use the printed book on appeal.

The Court—In other words, the whole record would be before me.

Mr. Hanstein—Yes.

The Court—It would seem to me that that would be sufficient under the present-day system of pleadings. I think they have pleaded that which would constitute a bar, if it does, by referring to it and holding themselves

in readiness to produce it at the trial. I will refuse the motion and grant you an exception.

Mr. Richards—Exception.

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

(Mr. Richards opened the defendants' case to the jury.)

Mr. Hanstein—I offer the agreement of sale.

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

Mr. Hanstein—Now, by consent of the attorneys for the defendants, I am permitted to use the record of the appeal of this case in lieu of certified copies of the pleadings in the chancery case.

The Court—That shows the complete record of the chancery case?

Mr. Richards—That is objected to, not as to the form of the proof but as to the quality of the proof, and it is objected to on the ground that it does not conform with the pleading, that is, the amended pleading, and that he cannot use either the bill, answer or final decree in support of his pleading because it is a variation of the pleading, in that the final decree does not find the same set of facts as set out in Count Two, and the variation between the two is fatal.

The Court—As the result of the finding of fact the Court says it is ordered, adjudged and decreed that the bill be dismissed. For the purposes of determining whether or not a matter is *res adjudicata* I have a right not only to take the working part of the decree but the pleadings and if necessary the evidence. It seems to me that the book is admissible for the purpose for which it is offered, and I will admit it and allow you an exception.

Mr. Richards—Exception.

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

Mr. Hanstein—I would like to offer the order of averments in the Court of Errors. It is surplusage but—

Mr. Richards—It is objected to, not on the ground of the method of proof, but because it was not pleaded.

The Court—Well, I would assume that unless there was something produced before me showing that this decree had been reversed, I would have to assume that it was still a valid outstanding decree. So that I will admit the paper. I do not see that it has any particular value.

Mr. Richards—Exception.

(The paper offered is received in evidence and marked as an exhibit for the plaintiff, *P-3.*)

Julius Taylor, called as a witness on behalf of the plaintiff, being sworn, was examined and testified as follows:

Direct examination, by Mr. Hanstein.

Q. Mr. Taylor, did you order a search for Mr. Stern in this matter?

A. I did.

Q. From whom?

A. From the Chelsea Title Company.

Q. How much were you charged for that search?

A. On thousand dollars.

Mr. Richards—I move that all this testimony be stricken on the ground that it does not tend to support either the pleadings or contract.

The Court—In other words, they did not fix on the amount.

Mr. Richards—They did not fix on any damages.

The Court—Of course, the motion to strike out comes too late, anyway, but I cannot adopt that construction of the contract, and I will overrule the motion and grant you an exception.

Mr. Richards—Exception.

Cros-examination, by Mr. Richards.

Q. Who authorized you to get this search?

A. Mr. Stern.

Q. Who was Mr. Stern in this transaction?

A. Mr. Stern was the purchaser under the agreement.

Q. The Mr. Stern you speak of is Jacob Stern?

A. He is.

Q. Were you his agent in connection with this transaction?

A. We were to—

Mr. Hanstein—I object to that. I do not see that that is at all material. It is not within the scope of the examination in chief.

The Court—You asked him whether he was authorized—

Mr. Hanstein—No, the Senator asked him that.

The Court—Well, you asked him whether or not he did for Mr. Stern procure the title search, the application for the investigation of the title. I will permit the question if that is the only objection. I assume his declaration cannot bind Mr. Stern, but that is not the form of your objection, as I understand it.

Q. (Repeated by the stenographer): Were you his agent in connection with this transaction?

Mr. Hanstein—I object, of course, that that is not proper proof of agency.

The Court—I will sustain that objection.

Q. What was the arrangement between you and Mr. Stern whereby you claim you were authorized to order this search?

A. Our arrangement was merely that of client and broker. When we sold him the property, Mr. Stern, being a Philadelphia resident, requested that we attend to the necessary details in completing the settlement, the first of which is ordering a search.

Q. So that he had authorized you to do all that was necessary in connection with the settlement of this property?

Mr. Hanstein—I object to that. I do not think what he had to do with the settlement has anything to do with ordering the search.

The Court—I do not think it is cross-examination, Senator. All he has been asked is whether

or not he procured the search at the request of Mr. Stern, and he says he did. That does not open the other subject. I will sustain the objection, permitting you to get the conversation with reference to the ordering of the search.

Q. What was the conversation between Stern and yourself concerning the ordering of this title policy?

A. Mr. Stern as is usual—

Q. Not what is usual. What did he say?

Mr. Hanstein—What did he say?

A. Mr. Stern said: "Order the title insurance."

Q. From whom did he say to order it?

A. He didn't say from whom.

Q. Did he authorize you to spend a thousand dollars in getting it?

A. He didn't set any amount.

Q. Did you ever communicate to him how much the title insurance was going to cost?

A. I did.

Q. When did you do that?

A. Upon ordering the search—immediately after ordering the search.

Q. Who told you it was going to be a thousand dollars?

A. Mr. Lambert, the secretary of the title insurance company.

Q. Was that for the insurance or for the search of the title?

A. Apparently that was for the search of the title.

Q. Did you ever get the title insurance?

A. No; we did not.

Q. Did you ever get a bill for it?

A. We did.

Q. What was the bill?

A. One thousand dollars.

Q. Have you got it here?

A. I don't know. We can produce it.

Mr. Hanstein—We don't have it here. It is in our files at the office.

Q. Well, then, as I understand it, you were authorized by Mr. Stern to get the title insurance?

A. That's right.

Q. And I now understand that you never did get any insurance title—policy?

A. We did not.

Q. And you can't tell us positively that this bill that you got for one thousand dollars was for the policy of insurance; can you?

A. I cannot.

Q. As a matter of fact, it was not for the title policy of insurance, was it?

A. I don't think so. I think it was for the work entailed in completing the search.

Mr. Richards—That is all.

Re-direct examination, by Mr. Hanstein.

Q. The thousand dollars was merely for the search?

A. Yes.

Q. And not for a title policy?

A. I don't think so.

(Witness excused.)

Plaintiff rests.

Julius Taylor, recalled as a witness on behalf of the defendant, having been previously sworn, was examined and testified as follows.

Direct examination, by Mr. Richards.

Q. Mr. Taylor, this contract was executed February 14, 1926, was it not?

A. It was.

Q. And you were one of the parties who helped to bring this agreement about; were you not?

A. I was.

Q. At that time you were the agent of the defendants in this suit?

A. I was.

Q. Were you also acting for Mr. Stern?

A. Not as his agent at that time.

Q. Now, you seemed to hesitate about that. What were you doing for Mr. Stern?

A. Well, we were trying to sell him this property. Mr. Stern —

Q. And were you also trying after you sold it to him to get another purchaser for him?

A. We were.

Q. Now, after this agreement was signed, did you try to get another purchaser for him?

A. We did.

Q. And in pursuance of that did you go out there on the property and put signs up advertising the property for sale?

A. We did.

Q. A number of signs?

A. Yes, sir.

Q. Now, when did you put those signs up?

A. I can't recall the exact date that the sign painters erected them on the land, but they were ordered shortly after the signing of the agreement.

Q. And one of the signs was not completed until about the thirteenth or fourteenth of July, was it?

Mr. Hanstein—I object to this. I do not see any materiality in whether some real estate agent puts up his sign on the property or does not.

The Court—What is the materiality?

Mr. Richards—The materiality is that they entered upon the property and accepted it and waived the exceptions.

Mr. Hanstein—That was all thrashed out before Vice-Chancellor Ingersoll, and, further than that, I say it is of no materiality.

Mr. Richards—It is not in the pleadings in that case.

The Court—At this time I will not overrule it. I will allow it and grant Mr. Hanstein an exception.

Mr. Hanstein—Exception.

Q. (Repeated by the stenographer): And one of the signs was not completed until about the thirteenth or fourteenth of July, was it?

A. I don't know its exact date of completion. It was a large sign and was not erected until some time later.

Q. And it was after the fourteenth of June, in any case?

A. I don't remember.

The Court—Fourteenth of April, isn't it?

Mr. Richards—Fourteenth of June, date of settlement.

The Court—Oh, date of settlement.

The Witness—All the signs were ordered at the same time.

Q. Now, you are evading my question. Won't you tell me whether or not you didn't even testify in the former case that the one sign was not completed until along about the thirteenth or fourteenth of July?

A. Around that time. The exact date I don't recall.

Q. Substantially about a month after the date of settlement?

Mr. Hanstein—I am objecting to all of the testimony with regard to "for sale" signs on the property.

The Court—Yes. Your objection will go to the whole line of testimony, and you have an exception.

Q. Now, you talked to Mr. Stern about putting the signs up there; didn't you?

A. No.

Q. Didn't he know you were putting the signs up there?

A. I wouldn't say that he did.

Q. Didn't you ever tell him you did?

A. Not on this piece, no.

Q. Did he ever go out and see the signs there?

Mr. Hanstein—I object to that. I don't think it matters whether he saw an agent's "For Sale" sign.

Mr. Richards—If your Honor please, if that is to be the line of counsel's argument, I suggest he get in this chair instead of the one he is in.

The Court—No. I think counsel is within his rights.

Q. (Repeated by the stenographer): Did he ever go out and see the signs there?

The Court—You may answer that yes or no, if you know.

A. I don't know.

Q. Did you ever accompany him out on the property at any time?

A. No.

Q. Did you yourself have any interest in this property?

Mr. Hanstein—I object to this. That has nothing to do with this case.

The Court—I do not see how it has.

Mr. Richards—He is a hostile witness. I think I have a right to cross-examine him for the purpose of finding out what his interest is and whether or not he communicated to Stern.

The Court—I will sustain the objection.

Mr. Richards—Exception.

Q. But Stern did tell you to sell the property for him?

A. He did.

Q. And in pursuance of that you erected these signs upon the property; is that right?

A. We did.

Q. Are these pictures of the signs?

A. This is.

Q. And this one?

A. Yes.

Q. And this one?

A. That's right.

Q. And this one?

A. Yes.

Q. And this one?

A. Those are duplicates.

Q. Now, which are duplicates?

A. There is a duplicate.

The Court—It does not make much difference whether they are duplicates or not.

Mr. Hanstein—They are all substantially alike.

Q. There were five signs on the property?

A. That's right.

Q. And some of them were quite large signs?

A. Yes.

Mr. Richards—That is all.

Mr. Hanstein—Now, I ask that all the testimoney about the signs be stricken out.

The Court—I won't strike it just at the present time. I will leave it.

Mr. Hanstein—I ask for an exception.

(Witness excused.)

Frank Perone, called as a witness on behalf of the defendants, being duly sworn, was examined and testified as follows.

Direct examination, by Mr. Richards.

Q. Mr. Perone, were you associated with the defendants in this property?

A. As an agent.

Q. Now, were you authorized by them to procure a title policy to this property?

A. I was.

Q. Now, I show you a policy of the Chelsea Title & Guaranty Company, No. 47,519, and ask you if you procured this title policy?

Mr. Hanstein—I object. I don't think it matters whether he procured the title policy or whether he didn't.

The Court—Well, I will permit it.

A. I did.

Mr. Hanstein—I ask for an exception.

Q. Does this cover the land described in the contract that has been offered in evidence?

A. Yes.

Q. Now, who paid for this policy?

Mr. Hanstein—I object.

The Court—I will sustain the objection.

Mr. Richards—Exception.

The Court—On the ground that it has no materiality at all in this case.

Mr. Richards—I offer in evidence this title policy.

Mr. Hanstein—I object. I do not see how a title policy to somebody else can have anything to do with it.

Mr. Richards—The offer being to show that the title policy was dated the third day of May and undertook to insure the premises in question.

The Court—I will sustain the objection. I understand that title policy is to a party other than the plaintiff.

Mr. Richards—Well, the policy is a policy covering the premises in question and is in the usual form of such a policy.

The Court—Insuring whom?

Mr. Hanstein—The defendant.

The Court—The defendant, yes. I sustain the objection, and exception is allowed.

Mr. Richards—Exception.

Defendants rest.

Mr. Hanstein—I move for a direction of verdict.

The Court—I suggest if you have the title company representative here that you show exactly what the thousand dollars was paid for. I will permit you to open for that purpose.

Mr. Richards—I object. He rested.

The Court—I will permit him to re-open for that purpose. There may be some doubt about it and I think that it ought to be cleared up.

William G. Lambert, called as a witness on behalf of the plaintiff, being sworn, was examined and testified as follows.

Direct examination, by Mr. Hanstein.

Q. Mr. Lambert, you are an officer of the Chelsea Title Company; are you not?

A. I am.

Q. And what is your office?

A. Secretary and title officer.

Q. In that capacity do you have charge of the general management of the business of the company?

A. I do.

Q. You are familiar with this land that is in controversy in this suit; are you not?

A. I am.

Q. Did Mr. Taylor order a search on the land in question from you?

A. He did—

Mr. Richards—Wait a minute. I object to that as irrelevant. It is no part of this case.

The Court—I will permit it and allow you an exception.

Mr. Richards—Exception.

Q. Was a search made?

A. Yes, sir.

Q. What charge was made for the making of that search?

Mr. Richards—That is objected to on the ground that it is irrelevant.

The Court—I will permit it.

Mr. Richards—Exception.

A. One thousand dollars.

Q. Was that to include a title policy?

Mr. Richards—I object.

Mr. Hanstein—All right. I will withdraw the question. Cross-examine.

Cross-examination, by Mr. Richards.

Q. Has the thousand dollars been actually paid to you?

Mr. Hanstein—I object. It does not matter.

The Court—I do not see that it makes any difference.

Q. To whom did you submit the charge of a thousand dollars?

A. The firm of Taylor & Soloff.

Mr. Richards—That is all.

(Witness excused.)

PLAINTIFF'S MOTION FOR DIRECTION OF VERDICT.

Mr. Hanstein—I move for a direction in favor of the plaintiff for the sum of $5,000 with interest from June 14, 1926, and one thousand dollars without interest.

Mr. Richards—I move for a direction of no cause of action in both counts.

The Court—I will grant the motion for a direction of verdict for the plaintiff for the sum of $5,000 with interest from June 14, 1926, and the further sum of one thousand dollars without interest.

Mr. Richards—I ask an exception.

The Court—Ladies and gentlemen of the jury, I direct that you bring in a verdict in favor of the plaintiff against the defendants in the sum of $6,512.50.

(The jury found as directed.)

ATLANTIC COUNTY CIRCUIT COURT.

JACOB STERN,
Plaintiff-Respondent,

vs.

HARRY GARBER, LENA GARBER, HARRY LATT AND JENNIE LATT,
Defendants-Appellants.

Action at Law.

NOTICE OF APPEAL AND GROUNDS.

(*Filed March 22, 1928.*)

To Thompson and Hanstein, Attorneys of Plaintiff, or to whom it may concern:

Gentlemen:

Please take notice that the defendants, Harry Garber, Lena Garber, Harry Latt and Jennie Latt, in the above entitled cause, 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, on the following grounds, to wit:

1. Because the Court erred in refusing the motion of the defendants-appellants for a direction of a verdict on the ground that there was no proof to support the claim of the plaintiff-respondent that he had ordered a search or was charged for the search, the only proof being that certain real estate brokers were instructed by the plaintiff-respondent to contract for a title policy and that there was no proof that the Chelsea Title and Guaranty Company charged or intended to charge the plaintiff-respondent with the search fee, nor did the said title company ever issue a title policy.

2. Because the Court erred in directing a verdict for the plaintiff-respondent.

3. Because the Court erred in admitting the record of the proceedings in the Court of Chancery by these parties, said proceedings not having been properly pleaded by the plaintiff-respondent.

4. Because the Court erred in admitting the record of the decree made in the Court of Chancery to prove the defect in the title to the property, said decree simply dismissing the bill filed in the Court of Chancery by the defendants-appellants.

5. Because the Court erred in refusing to allow the motion of the defendants-appellants for a direction of verdict due to the lack of sufficient evidence to support the allegations of the plaintiff-respondent.

ISADORE SACKS,
Attorney for Defendants-Appellants.

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

THOMPSON & HANSTEIN,
Attorneys of Plaintiff-Respondent.

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

WILLIAM A. BLAIR,
Clerk.

STATE OF NEW JERSEY,
COUNTY OF ATLANTIC.

I, William A. Blair, Clerk of the County of Atlantic, and also Clerk of the Circuit, etc., Courts holden therein, said court being a court of record, having a common seal, do hereby certify, that the foregoing is a true copy of a certain Notice of Appeal and Grounds in the case of Jacob Stern, plaintiff-respondent, vs. Harry Garber, Lena Garber, Harry Latt and Jennie Latt, defendants-appellants, as the same is filed in my said office.

In Testimony Whereof, I have hereunto set my hand and affixed my Official Seal at Mays Landing, N. J., this fourteenth day of March, A. D. 1928.

(Seal)

WM. A. BLAIR,
Clerk.

IN CHANCERY OF NEW JERSEY.

BILL FOR SPECIFIC PERFORMANCE.

(*Filed July 8, 1926.*)

To His Honor, Edwin Robert Walker, Chancellor of the State of New Jersey:

Complainants, Harry Garber and Lena, his wife, Harry Latt and Jennie, his wife, all of Atlantic City, Atlantic County, New Jersey, respectfully show that:

1. On April 14th, 1926, complainants agreed to sell and defendant Jacob Stern, agreed to buy a certain tract of land described in said agreement, under seal, a copy of which is hereto made a part hereof and marked *Exhibit "A"* and the original of which is in complainants' possession ready to be produced.

2. At the time of the signing and delivery of said agreement defendant paid to complainants the sum of $1,500 and took possession of the land described in said agreement and has ever since had possession thereof.

3. On the fourteenth day of June, 1926, at 3 o'clock in the afternoon, the time stated in said agreement for final settlement, complainants were ready, able and willing to perform said agreement on their part but defendant refused to perform pretending that complainants were not able to give such title as the agreement provided for.

4. Pursuant to a verbal understanding had before said date complainants and defendant met at the office of the Chelsea Title & Guaranty Company in Atlantic City, New Jersey, and defendant had agreed to accept title insurance from said company. Said company was willing then, and has ever since been willing, to insure complainants' title, but defendant has ever since refused to accept the same and perform the agreement on his part.

5. Complainants still tender themselves ready, able and willing to perform said agreement on their part.

Complainants are without adequate remedy in the courts of law and therefore pray:

(1) That Jacob Stern, who is the defendant to this suit, may answer this bill of complaint, without oath, and each statement herein made.

(2) That said defendant be decreed to specifically perform the agreement on his part upon complainants performing said agreement upon their part; and complainants have such further relief as may be agreeable to equity.

(3) That a writ of subpœna may issue commanding said defendant to answer this bill of complaint and to abide such decree as this Honorable Court shall make in the premises.

COLE & COLE,
Solicitors for and of Counsel with Complainants.

IN CHANCERY OF NEW JERSEY.

Between
HARRY GARBER *et al.*,
Complainants,
and
JACOB STERN,
Defendant.
} On Bill &c.

ANSWER AND COUNTERCLAIM.

(*Filed July 30, 1926.*)

The defendant, Jacob Stern, answering the complainants' complaint says that:

1. He admits paragraph 1.

2. He admits the payment of the said sum of $1,500 referred to in paragraph 2, but denies all the rest of said paragraph.

3. He denies paragraph 3.

4. He admits that he agreed to accept title insurance from the Chelsea Title and Guaranty Company, pursuant to the verbal understanding referred to in complainants' complaint, but denies that the company was willing then, or since, to insure complainants' title, in accordance with the terms of said agreement of sale.

5. He denies paragraph 5.

AFFIRMATIVE DEFENSES.

Defendant further answering says that:

1. Under the terms of said agreement said premises were to be conveyed free and clear of all encumbrances, except such as are set forth in the agreement of sale, and further says that said title was to be good and marketable and such as would be insured by the title company referred to in said agreement.

2. Defendant further says that he paid the sum of $1,500 on the signing of the agreement and on May 14th, 1926, paid the further sum of $3,500 as per the terms of said agreement, making in all a total payment of $5,000.

3. At the time fixed for the settlement, defendant was ready, willing and able to perform said agreement on his part, and so tendered himself, but complainants were not ready, able and willing to perform said agreement in accordance with the terms thereof, and, in fact, said title was not good and marketable nor was the Chelsea Title and Guaranty Company willing to insure said title. At that time said land was subject to the interest of one Abraham Browning, as trustee, or his successors in trust for Stephen Caldwell, which interest became vested in said Abraham Browning through a declaration of trust dated April 27th, 1866, and recorded in the Atlantic County Clerk's office in Deed Book 28, page 481, which said interest of the said Abraham Browning, trustee as aforesaid, or his successors in trust, was an outstanding interest or encumbrance upon the land in question not referred to in the agreement. Said premises

were also subject to the rights of the Delaware and Atlantic Telephone & Telegraph Company to construct and operate lines, erect poles, etc., as granted by Annie M. Coughlin to said company September 15, 1916, Deed Book 577, page 42.

It was also subject to the rights of the public in all streets, avenues or roads running through or abutting premises in question.

It was also subject to a right of way of Camden & Atlantic Railroad, now the West Jersey & Seashore Railroad.

It was also subject to a certain mortgage made by Harry Garber to James Ruberton, Jr., and Rose Ruberton, his wife, dated April 28, 1926, recorded May 3, 1926, to secure the sum of $30,000 payable in two years.

It was also subject to a judgment of the New Jersey Quarry Company against W. J. Coughlin, entered in the New Jersey Supreme Court on March 11, 1915, in the amount of $2,294.36.

It was also subject to a judgment of Alfred W. Booth & Bro., against William Couglin et al., entered in the New Jersey Supreme Court, docketed from Hudson County Circuit Court, in the amount of $887.14, and

Also subject to a recognizance entered into by the said William Coughlin, as surety, to the United States dated July 10th, 1923, in the amount of $1,000 and another recognizance entered into by the said William Coughlin as surety, to the United States on July 12th, 1923, in the amount of $1,000.

None of which liens, encumbrances or defects of title were referred to in the agreement of sale, and as a result of all or any of which said title was not good and marketable, nor would said Chelsea Title and Guaranty Company insure said premises, and by reason of the same complainants were not able to deliver unto the defendant, such title as was called for by said agreement.

4. Defendant was at all times able, willing and ready to carry out and perform his part of said contract, and so tendered himself at the time and place of settlement,

but by reason of the defect in said title aforesaid, complainants were not able to carry out and perform their part of said contract.

5. Defendant prays that said bill be dismissed with his costs most wrongfully sustained.

THOMPSON & HANSTEIN,
Solicitor of Defendant.

IN CHANCERY OF NEW JERSEY.

Between
HARRY GARBER *et al.*, *Complainants,*
and
JACOB STERN, *Defendant.*
} On Bill, &c.

REPLICATION, &c.

(*Filed August 24, 1926.*)

Complainants join issue on the answer of the defendant.

Denying the right of the defendant to file an affirmative defense, complainants however, say:

1. They admit paragraph 1.
2. They admit paragraph 2.
3. They deny paragraph 3.
4. They deny paragraph 4.
5. They say that if any such defects or encumbrances as are set forth in the affirmative defense appear of record, they could have been and would have been removed at the time of settlement upon defendant's being able and willing to perform upon his part.

Denying defendant's right to counterclaim, complainants notwithstanding, say:

1. They admit paragraph 1.
2. Paragraph 2 is denied.
3. Paragraph 3 is admitted.

COLE & COLE,
Solicitors of Complainants.

IN CHANCERY OF NEW JERSEY.

Between
HARRY GARBER *et al.*,
Complainants,
and
JACOB STERN,
Defendant.
} On Bill for Specific Performance on Final Hearing.

CONCLUSIONS.

(*Filed January 13, 1927.*)

MESSRS. COLE & COLE, for the Complainants.
MESSRS. THOMPSON & HANSTEIN, for the Defendants.

INGERSOLL, *V. C.:*

On the fourteenth day of April, 1926, the complainants and defendant entered into an agreement wherein the complainants agreed to sell and the defendant to buy certain premises therein described, for the sum of $83,000 to be paid in the manner therein prescribed.

The contract provided that the conveyance should be by deed of warranty, free from all encumbrance excepting certain then existing mortgages, on or before June 14th, 1926. The title was to be good and marketable and such as would be insured by a reputable title company. It was later agreed that settlement should be made at the office of the Chelsea Title and Guaranty Company, and the title should be insured by that company.

On the day fixed for settlement, the parties appeared; the complainants presented and tendered a deed; the defendant declared himself prepared to make settlement, but insisted that the title was not such as the contract called for. Objections are made by the defendant as follows:

1. That the deed tendered was a special warranty, and not one of general warranty.

2. That the Chelsea Title and Guaranty Company was not at that time prepared to insure title.

3. That the Pennsylvania Railroad Company had a right of way over a portion of the premises.

4. That the public had right of way over certain streets or roads upon said premises.

5. That the Delaware and Atlantic Telephone and Telegraph Company had certain rights to maintain poles, wires, &c., over parts of said premises.

6. An item upon the settlement sheet concerning and interest as trustee of Stephen Colwell, which became vested in one Abraham Browning, by a declaration of trust dated April 27th, 1866.

The first objection, had it been made at the time of the proposed settlement, could have been readily corrected. This objection does not appear to be discussed by either brief, and is apparently not relied upon.

The second objection, that the title company was not at that date prepared to make settlement, may be considered later.

The third and fourth objections were disposed of at the time of the hearing. The Court announced that an examination of the agreement and the map accompanying it, evidenced clearly that the purchase was to be made subject to these rights.

The agreement in terms describes the beginning point as, "at the point of intersection of the center line of Camden and Atlantic Railroad, now the West Jersey and Seashore Railroad (usually known as the Pennsylvania Railroad), with the center line of Center Street," and the map delineates certain other streets and highways.

It is true that had there been no physical indications on the ground, of any such streets, the fact that the purchaser before making his contract for a title that would be good and marketable, free from all encumbrance (excepting certain mortgages) saw a map thereof showing a paper street, does not constitute a waiver of objections to the title because of the public servitude created

by the dedication of the street. *Simpson* and *Klipstein,* 89 N. J. Eq., 543.

The fifth objection is the right of way of the Delaware and Atlantic Telephone Company.

The existence of an easement upon premises conveyed is a breach of a covenant against encumbrances. *Propper* v. *Colson,* 86 N. J. Eq., 399.

Under a contract to convey real estate "by a good and marketable title free and clear of all encumbrances," the vendor is bound to have and tender a title free from encumbrances. *Simpson* v. *Klipstein, supra,* 89 N. J. Eq., 543.

The word "marketable" means saleable; "encumbrance" means a right to, or an interest in, an estate to the diminution of its value. *Bier* v. *Walbaum,* 4 Adv. Rep. 151.

I am not inclined to view with great seriousness the exception on the title sheet of the interest, if any, of Abraham Browning in the tract. It is admitted that no such interest exists, and the title company thereafter promptly removed it as an exception.

The complainants contend that the recission by Taylor on the day set for final settlement was not in good faith. They insist that by the placing of "For Sale" signs upon the premises by Taylor & Soloss, the admitted agents of the defendant; and that manifestly defendant never intended to urge the existence of the poles as a barrier to his performing the contract. Further, that he, the defendant, was under a high obligation to give timely notice to the complainants of any serious exception appearing upon the certificate in order to give complainant a fair opportunity to have it removed.

The title, on the day set for settlement, was such as would be insured by the title company, excepting the rights of way, and the rights of the telephone company to maintain poles and wires.

Counsel for the complainants says: "At most they (the poles) are only an incumbrance, and there should

be a decree to compel performance, subject to an abatement."

This could not be done. It is not similar to a condition where a mortgage is past due and payable and the money therefore could be retained or paid into court.

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

IN CHANCERY OF NEW JERSEY.

Between
HARRY GARBER *et al.*,
Complainants,
and
JACOB STERN,
Defendant.
} On Bill, &c.

FINAL DECREE.

(*Filed January 22, 1927.*)

This cause coming on to be heard in the presence of Cole & Cole, Esquires, solicitors of complainants, and Thompson & Hanstein, Esquires, solicitors of defendant, Jacob Stern.

And the Court having examined the pleadings and taken proof orally in open court, and having heard and considered the arguments of counsel; and

The Court being satisfied that on the fourteenth day of April, 1926, complainants and the defendant entered into an agreement wherein the complainants agreed to sell and the defendant agreed to buy certain premises described, which contract provided that the conveyance should be by deed of warranty, free from all encumbrances, except certain then existing mortgages, on or before June 14th, 1926, title was to be good and market-

able and such as would be insured by a reputable title company. Time was of the essence of the agreement; and

The Court having found that the parties to said agreement agreed that settlement should be made at the office of the Chelsea Title and Guaranty Company, and that the title should be insured by that company, and on the day fixed for settlement the parties appeared and the complainants presented and tendered a deed, and the defendant declared himself prepared to make settlement, but understood that the title was not such as the contract called for; and

The Court being of the opinion that, upon the day fixed for final settlement, the complainants were unable to give a good and marketable title free from all encumbrances, except the mortgages;

It is, thereupon, on this twenty-second day of January, 1927, ordered, adjudged and decreed that the complainant's bill be dismissed;

It is further ordered that the complainants pay to the defendant the cost of this suit to be taxed, which is hereby allowed to said defendant, and that in default of the payment of said taxed costs within thirty days after service upon said complainants, or their solicitors, of a true, but uncertified, copy of this decree and of said taxed costs, execution issued against the goods and chattels, lands, tenements, hereditaments and real estate of the complainants to make said costs, according to the practice of this Court.

E. R. WALKER,
C.

Respectfully advised.
R. H. INGERSOLL,
V. C.

MacCrellish & Quigley Co., Printers, Trenton, N. J.

NEW JERSEY

Court of Errors and Appeals

JACOB STERN,
Plaintiff-Respondent.
vs.
HARRY GARBER, LENA GARBER, HARRY LATT AND JENNIE LATT,
Defendants-Appellants.
} On Appeal.

BRIEF OF DEFENDANTS-APPELLANTS

STATEMENT OF FACTS.

On April 14th, 1926, Jacob Stern entered into an agreement with Harry Garber, Lena Garber, Harry Latt and Jennie Latt, to purchase from them certain lands described in that agreement and in accordance with the terms of said agreement Stern paid to Garber and the others five thousand dollars ($5,000.00) as a deposit. The agreement provided among other things that the title was to be good and marketable and such as would be insured by any reputable title company in the State of New Jersey. The parties agreed upon the Chelsea Title and Guaranty Company as the one to make a search and issue a policy of title insurance and the offices of that company were fixed as the place of

settlement. At the time set for settlement the parties appealed, the purchaser Jacob Stern being represented by one Julius Taylor, as agent. Through this agent, the purchaser refused to take title such as the title company would give, the said title company refusing to insure against an outstanding interest of one Abraham Browning and also refusing to insure free of a right of the Delaware and Atlantic Telegraph and Telephone Company to erect their telephone poles over the premises, the said title company further excepting the right of way of the West Jersey and Seashore Railroad. A bill was filed by the defendants-appellants for specific performance on or about July 8th, 1926, and on January 22d, 1927, a final decree was entered dismissing the bill in the suit. The plaintiff-respondent instituted a suit in the Atlantic County Circuit Court for the return of the deposit together with search fees and expenses, asking for judgment for twenty-five thousand dollars ($25,000.00). After said suit was instituted a supplemental count was added by order of the Court dated March 22d, 1928, which count substantially set out the facts that a bill for specific performance had been filed and that the Court of Chancery had directed that the bill should be dismissed. At the trial of this suit for damages, upon notice, a motion was made to strike the amendment, on the theory that the amendment was probably made for the purpose of showing the judgment rendered in the Court of Chancery and that if such was the purpose, *res adjudicata* was not properly pleaded. This motion was refused and an exception taken. The record of the Chancery suit was then offered and objected to on the ground that it did not conform to the pleading in that the facts set out in the record were at variance with the facts set out in the pleading. Over objection the record of the Court of Chancery was admitted.

Upon the plaintiffs' motion for a direction, the Court directed a verdict for the plaintiff for the sum of five thousand dollars ($5,000.00) with interest, together with

the sum of one thousand dollars ($1,000.00) search fee without interest, and judgment was entered for the plaintiff and against the defendants in the sum of $6,512.50.

Defendants-appellants have appealed from this judgment.

LAW.

The Court erred in directing a verdict in favor of the plaintiff and against the defendants for the search fee of one thousand dollars ($1,000.00) on the ground that there was no evidence adduced at the time of the trial by the plaintiff, that the plaintiff was responsible for the sum of one thousand dollars ($1,000.00), the only evidence being that one Julius Taylor, a real estate broker ordered title insurance which he never received and that said Julius Taylor received a bill for one thousand dollars ($1,000.00) for search fees, it not appearing that a search had been ordered without a title policy. The secretary of the title company testified that Mr. Taylor ordered a search, that the search was made and that Mr. Taylor or the firm of Taylor and Soloff was charged one thousand dollars ($1,000.00) for said search. Nowhere in the testimony was there shown any contractual relationship between the title company and Jacob Stern nor was there any testimony to the effect that Jacob Stern was responsible to the title company for said search. Under P. L. 1915, Chapter 159, a vendee, under certain conditions, is entitled to recover from a vendor the "reasonable expenses of examining the title." There was no testimony anywhere in the case that the charge of one thousand dollars ($1,000.00) was reasonable and if anything the reasonableness of said charge was a jury question and should not have been decided by the Court upon a motion for a direction.

The Court erred in admitting the record of the proceedings in the Court of Chancery, these proceedings not having been properly pleaded by the plaintiff-respondent. The plea did not show the nature and

scope of the former decision and its applicability to the controversy in the above entitled cause as a judicial determination of any point or question in issue. The final decree in the Court of Chancery was a decree dismissing the bill filed for specific performance and certainly this decree stated in the form of a plea could not be said to be *res adjudicata* of the questions involved in the above entitled cause. There was no testimony on the part of the plaintiff-respondent to show what the nature of the former decision was nor did the plea make it appear clearly that the same point or question involved in the suit at trial had actually been litigated and decided in the former suit. Reference is made to the case of *Taylor* v. *Hutchinson,* 61 *N. J. Law,* 440. Reference is made to the case of *Rosenberg* v. *Stover,* 67 *N. J. Law,* 506, and *Water Commissioners* v. *Cramer,* 61 *N. J. Law,* 270. "The judgment produced in evidence must correspond in all essential particulars with that pleaded; any material variance will prevent its admission" 23 *Cyc.,* 1529. Certainly the offer of the plaintiff-respondent of the decree in the Court of Chancery should not have been admitted because that decree in no way corresponded with the pleadings filed by the said plaintiff-respondent. The decree in the Court of Chancery simply dismissed the bill for specific performance filed in said Court and should not have been admissible to prove any defect in the title to the property. Suit was instituted by the plaintiff-respondent for the sum of $25,000.00 damages and certainly there was a jury question as to the amount of these damages and especially as to the reasonableness of the search fee. It is the opinion of the defendants that the Court erred in directing a verdict for the plaintiff-respondent.

Wherefore defendants-appellants pray that the judgment may be reversed.

Isadore Sacks,
Attorney for Defendants-Appellants.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Jacob Stern,
Plaintiff-Respondent,
v.
Harry Garber, Lena Garber
Harry Latt and Jennie Latt,
Defendants-Appellants.

On Appeal.

BRIEF OF PLAINTIFF-RESPONDENT.

The plaintiff below agreed to purchase land from the defendants. When the time for settlement arrived, it was found that title was defective, and the plaintiff refused to accept title. The sellers, the defendants below, filed a bill for specific performance in our Court of Chancery, which came on for final hearing before Vice-Chancellor Ingersoll. The Vice-Chancellor found that the sellers were unable to give a good and marketable title, free from all encumbrances, as required by the terms of the contract, and accordingly entered a decree reciting these facts and dismissing the bill. This decree was appealed to the Court of Errors and Appeals and there affirmed.

The plaintiff, who was the purchaser in the agreement of sale, instituted a suit for the return of the $5,000.00 deposit money, and also for search fees paid. The complaint sets up the making of the contract of sale and the inability of the defendants to perform, and also sets up the fact that the defendants had instituted their suit in Chancery for specific performance, and that an answer had been filed in said suit setting up, among other things, that the title was defective and that upon the issue so joined, a hearing was had, as a result of which the Vice-Chancellor found that the title was defective, and that the defendants were unable to convey a good and marketable title as called for by the contract.

At the trial a motion was made to strike that part of the complaint which sets up the proceeding in Chancery, which was denied. The plaintiff offered in evidence the agreement of sale, and the record of the Chancery suit and the order of affirmance in the Court of Errors and Appeals. By way of verbal testimony, the plaintiff proved that a search on the land in question, which was a very large tract of uninhabited and uncultivated land lying along the White Horse Pike in Atlantic County, was ordered from the Chelsea Title Company for the benefit of the plaintiff, for which a charge of $1,000.00 was made by the Title Company.

Upon the conclusion of the plaintiff's case, defendants offered some testimony, none of which tended to contradict the contract, nor the fact that $5,000.00 had been paid under it, nor that the search had been ordered for which a charge of $1,000.00 was made, and upon the conclusion of the defendants' case, the Court directed a verdict in favor of the plaintiff and against the defendants.

ARGUMENT.

It is argued by the appellant that there was no evidence that the plaintiff was responsible for the payment of the sum of $1,000.00. To off-set that argument, we respectfully direct the attention of this Court to the testimony of Julius Taylor the plaintiff's witness, on page 21 of the State of the Case:

> "Q. Mr. Taylor, did you order a search for Mr. Stern in this matter?
>
> A. I did.
>
> Q. From whom?
>
> A. From the Chelsea Title Company.
>
> Q. How much were you charged for that search?
>
> A. One thousand dollars."

and subsequently, on cross-examination, the same witness was asked:

> "Q. What was the arrangement between you and Mr. Stern whereby you claim you were authorized to order this search?
>
> A. Our arrangement was merely that of client and broker. When we sold him the property, Mr. Stern, being a Philadelphia resident, requested that we attend to the necessary details in completing the settlement, the first of which is ordering a search." (S. C. page 22, line 24.)

That testimony, it seems to us, clearly meets and refutes any argument that the plaintiff was not responsible for the charge and that Taylor, his agent, was the one responsible. Taylor was clearly acting for Stern, the plaintiff, and the obligation to pay for the search was clearly that of the plaintiff.

There is some suggestion in the brief that there is

no testimony that the charge of $1,000.00 was reasonable. That question was not raised in the Court below. Futhermore, we submit that having shown that we incurred a charge of $1,000.00 it was incumbent upon the defendants to show that the charge was not reasonable.

The case of Grossman against Brick, et al., 139 Atlantic Reporter, 490, was a case where the plaintiff brought suit to recover a deposit and search fee on an agreement for the purchase of real estate. The answer admitted the agreement and the payment of the deposit but averred that the defendants were able and willing to convey in accordance with the terms of the agreement. The Court struck out the answer and gave a summary judgment for the plaintiff for the amount of the deposit and the search fees. In the opinion of the Supreme Court, the Court held:

> "The record presents no proofs in contridiction of the facts presented by the plaintiff's affidavits. From these latter it clearly appears that the defendants were unable to convey according to their agreement, and it follows that the plaintiff was entitled to recover the deposit money."

"It is urged that the claim for the search fees was for unliquidated damages, and that to this extent at least the judgment was wrongful. The inclusion of the $400 item is not specifically urged as ground of reversal, but, assuming that it is adequately presented, we think the contention is without merit. By Section 57 of the Practice Act of 1912, p. 394, it is provided that:

'When an aswer is filed in an action brought to recover a debt or liquidated demand arising (a) upon contract express or implied—or (c) upon a statute; 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 reasonable expenses of examining the title and making survey" are expressly allowed to a purchaser as against a vendor defaulting by reason of defect in title by Section 1, Act of 1915, p. 316. We think the charges in the present case constitute liquidated damages, within the meaning of the Practice Act. *Sullivan v. Mofat,* 68 N. J. Law, 211, 52 A. 291; *Laura v. Puncerelli,* 91 N. J. Law, 38, 102 A. 433, affirmed 92 N. J. Law, 518, 105 A. 894.

"We conceive that the order striking out the counter-claim as well as the answer was properly made."

In the case of *Fairchild v. Llewellyn Railroad Company,* 82 N. J. L. p. 423, on p. 436, it was held:

> "As between vendor and purchaser the estimated value of land as recited in the contract of sale is prima facie evidence of its value. *Humphreys v. Shellenberger,* 89 Minn. 327; *Conklin v. Hancock,* 67 Ohio St. 455."

This case bears out our contention that we created a prima facie case of liability to the extent of $1,000.00 on the search fees, and it is submitted that the instruction of the Court including the $1,000.00 in the judgment, was eminently proper.

The next point raised by the appellants' brief is that the admission of the records of the proceedings in the Court of Chancery was improper. The Chan-

cery suit was between the identical parties and related to the identical contract and land. Count 2 of the complaint refers specifically to that suit and the conclusions and decree of the Court, and contains an offer to produce those pleadings at the trial. The issue raised in this suit and the Chancery suit was identical, to wit, that the vendors failed to convey such title as they agreed to convey. It is contended by the appellants' brief that the decree simply dismissed the bill for specific performance. The decree recites, among other things, as follows:

> "The Court being of the opinion that, upon the day fixed for final settlement, the complainants were unable to give a good and marketable title free from all encumbrances, except the mortagages; it is, thereupon, on this 22nd day of January, 1927 ordered, adjudged and decreed that the complainant's bill be dismissed."

That clearly constitutes an adjudication by the Court of Chancery that the defendants' title at the time of settlement was defective.

It is contended in the appellants' brief that there was a jury question as to the amount of damages and as to the reasonableness of the search fee. It is submitted that the amount of damages was beyond any legal question the amount paid by the purchaser on account and there was no dispute as to that amount. There was no question raised as to the reasonableness of the search fee.

It is, therefore, respectfully submitted that the judgment below should be sustained.

THOMPSON & HANSTEIN,
Attorneys for Plaintiff-Respondent.