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NOTICE AND GROUNDS OF APPEAL.

(Filed Jan. 21, 1926.)

ATLANTIC COUNTY CIRCUIT COURT.

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JULIUS TAYLOR and JOSEPH L. SOLOFF, partners, trad- ing as TAYLOR & SOLOFF, <i>Plaintiffs,</i>	}	Notice and Grounds of Appeal.	10
v. MARY FREEDMAN, <i>Defendant.</i>			

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*To Cole & Cole, Esquires, Attorneys of Defendant- 20*  
*Respondent:*

Take notice that the plaintiff appeals to the New Jersey Court of Errors and Appeals from the whole of the judgment entered in this cause on the following grounds:

1. Because the Court refused to admit in evidence Exhibit P3 for identification.

2. Because the Court refused to admit in evidence Exhibit P4 for identification. 30

3. Because the Court refused to admit in evidence the plans and specifications, under which the buildings in question were built, marked Exhibits P6 and P7, respectively, for identification.

4. Because the Court overruled the following question:

“Q. Mr. Abramson, were these apartments built in accordance with the plans and specifications?”

A. No.

Mr. Cole: Objected to, of course.

The Court: Objection sustained.

Mr. Hanstein: I ask an exception.

10 The Court: Strike out the witness’ answer; and (to the witness) do not answer when you hear counsel object.”

5. Because the Court overruled the plaintiff’s offer of testimony as follows:

“The Court: I have suggested to you several times that you offer the testimony on the record—you, not the witness; that you simply make a statement that you offer to prove the following

20 facts and give me an opportunity to rule. Suppose you begin by saying: ‘I do offer to prove on behalf of the plaintiff the following facts.’

Mr. Hanstein: All right. In the first place, that Mrs. Miller, the daughter of this defendant, Mrs. Freedman, went down and took the place of her mother, Mrs. Freedman, in overseeing the construction of these apartments, and that Mrs. Freedman on some occasions was with her; that these two, either one or the other—and if it was

30 Mrs. Miller she was acting as the agent of Mrs. Freedman—these two substantially changed the manner in which those buildings were being constructed, narrowed or varied them in a substantial way from the way in which the plans and specifications called for, and that it was entirely their own doings; that Nedleman was the contractor and was interested in this building op-

eration as a part owner in it, and that he was the contractor who had charge of the construction, and that he changed the plans and specifications, in the manner in which this building was going up—I do not mean changes, but I mean these variations in the way in which that building was being constructed from the original plans and specifications was substantial variations; that that resulted in a saving of money to these people, to Mrs. Freedman, from which the inference is easily reached that they were done for their own benefit. Now, I think that is what I propose to prove by Mr. Abramson. 10

We also propose to prove as part of our case what we have to a certain extent shown; that Sinderbrand went to the settlement, tendered himself ready to settle, demanded these properties in accordance with the plans and specifications; that Freedman never made any offer to correct this building so as to make it conform, and that Freedman was the cause of her own changes in the plans and specifications, unable to deliver to Sinderbrand the buildings in accordance with the plans and specifications, and that the failure of that settlement in view of Sinderbrand's tender, was due entirely to the fault of Mrs. Freedman. We want to offer to prove, too, that Freedman returned the deposit money and Sinderbrand's expenses. 20

The Court: That has been proved. 30

Mr. Hanstein: Well, I am merely summarizing the whole thing.

The Court: You are giving me an offer now to rule upon. You cannot put in this offer things that have already been ruled on in the case.

Mr. Hanstein: I do not recall whether that testimony was actually introduced or not.

The Court: Oh, yes, Sinderbrand was called for that very purpose.

Mr. Hanstein: I know, but I called him for a lot of purposes that did not accomplish anything. It is in there that he gave a quit claim deed.

The Court: Yes, and the book is in evidence, too.

10 Mr. Hanstein: And that the contract was handled by the Freedmans.

The Court: Yes.

Mr. Hanstein: Another proposition I want to prove is —

Mr. Cole: Is this a matter of record? I object to this offer on the ground that none of it is material or relevant or properly within the issue in this case.

The Court: It will all be overruled.

Mr. Hanstein: I ask an exception.

20 The Court: You may have it.

Mr. Hanstein: Now, do I understand that by this process of shortening this case I stand in the position of having called the witness and asked him a question that would have produced that answer?

The Court: You certainly do or I am very much mistaken as to rules. It is a very common practice, in other words, to do just this thing, where some collateral issue is undertaken to be introduced into the case.

30 Mr. Hanstein: Now, I want to offer in evidence the file so as to be sure of the file's offer, in the suit of Samuel Abramson against Mary Freedman, Alexander Nedleman and Joseph Singer, owners, which suit was a mechanics' lien suit by Samuel Abramson as plaintiff against these three people as owners and was for the

recovery of Mr. Abramson's architect's commission on the same property. I want to offer from that record the answer—the counter-claim filed by the defendant, Mary Freedman, against Mr. Abramson, in which she says this:

Mr. Cole: I object to it.

The Court: Well, I will submit it to the Court so that there is no reading of it to the jury that would be embarrassing.

Mr. Cole: It is not properly an issue here. 10  
It is a foreign case so far as this issue is concerned.

The Court: The offer is overruled.

Mr. Hanstein: I do not want to be embarrassed by the informality of not offering the whole file and only offering part of it. I am offering this answer and counter-claim to get those in evidence, and if that is refused I will offer the whole file, so there is no doubt about the formality of it. 20

The Court: The answer and counter-claim are refused.

Mr. Hanstein: I ask an exception. Now, I offer the file.

Mr. Cole: I object for the same reason.

The Court: That is overruled.

Mr. Hanstein: I ask an exception.

(This answer and counter-claim are designated as exhibits for identification for the plaintiff P8 and 9; the entire file indicated as P10, 30  
for the purposes of this record, but they are not marred physically.)”

6. Because the Court directed a verdict on behalf of the defendant:

“The Court: We have had the whole meat of the situation very well argued before.

The motion to direct a verdict on behalf of the defendant will be allowed.

Mr. Hanstein: I ask an exception."

THOMPSON & HANSTEIN,  
*Attys. for Plaintiff-Appellant.*

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SUMMONS.

(Filed March 11, 1925.)

THE STATE OF NEW JERSEY, to Mary Freedman:

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

Witness HONORABLE THEO. W. SCHIMPF, Judge of the Atlantic County Circuit Court at Mays Landing, this 7th day of March, 1925.

WM. A. BLAIR,  
*Clerk.*

THOMPSON & HANSTEIN,  
*Attorneys.*

COMPLAINT.

ATLANTIC COUNTY CIRCUIT COURT.

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JULIUS TAYLOR and JOSEPH L. SOLOFF, partners, trad- ing as TAYLOR & SOLOFF, <i>Plaintiffs,</i>	}	10
v.		
MARY FREEDMAN, <i>Defendant.</i>	}	Complaint.

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Plaintiffs, Julius Taylor and Joseph L. Soloff, partners, trading as Taylor & Soloff, say that: 20

1. That on the 28th day of September, 1922, and ever since that time they were duly licensed real estate brokers doing business in the City and County of Atlantic, State of New Jersey.

2. That on said September 28th, 1922, defendant Mary Freedman had the legal title to a certain tract of land located on North Dover Avenue, Atlantic City, New Jersey, upon which was erecting, or shortly thereafter began to erect, certain apartment houses. 30

3. That on said date, said defendant employed these plaintiffs, in writing, to sell said buildings and agreed to pay a commission of 3% on the sale price for so doing, which said agreement provided that

said commission was to be paid at the time of settlement. A copy of which agreement is attached hereto and made a part hereof as fully as if the same were incorporated herein.

4. That pursuant to said employment, these plaintiffs secured a purchaser for said buildings, who agreed to pay \$200,000.00 for the same.

- 10 5. That the said defendant and Louis Friedman, her husband, entered into an agreement on the 29th day of January, 1923, with said purchasers, to wit: Isaac D. Sinderbrand and Isadore Sinderbrand and Joseph Lyons, wherein and whereby the said defendant and her husband agreed to convey said land and the apartment to be erected thereon for the sum of \$200,000.00 and received on account of said agreement the sum of \$10,000.00. Said agreement further provided that said houses were to be completed according to the revised plans and specifications of one Samuel Abramson, the architect and engineer of the defendant. Said agreement provided that settlement was to take place within ten days after the completion of the operation, and that the completion of said houses should be determined by two architects, one appointed by the parties of the first part and one appointed by the parties of the second part. A copy of which said agreement with said purchasers is attached hereto and made
- 20
- 30 a part hereof, as fully as if the same were herein incorporated.

6. Said buildings were completed, but not in accordance with the plans and specifications. Defendant advised her purchasers that said buildings were completed and a day of settlement was agreed upon and fixed at the office of the Atlantic Guaranty and

Title Insurance Company; that said purchasers procured by these plaintiffs appeared at said settlement and offered to settle in accordance with their agreement, but defendant was unable to comply with her said agreement because of the fact that she had wilfully, deliberately, capriciously and negligently, and without the consent of said purchasers, or these plaintiffs, erected said buildings contrary to and in a manner not provided for in the plans and specifications aforesaid, and no settlement took place because of the fault of said defendant. 10

7. Thereafter said defendant cancelled said agreement with the purchasers procured by these plaintiffs and returned to said purchasers the deposit money paid by them.

8. Defendant paid to these plaintiffs the sum of \$2,500.00 on account of said commission aforesaid. 20

9. Plaintiffs were entitled to be paid the balance of said commission, to wit, \$3,500.00, but the defendant has refused and still does refuse to pay the same.

Judgment will, therefore, be claimed in the sum of \$3,500.00, together with interest and costs of suit.

THOMPSON & HANSTEIN,  
*Attys. of Plaintiff.*

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Sept. 28, 1922.

I hereby agree to pay to the Firms of Taylor and Soloff, and Saslaff and Saslaff, the sum of one thousand (\$1,000) dollars, as their commissions, fees, and so forth, for affecting the sale of all those certain lots, owned by Robert Bogatin, as per legally

drawn agreement between Robert Bogatin and Mary Freedman. Said commission to be paid on date of settlement.

It is further agreed and understood that the firm of Taylor & Soloff shall have the sole and exclusive rights to sell any or all buildings erected upon the aforementioned properties and for which they shall receive a commission of three per cent of the sale price. Said commissions to be paid at the time of settlement. This agreement to be binding upon both parties until all said buildings shall have been sold. It is further agreed that the firm of Taylor & Soloff shall duly advertise the said sale of the said buildings and shall concentrate their best efforts to effect the sale of same.

(Signed)

Mary Freedman

Witnessed by  
B. Louis Blumberg

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EXHIBIT P2.

ARTICLES OF AGREEMENT, MADE THIS Twenty-ninth day of January in the year of our Lord one thousand nine hundred and Twenty-three BETWEEN MARY FREEDMAN and LOUIS, her husband, of the City of Atlantic City, County of Atlantic and State of New Jersey of the first part, and ISAAC D. SINDERBRAND, ISADORE SINDERBRAND and JOSEPH LYONS, all of the City of Atlantic City, County of Atlantic and State of New Jersey of the second part; WITNESSETH, that the said parties of the first part, for and in consideration of the sum of TWO HUNDRED THOUSAND (\$200,000) DOLLARS

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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 parties of the second part, do agree to and with the said parties of the second part, that they the said parties of the first part, will well and sufficiently convey to the said parties of the second part, their heirs and assigns, by Deed free from all incumbrances Except as hereinafter mentioned and except all those certain restrictions now existing on 10 the hereinafter properties on or before the final day of settlement all that lot, tract, or parcel of land and premises hereinafter particularly described, situate, lying and being in the City of Atlantic City in the county of Atlantic and State of New Jersey Being bounded and described as follows:

BEGINNING at a point in the East line of Dover Avenue Three Hundred Forty-five feet, South of the South line of Winchester Avenue and extends; thence 20

- (1) Eastwardly, parallel with Winchester Avenue, Ninety-five feet; thence
- (2) Southwardly, parallel with Dover Avenue, Two Hundred feet to the North line of a twenty foot wide street or alley; thence
- (3) Westwardly, in and along the North line of the said Twenty foot wide street or alley Ninety-five feet to the East line of Dover Avenue; thence
- (4) Northwardly, in and along the East line of 30 Dover Avenue Two Hundred feet to the place of beginning.

Upon which land are to be erected ten (10) semi-detached two (2) family apartments.

AND the said parties of the second part for themselves, their heirs, executors and administrators, do covenant, promise and agree to and with the said

parties of the first part, their heirs, executors assigns, that they the said parties 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 TWO HUNDRED THOUSAND (\$200,000) DOLLARS as and for the purchase money of the foregoing described land and premises, in the following manner, that is to say:

10 Ten Thousand (\$10,000) Dollars on the signing of this agreement the receipt of which is hereby acknowledged.

One Hundred Thousand (\$100,000) Dollars by the parties of the second part assuming ten (10) first mortgages of Ten Thousand (\$10,000) Dollars each, which are to be placed by the parties of the first part on each of the ten (10) semi-detached two (2) family apartments, payable within three (3) years, to bear interest at the rate of six per cent (6%) per annum from the date of settlement.

20 Fifty Thousand (\$50,000) Dollars by the parties of the second part, assuming ten (10) second mortgages of Five Thousand (\$5,000) Dollars each, which are to be placed by the parties of the first part on each of the ten (10) semi-detached two (2) family apartments, payable within two (2) years, from the date of settlement, and to bear interest at the rate of six per cent (6%) per annum.

30 Forty Thousand (\$40,000) Dollars in cash or by a certified check to be paid by the parties of the second part on the final day of settlement, to the parties of the first part.

It is understood and agreed that the said houses are to be substantially completed according to the revised plans and specifications of Samuel Abramson, Architect and Engineer, 2313 Walnut Street, Philadelphia, Pa., a copy of which plans and specifications has been filed with the building department

of Atlantic City, New Jersey, and a copy of which is hereby delivered to the parties of the second part.

Settlement is to take place at the office of the Atlantic Guarantee Title & Insurance Company, Atlantic City, N. J., and the title is to be such as will be insured by the said Title Company, good and marketable. Title Insurance and other Insurance to be paid by parties of the second part. Settlement is to take place within ten (10) days after completion of the entire operation.

10

Completion of said houses shall be determined by two (2) Architects one appointed by the parties of the first part, and one appointed by the parties of the second part.

Permission is given to the parties of the second part to appoint their agents to have reasonable access to this operation for the purpose of affecting sales thereof.

It is understood that the buildings, instead of being built five (5) feet from the front building line are being built three (3) feet from the said line.

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No changes are to be made in the plans and specifications, unless with the written consent of the parties of the second part.

The style of the fixtures are to be selected by the parties of the second part, and not to exceed Fifty (\$50.00) Dollars for each apartment. All adjustments to be as of the day of settlement.

AND IT IS FURTHER AGREED, by the parties to these presents, that the said parties of the second part, their heirs and assigns, may enter into and upon the said land and premises on the final day of settlement and from thence take the rents, issues and profits to their and their use

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AND for the performance of all and singular the covenants and agreements aforesaid, the said parties do bind themselves and their respective heirs, execu-

tors 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.

Mary Freedman  
L. Freedman  
Isaac Sinderbrand  
Isadore Sinderbrand  
Joseph Lyons

10

SIGNED, SEALED AND DELIVERED

IN THE PRESENCE OF

Jos L. Soloff

STATE OF NEW JERSEY }  
ATLANTIC COUNTY, } ss.

20

BE IT REMEMBERED, That on this Twenty-ninth day of January in the year of our Lord one thousand nine hundred and Twenty-three before me

A Master in Chancery of the State of New Jersey personally appeared Mary Freedman, and Louis, her husband who, I am satisfied, are the vendor mentioned in the above deed or conveyance, and I having first made known to them the contents thereof, they acknowledged that they signed, sealed and delivered the same as their voluntary act and deed. All of which is hereby certified.

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M. C. C. of N. J.

ANSWER.

(Filed March 24, 1925.)

ATLANTIC COUNTY CIRCUIT COURT.

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JULIUS TAYLOR and JOSEPH  
L. SOLOFF, partners, trad-  
ing as TAYLOR & SOLOFF,  
*Plaintiffs,* }  
v.  
MARY FREEDMAN,  
*Defendant.* }

Action at Law.  
Answer.

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Mary Freedman of Atlantic City, New Jersey,  
answering the complaint, says:

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1. Paragraph 1 is admitted.
2. Paragraph 2 is admitted.
3. She admits the agreement and prays the pro-  
duction thereof as to its contents and legal effect.
4. Paragraph 4 is denied.
5. The agreement is admitted, but defendant prays  
production thereof as to its facts and legal effect.
6. Paragraph 6 is admitted except it is denied  
that purchasers appeared at settlement and offered

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to settle in accordance with agreement and denied that she either wilfully, deliberately, capriciously and negligently erected the buildings contrary to and in a manner not provided for in the plans and specifications, and she denies that the settlement did not take place because of her fault.

7. She denies that she cancelled the agreement, but admits that she returned to purchaser the deposit  
10 made by them.

8. Paragraph 8 is admitted.

9. She admits so much of paragraph 9 as is not denied. She denies that plaintiffs were or are entitled to be paid the sum of \$3,500 or any other sum.

## DEFENSES.

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### FIRST DEFENSE.

1. The agreement provided that the commission sued for was to be paid at the time of settlement. There was no settlement. The failure to settle was not defendant's fault.

### SECOND DEFENSE.

30 1. After the making of the agreement referred to in the agreement made a part of the complaint and before the execution of the agreement of January 29, 1923, between defendant and Sinderbrand and others, referred to in the complaint, plaintiffs agreed with defendant that in consideration of defendant's entering into the agreement of January 29, 1923, with Sinderbrand and others to sell the premises

herein referred to for the sum of \$200,000, which was a sum less than the premises were worth and a less sum than they had theretofore agreed to sell the same, all of which was known to plaintiffs, plaintiffs agreed in writing as follows:

“January twenty-ninth,  
1 9 2 3.

Received from Mrs. Mary Freedman, Twenty-five hundred dollars (\$2,500.00) as part commission on the sale from Mary Freedman to Isadore Sinderbrand, et al, balance of Thirty-five hundred dollars (\$3,500.00) to be paid at the time of settlement, which is to take place at the Atlantic Guarantee Title & Insurance Company, Atlantic City, New Jersey, ten (10) days after entire completion of the operation. Thirty-five hundred dollars to be paid in the event settlement takes place. 10

Taylor & Soloff  
J. L. Soloff

20

Witness  
Nan Schwartz”

No settlement ever took place. The sum of \$10,000 earnest money referred to in the agreement was returned to said Sinderbrand and others who arbitrarily and without right refused to perform said agreement or make settlement.

COLE & COLE,  
*Attorneys for Defendant.* 30

## REPLY.

(Filed March 27, 1925.)

## ATLANTIC COUNTY CIRCUIT COURT.

10	JULIUS TAYLOR and JOSEPH L. SOLOFF, co-partners, trading as TAYLOR & SO- LOFF,  <i>Plaintiffs,</i>	}	Action at Law. Reply.
	v.		
	MARY FREEDMAN, <i>Defendant.</i>	}	

20 Plaintiffs, replying to defendant's affirmative defenses, says that:

1. Paragraph 1 is denied, except that it is admitted that no settlement took place and plaintiffs allege that the failure to settle was due to the fault of the defendant.

2. Defendant's second defense is denied.

30 3. Plaintiffs further replying, say that the contract referred to in defendant's second defense is without consideration and void.

4. The contract set up in defendant's answer does not relieve defendant of her obligation to pay where the failure of the settlement to take place is due to the fault of the defendant.

5. Plaintiffs deny that said Sinderbrand, and others, arbitrarily and without right, refused to perform said agreement or make settlement, and say that the fact that the settlement did not take place was due solely to the fault of the defendant, as alleged in the complaint.

THOMPSON & HANSTEIN,  
*Attys. of Plaintiffs.*

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## TESTIMONY.

## ATLANTIC COUNTY CIRCUIT COURT.

10 JULIUS TAYLOR and JOSEPH  
 L. SOLOFF, partners, trad-  
 ing as TAYLOR & SOLOFF,  
*Plaintiffs,* } Action at Law.  
 v.  
 MARY FREEDMAN,  
*Defendant.* }

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Mays Landing, N. J.

20 APPEARANCES:  
 MESSRS. THOMPSON & HANSTEIN, counsel for plain-  
 tiffs.  
 MESSRS. COLE & COLE, counsel for defendant.

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The above entitled case was tried November 9,  
 1925, before HON. THEODORE W. SCHIMPF, Judge, and  
 a jury.

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(Mr. Hanstein opened the plaintiffs' case to the  
 jury.)

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

JULIUS TAYLOR, called as a witness on behalf of the plaintiff, being duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Hanstein:

Q. Mr. Taylor, where do you live, sir? 10

A. I live number 3 East Drive, Marven Gardens.

Q. You are in business in Atlantic City?

A. I am.

Q. You are a member of the firm of Taylor and Soloff?

A. I am.

Q. You are real estate brokers?

A. We are.

Q. Duly licensed?

A. Yes, sir. 20

Q. Do you know Mary Freedman?

A. I do.

Q. Did you have some transactions with Mrs. Freedman relating to giving you an agency for the sale of certain property on Dover Avenue?

A. We did.

Q. Is this the contract that Mrs. Freedman gave to you relative to commissions on Dover Avenue?

A. It is.

Mr. Hanstein: I will offer this in evidence. 30

(The paper offered is received in evidence and marked as an exhibit for the Plaintiffs P1 and is read to the jury by Mr. Hanstein.)

Q. Does this agreement relate to the property on Dover Avenue which is the property that was subsequently sold to Sinderbrand?

A. That is correct.

Q. Did you and your partner make efforts to sell this property?

A. We did.

Q. And did you subsequently procure a customer for this property?

A. We did.

Q. And who was that customer?

A. Isaac Sinderbrand, Isadore Sinderbrand and  
10 Joseph Lyons.

Mr. Hanstein: Have you seen the copy of this contract?

Mr. Cole: There is no dispute about. You can offer the one you have.

Mr. Hanstein: I offer this contract.

20 (The paper offered is received in evidence and marked as an Exhibit for the Plaintiff P2.)

Mr. Hanstein: May we note on the record that the file copy of this agreement which is introduced in evidence here and marked Exhibit P2 shows that it was signed by Mary Freedman, L. Freedman, Isaac Sinderbrand, Isadore Sinderbrand and Joseph Lyons, and it was signed in the presence of Joseph  
30 L. Soloff and B. Louis Blumberg, and I would like at this time to move to amend the copy attached to the complaint by having those signatures added to that copy.

Q. Now, at the time this contract was signed between Freedman and Sinderbrand and Lyons, which is marked Exhibit P2, did you receive some money on account of your commission?

A. We did.

Q. How much did you receive?

A. \$2500.

Q. What was the condition of this land at the time this agreement was entered into between Freedman and Sinderbrand?

A. They had just poured the foundations.

Q. And the buildings were no further advanced than that?

A. Just up to the foundations.

Q. What buildings were subsequently erected on that lot?

A. There were ten two family apartment houses.

Q. And they were subsequently completed?

A. Right.

Q. Did you subsequently attend the settlement on these properties between Freedman and Sinderbrand?

A. I did.

Q. Will you state what took place at that settlement?

Mr. Cole: This is objected to on the ground that it is irrelevant and immaterial; that it cannot be tried in this issue; that the only issue here is the legal effect of the two writings, one of September 28th, 1922, and the other of January 29, 1923. He has no right in this case to try an issue as to whether there was any justification for Sinderbrand to refuse to perform.

The Court: I think that objection goes to the whole crux of the situation, and I think it ought to be for my benefit fairly well argued.

(After extended argument in chambers the trial was adjourned to 1.30 P. M.)

## AFTER RECESS.

Q. (Repeated by the stenographer.) Will you state what took place at that settlement?

The Court: I am going to allow that question, and so counsel may know what is in my mind, I think I will permit complete testimony to be given as to all  
10 of the things that took place at the settlement, but I am going to suggest that with respect to the dispute which has arisen between the defendant and the Sinderbrands concerning the substantial compliance of the terms of the contract to erect buildings for the defendant, that an offer to make that proof may be put upon the record and ruled on.

Q. (Repeated by the stenographer.) Will you state what took place at that settlement?

20

Mr. Cole: This is objected to on the ground that it is irrelevant and immaterial; that it cannot be tried in this issue; that the only issue here is the legal effect of the two writings, one of September 28th, 1922, and the other of January 29, 1923. He has no right in this case to try an issue as to whether there was any justification for Sinderbrand to refuse to perform.

30 Mr. Cole: Perhaps I should especially say that my objection goes to any proof which may tend to support the allegation in the complaint that the transaction or agreement between the defendant and Sinderbrands failed because she could not or did not deliver the buildings in substantial compliance with the plans and specifications.

The Court: I will admit the question.

Q. (Repeated by the stenographer.)

Mr. Cole: Now, may it please your Honor, I want further to protect myself against any testimony here which may undertake to establish another reason why this did not go through, than that alleged in the complaint; that there was any suggestion that we were not prepared to deliver the deed because there is not any allegation of that sort in the complaint. 10

The Court: That will all be taken care of on a motion to strike after we hear the answer.

A. The purchasers and the sellers went to the Atlantic Guaranty and Title Insurance Company to make the settlement and demanded that the property be delivered to them in accordance with their agreement — 20

Q. Who demanded?

A. The purchasers, Sinderbrand, Lyons, and Sinderbrand's brother. The agreement was —

Mr. Cole: No, no. What was said? Never mind what the agreement was.

The Witness: The sellers said, "We will deliver the properties as they now stand," and the purchaser said, "We won't take the properties as they now stand because they are not completed in accordance with the plans and specifications," and tenders were made by both parties and they got up and walked out from the table together. 30

Q. Who got up and walked out?

A. Both parties, the sellers and their representatives and the purchasers and their representatives.

Q. Did Mr. Sinderbrand offer the consideration money provided in the agreement?

Mr. Cole: I object. I would like the witness to tell all that happened without being led.

The Court: Yes; I think the witness ought to tell what was said, who said it, and what each person at the settlement did.

10

The Witness: This happened so long ago, your Honor, that it is hard to remember exactly the exact verbal language.

Mr. Cole: Do the best you can.

The Court: I think the substance of what each person said and what they did is all you need to try to remember.

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The Witness: The purchasers came to the title company to make settlement. We were there to collect our commission. The purchasers requested —

The Court: Mr. Taylor, who was there?

The Witness: There was Mr. Isadore Sinderbrand, Mr. Isaac Sinderbrand, Mr. Joseph Lyons, Mr. Morris Bloom representing the purchasers —

30

The Court: Representing the purchasers or the sellers?

The Witness: Representing the purchasers.

The Court: That is Morris Bloom?

The Witness: Morris Bloom. There was Mr. Freedman, Mr. Nedleman, Mr. Louis Blumberg, Mrs. Miller and myself.

The Court: And Mr. Blumberg represented whom?

The Witness: Mr. Blumberg represented Mrs. Mary Freedman, the seller. There was also a Mrs. Mitchell who attended the settlement for the Atlantic Title and Insurance Company. The purchasers demanded a conveyance in accordance with their contract and they said, "We know that you can't deliver it in that way because you did not complete the buildings in accordance with the plans and specifications, and if you can deliver the buildings that way we are prepared to settle." The sellers wanted to know or asked in what manner the buildings were not completed according to the plans and specifications. Mr. Bloom produced signed statements by two disinterested architects showing how they had deviated from the plans and specifications and they said, "Now, if you can deliver these buildings the way we want them, in accordance with your plans and specifications, we will go through with the deal," and they made a tender of the balance of their purchase money and demanded that the properties be delivered that way. The sellers claimed that the statements contained in the architect's report were not true and that they had completed the buildings in accordance with the plans and specifications. There was further discussion along those lines and there was a tender made of the deed and a tender made of the purchase money—balance of the purchase money, and nothing was done in completing the settlement. They got up from the table and walked out of the title company and I accompanied Mr.

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Freedman, Mrs. Freedman's husband, as far as our office —

Mr. Cole: You have told us all that happened at the title company?

The Witness: That is practically all that happened.

10 Q. Now, Mr. Taylor, is this one of the reports that was submitted to the Freedmans as being a report of the architects showing whether or not the buildings were completed in accordance with the plans and specifications?

A. It is.

Q. And this was produced at the settlement?

A. It was.

Q. And a copy of this was handed to the Freedmans?

20 A. Yes, sir.

Mr. Hanstein: I offer this in evidence.

Mr. Cole: It is objected to as not being relevant or material. We cannot cross-examine it and it has nothing to do with the issue in this case.

The Court: The objection is properly taken with respect to it.

30

Mr. Hanstein: I ask an exception.

The Court: Yes.

(The paper offered is marked as an exhibit for identification for the Plaintiff P3.)

Q. I show you this statement and ask you if that statement is a copy of the statement handed to the Freedmans at the time of the settlement.

A. It is.

Q. And is this one of the statements that the Sinderbrands tendered as being a statement embodying their objection to the manner in which the buildings were completed?

A. It is.

Q. They both are?

10

A. They both are.

Mr. Hanstein: I offer this in evidence.

Mr. Cole: Objected to for the same reason.

The Court: Same ruling.

Mr. Hanstein: I ask an exception to both these rulings.

20

(The paper offered is marked as an exhibit for identification for the Plaintiff P4.)

Mr. Hanstein: By way of answer to the objection, although it is ruled on, I want to say it is clearly competent in my opinion for us to offer in evidence a document as being a document handed to this defendant and setting forth the objections of the purchaser. I do not offer it for the truth of the statements in there, but I do offer it as being a statement made by the purchaser to the seller of the purchaser's objections to the manner in which that building was completed and it seems to me that for that limited purpose, at least, it is—they are properly admissible.

30

Mr. Cole: It is not our paper. We disputed it, according to the testimony.

The Court: Yes. I do not think it is admissible.

Mr. Hanstein: I ask an exception to the ruling.

The Court: Yes.

10 Q. You say Mr. Bloom was present representing the purchaser?

A. Yes.

Q. Mr. Bloom is an attorney, is he not?

A. He is.

Q. Did you say Mr. Blumberg was present representing the seller?

A. I did.

Q. Mr. Blumberg is an attorney; is he not?

A. Yes, he is.

20 Q. Who is Mr. Nedleman?

A. Mr. Nedleman is the builder.

Q. And what was his interest in the property?

Mr. Cole: Objected to as being irrelevant, immaterial, and not an issue in this case.

The Court: I sustain the objection.

30 Mr. Hanstein: May it please your Honor, if we may be heard, our purpose in offering this testimony is to show that Mr. Nedleman, the builder, was one of the parties in interest in this property, and they are so closely related in this transaction to the Freedmans that his act was their act.

The Court: That is not the way to prove his ownership.

Mr. Hanstein: Well, I am not doing it to prove ownership. I am making the offer to attach to Freedman the responsibility for the acts of Nedleman.

The Court: No; I think I will have to let the ruling stand.

Mr. Hanstein: I ask an exception.

10

The Court: Yes.

Q. You say Sinderbrand offered to settle?

A. He did.

Q. Did you ever demand your commission from Freedman?

A. We did.

Q. Was it ever paid to you?

A. It was not.

20

Mr. Hanstein: Cross-examine.

Cross-examination.

By Mr. Cole:

Q. Do you recall the date on which the agreement between Freedman and Sindebrand was signed?

A. It was around January —

Q. I say, do you recall the day?

30

A. Yes.

Q. I show you Exhibit P1 and ask you as to whether at the same time you signed that paper?

A. We did.

Q. And wrote in the words “\$3500 to be paid in the event settlement takes place?”

A. I did.

Mr. Cole: May we offer that?

Mr. Hanstein: You might mark it for identification.

(The paper offered is marked as an exhibit for the defendant for identification D1.)

(Witness excused.)

10

ISAAC D. SINDERBRAND, called as a witness on behalf of the plaintiffs, being duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Hanstein:

20 Q. Mr. Sinderbrand, you are one of the purchasers mentioned in the agreement of January 29, 1923, between Freedman and Sinderbrand, Sinderbrand and Lyons, marked P2 in this case?

A. Yes, sir.

Q. Did you examine the plans and specifications of these buildings before you purchased them?

30 Mr. Cole: I want to object to that preliminarily and for safety first; on the ground that it has nothing to do with the case or with this issue properly in the case whether he did or whether he did not.

The Court: I think I will adopt the plaintiff's view as far as showing what occurred at the settlement is concerned, and what reason was given by the purchaser for not taking the property and for not making the settlement.

Mr. Cole: May it be considered, then, that I am objecting to all the proof of that character, or shall I object as we go along?

The Court: I think you would better object as we go along, because I do not think the rules permit it; otherwise I would have it considered as on the record.

Mr. Cole: Then may we have an exception to this 10 ruling now?

The Court: Yes.

Q. Did you examine the plans and specifications of these buildings before you purchased them?

A. I did.

Q. By the way, at the time you signed the contract for the purchase of them, how much progress had been made towards the construction of these build- 20 ings?

Mr. Cole: That is objected to as incompetent, immaterial and irrelevant and not an issue in this case.

The Court: I will permit it.

Mr. Cole: Exception.

A. The foundations were laid and the rafters— 30 first floor rafters were on.

Q. When completed, how large were these buildings? How tall were they?

A. About fourteen feet, I should think, in height.

Q. No, when completed, how many stories were they?

A. Two stories.

Q. They were two stories?

A. Yes, sir.

Q. Did you see these buildings during the course of their construction?

A. I did.

Q. Did you observe whether or not they were being erected with the plans and specifications?

A. I did not.

10 Q. Did you make any complaint to Mrs. Freedman as to whether or not they were being completed in accordance with the plans and specifications?

A. I did.

Mr. Cole: Objected to on the ground that it is irrelevant and immaterial and not an issue properly in this case.

The Court: Well, I would rather hear when this  
20 objection was made first.

Mr. Hanstein: I am going to bring that out.

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

Mr. Cole: Exception.

Q. Did you make any complaint to the Freedmans  
30 as to whether or not they were completed in accordance with the plans and specifications?

A. I did.

Q. When did you do that?

A. After they had notified me that they were ready for settlement.

Q. What did you tell the Freedmans at the time they notified you that they were ready for settlement?

Mr. Cole: Objected to on the ground that it is irrelevant and immaterial and not an issue in this case.

The Court: I will permit it.

Mr. Cole: Exception.

Q. What did you tell the Freedmans at the time they notified you that they were ready for settlement? 10

A. Told them they were not completed in accordance with the plans and specifications when I bought them.

Q. Did you engage an architect to examine these buildings?

A. I did.

Q. Whom did you engage?

A. Howard Starr.

Q. Anyone else? 20

A. Yes; Hudson Vaughn, I guess his name is.

Q. Did you ever advise Mrs. Freedman as to what the architect's determination as to the completion of these buildings was?

A. I did.

Q. Did you ever give them a copy of the report of the architects?

A. I am most sure I did.

Q. You are most sure you did?

A. Yes. 30

Q. When did you say you first advised them that these buildings were not completed in accordance with the plans and specifications?

A. After they notified me they were ready for settlement.

Q. Was that before the time you went to the Title Company for settlement?

A. Yes, sir.

Q. What did Freedman tell you—say to you about building these buildings in accordance with the plans and specifications, if anything?

Mr. Cole: That is objected to as irrelevant and immaterial, and it is not within the issue.

The Court: I think I will have to sustain it because he is constantly asking questions about “What did the Freedmans say?” I do not suppose they talked in concert always, and the defendant here is Mrs. Freedman.

Mr. Hanstein: I do mean Mrs. Freedman and I would like to re-frame that question.

The Court: Then I will permit it.

Mr. Cole: Exception.

Q. What did Mrs. Freedman say to you about building these buildings in accordance with the plans and specifications, if anything?

A. Why, as a matter of fact, I have not spoken to her at all.

Q. Whom did you talk to about this transaction?

Mr. Cole: I object to it on the further ground it does not matter whom else he may have spoken to if he did not speak to Mrs. Freedman, the defendant.

The Witness: I wrote to her a letter.

The Court: Of course, he said he did not speak to her. Now, he is asking whom he did speak to. I do not think that it is relevant but we might as well find out.

Q. Whom did you speak to about it?

A. Why, at the time —

Mr. Cole: No, who?

The Witness: I am going to bring it out, Judge. At the time I spoke to Miss Miller, who was representing Mrs. Freedman.

Mr. Cole: I asked that that be stricken out. 10

The Court: Yes, it will be stricken out.

Mr. Hanstein: I ask that it be permitted to stand that he spoke to Miss Miller.

The Court: The difficulty with that is that no relationship has been shown between Mrs. Freedman and Miss Miller.

20

Mr. Hanstein: I understand that. That is why I would like to have it stand and I can show the relationship.

The Court: I do not want to go too far afield in this examination. I will strike it out and overrule the last question.

Mr. Hanstein: I ask an exception.

The Court: You may have it. 30

Q. Do you know Miss Miller?

A. I do.

Q. What is her relationship to Mrs. Freedman?

A. Daughter.

Q. Is Miss Miller the lady sitting at the counsel table with Judge Cole?

A. She is.

Q. Did you ever meet her in connection with the business of the purchase of these properties?

A. At all times.

Q. What do you mean by "at all times?"

A. When I purchased them and thereafter.

Q. Did you ever discuss this matter at all with Mrs. Freedman?

A. I did.

10 Q. Who handled the transaction of the business between you and Mrs. Freedman?

Mr. Cole: I object to it now on the ground it does not matter; it is not relevant, material, and it is not an issue, and it really calls for a conclusion, after all.

20 Mr. Hanstein: We are entitled to show the act of an agent by way of showing her agency.

The Court: I will overrule this question.

Mr. Hanstein: I ask an exception.

Q. When you wanted to discuss matters in regard to this contract with Mrs. Freedman, with whom did you take them up?

A. With Miss Miller.

Q. With Miss Miller. Did she act for her mother?

30 Mr. Cole: That is objected to.

The Court: Objection sustained.

Mr. Hanstein: I ask an exception.

Q. Do you know if Mrs. Miller attended to her mother's business in connection with this property?

A. I do.

Mr. Cole: Objected to. It is too indefinite; it is immaterial, indefinite, and it is not an issue in the case.

The Court: Objection sustained.

Mr. Hanstein: I ask an exception.

Q. When you told Miss Miller that these properties were not completed in accordance with the plans and specifications, what did she say to you? 10

Mr. Cole: Objected to. It is not relevant, material, and it is not within the issue and could not bind Mrs. Freedman.

The Court: Objection sustained.

Mr. Hanstein: I ask an exception. 20

Q. Now, what did you say at the settlement to Mrs. Freedman or to whomever you talked to about settlement?

Mr. Cole: This is also objected to on the ground that it is not relevant, material, nor within the issue properly in this case.

The Court: I will permit this.

Mr. Cole: Allow me an exception. 30

A. Well, at the settlement Mrs. Freedman was there with Miss Miller, and they were all there, quite a few, and I told them they were not completed in accordance with the plans and specifications, and, therefore, I refused to accept it.

Q. Did you offer to—did you offer them the purchase price?

A. I did.

Q. Now, subsequently, Mr. Sinderbrand, did you receive a return of the deposit money you had paid?

Mr. Cole: That is objected to on the ground that it is not material nor relevant, and is not properly an issue in this case.

10 The Court: I will permit it.

Mr. Cole: Exception.

Q. Subsequently, Mr. Sinderbrand, did you receive a return of the deposit money you had paid?

A. In the form of a mortgage.

Q. And did you and Mrs. Freedman release each other from the performance of this contract?

20 Mr. Cole: Is it in writing? Was there a release in writing between these two?

The Witness: I gave her a quit-claim deed.

Mr. Cole: If there is a writing I would like to see it, and, of course, I am objecting to this proof upon the same ground and ask an exception.

30 Mr. Hanstein: Do you have the quit-claim deed, Judge?

Mr. Cole: No; I have not got it.

Mr. Hanstein: Well, I will offer the record of quit-claim deed from Sinderbrand to Freedman, book 734 of Deeds, pages 906 and 907. I offer this in evidence.

Mr. Cole: It is objected to for reasons already given.

The Court: It is allowed.

Mr. Cole: Exception.

Q. Now, did you people exchange any other writing other than this? This quit-claim deed?

A. I cannot recollect, not to my knowledge. 10

Q. Did Mrs. Freedman release you from the performance of your contract?

Mr. Cole: By writing or quit-claim deed? You said that was the only writing; is that correct?

The Witness: I cannot recollect that. Mr. Bloom, who was my attorney representing me —

Mr. Cole: I object to this question—the form of it, at least. If there was a writing we ought to have it. If there was not, we ought to have the language. 20

The Court: Yes; I think the form of the question is objectionable. It calls for a conclusion.

Mr. Hanstein: I ask an exception.

Q. Did you and Mrs. Freedman have any agreement as to whether or not the contract of yours was to be performed? I mean after the settlement? 30

A. I don't quite get you, counsel.

Q. After the settlement, did you and Mrs. Freedman —

A. After which settlement?

Q. After this effort at a settlement in the title company, did you and Mrs. Freedman have any

agreement as to whether or not this contract for the sale and purchase was to be performed? Do you understand the question?

A. Do you mean that we had arranged that they should pay me the deposit back; that I was to perform that?

Q. No.

A. I don't get you.

10 Q. Tell me what the transaction was after you left the title company and there was no settlement. What arrangement did you make with Mrs. Freedman?

A. Why, there was an arrangement made that they were to return the deposit plus some expenses that we had and we were to give them a quit-claim deed and they were to release us from performance of the contract.

Q. I see. Now, that was the agreement?

20

A. Yes.

Mr. Hanstein: I think that is all.

Cross-examination.

By Mr. Cole:

Q. When you tendered the purchase money, did you know that Mrs. Freedman could not perform?

A. I did.

30 Q. Why did you tender money to Mrs. Freedman when you knew she could not perform the contract?

A. Just do my duty that the contract calls for; that I am to be there with the money and I was there.

Q. In other words, you performed the idle act of handing money to her which you knew she was not in a position to take?

A. Well, I didn't know until the architect informed me.

Q. And when was that?

A. That was three or four days prior to the settlement.

Q. All right. Three or four days before the settlement you knew you were not going to take title to this property?

A. Oh, no; I knew I would take it provided they would give me the properties as I wanted them. I 10 asked them at the time of settlement to give me the properties as I previously bought them.

Q. Precisely. But you knew three or four days before the settlement —

A. Yes.

Q. You knew at the time set for settlement that you were not going to take the properties in the condition they then were; didn't you?

A. Oh, no; I didn't know that. There was some arrangement supposed to be made between us. In 20 case they were to give me certain things I was to go ahead and take it.

Q. You mean some other agreement between you?

A. Probably fix up the property as I asked them.

Q. However, you knew at that time that they were not going to perform, and tendered the money at that time?

A. Yes, tendered the money at that time.

Q. Did you make any other objection to performing other than the fact that these buildings were not 30 completed in accordance with the plans and specifications?

Mr. Hanstein: I object. That is not within their pleadings. They do not raise any other proposition that is different from the proposition that we raise in our complaint, and they cannot come in now and

show that there was some other reason why Sinderbrand did not settle; because it is not within their pleadings.

The Court: Couldn't they cross-examine this witness and determine whether or not the reason which was given under direct examination was the reason or some other reason regardless of the pleadings? I think they can. I will permit it.

10

Mr. Hanstein: I ask an exception.

Q. Did you make any other objection to performing other than the fact that these buildings were not completed in accordance with the plans and specifications?

20

Mr. Hanstein: I want to add to my objection, may it please your Honor, the fact that there may have been another reason has never been brought into issue. If this reason which Mr. Sinderbrand has stated was the reason, was given as the reason, that would constitute a default under the contract on Freedman's part and the fact that there may have been some other reason is not within the pleading.

30

The Court: I am admitting all this testimony because you insisted upon it, not because I think it is very relevant myself, but I certainly am not going to limit the defendant to showing what the real reason was, if the reason this witness has given is not the reason. I will admit it.

Mr. Hanstein: I ask an exception.

Q. (Repeated by the stenographer.) Did you make any other objection to performing other than

the fact that these buildings were not completed in accordance with the plans and specifications?

A. Not to my knowledge.

Q. Didn't you write a letter either to Taylor and Soloff or to Mrs. Freedman and object that you were not getting all the ground that it was agreed you should have?

A. I don't think I did.

Q. Who did?

A. I haven't any knowledge.

10

Q. Anybody for you?

A. I don't think so.

Q. Did your brother?

A. I don't know that.

Q. Was Mr. Morris Bloom your attorney?

A. Yes.

Q. Did you know that he wrote a letter objecting to taking this title on the ground that you were not getting all the land that it was agreed you should have?

20

A. I don't know of any.

Q. You never heard of it?

A. I have heard about some discussion about that later on, but I have never made that kind of complaint.

Q. Did you ever know that he wrote such a letter?

A. Not to my knowledge.

Q. Didn't you talk with Mr. Blumberg, the attorney here, about the fact that you were not getting all the land that they agreed to give you?

30

A. No, I didn't.

Q. Well, now, did you ever hear of that before?

A. I heard the discussion.

Q. Where did you hear it?

A. Mr. Lyons was talking to Mr. Blumberg, but I didn't.

Q. Mr. Lyons?

A. Yes.

Q. Who is he?

A. He was interested in that proposition.

Q. With you?

A. Yes.

Q. What did you hear him tell Mr. Blumberg?

A. He thought that Mrs. Freedman misrepresented, told him that he was to get more ground than he did get in the end.

010 Q. Was that assigned as one of the reasons you did not want to perform?

A. It was not me at all.

Q. I am asking you whether Mr. Lyons assigned that reason?

A. I don't know, but that is what I understood afterwards; I wasn't, at the time, there.

Q. What interest did Mr. Lyons have in it?

A. He had one-sixth.

020 Q. That is to say, he was to have one-sixth interest in the land?

A. Yes.

Q. Didn't you hear him tell Mr. Blumberg that?

A. I didn't hear him at all. He was telling me that he told Mr. Blumberg that, but I didn't know anything about it.

Q. In what capacity did Mr. Bloom represent you?

A. Merely to settle this proposition.

030 Q. Did you ever hear that he had objected to taking this title on the ground that he was not getting land enough?

A. I was not present if it was.

Q. Did you ever hear of it?

A. I say I was not present; I don't know anything about it.

(Witness excused.)

SAMUEL ABRAMSON, called as a witness on behalf of the plaintiff, being duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Hanstein:

Q. Mr. Abramson, you are an architect; are you not? 10

A. I am.

Q. Were you the architect who prepared the plans and specifications referred to in this contract between Mrs. Freedman and Mr. Sinderbrand, marked Exhibit P2?

A. I am.

Q. Have you those plans and specifications?

A. I have.

Q. Will you produce them, please? 20

A. (Witness produces papers.)

Mr. Hanstein: I offer these in evidence.

Mr. Cole: I object on the ground that they are not material, not relevant, not properly in issue in this case. We are not here to try a law suit between other folks.

The Court: Objection sustained. 30

Mr. Hanstein: This offer is an offer of the plans and specifications under which the apartments were to be built as provided in the contract between Freedman and Sinderbrand and others, and our purpose in offering them is by way of laying a foundation that will establish that the buildings were not

built in accordance with the plans and specifications through the fault of the defendant in this suit, and we, therefore, make this tender. I understand that you overrule the offer?

The Court: Yes.

Mr. Hanstein: I understand you overrule the offer?

10

The Court: Yes.

Mr. Hanstein: May I have an exception?

The Court: Yes.

Mr. Hanstein: May I have these marked for identification as being the plans and specifications offered?

20

(The papers offered are marked as exhibits for the plaintiff for identification P6 (plans) and P7 (specifications).)

Q. Were you the officer in charge superintending the construction?

A. I was.

Q. Were these apartments completed substantially in accordance with the plans and specifications?

30

Mr. Cole: Objected to on the ground it would be a jury question; certainly, it is irrelevant and immaterial and not within the issue properly in this case.

The Court: Objection sustained.

Mr. Hanstein: I ask an exception. Now, it may be that the form of that question is objectionable and it may be that I ought to go the route here and show in what specific manner there was a variance. I do not need to take up a lot of time on that. If the offer of that testimony is going to be refused—well, I will offer it.

The Court: I have undertaken to indicate to you that I am not going to try an issue that might be properly framed between Mrs. Freedman and Sinderbrand in this case, and I think all you need to do in view of what I have already indicated to you is to make an offer of your proof. 10

Q. Mr. Abramson, were these apartments built in accordance with the plans and specifications?

A. No.

Mr. Cole: Objected to, of course. 20

The Court: Objection sustained.

Mr. Hanstein: I ask an exception.

The Court: Strike out the witness' answer; and (to the witness) do not answer when you hear counsel object.

Q. Mr. Abramson, who had charge of the construction of these buildings? Who was the contractor? 30

A. Alexander Nedleman.

Q. Who took charge of the construction of these buildings on behalf of Mrs. Freedman?

Mr. Cole: That is objected to. That may attempt to create an agency and it is not relevant, material, nor within the issue.

The Court: Objection sustained.

Mr. Hanstein: I ask an exception.

Q. Do you know who authorized the changes in these buildings from the original plans and specifications—no; I do not mean the original plans and specifications—from the revised plans and specifications?

10

Mr. Cole: That is objected to on the ground it does not matter who may have done so; it is not relevant and it is not within the issue.

Mr. Hanstein: It seems to me we are entitled to show whether Mrs. Freedman herself or her agent authorized the making of these changes which were the basis of Sinderbrand's refusal to perform.

20 The Court: I have suggested to you several times that you offer the testimony on the record—you, not the witness; that you simply make a statement that you offer to prove the following facts and give me an opportunity to rule. Suppose you begin by saying: "I do offer to prove on behalf of the plaintiff the following facts."

Mr. Hanstein: All right. In the first place, that Mrs. Miller, the daughter of this defendant, Mrs.  
30 Freedman, went down and took the place of her mother, Mrs. Freedman, in overseeing the construction of these apartments, and that Mrs. Freedman on some occasions was with her; that these two, either one or the other—and if it was Mrs. Miller, she was acting as the agent of Mrs. Freedman—these two substantially changed the manner in which those buildings were being constructed, narrowed or varied

them in a substantial way from the way in which the plans and specifications called for, and that it was entirely their own doings; that Nedleman was the contractor and was interested in this building operation as a part owner in it, and that he was the contractor who had charge of the constructions, and that he changed the plans and specifications, in the manner in which this building was going up—I do not mean changes, but I mean these variations in the way in which that building was being constructed from the original plans and specifications was substantial variations; that that resulted in a saving of money to these people, to Mrs. Freedman, from which the inference is easily reached that they were done for their own benefit. Now, I think that is what I propose to prove by Mr. Abramson. 10

We also propose to prove as part of our case what we have to a certain extent show: that Sinderbrand went to the settlement, tendered himself ready to settle, demanded these properties in accordance with the plans and specifications; that Freedman never made any offer to correct this building so as to make it conform, and that Freedman was the cause of her own changes in the plans and specifications, unable to deliver to Sinderbrand the buildings in accordance with the plans and specifications, and that the failure of that settlement in view of Sinderbrand's tender, was due entirely to the fault of Mrs. Freedman. We want to offer to prove, too, that Freedman returned the deposit money and Sinderbrand's expenses. 20 30

The Court: That has been proved.

Mr. Hanstein: Well, I am merely summarizing the whole thing.

The Court: You are giving me an offer now to rule upon. You cannot put in this offer things that have already been ruled on in the case.

Mr. Hanstein: I do not recall whether that testimony was actually introduced or not.

The Court: Oh, yes; Sinderbrand was called for that very purpose.

10 Mr. Hanstein: I know, but I called him for a lot of purposes that did not accomplish anything. It is in there that he gave a quit-claim deed.

The Court: Yes, and the book is in evidence, too.

Mr. Hanstein: And that the contract was handled by the Freedmans.

20 The Court: Yes.

Mr. Hanstein: Another proposition I want to prove is —

Mr. Cole: Is this a matter of record? I object to this offer on the ground that none of it is material or relevant or properly within the issue in this case.

30 The Court: It will all be overruled.

Mr. Hanstein: I ask an exception.

The Court: You may have it.

Mr. Hanstein: Now, do I understand that by this process of shortening this case I stand in the position

of having called the witness and asked him a question that would have produced that answer?

The Court: You certainly do or I am very much mistaken as to the rules. It is a very common practice, in other words, to do just this thing, where some collateral issue is undertaken to be introduced into the case.

Mr. Hanstein: Now, I want to offer in evidence the file so as to be sure of the file's offer, in the suit of Samuel Abramson against Mary Freedman, Alexander Nedleman and Joseph Singer, owners, which suit was a mechanics' lien suit by Samuel Abramson as plaintiff against these three people as owners and was for the recovery of Mr. Abramson's architect's commission on the same property. I want to offer from that record the answer—the counter-claim filed by the defendant, Mary Freedman, against Mr. Abramson, in which she says this: —

10

20

Mr. Cole: I object to it.

The Court: Well, I will submit it to the Court so that there is no reading of it to the jury that would be embarrassing.

Mr. Cole: It is not properly an issue here. It is a foreign case so far as this issue is concerned.

30

The Court: The offer is overruled.

Mr. Hanstein: I do not want to be embarrassed by the informality of not offering the whole file and only offering part of it. I am offering this answer and counter-claim to get those in evidence, and if that is refused I will offer the whole file, so there is no doubt about the formality of it.

The Court: The answer and counter-claim are refused.

Mr. Hanstein: I ask an exception. Now, I offer the file.

Mr. Cole: I object for the same reason.

The Court: That is overruled.

10

Mr. Hanstein: I ask an exception.

(The answer and counter-claim are designated as exhibits for identification for the Plaintiff P8 and 9; the entire file indicated as P10 for the purposes of this record, but they are not marked physically.)

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DEFENDANT'S CASE.

Mr. Cole: I offer in evidence D1.

(The offer is received in evidence and marked as an exhibit for the Defendant, D1.)

30

Mr. Cole: I rest and ask your Honor to direct a verdict in behalf of the defendant on the ground that the contingency or condition on which the plaintiff had a right to recover never arose and never arrived.

The Court: Is there any reason why I should not direct that verdict as requested?

Mr. Hanstein: I think there is a lot of reasons, but your Honor does not agree. I, of course, want

an exception on the record to the direction of verdict, and I do not suppose your Honor is interested in hearing me any further.

The Court: We have had the whole meat of the situation very well argued before.

The motion to direct a verdict on behalf of the defendant will be allowed.

10

Mr. Hanstein: I ask an exception.

The Court: The jury will, therefore, find a verdict for the defendant for no cause of action.

(The jury found as directed by the Court.)

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EXHIBIT P1.

20

Julius Taylor      Phone 5646      Joseph L. Soloff  
Notary Public  
TAYLOR & SOLOFF  
REAL ESTATE AND INSURANCE  
1419 Atlantic Avenue  
Atlantic City, N. J.

Sept. 28, 1922.

I hereby agree to pay to the Firms of Taylor and Soloff, and Saslaff and Saslaff, the sum of One Thousand (\$1,000) Dollars, as their commissions, fees, and so forth, for affecting the sale of all those certain lots, owned by Robert Bogatin, as per legally drawn agreement between Robert Bogatin, and Mary Freedman. Said commission to be paid on date of settlement.

30

It is further agreed and understood that the firm of Taylor & Soloff shall have the sole and exclusive right to sell any or all buildings erected upon the aforementioned properties and for which they shall receive a commission of three per cent of the sale price. Said commissions to be paid at the time of settlement. This agreement to be binding upon both parties until all said buildings shall have been sold. It is further agreed that the firm of Taylor & Soloff  
 10 shal duly advertise the said sale of the said buildings and shall concentrate their best efforts to effect the sale of same.

Mary Freedman

Witnessed by  
 B. F. Blumberg

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EXHIBIT P2.

20

ARTICLES OF AGREEMENT, MADE THIS Twenty-ninth day of January in the year of our Lord one thousand nine hundred and Twenty-three BETWEEN MARY FREEDMAN and LOUIS, her husband, of the City of Atlantic City, County of Atlantic and State of New Jersey of the first part, and ISAAC D. SINDERBRAND, ISADORE SINDERBRAND and JOSEPH LYONS, all of the City of Atlantic City, County of Atlantic and State  
 30 of New Jersey of the second part;

WITNESSETH, that the said parties of the first part, for and in consideration of the sum of TWO HUNDRED THOUSAND (\$200,000) 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 parties of the second part, do agree to

and with the said parties of the second part, that they the said parties of the first part, will well and sufficiently convey to the said parties of the second part, their heirs and assigns, by Deed free from all incumbrances Except as hereinafter mentioned and except all those certain restrictions now existing on the hereinafter properties on or before the final day of settlement all that lot, tract, or parcel of land and premises hereinafter particularly described, situate, lying and being in the City of Atlantic City in the county of Atlantic and State of New Jersey 10

Being bounded and described as follows:

BEGINNING at a point in the East line of Dover Avenue Three Hundred Forty-five feet, South of the South line of Winchester Avenue and extends; thence

(1) Eastwardly, parallel with Winchester Avenue, Ninety-five feet; thence

(2) Southwardly, parallel with Dover Avenue, Two Hundred feet to the North line of a twenty foot wide street or alley; thence 20

(3) Westwardly, in and along the North line of the said Twenty foot wide street or alley Ninety-five feet to the East line of Dover Avenue; thence

(4) Northwardly, in and along the East line of Dover Avenue Two Hundred feet to the place of beginning.

Upon which land are to be erected ten (10) semi-detached two (2) family apartments. 30

AND the said parties of the second part for themselves, their heirs, executors and administrators, do covenant, promise and agree to and with the said parties of the first part, their heirs, executors assigns, that they the said parties 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 TWO HUNDRED THOUSAND (\$200,000) DOLLARS as and for the purchase money of the foregoing described land and premises, in the following manner, that is to say:

Ten Thousand (\$10,000) Dollars on the signing of this agreement the receipt of which is hereby acknowledged.

10 One Hundred Thousand (\$100,000) Dollars by the parties of the second part assuming ten (10) first mortgages of Ten Thousand (\$10,000) Dollars each, which are to be placed by the parties of the first part on each of the ten (10) semi-detached two (2) family apartments, payable within three (3) years, to bear interest at the rate of six per cent (6%) per annum from the date of settlement.

20 Fifty Thousand (\$50,000) Dollars by the parties of the second part, assuming ten (10) second mortgages of Five Thousand (\$5,000) Dollars each, which are to be placed by the parties of the first part on each of the ten (10) semi-detached two (2) family apartments, payable within two (2) years, from the date of settlement, and to bear interest at the rate of six per cent (6%) per annum.

Forty Thousand (\$40,000) Dollars in cash or by a certified check to be paid by the parties of the second part on the final day of settlement, to the parties of the first part.

30 It is understood and agreed that the said houses are to be substantially completed according to the revised plans and specifications of Samuel Abramson, Architect and Engineer, 2313 Walnut Street, Philadelphia, Pa., a copy of which plans and specifications has been filed with the building department of Atlantic City, New Jersey, and a copy of which is hereby delivered to the parties of the second part.

Settlement is to take place at the office of the Atlantic Guarantee Title & Insurance Company, At-

lantie City, N. J., and the title is to be such as will be insured by the said Title Company, good and marketable. Title Insurance and other Insurance to be paid by parties of the second part. Settlement is to take place within ten (10) days after completion of the entire operation.

Completion of said houses shall be determined by two (2) Architects one appointed by the parties of the first part, and one appointed by the parties of the second part. 10

Permission is given to the parties of the second part to appoint their agents to have reasonable access to this operation for the purpose of affecting sales thereof.

It is understood that the buildings, instead of being built five (5) feet from the front building line are being built three (3) feet from the said line.

No changes are to be made in the plans and specifications, unless with the written consent of the parties of the second part. 20

The style of the fixtures are to be selected by the parties of the second part, and not to exceed Fifty (\$50.00) Dollars for each apartment. All adjustments to be as of the day of settlement.

AND IT IS FURTHER AGREED, by the parties to these presents, that the said parties of the second part, their heirs and assigns, may enter into and upon the said land and premises on the final day of settlement and from thence take the rents, issues and profits to their and their use 30

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.

Mary Freedman

L. Freedman

Isaac Sinderbrand

Isadore Sinderbrand

Joseph Lyons

SIGNED, SEALED AND DELIVERED

10

IN THE PRESENCE OF

Jos L. Soloff

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

BE IT REMEMBERED, That on this Twenty-ninth day of January in the year of our Lord one thousand nine hundred and Twenty-three before me

A Master in Chancery of the State of New Jersey personally appeared Mary Freedman, and Louis, her husband who, I am satisfied, are the vendor mentioned in the above deed or conveyance, and I having first made known to them the contents thereof, they acknowledged that they signed, sealed and delivered the same as their voluntary act and deed. All of which is hereby certified.

20

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M. C. C. of N. J.

EXHIBIT P3.

CHARLES H. DONEHOWER

ARCHITECT

745 WEST AVENUE  
OCEAN CITY, N. J.

October 18th, 1923.

Sinderbrand Bros and Lyons, 10  
Atlantic City, N. J.

I am handing you herewith a statement of what I have found that does not conform to the Contract Documents as filed with the Building Dept. of Atlantic City, N. J. for apartment houses on the East side of Dover Ave. north of Ventnor Ave.

Yours very truly,

Charles H. Donehower

October 18th, 1923.

Inspection Report for Sinderbrand Bros and Lyons. 20  
Houses on the East side of Dover Ave. north of Ventnor Ave. Atlantic City, N. J.

The red face brick which extend thru the stucco should have been cleaned before the mortar set in order to show the red blood color of the brick thru the stucco, as set forth in the Specifications.

On the side elevations of the Drawings is shown a rowlock course of brick from front to rear and is omitted on the work from the end of the stucco work to the rear. 30

The general appearance of the exterior walls show carelessness on the part of the mechanics and does not bring out the idea conveyed by the drawings and as implied by the Specifications.

The Water Closets are not the syphon jet as specified and are small and very noisy, the noise is evidently due to the lack of water supply

Sinks and trays have the ordinary T handle compression faucets instead of the quick action faucets as called for for the sinks and the tray bibbs as called for for the trays. The drain board is not hinged as called for in the Specifications and is only laid on top of the top of the tubs.

Shower heads are only 4" and are not adjustable 6" heads as called for in the Specifications.

The towel racks have ivoried bar instead of the glass bar called for.

10

There appears to be no bridging used throughout and on the first floor where it could be plainly seen there was none at all.

The base boards look rather skimpy on account of the narrow O. G. moulding place on the top instead of the lip moulding as specified. The absence of this lip moulding also shows the defects on the edges of the boards which should have been covered.

20

The vestibule doors which should have been 1-3/4" thick are only 1-3/8" thick and instead of one light vestibule doors on the first floor, 15 light doors have been used.

Mirror doors in the bed rooms are disappointing and unattractive on account of not being properly constructed to carry the glass and the moulding on the face of these doors interferes with the hardware.

In one particular case the bed closet door in the Sun Parlor was bored for hardware and then plugged and on account of the stain finish shows a considerable defect.

30

The staining of the interior doors does not show a three coat finish of good material and on the inside of the bath rooms the doors should have been painted enamel instead of the stain. This is clearly defined in the Specifications. The inside of the ironing board closets received no paint at all.

The heating plant appears to be inadequate as the boiler is not rated high enough to take care of the radiation in the two apartments. There is either too much radiation installed or the boiler is specified too small and further the boiler is not any of the makes as specified.

The cellar is not painted with cold water paint as specified.

The biggest defect is the condition of the hardwood floors and should require considerable attention as it is an eye-sore as soon as you enter the door. Instead of white oak 1-1/2" wide the flooring is as cheap a grade of unselected oak varying in color from black to white and is two inches wide, and in many cases the narrow border appears to be worm eaten. Not only is the material defective but the workmanship is very crude and some cases it would almost trip you to walk over the humps and hollows. White oak floors are specified but you can readily understand from the above description that no effort was made to comply with the specifications in this respect. The nailing of the floor should have been every seven inches and actually is ten or more inches apart, while the scraping of these floors was evidently done with a hatchet.

Yours,

Charles H. Donehower

Inspector.

## EXHIBIT P4.

Atlantic City, N. J.,  
November 5, 1923.

Morris Bloom, Esq.,  
Guarantee Trust Bldg.,  
Atlantic City, N. J.

Dear Sir:—

10 In accordance with your request I have examined the five four family, two story brick houses located on the East side of Dover Avenue, North of Ventnor Avenue, this city, and will report as follows:

NOTE. In making this examination it must be born in mind that as the houses are finished it will be impossible for me to give you as full a report on the closed in work as if the work had not been advanced to its present stage. I will, however, give you the following report on the superficial appearances of the work and such information as I can present to you from external appearances and the comparison of the buildings with the drawings and specifications handed me by Mr. Sindelberg.

20

The first paragraph in the specifications, entitled "Quality of Workmanship" states as follows: "All the work described in these specifications or shown on the drawings and all work necessary to completely finish the building as described, shown or reasonably implied on the drawings and specifications, is to be furnished by the contractor and is to be executed in the best, most thorough workmanlike and prompt manner, with materials the best of their respective kind; and all work when finished is to be delivered in a perfect and undamaged stage without exception, leaving the building."

30

## CONCRETE WORK AND PAVING

The exterior walks and yard paving seems to be done in a fairly good manner, but I am unable to say whether the thickness of the paving is as called for by the specifications.

The red colored cement finish on the platforms and steps between the fronts of the houses is badly discolored and stained. This stain seems to have penetrated into the body of the work and I do not think can be entirely removed unless some of the top finish be taken off and new work built in. 10

## BRICKWORK AND HOLLOW TILE

JOINTS. There are a number of places in the brickwork where the joints should be raked out and the work repointed as the present jointing is poorly done and has a bad appearance. There are a number of places under the window sills where the pointing is poorly done and the probabilities are that the work will leak during stormy weather.

The drawings show a row-lock course on side walls at the lines of the first and second story window sills. These row-lock courses are not built into place. This is not a structural defect, but does not give the pleasing appearance that they would have if the drawings had been followed. 20

CLEANING DOWN OF BRICKWORK. All the brickwork throughout, particularly the red brickwork, is so badly stained and soiled from exterior plastering of the surrounding walls that in a great many places it is hard to distinguish the color of the brick. The brickwork shows that no protection was given the bricks while the exterior plaster was being done and it will be impossible to ever clean off the bricks and bring them to the original color. Any attempt to clean rough texture bricks, such as these are, will only result in a very poor looking and smeary job, without character or snap. The 30

appearance of the work is as much a factor as its strength and durability and the fact that the brick is so badly splashed with mortar will be a permanent disfigurement to the work.

The specifications call very particularly that the bricks must be protected by paper and that the work must be delivered first class, clean and in good order. The work in its present condition can never be brought out to a good, clean and wholesome looking job and the good appearance of the work will be permanently spoiled.

The above regarding exterior brickwork, applies to interior brickwork in fireplaces.

#### FINISHING HARDWARE

DOOR HINGES. Specifications call for 4-1/2" butts or hinges for entrance and vestibule doors. These hinges are only 4".

Specifications call for second story bed closet doors to have three butts to each door. There are only two butts to each door and these butts are also 1/2" less in size than specified.

KNOBS. Quite a few of the knobs are loose in the shanks and also poorly fitted into place.

WINDOW LOCKS. Some of the window locks are so put on that the sash, when the locks are engaged, do not draw in the sash as tightly as it should be drawn together at the meeting rail.

KEYS. I do not find any keys on the premises. These may possibly be still in the hands of the contractor.

Specifications call for hinges to be cast iron, brass plated. The hinges now on the job and in the work are stamped steel, brass plated. The hinges at present in the work are a fairly good butt, but do not have the body and weight of the proper kind of cast hinge.

## ROOFING AND SHEET METAL WORK

The specifications for roofing call for four ply, single thick felt, in hot pitch, on the main portion of the roof, and five ply in the gutters. Inasmuch as the roofing is completed and the slag in place, I am unable to tell you whether the roofs are built in accordance with the specifications regarding the number of plies of paper and the proper quantity of pitch. This can only be determined by cutting through the slag roofs at various places and counting the laps of the paper. Judging from the character of the external appearances of the balance of the roofing I have serious doubts as to the roofing which I have been unable to investigate. 10

The specifications call for tin flashings for the roofs and in examining the work, particularly around the chimneys, I find that there is no tin used on the chimneys, nor behind battlement walls as required by the specifications, but that the tar paper and pitch are carried up around the masonry of the chimneys projecting above the roofs and on the backs and tops of battlement walls and fire walls, and that the paper is held fast to the chimneys by wooden lath nailed into the masonry of the chimney, and over which is a covering of pitch. There has been no attempt made to follow the specifications in this detail and the work as built is such as would hardly be allowed on the poorest and meanest class of work. At best this is a shifty job and would not be allowed on a temporary work shed. 20 30

The specifications call for tin flashings to be carried up at least 6" on the brickwork and 4" out under the felt paper of the roof; I find no tin flashings behind any of the brick battlements above the roof, nor over the fire walls projecting above the roofs. I find only that the tar paper and pitch have been carried up over the backs of the battlements and

over the fire walls and then out over the tops of the walls against a galvanized iron slag strip. This work is not of the quality intended by the first paragraph of the specifications and is inferior and done in a shifty and slovenly manner. The work will deteriorate and leak badly in a short time. Altogether I consider the roofing and sheet metal work of the poorest class and fit only for temporary shed construction.

10 LUMBER AND CARPENTRY

I have been unable to determine the quality of the carpenter work in the building except in the air spaces over the top story and to a limited extent under the first story floor. In these places I note that the work is fairly well done.

The drawings show the ceiling rafters of the second floor to be 2" x 6", 16" on centers, while the specifications call for 2" x 4" rafters 16" on centers. In this detail I will say that the ceiling joist of the second story are 1-3/4" x 4-3/4" and are spaced 8" farther apart than specified.

The drawings show the roof rafters to be 2" x 8", 16" on centers, while the specifications call for these timbers to be 2" x 10". The roof rafters as now in the building are 1-3/4" x 7-3/4" and are spaced 8" farther apart than the drawings call for. All the above conditions operate to the weakening and instability of the structure.

30 FLOOR BRIDGING. The drawings and specifications call for the joist of the first and second story floors to be cross-bridged. I cannot find any cross-bridging in the floors under the main stories.

REAR PORCH CONSTRUCTION. The rear porch construction is done in a very poor and slovenly manner; the cutting and fitting is very roughly done, the dressing of timbers is poor and in many places

the exposed timbers are so badly marred and defaced that the whole appearance of the work is very bad.

Rear steps to first story porches at a number of places do not have risers and the step is simply a board nailed between rough timbers. This appearance is very bad.

**REAR OUTSIDE SHEDS ON PORCHES.** The workmanship on these refrigerator enclosures is poorly done; the work does not have a finished appearance and in many places the boards are so roughly cut and poorly fitted that the work has a general appearance of being a temporary shed. 10

#### MILLWORK

The millwork throughout is generally of poor quality and finish. The finish of all the millwork throughout is very rough and in many places the grain of the wood is so uneven and rough that the finish looks as if the grain had been embossed. At other places the finish is so rough through poor milling that the work has the appearance of very coarse sandpaper. The millwork is also damaged by hammer marks in erecting, is badly damaged at many places by rough handling and numbers of places have badly gouged surfaces and edges. 20

Where doors and sash have been fitted into place there are many cases where the edge of the doors show a slivered and highly defaced condition, evidently caused by careless and indifferent workmanship.

Doors and sash are very loosely fitted and particularly casement sash, in which there are spaces varying from 1/8" to 3/8" between the sash and the frames. Doors are poorly and loosely fitted. Joints are poorly made and are open in many cases. Doors and sash are badly slivered in fitting and handling. 30

**BASEBOARDS.** Specifications call for lip mouldings on baseboards. Instead of lip mouldings there are plain O. G. top mouldings. Baseboards and cap mouldings for the same are very badly fitted and the plaster finish behind baseboards is so uneven and rough that in almost every house at least thirty per cent of the baseboard is away from 1/8 to 1/4" from the plastered wall.

- 10 **STAIR WORK.** The fitting of newel posts, etc., in stair work, particularly at the intermediate winders between the first and second floor, is so poorly done around the cap that a number of places the plaster cannot be brought down to fill up the holes caused by poor fitting in the top of newel cap.

- 20 Specifications call for 1-3/4" thick door from the entrance vestibule to living room. These doors are 1-3/8" instead of 1-3/4" as specified. The specifications call for vestibule door to be one light door in the upper half. All doors on the job are made with a number of small lights. This is not in accordance with the specifications.

**WOOD SEATS.** Drawings show two small wood seats to be built in the front room of each second story on each side of the bed closet. These seats are not in the building.

**LINEN CLOSETS SHELVING IN BATHROOMS.** Plans call for four shelves in these shelves; there are only two in each closet.

- 30 **CLOSET SHELVING.** Closet shelving is of inferior, rough, warped and poor material, very poorly cut and roughly finished. In some cases I notice that shelving material had the appearance of being ordinary yellow pine fencing or roofers.

**GENERAL NOTE REGARDING ERECTION OF TRIM.** The workmanship in erection of all interior trim is of the poorest character. The joints are poorly made and fitted, work roughly cut, slivered

and hammer marked as before mentioned. No adequate written report can be made to show how poorly this work is done. Only an actual examination of the premises can reveal the condition of the work.

**KITCHEN DRESSERS.** Crown mouldings around tops of kitchen dressers are not completed as there are no crown moulding returns on the free standing ends of the dressers.

Drawings call for exterior windows to be 24" x 30" glass and sash. The windows so designated on the drawings throughout each story of every building are 4" less in height than the drawings call for; the glass opening being, in each sash, 28" high instead of 30".

In many cases the sash was not properly counter-weighted; the weights being too light.

**HARDWOOD FLOORING.** Specifications call for 3/8" thick x 1-1/2" wide plain sawed, straight white oak finished flooring. The flooring in the building is 2" wide instead of 1-1/2" wide. This does not make as good a job as a narrow flooring of the width as specified. The wood used for flooring is of the poorest grade; the colors of the wood vary from light oak to very dark brown and in some cases almost a chocolate color. The result of this is a very poor looking floor. The specifications call for the entire work to be scraped smooth, while in many places in each house the work is so roughly dressed that it gives the appearance of having been dressed or chipped off with an adze. The defects in this work are very apparent.

In a number of places the hardwood floors in every house are buckling up and away from the sub-floor at some places to a height of 3/4". The finished floors are also uneven in laying and contain many depressions and humps. Generally the finished floor laying is of the poorest class.

In a number of places in the hardwood floors, the nailings are so badly puttied and stained that the appearance of the floors is marred; also in several places an attempt has been made by someone to clean off the spots from the finished flooring and to re-finish such places, and in the attempt the floor has been made to look worse than it was originally. A personal examination of the floors will convince you that they are of the poorest quality of labor and material and not in conformity with the first paragraph of the specifications, requiring good workmanship and first class material.

#### PLASTERING

The plastering work throughout is rough, uneven and of poorest workmanship. Many of the corners and walls are cracked, wall surfaces and corners are rough, crooked and uneven, the plaster is soft and has already begun to fall from some portions of the ceiling. Plaster is not well pressed into the lath and does not have a good key into the lath joints; the lath are too closely spaced to afford a proper key; the sand contains a greater percentage of loam and clay than is allowable for good plastering, and the body of the plaster is very thin at many places.

The exterior stucco work seems to be in good condition and is neatly done except that in putting this work on the surrounding brickwork has been so badly splashed as to hide the color of the brick.

Where the patching of plastering has been done the work is of the poorest and roughest class and the patching has done more to hurt the appearance of the work than if it had not been patched. The patching is also incomplete, there still being a number of places where patching should be done.

The patching is so crooked that it has been impossible to line up and close in tightly with baseboards and trim against the plaster work. The in-

terior plastering is a very inferior job in every respect.

#### PAINTING AND GLAZING

This work is very poorly done; in many places the wood has never been touched with paint and the bare wood is still exposed where no paint has been applied. Where the paint has been applied, it is so thinly and unevenly brushed on that the grain of the wood is exposed through the paint. In closets I find that shelving has not been fully painted, pin rails not painted fully, interior trim of closets not painted fully, scuttle doors and trim in tops of second story closets not painted at all, ends of dressers not painted in second story, and numbers of other places where the paint is so thin that no three coat work has been applied as specified. 10

Specifications for interior woodwork call for three coat work. This has not been given in a number of places. The specifications call for all prominent rough spots to be sanded smooth. No attempt has been made to do this rubbing down. 20

Specifications call for the stained doors to be lightly sanded between coats and all doors facing in bathrooms to be enameled same as woodwork. This has not been done.

Mirrors for inside doors show the raw wood on the back of the mouldings holding the mirrors in place. This work should have been stained on the back as well as on the exposed portion.

GLAZING. All outside windows where marked 24" x 30" glass are only 28" glass. This means both stories of every house throughout. 30

Specifications call for main entrance doors to have beveled plate glass set in wood glazing strips. These doors are only glazed with ordinary sheet glass.

Medicine cabinets in bathrooms are badly marred and scratched in many instances.

## TILE AND MARBLE WORK

Specifications call for tile floors at the landing of main steps, also for vestibule main steps. Vestibule floors are tile, but the landings of the stairs are not of tile. Tile wainscoting in vestibules is backed against the uneven plaster and in a number of places the edges of the tile project from 1/4 to 1/2" away from the plaster backing. This is not the fault of the tile work so much as it is the fault of uneven

10 and crooked plaster work.

BATHROOM ACCESSORIES. Under tile work the specifications call for 24" glass towel bars. The towel bars in the building are of wood, covered with opaque white celluloid.

TILE FLOORS IN BATHROOMS AND VESTIBULES. There are a number of places where the tile floors in bathrooms and vestibules do not finish out full against walls and at trims. This should be done to make a complete job.

20

## PLUMBING

Shower bath heads are specified to be 6" in diameter, while those actually in the building are 4" in diameter.

Specifications call for #230 sheet covered, five year guaranteed, white Pyralin seat and cover. In the seats and lids of the toilets now in the building no Pyralin is used; the finish being an enamel finish so far as I can determine without spoiling a seat.

KITCHEN SINK AND TRAY COMBINATION.

30 Specifications call for combination sink and tray; one piece cast iron enameled tray and sink with straight pattern tray faucets and 1/2" N. P. quick opening faucets over sink; tray to be covered with heavy ash drainboard and N. P. hinges; also specifications call for chain and plug. These sinks do not have N. P. hinges for tray cover, neither do they have quick opening sink faucets, nor straight pat-

tern tray faucets. The tray is evidently something entirely foreign from that specified and is not cast and fitted for a drainboard to be placed over the laundry tray portion, because of the fact that the tray cocks are placed so high in the back of the tray portion that they project above the wood lid.

REFRIGERATOR DRAINS. Specifications call for 2" galvanized iron pipe and refrigerator drain emptying out on to the cement work. The pipe now in place is 1-1/2" pipe and does not carry to the cement work. The pipe at present is exposed on the rear of the building and is run down under the porch. 10

HOT WATER TANK. Specifications call for #002 Ideal to be connected up to the chimney and to be complete with thermometer, valves, fire tools, chart, etc. The boiler in place is not the make and the capacity as specified in the specifications and the hot water storage tank is not fitted with a thermometer, nor is a full complement of valves in the lines as specified for this part of the work. 20

#### HEATING.

Specifications call for an Ideal Arco #4-22-W boiler, while the boilers in the work are the Weil-McLain boilers 4-W-22-Series B. With the information at hand and now available, I am not able to tell you whether this boiler is the equal in heating capacity of that specified.

The specifications call for eccentric fittings where the main water pipes for heating system are reduced. I cannot find any eccentric fittings anywhere in the system. 30

The specifications are so worded as to make it evident that the boilers were to have the water lines somewhat lower than the boilers now in the building show and that the lines from the boilers to the radiators were to be placed under the first story floors. The piping now in the building is an over-

head system with the pipes extending upward to the attic and there branched out and dropping downward throughout the building to return to the boiler. There is no objection to an overhead system of piping, if the piping is properly protected against loss of heat through radiation in the attic. There is no requirement in the specifications for covering of heat pipes, but under existing conditions the overhead lines in the attic being uncovered and exposed to cold through the roof and from open air vents in the attic spaces, will loose and radiate a great percentage of the heat in the attic spaces with the result that the first and second stories of the house will have the temperature of the water in the radiators so greatly reduced through the attic loss so as to materially lessen the value of the radiators in the building. The way it looks to me is that when the cellars, as originally projected in the work were omitted, that the heating system was changed to an overhead system without adding or providing for the proper pipe covering for the pipes in the attic.

10  
20  
RADIATION. The radiation is generally of the equivalent of that shown by the schedule on sheet #1 of the drawings, except in second story bathrooms where the radiators are one section less, in each radiator, than specified.

FINAL NOTE. I have made a very careful study of the specifications and plans as given me and have tried to make a thorough search and investigation of the work as furnished and built. My feeling is that the specifications are sufficiently clear and exact in their wording generally, as to require a far better class of materials and a better performance of work than has been given in these houses.

30

Very truly yours,  
Howard A. Stout.

P. S. I am returning you five sheets of drawings and specifications for the above mentioned houses; one set of specifications #219 and one set of specifications for another job by the same Architect, #216.

---

EXHIBIT D1.

January twenty-ninth 10  
1923

Received from Mrs. Mary Freedman, twenty-five hundred dollars (\$2,500.00) as part commission on the sale from Mary Freedman to Isadore Sinderbrand, etal, balance of thirty-five hundred dollars (\$3,500.00) to be paid at the time of settlement, which is to take place at the Atlantic Guarantee Title & Insurance Company, Atlantic City, New Jersey, ten (10) days after entire completion of the operation, 20  
\$3500. to be paid in the event settlement takes place.

Taylor & Soloff  
J. L. Soloff

1659  
(U. S.)  
(STAMP)  
(\$1.50)

QUIT-CLAIM DEED—ISAAC D. SINDER-  
BRAND etal to MARY FREEDMAN.

THIS INDENTURE, made the thirteenth day of 30  
December in the year of our Lord one thousand nine  
hundred and twenty-three.

BETWEEN ISAAC D. SINDERBRAND and  
ANNA,—his wife, ISADORE SINDERBRAND and  
ANNA, his wife, JOSEPH LYONS and BELLA his  
wife, all of the City of Atlantic City, the County of  
Atlantic and State of New Jersey, of the first part,

and MARY FREEDMAN, of the City of Atlantic City, in the County of Atlantic and State of New Jersey of the second part;

WITNESSETH, That the said party of the first part, in consideration of the sum of One Thousand Dollars and other good and valuable considerations, to them duly paid before the delivery hereof, hath remised, released, and forever quit-claimed, and by these presents do remise, release and forever quit-claim to the said party of the second part, and to her heirs and assigns, ALL that lot, tract or parcel of land and premises, *tract or parcel of land and premises* hereinafter particularly described, situate, lying and being in the City of Atlantic City, in the County of Atlantic and State of New Jersey, bounded and described as follows:

BEGINNING at a point in the East line of Dover Avenue, three hundred forty-five feet South of the South line of Winchester Avenue and extends; thence (1) Eastwardly, parallel with Winchester Avenue, ninety-five feet; thence (2) Southwardly parallel with Dover Avenue, two hundred feet to the North line of a twenty foot wide street or alley; thence (3) Westwardly, in and along the North line of the said twenty foot wide street or alley ninety-five feet to the East line of Dover Avenue; thence (4) Northwardly, in and along the East line of Dover Avenue, two hundred feet to the place of beginning, with the appurtenances, and all the estate, right, title and interest, of the said party of the first part therein.

TO HAVE AND TO HOLD the above mentioned and described premises, with the appurtenances, unto the said party of the second part her heirs and assigns forever.

IN WITNESS WHEREOF, the said party of the first part have hereunto set their hands and seals dated the day and year first above written.

Isaac Sinderbrand.	(Seal)
Anna G. Sinderbrand	(Seal)
Isadore Sinderbrand	(Seal)
Anna Sinderbrand	(Seal)
Joseph Lyons	(Seal)
Bella Lyons	(Seal)

Signed, Sealed and Delivered 10  
in the presence of  
Fannie Alten

STATE OF NEW JERSEY COUNTY OF ATLANTIC, ss.

BE IT REMEMBERED, that on this 13th day of December in the year of our Lord one thousand nine hundred and twenty-three before me, the subscriber, a Notary Public personally appeared Isaac D. Sinderbrand and Anna,—his wife, Isadore Sinderbrand and Anna, his wife, Joseph Lyons and Bella, his wife, who, I am satisfied are the grantors in the within Deed of Conveyance 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, for the uses and purposes therein expressed. 20

Fannie Alter—

Notary Public of N. J.

Received and recorded Jan. 3, 1924 at 8 A. M.

William A. Blair, Clerk.

## EXHIBIT P8.

## ATLANTIC COUNTY CIRCUIT COURT

	Samuel Abramson,	}	
	Plaintiff		
	vs.	}	
	Mary Freedman, Alexander		Action at Law
10	Nedelman and Joseph		COMPLAINT
	Singer owners and		
	builders		
	Defendants		

Plaintiff, Samuel Abramson, of the City and County of Atlantic, State of New Jersey, says that:—

1. At the time hereafter stated defendants, Mary  
 20 Freedman, Alexander Nedelman and Joseph Singer  
 were the owners of a tract of land upon which they  
 were erecting and constructing five double two-story  
 brick and stucco apartments, which land is described  
 as follows:

30 BEGINNING at a point in the easterly line of  
 Dover Avenue 175 feet south of the southerly  
 line of Winchester Avenue and extends thence  
 (1) Eastwardly, parallel with Winchester Ave-  
 nue 140 feet to a 20 feet wide alley or street;  
 thence (2) Southwardly in and along the west-  
 erly line of the said 20 feet wide street or alley  
 200 feet to the northerly line of a 20 feet wide  
 street or alley; thence (3) Westwardly in and  
 along the northerly line of said 20 feet wide  
 street or alley 140 feet to the easterly line of  
 Dover Avenue; thence (4) in and along the east-  
 erly line of Dover Avenue 200 feet to the place of  
 beginning.

2. In or about December, 1922 the owners of this land entered into a contract with the plaintiff, as an architect, under which contract the said owners engaged this plaintiff to prepare plans for the construction of said apartments and to supervise the erection of the same and agreed to pay plaintiff 3% of the cost of said apartments for said services. Said apartments cost \$111,846.00.

3. Plaintiff performed said labor and therefore became entitled to the sum of \$3355.00 upon which he has been paid the sum of \$1600.00, leaving a balance of \$1755. due to plaintiff. All of plaintiff's labor was performed between December, 1922 and October 20th, 1923. 10

4. Said indebtedness is a lien upon said buildings and land by virtue of the provisions of "An act to accure to mechanics and others payment for their labor and materials in erecting any building (Revision of 1898)" and the supplements thereto and amendments thereof. 20

Plaintiff, therefore, demands as damages the sum of \$1755.00 together with interest thereon and costs of suit.

THOMPSON & HANSTEIN  
Attys. of Plaintiff.

## EXHIBIT P9.

## ATLANTIC COUNTY CIRCUIT COURT.

	SAMUEL ABRAMSON,	}	Action at Law.
	Plaintiff,		
	vs.	}	ANSWER AND COUNTER-CLAIM.
10	MARY FREEDMAN, et al,		
	Defendants.		

Defendants, Mary Freedman, Alexander Nedelman and Joseph Singer, answering the complaint, say:

1. They deny Paragraph 1 of the complaint.
2. They deny Paragraph 2 of the complaint.
3. They deny Paragraph 3 of the complaint.
4. They deny Paragraph 4 of the complaint.

## COUNTER-CLAIM.

20 Defendant, Mary Freedman, counter-claims against the plaintiff, and says:

1. Plaintiff agreed with her to prepare plans and specifications for the construction of apartment houses on the land described in the complaint and to supervise the erection of the same and that said plans and specifications were to be independent of any other plans and specifications theretofore prepared by plaintiff and were to be carefully and efficiently done and plaintiff was to give his careful attention to the supervision of the work in accordance with said plans and specifications.

- 30 2. To the knowledge of plaintiff at and before the time of the making of said agreement with him, defendant had entered into a written contract under seal with Isaac D. Sinderbrand and others in which he had agreed to grant and convey the real estate described in the complaint together with said apart-

ment house to be erected thereon. Said agreement contained this provision, to the knowledge of said plaintiff:

“It is understood and agreed that said houses are to be substantially completed according to the revised plans and specifications of Samuel Abramson, Architect & Engineer, 2313 Walnut Street, Philadelphia, Pa., a copy of which plans and specifications has been filed with the building department at Atlantic City, New Jersey, 10 and a copy of which is hereby delivered to the parties of the second part.”

3. Said buildings or apartments were not substantially completed according to said revised plans and specifications and there were material variations therefrom in the erection of said apartments or houses to the knowledge of the plaintiff and for which he was alone responsible.

4. In consequence thereof said Isaac D. Sinderbrand and others refused to perform said contract 20 in writing on their part and threatened to defend any action that might be brought by this defendant for the specific performance of this contract, or damages for breach on their part. They thereupon rescinded said contract for the cause aforesaid and as a result defendant lost the benefit of said contract and was required to return to said parties the sum of \$10,000 earnest money paid under and in pursuance of the terms of said contract.

5. Defendant has been damaged to the amount of 30 not less than \$15,000 as a result of plaintiff's non-performance as herein alleged, said damages being made up of the return of said earnest money \$10,000; loss of profits by reason of the rescission of the contract on the part of Sinderbrand, and the expenditure of money in the reconstruction, for which judgment

will be claimed against plaintiff, besides interest and costs.

COLE & COLE  
Attorneys of Defendants.

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RULE FOR JUDGMENT.

10

(Filed Jan. 27, 1926.)

ATLANTIC COUNTY CIRCUIT COURT.

JULIUS TAYLOR and JOSEPH  
L. SOLOFF, partners, trad-  
ing as TAYLOR & SOLOFF,  
*Plaintiffs,*

20

v.

MARY FREEDMAN,  
*Defendant.*

Action at Law.  
Rule for Judgment.

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This cause was tried before Judge Schimpf and a jury on this ninth day of November, 1925, and the Judge directed the jury to find in favor of the defendant and against the plaintiffs,

30

It is thereupon, on this 27th day of January, 1926, on motion of Cole & Cole, attorneys of defendant,

Ordered that judgment be entered in favor of the defendant and against the plaintiffs with defendant's costs to be taxed.

On motion of

COLE & COLE,  
*Attorneys of Defendant.*

NEW JERSEY COURT OF ERRORS AND  
APPEALS.

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JULIUS TAYLOR and JOSEPH L. SOLOFF, partners,  
trading as TAYLOR & SOLOFF,  
*Plaintiffs-Appellants,*

v.

MARY FREEDMAN,  
*Defendant-Respondent.*

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ON APPEAL.

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BRIEF OF PLAINTIFFS-APPELLANTS.

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These plaintiffs appealed from a directed verdict in the Atlantic County Circuit Court.

Plaintiff's complaint sets out that the plaintiffs are duly licensed real estate brokers in Atlantic City. The defendant was the owner of a piece of property in Atlantic City, upon which she was erecting, or about to erect, certain apartment houses. On the 28th day of September, 1922, defendant entered into an agreement to pay a commission of 3% to the plaintiffs for selling any or all of the buildings erected on the property, which said agreement is set out in Exhibit P1 (page 56, l. 1). Plaintiffs secured a purchaser for said buildings at the agreed

price of \$200,000, with whom the defendant and her husband entered into an agreement on the 29th of January, 1923, whereby the defendant agreed to convey said land and premises for the sum of \$200,000, and received on account of said agreement the sum of \$10,000. Said agreement provided that the buildings were to be completed in accordance with the revised plans and specifications of one Samuel Abramson, the architect and engineer of the defendant. Said agreement is marked Exhibit P2, and commences on page 56, line 20.

The complaint further sets out that the buildings were completed, but not in accordance with the plans and specifications, and the purchasers appeared at the settlement and offered to settle in accordance with the agreement, but the defendant was unable to comply with her agreement because she had wilfully, deliberately, capriciously, negligently and without the consent of the purchasers, or the plaintiffs, erected the buildings contrary to and in a manner not provided for in the plans and specifications; whereupon the defendant cancelled her agreement with the purchasers so secured by the plaintiffs, and returned their deposit money. Plaintiffs received on account of their commission the sum of \$2500, and this suit is brought for the balance of \$3500.

The answer of the defendant admits the making of the commission agreement, denies that the plaintiffs procured the purchaser, admits the making of the agreement with the purchaser, denies that the purchaser offered to settle and denies that the defendant wilfully, deliberately, capriciously or negligently and without the consent of the purchasers or the plaintiffs, erected the building contrary to and in a manner not provided for in the plans and specifications, and denies that the settlement did not take place because of her fault. The answer also denies

that the defendant cancelled the agreement, but admits the return of the deposit to the purchaser, and denies the obligation to pay the sum of \$3500.

By way of affirmative defenses the defendant sets up that the agreement provided for the commission to be paid at the time of settlement, and that there was no settlement without any fault on the part of defendant. It also sets up that after the making of the commission agreement referred to in the complaint, the plaintiffs entered into an agreement with the defendant in consideration of the defendants entering into the agreement with the purchaser, at a price less than the premises were worth, in the form which was introduced in evidence and marked Exhibit D1 (p. 77, l. 10), which said agreement was as follows:

“January twenty-ninth  
1923

Received from Mrs. Mary Freedman twenty-five hundred dollars (\$2,500.00) as part commission on the sale from Mary Freedman to Isadore Sinderbrand, *et al.*, balance of thirty-five hundred dollars (\$3,500.00) to be paid at the time of settlement, which is to take place at the Atlantic Guarantee Title & Insurance Company, Atlantic City, New Jersey, ten (10) days after entire completion of the operation, \$3500 to be paid in the event settlement takes place.

Taylor & Soloff,  
J. L. Soloff.”

The answer also sets up that the purchaser refused, without right, to perform the agreement, or make settlement.

The plaintiff's reply sets up that the failure of the settlement was due to the fault of the defendant; that the second commission contract, to wit: The contract marked Exhibit D1, is without considera-

tion; that the contract does not relieve defendant of her obligation to pay, where the failure of the settlement to take place is due to the fault of the defendant, and also denied that the failure of the settlement was not due to the fault of the purchasers, but was solely the fault of the defendant.

The evidence established the making of the commission agreement, Exhibit P1, the procuring of a customer for the property by the plaintiffs, the making of the agreement of sale (p. 22, l. 5), and the receipt of \$2500 on account of the commission. It was also proven that at the time the agreement with the purchaser was entered into by the defendant, the foundation had just been poured, and that subsequently ten 2-family apartment houses were erected on the property (p. 23).

The testimony showed that the purchasers went to the settlement, demanded a conveyance, in accordance with their contract, and stated that they knew that the buildings were not completed in accordance with the plans and specifications. The defendant asked in what manner the buildings were not completed in accordance with the plans and specifications, whereupon two statements were produced by the purchasers made up by architects showing the deviations from the plans and specifications, and the purchasers then said, "Now, if you can deliver these buildings the way we want them, in accordance with your plans and specifications, we will go through with the deal," and they made a tender of the balance of the purchase money and demanded that the properties be delivered in that way. The deed was tendered and not accepted (p. 27, l. 8).

The plaintiffs offered in evidence two of the reports of the architects showing that the buildings were not completed in accordance with the plans and specifications, and a copy of which had been handed to Mrs. Freedman at the time of settlement.

This offer was refused, and the papers were marked Exhibits P3 and P4 for identification respectively. The testimony as to the offers is found on page 28, line 10, &c., and page 29, line 1, &c. The exhibits are on pages 61 and 64, respectively. The refusal is made one of the grounds of appeal.

One of the purchasers, Sinderbrand, testified that he examined the plans and specifications before he purchased the building (p. 32, l. 25), and that when he was told by the defendant that she was ready for settlement he advised the defendant that the buildings were not completed in accordance with the plans and specifications (p. 35, l. 12), and that he had engaged architects to examine the buildings and advised the defendant of the report of the architects. Subsequently to the effort at settlement, the defendant returned to the purchaser, Sinderbrand, the deposit money he had paid (p. 40, l. 4), and he gave to her a quit-claim deed (p. 40, l. 22), which quit-claim deed is printed on page 77, line 28, &c.

Plaintiffs offered in evidence the plans under which the buildings were to be built, for the purpose of laying a foundation that would establish that the buildings were not built in accordance with them, through the fault of the defendant. This offer was overruled and an exception taken (p. 47, l. 20, &c.) and that refusal has been made one of the grounds of appeal.

The defendant's architect was asked whether or not the premises were built in accordance with the plans and specifications, to which an objection was made and sustained, which ruling is also made one of the grounds of appeal (p. 48, l. 15).

At this point the Court required the plaintiffs' attorney to make a statement of the testimony that he proposed to offer, which would be ruled on, without the formality of interrogating witnesses.

“The Court: I have suggested to you several times that you offer the testimony on the record—you, not the witnesses; that you simply make a statement that you offer to prove the following facts and give me an opportunity to rule. Suppose you begin by saying ‘I do offer to prove on behalf of the plaintiff the following facts.’

Mr. Hanstein: All right. In the first place, that Mrs. Miller, the daughter of this defendant, Mrs. Freedman, went down and took the place of her mother, Mrs. Freedman, in overseeing the construction of these apartments, and that Mrs. Freedman, on some occasions, was with her; that these two, either one or the other—and if it was Mrs. Miller, she was acting as the agent of Mrs. Freedman—these two substantially changed the manner in which those buildings were being constructed, narrowed or varied them in a substantial way from the way in which the plans and specifications called for, and that it was entirely their own doings; that Nedleman was the contractor and was interested in this building operation as a part owner in it, and that he was the contractor who had charge of the constructions, and that he changed the plans and specifications in the manner in which this building was going up—I do not mean changes, but I mean these variations in the way in which that building was being constructed from the original plans and specifications was substantial variations; that that resulted in a saving of money to these people, to Mrs. Freedman, from which the inference is easily reached that they were done for their own benefit. Now, I think that is what I propose to prove by Mr. Abramson.

We also propose to prove as part of our case what we have to a certain extent shown; that Sinderbrand went to the settlement, tendered himself ready to settle, demanded these properties in accordance with the plans and specifications; that Freedman never made any offer to correct this building so as to make it conform and that Freedman was the cause of her own changes in the plans and specifications, unable to deliver to Sinderbrand the buildings in accordance with the plans and specifications, and that the failure of that settlement in view of Sinderbrand's tender, was due entirely to the fault of Mrs. Freedman. We want to offer to prove, too, that Freedman returned the deposit money and Sinderbrand's expenses" ( p. 50, l. 20, to p. 51, l. 30).

The offer of testimony was overruled and made one of the grounds of appeal.

Plaintiffs also offered in evidence the file in the suit of Samuel Abramson v. the same defendant, Freedman, which was a mechanic's lien suit filed by defendant's architect against the defendant for architect's commissions, to which the defendant filed an answer and a counter-claim. The counter-claim alleges that the buildings were not completed according to the plans and specifications, through the fault of her architect. These pleadings are marked Exhibits P8 and P9 for identification and are found on pages 80 and 82, respectively. That offer was also refused and the refusal made one of the grounds of appeal.

The defendant merely offered in evidence Exhibit D1, which is set out in full above, rested her case and moved for the direction of a verdict on the part of the defendant, which was allowed and an exception taken, which is also one of the grounds of appeal.

## ARGUMENT.

## I. ADMISSION OF TESTIMONY.

The first question presented by this appeal is the propriety of the action of the Court in excluding the testimony offered by the plaintiff. The complaint alleged that the failure of the settlement to take place was due to the fault of the defendant in failing to complete the buildings in accordance with the plans and specifications. The defendant denies this, and sets up that the purchasers had arbitrarily and without right refused to perform the agreement of sale and make settlement. The issue as to whose fault it was that the settlement did not take place was thereby very sharply made an issue.

The question asked by the plaintiff of the defendant's architect, Abramson, as to whether or not the buildings were built in accordance with the plans and specifications was clearly within the pleadings competent and relevant, and the exclusion of the question error. The refusal is the fourth ground of appeal.

The Court, required, as pointed out above, that the plaintiff make a general statement of the testimony that was intended to be produced without calling the witnesses. The offer made in that way was intended to show that the defendant had substantially changed the manner in which the buildings had been constructed from the way called for by the plans and specifications, which changes resulted in the saving of money to the defendant. That offer of testimony was also refused, though clearly within the issue raised by the pleadings and thoroughly competent.

The pleadings in the suit of Abramson v. Freedman were offered in evidence and refused. That was a suit by the architect of the defendant against the defendant herein in which the defendant counter-claimed against her architect setting up that the buildings were not completed in accordance with the plans and specifications through the failure of the architect, whereby the defendant in that suit was damaged. Those pleadings were competent for the purpose offered and were relevant to this issue, and the exclusion harmful error.

It can be substantially said that all of the testimony excluded by the Court fell within the same category. The purpose of the offer of all of it was to show that there had been a variance from the original plans and specifications, through the fault of the defendant, as a result of which the purchaser refused to settle. The same argument that would apply to the exclusion of any of it, would apply to all, and it is submitted that the exclusion was harmful error, for it prevented the submission of the question of fault to the jury.

It is perhaps only fair to the trial Judge to state that his reason for the exclusion of this testimony was that it was not in his opinion, at all material whose fault it was that the settlement between the defendant and her vendee did not go through. His idea seemed to be that the writing, offered by the defendant, "D1," must be so construed that the plaintiff was not entitled to recover, regardless of whose fault it was that the settlement never took place.

The plaintiff's view of the construction that should be placed on Exhibit "D1" is entirely different, and it is submitted that the true construction of that writing justifies a judgment in favor of the plaintiff where the failure of the settlement to go through was due to the fault of the defendant. Under that

view the testimony above referred to which goes to the determination of the question of who was at fault, should have been admitted.

## II. CONSTRUCTION TO BE GIVEN TO "D1."

The next point for determination is the construction to be given to the defendant's Exhibit "D1." In the first place, Exhibit "D1" recites that the balance of thirty-five hundred dollars (which is the amount the plaintiffs are suing for) is to be paid at time of settlement, and at the end there is written, "Thirty-five hundred dollars to be paid in the event settlement takes place." That agreement is dated the same date as the contract of sale entered into between the defendants and their purchaser, and the plaintiffs had, at that time, fully performed all the work that they were called upon to do by the original commission contract made between them. The time of settlement referred to in Exhibit "D1" was to be ten days after the entire completion of the operation. At that time the purchasers came in and tendered themselves ready, willing and able to perform, but no settlement took place, because the buildings were not completed in accordance with the plans and specifications.

*On this appeal, all the evidence which was or should have been admitted, and all inferences fairly deductible therefrom favorable to the appellants must be accepted as true, and all inferences unfavorable to the appellants must be rejected.*

*D'Aloia v. Unione Fratellanza*, 84 N. J. L., 683;

*Andre v. Mertens*, 88 N. J. L., 626;

*Simon v. Myers* (Pa.), 130 Atl., 256.

Therefore, for the purpose of this argument, it must be considered that the failure of the settlement was due to the fault of the defendant.

In *Hinds against Henry*, 36 N. J. L., 328, the commission agreement was that the broker was to receive any amount over twelve thousand dollars that the property would bring. The property was sold for three thousand dollars in excess of that, and the terms for the payment of commission were fixed: first half of that amount at the time the purchasers pay the first half of the purchase money, and the balance at the expiration of one year from the date of the deed for the property, without interest. The commission agreement was made the day after the broker had procured a purchaser for the property, and the agreement of sale had provided for the conveyance of the title free and clear. There was, at the time of the making of the agreement, an outstanding tax title. This was known to the broker, and because of that cloud on the title the purchaser refused to settle. In a suit for the commission, the Court gave judgment for the defendant. Justice Depue in reviewing that judgment stated as follows:

“By the contract in this case, the defendant obligated himself to pay the commissions agreed on—one-half at the time the purchasers of the property should pay the first half of the purchase money and the balance at the expiration of one year from the date of the deed, without interest. In an action on an obligation of this kind, the pleader must aver, and it must be proved at the trial, that the contingency on which the debt is payable has happened, or that it was defeated through some *fault of the obligor*. *Holdipp v. Otway*, 2 Saunders 106; *Walker v. Tirrell*, 101 Mass. 257; *Moffatt v. Laurie*, 15 C. B. 583. The contingency on which

the plaintiff's compensation was dependent has never arisen. To excuse the absence of proof on this subject, the plaintiff relies on a class of cases which hold that the obligee is relieved from the necessity of proving performance of the condition, where performance has been prevented by the act of the obligor. The cases on this subject are quite numerous. *Malins v. Freeman*, 4 Bing. (N. S.) 395; *Doe v. Bancks*, 4 B. & Ald. 401; *Blanche v. Colburn*, 8 Bing. 14; *Hall v. Conder*, 2 C. B. (N. S.) 22; *Inchbald v. The Western Co.*, 17 Ib. 733; *Harler v. Carpenter*, 2 Ib. 56; *Young v. Hunter*, 2 Seld. 204; *Harlstone on Bonds*, 49. But they will be found, without exception, to be cases in which the obligee (*should be obligor*) has prevented the performance of the condition by some wilful or fraudulent act, in violation of his own undertaking, express or implied."

In the case of *Rauchwanger v. Katzin*, 82 N. J. L., 339, the commission agreement provided that the commission was to be *paid on the day of settlement*. The plaintiff procured a purchaser, ready and willing to settle, but owing to the objection of the defendant's wife to convey, and the further fact that the defendant insisted as a condition of settlement that the plaintiffs reduce their claim for commission, no "day of settlement" was ever reached or fixed, and upon that ground, the defendant contested the payment of plaintiff's claim for commissions.

Justice Minturn held that the plaintiff is entitled to recover, unless upon the authority of *Hinds v. Henry*, *supra*, that right is claimed. In commenting upon *Hinds v. Henry*, Justice Minturn said:

"The rule thus enunciated was not intended to work injustice by putting it within the power

of a vendor, after the agent has fulfilled his part of the contract, to postpone indefinitely the day of settlement, and thereby deprive the agent of the fruits of his labor, and enable the vendor to profit by his own malfeasance. *Actus legis nemini facit injuriam.* Milbourn v. Ewart, 5 T. R. 381."

The judgment in favor of the broker was there sustained.

In *Steinberg v. Mindlin*, 96 N. J. L., 206, the defendant agreed to pay to the plaintiff a commission "if he shall be instrumental in procuring a purchaser for my property, etc." "This agreement shall hold good only if the property is sold to a purchaser introduced to me through Mr. Steinberg."

The broker procured a purchaser, with whom the defendant agreed as to the terms of sale. After the agreement was thus reached, the defendant refused to execute the contract of sale unless the broker would abate his commission, which the broker refused to do, and therefore, the matter fell through. The defense was that the agreement should be good only if the property is sold to the purchaser introduced to the defendant through the plaintiff, and in as much as there was no sale there could be no recovery.

The case turns upon the meaning of the word "sale," and Justice Trenchard held that no meaning should be given to that word that the seller could utilize to deprive the broker of commission, which the seller had agreed to pay.

The judgment in favor of the broker was affirmed.

This case demonstrates the attitude of the Court towards the construction of an instrument in a manner that will permit the seller to so act as to prevent a broker from receiving his commission after his work has been done.

In the case of *Dubrow against Hornstra*, 95 N. J. L. 288, the commission agreement provided for the payment of \$500.00 to the broker, \$300.00 when the first payment of \$1000.00 was completed, and the balance of \$200.00 as the first three monthly payments were paid. The agreement to pay the commission is dated the same date as the written offer to sell the property. When the time for the execution of the formal contract between the parties arrived, the vendee refused to complete because he claimed he had just discovered that the plaintiff was to receive a commission from the defendant in addition to the commission which the vendee had paid. Within a day or two thereafter the attorney for the purchaser entered into an agreement with the defendant for the purchase and sale of the property for a price the same as agreed upon before after deducting the commission of \$500.00, and the attorney thereupon leased the property to the original purchaser procured by the broker. The issue therefore, was whether the defendant had entered into a scheme with the attorney to defraud the plaintiff of his commission by preventing the consummation by conveyance of the sale originally procured by the plaintiff.

The Court said:

“If Hornstra wrongfully interfered to induce the Central Supply Company to repudiate the contract (*Brennan v. United Hatters*, 73 N. J. L. 729; *Jonas Glass Company v. Glass Bottle Blowers' Association*, 77 N. J. Eq. 219) or himself refused to convey (*O'Neill v. Supreme Council, Am. L. of Honor*, 70 N. J. L. 410; S. C., 76 Id. 585) he could not by his own wrong escape liability for the commissions and *Dubrow* would be excused from further performance.”

In *Ludwig v. Aberbach*, the opinion in which was filed March 2, 1926, and is reported in Vol. 4 of the Miscellaneous Reports, page 169, the commission agreement provided for the payment of the commission *on the delivery of the deed*. The search disclosed the fact that the title was defective in that the buildings on the property encroached upon the street line, whereupon the prospective vendee refused to take title to the property, and the defendant refused to pay to th plaintiff any commission. The Court said:

“It was the fault of the prospective vendor that there was no delivery of the deed. The plaintiff has performed all that he was called upon to perform under his contract, namely, to procure a purchaser who was ready, willing and able to buy. This fact is not denied. The reason for non-delivery of a deed was directly due to the defendant’s inability to give a good title. The plaintiff ought not be made to suffer on that account. If it was intended that no commission was to be paid unless an actual sale was consummated by the delivery of a deed, it should have been explicitly so stated in the contract. The agent has a right to rely on his principal being able to give a perfect title to a prospective purchaser. If the principal was not in such a position, then he ought not be permitted to escape paying the commission agreed upon by reason of his inability to deliver a good and sufficient deed for the property.

The judgment below in favor of the broker was sustained.

Certainly the use of the words “on the delivery of the deed” are as strong as the words “In the event settlement takes place” and if the broker was

held to be entitled to his commission in the above case, even though the deed was not delivered, where it was the defendant's fault, certainly he is entitled to his commission in this case. The contingency in both cases was the same. The fault in both cases was the same, and in this case perhaps even stronger, for the acts of the defendant leading to her failure to comply with her contract were deliberate.

In *Lehrhoff v. Schwartzky*, 2 N. J. L. Miscellaneous Reports, page 353, the contract provided that the commission was to be paid *on the date of closing title* to the premises. The title did not pass upon the day fixed, for the reason that there were some imperfections in the title, and the vendor refused to convey, although the vendee tendered the purchase money. The defendant's suit for commission rested entirely upon the construction to be given to the commission contract, the contention being that the commissions were not to be paid unless the title to the property had actually passed from the prospective vendor to the prospective vendee. The Supreme Court, in sustaining the judgment for the broker held that the payment of commission was not made dependent upon the actual passing of title, and cites *Rauchwanger v. Katzin*. The Court also said:

“Undoubtedly, a vendor may protect himself against paying commissions until an actual sale of the property has been made by the passing of title by using words to that effect, but even then it might be questionable whether he could properly escape liability if he capriciously refused to carry out his bargain.”

In this pending case the defendant, it must be assumed, deliberately changed her buildings from the plans under which her vendee bought.

The intention of the parties to this writing is obvious. The defendant did not want to pay any com-

mission if the purchaser procured by the plaintiffs defaulted, and therefore, the provision, in regard to the \$3500.00 to be paid in event of settlement, was inserted. It is not conceivable that the plaintiff contracted with the defendant having in mind that the defendant could, of her own volition, and at any time, do anything that she saw fit to relieve herself of the obligation to settle, and thereby prevent the plaintiffs from recovering the commission which they had earned. The contingency that both parties were considering was a possibility of the default on the part of the vendee.

In *Hinds v. Henry, supra*, the broker knew at the time he entered into his commission contract that there was a possibility that the settlement would not be completed because of the outstanding encumbrance, for he had executed the contract with the vendee on behalf of the vendor, and so it is readily seen that he contracted with that contingency in mind. It is inconceivable in this case that the plaintiffs would have contracted with the contingency in mind that the defendant could do something that would prevent a settlement taking place, and then assert that as a defense to the claim for commission.

All the cases in this state, that have been examined by counsel, in which the right of a broker to recover has been denied, where his right to commission depended upon a contingency, were cases in which the purchaser was at fault.

### III. EFFECT OF DEFENDANT RELEASING VENDEE.

After the time fixed for settlement had passed, the defendant released the purchaser from his contract, and returned to him his deposit, and the purchaser evidenced his release of the defendant by delivering to her a quit-claim deed.

The contract of sale procured by the plaintiffs and which was the very thing for which they had been employed, was entirely abrogated by the action of the defendant.

In *Haber against Goldberg*, 92 N. J. L., 367, the commission agreement provided for the payment of a commission "to be paid on the date set for the delivery of the deed." No deed was ever delivered, and in a suit for the commission, the defendants claimed that the contract was based upon the contingency of title passing, which had not taken place. The reason that there was no settlement, was because the defendant was taking back, as the consideration for his conveyance, another piece of property, the title to which, it developed, was defective. The defendant sued his vendee for a breach of the contract, and recovered damages. Chancellor Walker, speaking for the Court of Errors and Appeals, said:

"Now, in the case at bar, the conveyances agreed to be made between the parties to the agreement of sale were not executed and delivered, and that for the reason that the title of the third party to the premises to be conveyed by him to the defendant was ascertained to be defective and unmarketable. However, the broker's commission cannot be defeated because title did not pass, for, by suing the third party for a breach of the contract between them and recovering damages therefor, the defendant, as between himself and the plaintiff, was not entitled to repudiate his undertaking with the latter for compensation for negotiating the very contract which was the basis of that suit."

In *Simon v. Garber*, 3 N. J. Miscellaneous Reports, page 150, the Court said:

"If the owner and the customer found by the

broker agree upon terms, the broker's right to a commission cannot be defeated by the owner, relieving the purchaser from carrying out his contract of purchase."

In *Dermody v. New Jersey Realties, Incorporated*, 128 Atlantic, page 265, the commission agreement provided for the commission to be paid at the time of passing title. The purchaser procured by the broker was unable to settle, and he paid \$1000 to the defendant in addition to the deposit paid, and mutual releases were exchanged. The defendant was in no wise at fault.

Chancellor Walker, speaking for the Court of Errors and Appeals, said:

"Where a real estate agent produces a purchaser able to buy, who is accepted by the vendor, with whom he enters into a contract, but afterwards defaults and settles with the vendor by the payment of a sum of money as damages for his breach of the contract, the agent's commission under his contract with the vendor is earned, notwithstanding it was stipulated to be paid at the time of passing title, which did not pass, because the contract of settlement substitutes payment of damages to the vendor, in the place of the purchase money stipulated in the contract of sale and purchase, which contract was brought about by the agent's services."

In *Somers v. Wescoat*, 66 N. J. L., 551, Justice Fort said:

"Chief Justice Beasley stated the rule of law in this class of cases as follows:

'It is certainly true, as a rule of law, that, under ordinary circumstances, where a broker, employed to sell property, brings about an introduction of a buyer and when a negotiation,

resulting in a purchase, ensues on that foundation, the owner and buyer cannot by any arrangement, disappoint the claim of the agent for remuneration.' *Vreeland v. Vetterlien*, 4 *Vroom*, 247."

This pending case is even stronger than *Haber v. Goldberg*, and *Dermoty against New Jersey Realities, Incorporated, supra*. Here the purchaser procured was not at fault. The seller was at fault. In order to relieve herself from the obligation of a contract, upon which she had defaulted, she settled with the purchaser procured by the plaintiff. The settlement was made by the return of the deposit, plus expense money.

"A. Why, there was an arrangement made that they were to return the deposit plus some expenses that we had and we were to give them a quit-claim deed and they were to release us from performance of the contract.

Q. I see. Now, that was the agreement.

A. Yes" (*S. C.*, p. 42, l. 12).

So we see that in one case where the vendee was at fault and the vendor successfully sued him and in another case where the vendee was at fault and settled with the vendor, the brokers were permitted to recover their commissions. How much stronger is this case where the vendor, being at fault, settled with the vendee in order to be relieved of her obligation to settle? The vendor substituted a new method of settlement with her vendee, different, it is true, than the settlement contemplated originally, but certainly one to her satisfaction—but none the less a settlement. Her doing so should not be permitted to relieve her from her obligation to pay these plaintiffs.

It is, therefore, respectfully submitted:

1. The evidence offered by the plaintiffs was improperly excluded, and the exclusion was harmful error.

2. Based upon the facts, which must be assumed to be true, the failure of the settlement between the defendant and her vendee, was solely the fault of the defendant.

3. Inasmuch as the failure of the settlement was the fault of the defendant, the plaintiffs are relieved of the obligation of showing the happening of the contingency referred to in the commission contract and are, therefore, entitled to be paid their commission.

4. By the defendant releasing her vendee from his contract she made herself liable to the plaintiffs for the agreed commission.

In the light of the foregoing, it is respectfully submitted that the judgment below should be reversed.

THOMPSON & HANSTEIN,

*Attorneys for and of Counsel  
with Plaintiffs-Appellants.*





