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COMPLAINT.

NEW JERSEY SUPREME COURT.

WALTER C. SOOY and LIDA H. SOOY, *Plaintiffs*, v. CHARLES E. HENKELMAN, *Defendant*.	Action at Law. On Postea. Judgment for Plaintiffs and Defendant. Cole & Cole, Attorneys for Plaintiffs. Emerson L. Richards, Attorney for Defendant.

Charles E. Henkelman, the defendant in this cause was summoned to answer unto Walter C. Sooy and Lida H. Sooy, the plaintiffs therein, in an action at law upon the following complaint:

(Summons issued February 25, 1927.)

The plaintiffs, Walter C. Sooy and Lida H. Sooy, of the City of Atlantic City, County of Atlantic and State of New Jersey, say that:

FIRST COUNT.

1. On September 22, 1926, they entered into an agreement in writing with Charles E. Henkelman, defendant, for the sale of certain real estate for the agreed sum of $1,083,333.33 as will appear by copy of said agreement hereto, hereby made a part hereof and marked Exhibit "A."

2. By the terms of said agreement there was due and payable from the defendant to the plaintiffs on the 1st day of January, 1927, the sum of $5,000, which, although demanded, has not been paid.

Judgment will be claimed on this count for the sum of $5,000 with interest from January 1, 1927.

SECOND COUNT.

1. The averments in the first count are for brevity here repeated.

2. On the 19th day of January, 1927, six months' interest became due on the balance of the consideration which balance is the sum of $1,058,333.33; which interest has been refused notwithstanding demand has been made for its payment.

Judgment will be claimed on this count for the sum of $31,750 with interest from January 19, 1927, besides costs of suit.

COLE & COLE,
Attorneys for Plaintiffs.

EXHIBIT A.

AGREEMENT made this 22nd day of September, nineteen hundred and twenty-six, between WALTER C. SOOY AND LIDA H. SOOY, of the city of Atlantic City, county of Atlantic and state of New Jersey, parties of the first part, and CHARLES E. HENKLEMAN, of the city of Atlantic City, county of Atlantic and state of New Jersey, party of the second part.

1. Said parties of the first part, in consideration of the sum of TEN THOUSAND DOLLARS ($10,000.) do hereby agree to sell unto the said party of the second part all that certain tract or parcel of land situate, lying and being in the city of Absecon City, township of Galloway, county of Atlantic and state of New Jersey, as shown on a map attached hereto and made a part hereof, for the sum of One Million Eighty-three Thousand Three Hundred Thirty-three Dollars and Thirty-three Cents ($1,083,333.33). The land to be conveyed lies within the points designated by red lines shown on said map. Said sum of One Million Eighty-three Thousand Three Hundred Thirty-three Dollars and Thirty-three cents ($1,083,333.33) is to be paid as follows:— Ten Thousand Dollars ($10,000) on the execution of this agreement, the receipt whereof is hereby acknowledged; Fifteen thousand Dollars ($15,000) by a promissory note made by the party of the second part in that amount payable November 1, 1926; Five Thousand Dollars ($5,000) payable January 1, 1927; Five Thousand Dollars ($5,000) payable April 1, 1927, the balance of One Million Forty-eight Thousand Three hundred Thirty-three Dollars and Thirty-three Cents ($1,048,333.33) to be paid within ten years from the date hereof with interest thereon at the rate of six percent per annum, payable semi-annually, upon the unpaid balance, the interest to commence on July 19, 1926.

2. Said parties of the first part agree to grant and convey such portions of said tract from time to time during the term of this agreement upon the party of the second part paying to the parties of the first part the sum of money taxed in Schedule

8. It is understood and agreed that the stipulations aforesaid are to bear on and to bind the heirs, executors, administrators and assigns of the respective parties.

IN WITNESS WHEREOF, the said parties have hereunto interchangeably set their hands and seals the day and year first above mentioned.

WALTER C. SOOY (seal)
LIDA H. SOOY (seal)
CHAS E. HENKLEMAN (seal)

SIGNED, SEALED AND DELIVERED)
IN THE PRESENCE OF)
Albert C. Abbott.)

STATE OF NEW JERSEY,)
ATLANTIC COUNTY,) ss:

BE IT REMEMBERED That on this 22nd day of September, Nineteen hundred and twenty-six, before me a Master in Chancery of New Jersey, personally appeared Walter C. Sooy, Lida H. Sooy and Charles E. Henkleman, who, I am satisfied, are the vendors 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.

Albert C. Abbott,
M. C. C. of N. J.

ANSWER.

Charles E. Henkelman, of the City of Atlantic City, County of Atlantic and State of New Jersey, answering the complaint, says:

First Count.

1. He denies paragraph one.
2. He denies paragraph two.

Second Count.

1. He denies paragraph one.
2. He denies paragraph two.

First Defense.

Defendant, by way of further answer, says:

1. That on or about September 22, 1926, plaintiffs and defendant entered into an agreement whereby the defendant took an option to purchase the lands mentioned in Exhibit "A" attached to plaintiffs' complaint.

2. That on or about November 30, 1926, defendant informed the plaintiffs that he did not intend to exercise his option to purchase the said lands and that thereupon the said agreement became void and of no further force and effect.

SECOND DEFENSE.

1. That on or about the fourteenth day of December, 1926, in consideration that the defendant would pay a certain promissory note in the sum of Fourteen Thousand Dollars ($14,000.00) payable December 1, 1926, which was then overdue, the said plaintiffs agreed to and with the said defendant to cancel the agreement marked Exhibit "A" attached to plaintiffs' complaint, and then and there agreed that the said agreement should be void and of no further force and effect. In pursuance to said agreement, defendant fully paid and satisfied said note.

THIRD DEFENSE.

1. Defendant, after the execution of the agreement marked Exhibit "A," attached to plaintiffs' complaint, applied to the Chelsea Title and Guaranty Company, South Jersey Title and Finance Company and the Atlantic Guaranty and Title Insurance Company, of Atlantic City, New Jersey, to insure the title to the said lands mentioned in the said agreement, pursuant to the terms of said agreement.

2. The said South Jersey Title and Finance Company and Atlantic Guaranty and Title Insurance Company both refused to accept applications to insure the title to the said lands. The said Chelsea Title and Guaranty Company refused to insure the title to said premises to be good and marketable, clear of the usual printed exceptions, except outstanding interest in the Absalom Doughty tract as shown in paragraph three of said agreement. There are certain rights of way or public roads running through the land mentioned in said agreement, which right or rights of way would make impossible the development of said property, according to the scheme of development proposed by the defendant, which scheme of development was known to the plaintiffs at the time of the making of the agreement marked Exhibit "A." The said Chelsea Title and Guaranty Company refused to insure title in the plaintiffs of that part of the property lying between Kessler Avenue and Sooy Lane. The said Chelsea Title and Guaranty Company refused to insure the marketability of any of the meadow lands attached to the upland.

3. Neither the said Chelsea Title and Guaranty Company, South Jersey Title and Finance Company nor the Atlantic Guaranty and Title Insurance Company will insure the title to the lands mentioned in Exhibit "A" to be good and marketable and such that they, the said Title Companies, either, or any of them, would insure, and the said Title Companies, each, and all of them, have refused and do refuse to insure the title to said lands to be good and marketable, clear of the usual printed exceptions, except outstanding interest to a portion of said lands known as Absalom Doughty tract as shown in paragraph three of said agreement and defendant says the fact to be that the said plaintiffs do not have such good and marketable title to said lands so required, at his option, to be conveyed to defendant, in accordance with the provisions of the said agreement.

COUNTER-CLAIM.

Defendant will counter-claim against plaintiffs for the sum of twenty-five thousand dollars ($25,000.00) with interest, as follows:

1. On or about the twenty-second day of September, 1926, the plaintiffs entered into an agreement with the defendant, which agreement is marked Exhibit "A" and attached to plaintiffs' complaint, wherein the defendant, in consideration of the sum of ten thousand dollars ($10,000.00), then and there paid and the subsequent payment of the sum of fifteen thousand dollars ($15,000.00) by promissory note, which note the said defendant paid, obtained an option upon certain lands described in said agreement and represented by the plaintiffs to be owned by them, according to the provisions of the said agreement.

2. That title to said lands was not good and marketable and such as either the Chelsea Title and Guaranty Company, South Jersey Title and Finance Company, or Atlantic Guaranty and Title Insurance Company would insure.

3. That the said Title Companies refused and still refuse to insure the said title as aforesaid, whereupon, by reason of the said agreement, the moneys hereinbefore paid were agreed by the plaintiffs to be returned to the defendant, but notwithstanding that the defendant has applied to the said plaintiffs for the return of the said money, the said plaintiffs have refused and still refuse to return

the said sum of twenty-five thousand dollars ($25,000.00) so due and owing by reason of the provisions of the said agreement marked Exhibit "A," whereby the said defendant demands of the said plaintiffs the sum of twenty-five thousand dollars ($25,000.00) together with interest thereon from the date of the payment thereof, together with costs of suit.

Judgment will be claimed for the sum of twenty-five thousand dollars ($25,000.00) with interest from November 1, 1926.

EMERSON L. RICHARDS,
Attorney for Defendant.

(Filed April 14, 1927.)

REPLY.

Plaintiffs join issue on the answer of the defendant.

FIRST DEFENSE.

1. Paragraph one is admitted.

2. Paragraph two is denied.

SECOND DEFENSE.

1. Paragraph one is denied.

THIRD DEFENSE.

1. Paragraph one is denied.

2. Paragraph two is denied.

3. Paragraph three is denied.

AS TO COUNTER-CLAIM.

1. Paragraph one is admitted.

2. Paragraph two is denied.

3. Paragraph three is denied.

COLE & COLE,
Attorneys of Plaintiffs.

(Filed April 21, 1927.)

TESTIMONY.

SUPREME COURT.
ATLANTIC COUNTY.

WALTER C. SOOY and LIDA H. SOOY,
Plaintiffs,
v.
CHARLES E. HENKELMAN,
Defendant.

(The above-entitled case was tried November 14, 1927, before HONORABLE WILLIAM FRANK SOOY, Judge, and a jury.)

PARTIAL TRANSCRIPT.

APPEARANCES:
MESSRS. COLE & COLE, for the plaintiffs.
EMERSON L. RICHARDS, ESQ., for the defendant.

Mr. Cole: I move to strike the first offense. We submit that an inspection of this agreement shows it is not an option; that it is a binding contract of

itself, so binding indeed that not only does he agree to pay the money, but he agrees to improve the property. It is a mutual contract on its face, not unilateral, and it is under seal. I submit it cannot be said or cannot possibly be interpreted to be an option, and, therefore, that defense is sham on its face and I move it be stricken.

Mr. Richards: The answer is that he admitted paragraph one, in which it is alleged to be an option. No motion to strike can be made after the subsequent pleadings are filed under the statute. Now, the first defense was filed and it was answered. Now, after the answer your Honor cannot strike. All motions to strike must be made before the answer is filed and not afterwards, and in this case the first paragraph that on or about September 22, 1926, plaintiff and defendant entered into an agreement whereby defendant took an option to purchase, is admitted.

Mr. Cole: No admission goes beyond the facts that are pleaded. My understanding is that this motion may be made at any time under the practice.

The Court: I do not understand it can be made unless you reserve your right in your pleadings to make it. If you file an answer either joining issue or denying or admitting, without giving notice of a reservation to strike, I do not think the Court has the right to deal with it as a motion to strike, and for that reason I will overrule the motion and allow an exception.

Mr. Cole: Exception.

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

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

Mr. Cole: We offer in evidence the agreement upon which the action is based, to which there is attached map referred to.

Mr. Richards: Objected to on the ground that it does not conform either with the opening of the counsel or with the complaint, in that it is not an agreement for the sale of lands; that there is no covenant pertaining to money; that there is no covenant in the contract for the payment of interest.

The Court: There is no objection to the formal proof?

Mr. Richards: No objection to the formal proof.

The Court: The contract will be admitted and exception noted.

Mr. Richards: Exception.

(The agreement offered with map attached is received in evidence and marked as one exhibit for the plaintiff, P1.)

PLAINTIFF RESTS.

(In Chambers.)

Mr. Richards: I move for a non-suit on the ground that the agreement does not tend to prove the allegations in the complaint, in that it is not an agreement to purchase land; that there is no agreement on the part of the defendant to pay the sums of money that are now in dispute. There are two counts and I will address myself to the second count first.

The Court: With reference to interests?

Mr. Richards: Yes; and the reason for that is this—that the contract itself says that the parties of the first part, in consideration of the sum of $10,000 (which, of course, is agreed to have been paid) do hereby agree to sell unto the said party of the second part all that certain tract and parcel of land. So that your Honor will note that there is no correlative agreement to buy as is usual in contracts of sale, and nowhere in the document is there a covenant on the part of the defendant to buy. So that the contract to that extent is unilateral.

The second clause says that the parties of the first part agree to grant and convey such portions —such portions of such tract from time to time during the term of such agreement upon the party of the second part paying to the parties of the first part the sum of money taxed in Schedule A and made a part hereof. So that there was only an agreement to convey by his paying certain sums of money in the attached schedule. You see, therefore, the contract was merely—not a contract of sale but a contract to deliver a deed to these various parcels of land when payment was made for them, except an outstanding interest.

"It is mutually agreed between the parties that the party of the second part shall have the right to occupy said land ——" That does not bring it within the rule.

It is agreed that the title shall be a good and marketable title except the outstanding interest, with a provision that he can take part of the land if he can get insurance to that.

The next paragraph simply relates to the fact that upon the filing of the map agreed to be conveyed, the party of the second part may lay out streets and proceed with the development there.

Mr. Cole: Not "may," but "shall."

Mr. Richards: "If the said party of the second part shall fail to perform this contract," *et cetera.* We will argue, of course, that that was the usual penalty clause for the failure of an option; that it of course, is an elected remedy upon the part of the plaintiff. But it has this significance. There is no proof in this case now of a tender of a deed and, therefore, his failure to tender a deed, demand the balance of the consideration, leaves him to his elected remedy which presumably he has taken, and that is the re-possession of the property. So that for that reason there must be a non-suit, and for the other reasons, particularly the one concerning the option I refer your Honor to a large number of cases. There is none in this State directly upon the point involved in the non-suit. (Citing 165 Pacific 265; Black v. Mannix, 104 Georgia; 120 Iowa 218; 109 Minnesota, 139; 82 Mississippi, page 180; 57 Nebraska, 378; 57 New York, 599; 210 Pennsylvania, 109; 51 Texas, 214; 32 Washington 418.)

Mr. Cole: May it please your Honor, this complaint is based clearly and wholly on this contract. The contract provides that on January—some date —1927, $5000 is to become due. The complaint says that it has not been paid. It further provides that every six months there shall be interest paid on the balance due on the principal. That we say was not paid. Now, an inspection of the agreement would show that that payment was due as alleged. There is no presumption that it was paid, no pretense or anything else. An inspection of the complaint will show that there was a balance due on the principal as alleged, so that the interest for that six months' period for the year 1927 is due, there being no presumption of payment and the burden being on them to show it.

Now, if that is an option, it may be that there is force in what counsel says. I maintain it is not an option; but if ever there came a time when the defendant in this case availed himself of the option by his action, to show that he intended to convert it into an absolute right, enforcible—he has exercised the option and made himself obliged to pay what he agreed to pay. Whether this is an agreement merely in the nature of an option or whether it is an agreement to buy depends on the nature of the contract taken as a whole. It is mutual on its face as between these parties, and signed by them. All through this agreement there is use of the word "mutual." The parties treated this as mutual.

I call your attention to this: That on this motion to non-suit, all you have is the agreement in evidence, and the fact that the money has not been paid. Now, that money became due. There is

nothing in this case to show this man said, "I am not going to exercise this option"; so that the motion for non-suit cannot prevail. If, later on, it should appear that he said, "I am not going to exercise this option," and your Honor says it is an option, then it might be we cannot collect any future payment; but until something appears in the case that before this money became due he said: "I waive my right to buy,"—then if he loses this money the contract is still binding upon us. Under the proof as it now stands, even if your Honor determines this to be an option, and if he didn't repudiate this agreement and say he did not intend to exercise this option before this payment became due, he is bound for it.

Mr. Richards: There is no proof of payment here. He has put in an agreement here and rested on the agreement, and there is no word of proof in this case at the present moment of non-payment of anything.

The Court: It seems to me that the agreement is nothing more than an option. I cannot consider it any other way. It is admitted that $5000 was not paid, and under the terms of the agreement, there being no obligation on his part to pay it, I cannot see why they should have to go to a defense.

Mr. Cole: If your Honor is going to grant the non-suit, this non-suit is to be granted on the ground solely that this is a mere option; therefore, that Henkelman was not obliged to pay, although there is no evidence at this time that he had undertaken to rescind or retreat from the option.

Mr. Richards: I don't want your Honor to be tied up with my friend's interpretation of your decision. I am insisting on all of the grounds; but what your Honor may grant the non-suit for, of course, does not necessarily bar me from the other grounds.

The Court: I am granting the non-suit on the ground that the agreement between the parties was an option on the part of Henkelman to purchase with no obligation on his part to make the payment now sued for.

Mr. Cole: Note an exception.

Mr. Richards: Now we still have our counterclaim.

DEFENDANT'S CASE.

CHARLES E. HENKELMAN, the defendant, called as a witness in his own behalf, being sworn, was examined and testified as follows:

Direct examination.

By Mr. Richards:

Q. Mr. Henkelman, where do you live?
A. Atlantic City.
Q. Did you sign this contract that was offered in evidence, P1?

A. Yes.
Q. Now, after that contract was signed, did you apply to the Chelsea Title & Guarantee Company for title insurance upon this property?
A. I did.
Q. When did you first apply for the title insurance?
A. Immediately after signing.

Mr. Cole: I want to raise the fundamental objection now to this line of proof on the ground that by the terms of this agreement the plaintiffs were not required to make a conveyance short of the period of ten years, and that if they could give title either within the third or the fifth paragraph of the complaint under the option agreement, we were in position to perform our contract. Therefore, any proof looking to establish that some time prior to that date we could not give a good and sufficient title, or the other, is not admissible in evidence; and I make the further objection that there is no averment in this complaint which says application was made at once, which is one of the provisions in the contract, that would entitle them, if at all, to recover the money paid. In other words, they have not shown themselves to be within the terms provided in the contract.

The Court: There was no objection taken to the pleadings, and I assume that can be proved ——

Mr. Cole: We do not have to take objection to the pleadings. We are objecting to any proof that goes beyond the immediate allegation in the complaint. It does not say when that application was made. In order to make it good it would have to be at once under the terms of their contract.

The Court: They are entitled to submit proof as to when they made it.

Mr. Cole: Allow me an exception. I ask that it be stricken and the witness required to give a date.

The Court: Yes, you are entitled to have the date.

Q. Do you remember the date on which you first made an application to the title company?

Mr. Cole: And will you tell us, please, which title company?

Q. The Chelsea Title Company?
A. Yes.
Q. What was the date?
A. 22nd of September.
Q. What year?
A. 1926.
Q. And what is the date of the contract?

The Court: September 22, 1926.

Q. Is that the same date that the contract was made?
A. Yes, sir.
Q. Whom did you see on that occasion?
A. Mr. Lambert.
Q. Who is Mr. Lambert?
A. Title officer for the Chelsea Title Company; secretary.
Q. Did you conduct any negotiations with Mr. Lambert relative to this title insurance?

A. Yes, I did.
Q. How long did those negotiations continue?
A. Off and on for a period of about six months.
Q. What was the nature of those negotiations?
A. I was trying to get ——

Mr. Cole: It is a question of whether they would or would not insure.

The Court: You can hardly bind Mr. Sooy with conversations he may have had with Mr. Lambert.

Mr. Richards: Except that this is not a contract in which a third party is the arbiter between the two parties.

Q. Well, on this first occasion, did Mr. Lambert agree to issue a policy of insurance?

Mr. Cole: I object. It cannot bind us.

The Court: I sustain the objection.

Q. On this occasion when you applied for this policy, on September, 1926, did the title company issue you a policy?
A. No.

Mr. Cole: I think we have a right to know what this witness said to the title officer. That must be a conclusion, "applied," and if it was in writing, we are entitled to have that.

The Court: The objection comes too late. He testified before, quite some time before, in regard to that.

Mr. Cole: I objected to that and your Honor overruled my objection.

The Court: I will permit this question.

Q. (Repeated by the stenographer): On this occasion when you applied for this policy, in September, 1926, did the title company issue you a policy?
A. Did they issue me a title policy at that time?
Q. Yes, yes.
A. No, sir.
Q. Have they ever issued you a title policy?

Mr. Cole: Objected to.

The Court: Objection overruled and I will allow an exception.

Mr. Cole: Exception.

A. They issued me a policy ——
Q. This is the title policy I am talking about, Mr. Henkelman.
A. Yes, they issued a policy; at least, they examined it and would not issue a policy.

The Court: That will be stricken out.

Q. The question is, did they issue you a policy, yes or no?
A. No.
Q. Will you tell us whether or not they have refused to issue you a policy?
A. They have.
Q. And did they tell you why?
A. Yes.

Mr. Cole: Who? Who?

Q. Did Mr. Lambert, the title officer, tell you why?
A. Yes.

Mr. Cole: I object.

The Court: I will let him say yes or no and he says yes.

Q. Now, have you ever demanded the return of the $10,000 and the $15,000 that you paid to Mr. Sooy, from Mr. Sooy?
A. Through Mr. Jeffers.

Mr. Cole: Well, I ask that the answer be stricken.
The Court: Strike it.

Q. Did you instruct your counsel to make such a demand?
A. Yes.
Q. Who was your counsel?
A. Mr. Jeffers.

Cross-examination.

By Mr. Cole:

Q. Who had this map made?
A. I don't know.
Q. Didn't you?
A. No, sir.
Q. It was attached to this paper when you signed it, wasn't it?
A. Yes, sir.

Q. You saw it?
A. Yes, sir.
Q. Where was that paper signed?
A. In the office of Mr. Abbott.
Q. Mr. Albert C. Abbott?
A. Yes, sir.
Q. Did he represent you?
A. No, sir.
Q. Mr. Sooy?
A. Yes, sir.
Q. And he drew that for Mr. Sooy, did he?
A. Yes, sir.
Q. Now, where did you see Mr. Lambert on September 22, 1926?
A. In his office in the title company.
Q. Did you file a written application for title?
A. Not at that time.
Q. That is the time I am talking about. Did you file written application for title on September 22, 1926?
A. No, sir.
Q. What time of the day was it?
A. About three o'clock in the afternoon, if I remember correctly.
Q. Who were present?
A. Mr. Lambert and his assistant.
Q. Do you remember his name?
A. I don't recall his name.
Q. Tell us what you said to Mr. Lambert?
A. I told him that I would like to get the search and a title policy on this property and I said: "Now, what is it going to cost?" He said: "It will cost you about $10,000." I says: "What for?" I said: "That is an awful lot of money for a search; never heard of such a thing before." "Well," he said,

"those things are so complicated and require so much time that it costs a lot of money." "Well," I said, "I will have to report back to the stockholders and see if they want to pay that," and that ended the conversation. There wasn't much more to that.
Q. What did you show him? You said that you wanted the search made. What did you show him?
A. He knew.
Q. I didn't ask you that. Did you show him anything? Did you show him your agreement?
A. I had it with me at that time.
Q. Did you show him your agreement?
A. I don't remember.
Q. Well, you went there to have insured the title to the land described in that agreement, didn't you?
A. Yes, sir.
Q. And you didn't show it to him?
A. I think I did show it to him.
Q. Well, now, what makes you think now you did, and a moment ago that you didn't?
A. Well, I didn't say that. I said I didn't remember that he had not seen it; but I must have shown it to him.
Q. Well, why do you say "must?"
A. Because what would he know that I wanted insured?
Q. You said a moment ago, however—have you not already said that you didn't show it to him; that he knew what you wanted insured? Now, you say if you did not show it to him he would not have known. Why did you say he did know?
A. Because he had this under advisement on previous occasions.
Q. Now, after he had supplied you with this figure, when did you next go to see him?

A. About a week later.

Q. On the occasion of September 22, 1926, did you tell him to proceed to prepare to insure that title?

A. No, sir.

Q. You told him you had to see the stockholders?

A. Yes, sir.

Q. And you didn't go there until a week afterward?

A. Yes, sir.

Mr. Cole: That is all.

Re-direct examination.

By Mr. Richards:

Q. You continued these negotiations for some time and then finally did you pay the $10,000 or some other sum?

Mr. Cole: Objected to as leading. We are entitled to know the facts.

Mr. Richards: That is all. No further questions.

(Witness excused.)

WILLIAM G. LAMBERT, called as a witness on behalf of the defendant, being sworn, was examined and testified as follows:

Direct examination.

By Mr. Richards:

Q. Are you an officer of the Chelsea Guarantee & Title Company?

A. Chelsea Title & Guarantee Company, yes, sir.

Q. And what is your office in that company?

A. Secretary and title officer.

Q. Now, is it part of your duties to accept or reject applications for title insurance?

A. Yes, sir, ordinarily, and sometimes with the advice of the solicitor, although that is not necessary.

Q. Now, then, did you have some negotiations with Mr. Henkelman about searching the title to the property shown on this map attached to this agreement that has been offered in evidence?

Mr. Cole: I object. It is not a question whether he had negotiations.

The Court: I will permit it as preliminary.

Q. (Repeated by the stenographer): Now, then, did you have some negotiations with Mr. Henkelman about searching the title to the property shown on this map attached to this agreement that has been offered in evidence?

A. I should like to see the agreement.

Q. Right in front of you there.

A. (After examining paper:) Yes.

Q. Have you agreed to insure that title?

Mr. Cole: I object. That question only becomes important when they have made application for insurance at once.

The Court: Well, I will receive it, expecting that this line will be pursued.

Mr. Cole: Allow me an exception.

Q. (Repeated by the stenographer): Have you agreed to insure that title?
A. No.

The Court: When you say "you," you mean the title company?

Mr. Richards: The title company, I mean.

Q. Will the title company issue a policy of insurance covering this property free and clear of its usual printed exceptions?
A. No.
Q. Will you tell us what the procedure is ——

Mr. Richards: Strike that out.

Q. When Mr. Henkelman first applied to you for insurance did he sign any sort of a formal application?
A. I think not.
Q. Did he negotiate with you concerning this application for insurance?

Mr. Cole: I object. I think we have a right to have what was said.

Mr. Richards: I am going to ask him that.

Mr. Cole: Negotiation is a matter of conclusion.

The Court: You are entitled to have the conversation.

Q. Do you remember when you had the first conversation with Mr. Henkelman concerning this—may we call it the Normandy Shores property?
A. I couldn't be positive of the date, but it was some time during the month of September, 1926.
Q. What was said by Mr. Henkelman to you and what did you say to him relative to the insurance of the title at that time?
A. We told him at that time that it would be necessary to make a cursory examination of the title before we could give him a report of any kind; but that we had been applied to by someone else for title insurance and quoted a price of $10,000.
Q. Now, was that for the title insurance?
A. That would have carried with it $2,000 of liability only.
Q. If Mr. Henkelman paid that $10,000, did you agree to insure the title?
A. No, sir.

Mr. Cole: I object and ask that be stricken. It is leading and suggests an answer.

The Court: I will strike it.

Q. What I want to know is, Mr. Lambert, what conversation you had with Mr. Henkelman relative to the insuring of the title to this Normandy Shores property.
A. In September?
Q. In September.

A. None. Everything pertained to price at that time. All the conversation pertained to price.

Q. Would you, in September, have agreed to insure that title?

A. No.

Mr. Cole: I object. I do not think that is competent.

The Court: I think the proof should be limited to what was done, and as the result of what was done, what happened? Was application made, and was a search and an investigation made by the title company, and if so, with what result?

Q. After this first conversation did you have another conversation with Mr. Henkelman?

A. Yes.

Q. Relative to this title insurance?

A. Yes.

Q. At that time what did you tell him concerning this application?

Mr. Cole: When was it, Mr. Lambert?

A. Well, I presume that was still in September, and I think our conversation was entirely concerning the volume of the work involved and price.

Q. What was it you said about the volume of work?

A. That it would be necessary ——

Mr. Cole: I object.

Mr. Richards: We are entitled to the whole conversation on it.

The Court: I will permit it as preliminary.

A. It would be necessary to go back to the Council Proprietors of West Jersey and bring the title down through a very voluminous chain to the present time. I told him also of the difficulties we would have in making protractions with poor description, and that the work was well worth what we had asked for it.

Q. Now, this work that you speak of—what was this work that you proposed to do?

A. That was the examination of the title ——

Mr. Cole: I object.

The Court: I will permit it. It is preliminary.

A. (Continuing): Examination of the title to such a point that we might be able to tell him with what exceptions a title policy might issue from our company.

Q. Now, were there further negotiations concerning this $10,000 payment that you wanted?

Mr. Cole: Objected to. It seems to me the jury have a right to know the date and what the conversation was.

Q. Were there further conversations?

A. Yes, there were many conversations relative to the matter.

Q. And finally did Mr. Henkelman pay you some money or agree to pay you some money?

A. Yes.

Q. To make this preliminary survey?

A. Yes.

Q. How much did he pay you?

A. $6500 up to the present time.

Q. And did you make the search?
A. Yes, sir.
Q. Now, as the result of that search I think you said that you had refused to insure the title?

Mr. Cole: He has not said it yet.

Mr. Richards: What was the first question I asked him?

The Court: He said it.

Q. (Repeated by the stenographer): Now, as the result of that search I think you said that you had refused to insure the title?
A. We had not refused to insure the title. We had refused to insure ——

Mr. Cole: Now, that is the answer.

Mr. Richards: We are entitled to the whole answer.

The Court: I think it is responsive.

Mr. Richards: Exception.

Q. Do I understand you to say that you have not refused to insure the title to the property shown in that map free and clear of your usual printed exceptions?

Mr. Cole: I object on the ground that the understanding of counsel is of no moment.

The Court: Oh, I will permit him to explain.

A. No, you don't understand that.
Q. Well, then, what do you mean by the answer to my former question in which you said that the company ——
A. I did not finish the answer. I was stopped.

The Court: Supposing you finish it now.

A. We didn't refuse to insure the title but we did refuse to insure the title free of exceptions.
Q. What exception do you propose to make to the title before you insure it?
A. Tenure of present occupants; claim for a survey, and reserving the right to take further exceptions as that survey produced; taxes, municipal liens; then there would be an exception as to the meadow part, as to overlapping and conflicting surveys that we cannot guarantee against. There is some avenue in there dedicated by reason of having filed a map. There is a portion of the land which was conveyed by quit-claim which our title company won't pass, a piece of meadow land. There is another portion of the land which the Sooys never did take title to. Galloway Township owns a portion in there, and by survey of the original Proprietors in 1810, I think it was. That is about all.

(Recess until 1.30 P. M.)

AFTER RECESS (1.30 P. M.).

WILLIAM G. LAMBERT, recalled.

Direct examination (resumed).

By Mr. Richards:

Q. Were there any other exceptions that occurred to you since lunch time?

A. Yes. I think there are a couple of rather serious exceptions that would have been noted. It is impossible in a great many instances to identify the land conveyed by certain deeds. Therefore, it would be necessary to take an exception to any portion of this particular tract that may have been conveyed by other deeds, the descriptions for which cannot be definitely determined. In addition to the street that I said had been cut through there and dedicated by the filing of a map, there is also a lane running from the meadow up to the upland reservation back in 1865, and there are exceptions in some of the old deeds in 1865 and around 1865 excepting certain acreage, but not describing that acreage. It is impossible to determine in those cases whether or not it affects any portion of the land.

Q. Now, Mr. Lambert, did you, yourself, prosecute this search, or was it turned over to someone else to make the actual search?

A. The actual search ——

Q. The details of which you have just reported to us.

A. The actual search was made by Mr. William H. Wallace on special contract work.

Q. How long did it take you to do this work?

A. When did we report that to you, do you recall? About September, I think; from March until about September

Q. Of what year?

A. 1927.

Q. Did you make a full report in September of 1927?

A. If I recall, it was in September or October.

Mr. Cole: I object. The question is whether they refused to insure the title.

Q. When did you finally report to Mr. Henkelman or his counsel that you would refuse to insure the title except with these exceptions in the insurance policy?

A. The final report was either in September or October of this year.

Q. That was after this suit was started?

A. I really don't know when this suit was started. When was the suit started, Judge, do you know?

Mr. Cole: February, 1927.

Q. Do you remember whether or not you made a preliminary report to counsel after the suit was started in February, 1927?

A. Yes, there were several preliminary reports made.

Q. And the final report was not made until September of this year?

A. Or October.

Q. Or October. And was the search prosecuted during all that time?

A. Yes, sir.
Q. And before that time?
A. Yes, sir.
Q. Now, look at this map which was attached to the agreement. Will you tell us, in view of the exceptions that you have just detailed, would it be possible to convey a good and marketable title to the land delineated upon that map?

Mr. Cole: Objected to. We are entitled to have the facts upon which he bases his opinion; and, in the second place, it is a question whether they will insure the title or not.

The Court: I sustain the objection.

Q. Mr. Lambert, how long have you been in the title business?
A. Nineteen years.
Q. And during that time have you had occasion to pass on many titles?
A. Oh, yes.
Q. About how many, have you any idea?
A. No; I don't believe I could even guess. It runs into the thousands.
Q. And is it your business to determine whether or not a title is a marketable title?
A. Yes, sir.
Q. Now, will you tell us whether or not in view of the exceptions that you have just detailed—whether or not this is a marketable title to the lands delineated on that map?

Mr. Cole: Objected to. It is not a question of what his opinion may be. It is a question of what the Court's and jury's opinion may be on the testimony.

The Court: I think we are entitled to have the facts, and from the facts it seems to me it becomes a legal question as to whether or not it is a marketable title.

Mr. Richards: We have already delineated the exceptions.

The Court: Yes. He has said what the exceptions were, and, of course, that could be put in a hypothetical question.

Mr. Richards: Well, I will ask an exception because I think his opinion is some evidence. It may not be the best evidence, but it is some evidence of the marketability of the title.

Q. Now, taking this map, will you show us on the map the exceptions to which you have referred, in a general way?
A. I don't believe I can show you on that map. I have another map which we work with, which is really our working map.

Mr. Cole: I shall object to any testimony by this witness as to exceptions. It seems to me the limit is as to whether or not they would insure this title.

The Court: I think he is entitled also to show the except of the exceptions. Whether or not they have the effect that is contended for them I cannot tell until I find out what they are.

Mr. Cole: The Court of Errors seems to say it does not make any difference. If the title company says, "We won't insure," I think that is the end of it. The question is, did they refuse to insure the title?

The Court: If counsel are both agreed that that is the only question, of course, the Court is absolutely satisfied and will limit the testimony to that phase of the case. So that the understanding between counsel is that the question as to whether or not the title company would or would not insure is the question for determination.

Mr. Cole: That is the issue they have made.

The Court: All right.

Mr. Richards: Well, if it is limited to that ——

Q. Have you refused to insure the title free and clear of the printed exceptions?
A. Yes.

Mr. Richards: Cross-examine.

Cross-examination.

By Mr. Cole:

Q. Did Mr. Henkelman file with you an application written for the insurance of the title to all the land?
A. Yes, sir.
Q. Will you produce that, please?
(Witness produces a paper.)
Q. You produce it, do you?
A. Yes, sir.
Q. And it is dated third month, eighth day, '27?
A. Yes, sir.
Q. Is that the correct date?
A. Yes, sir.

Mr. Cole: I offer this in evidence.

(Paper offered is received in evidence and marked as an exhibit for the plaintiff, P2.)

Q. Is this application the first written application you got for the insurance of this title?
A. Through Mr. Henkelman; yes, sir.
Q. When did you begin to work to ascertain whether you would insure this title?
A. For Mr. Henkelman?
Q. Of course, Mr. Lambert, we are talking about Mr. Henkelman. We are talking about this application.
A. On or shortly after March 8, 1927.
Q. Now, what did you have other than this application as the basis for your investigation?
A. A copy of the agreement which has been submitted.
Q. Have you that with you?
A. Yes, sir.
Q. Produce that, please.
A. Beg pardon, I don't have it with me. Do you know whether we have it, Mr. Wallace?

Mr. Wallace: It was turned back to Mr. Jeffers.

Mr. Richards: Is that the one you had? (Handing paper to witness.)

The Witness: Well, either that or one very similar to it. It looks like the one.

Q. You think this is the one?
A. Yes, sir.

Mr. Cole: I offer this.

(The paper offered, being the agreement with map attached, is received in evidence and marked as one exhibit for the plaintiff, P3.)

The Court: Is that the same as the other one?

Mr. Richards: Exactly the same as the other one.

Q. Was the map attached at the time you received the agreement?

A. Yes, sir.

Q. And Mr. Henkelman is the one who left this agreement and the map attached with you?

A. Yes, sir.

Q. Were you ever told after March when this written application was filed, and before September, 1927, by Mr. Henkelman, to discontinue your work?

A. No, sir.

Q. Are you personally acquainted with the land?

A. I have driven by in my car.

Q. Do you know whether or not there are no buildings on the land?

A. No, sir.

Q. You mean you don't know or there are not?

A. I don't know.

Q. Were you furnished with a survey of this land by Mr. Henkelman?

A. No, sir.

Q. Did you make a survey or did you have a survey made for him?

A. No, sir.

Q. Now, have you any record of the date in September when he first approached you about this property?

A. No, sir.

Q. Any record made at all in your office about it at that time?

A. No, sir.

Q. It is the custom, is it not, that in matters of this character a written application should be filed?

A. Yes, sir.

Mr. Richards: Objected to, and I ask that be stricken.

The Court: It is late.

Q. What did Mr. Henkelman say to you when he came to you in September, 1926?

Mr. Richards: Objected to on the ground it is irrelevant.

The Court: I will permit it.

Mr. Richards: Exception.

A. Whether or not in the first conference or in the second ——

Q. I am speaking now of the first time, if you can recall, what he said to you; because if you can't ——

A. I don't recall the incident whether it was the first or second conference; but if you want to answer that way, I can ——

Q. How long a time intervened between the first and the second conference?

A. A week or ten days I would think.

Q. Now, can you recall what took place at the second conference?

A. No, sir. I don't know whether it was the first or second which I can recall.

Q. Well, you do recall something which took place at one or the other of the conferences?

A. Yes, sir.

Q. But you cannot fix which conference?

A. That is right.

Q. Well, now, then, tell us what you recall he said to you.

A. He produced a copy of the agreement and asked us at what price we would examine the title and subsequently issue title insurance on that tract of land.

Q. And what did you say?

A. I told him that we would have to make an examination to see if we could cut down from a price of $10,000 formerly given to another applicant, and it was left that way at the time.

Q. And what did he say with respect to that? What did he say after you said that to him?

A. He asked if I didn't think $10,000 was a great deal too much money to pay for the examination.

Q. Was that all?

A. Well, my reply to him then was to the effect I didn't think so, because there was a great deal of work involved; we had to go back to the beginning of titles in New Jersey, and the indefinite description would make very much work.

Q. Did he tell you he was coming back?

A. Yes, sir.

Q. What did he say?

A. He said that he would have to put it up to some associates of his, or perhaps a corporation, I don't know which; someone, anyway, and come back and let me know.

Q. How many acres are in the entire tract?

A. I really don't know that.

Q. Approximately?

A. I don't know that.

Q. Did your search include all the lands?

A. Yes, sir.

Q. And did your investigation include all the lands?

A. Yes, sir.

Q. Was your company willing to insure any part of the property?

A. Yes, sir.

Q. Which part? Can you state it on the map, what your company was willing to insure?

A. Now, we weren't ready to insure any part free of all exceptions.

Q. Now, keeping in mind the part of this land that you had in mind when you said in answer to my recent question that the company was ready to insure a part of the title—having that in mind, what is the exception that you say you would place in the policy as to that?

A. Well, the printed exceptions, and I presume that is about all.

Q. Just the printed exceptions?

A. Yes, sir.

Q. And you know there were no occupants on this land, don't you?

A. No, sir.

Q. You don't know that this land was wholly unimproved?

A. No, sir.

Q. Did you ever report to Mr. Henkelman that you would not insure this title?

A. Yes, sir.

Q. When did you make that report?

A. Well, the final report was made either in September or October of this year.

Q. Now, will you point out on your map, please —and you might put it on the board so the jury can see it—the land that you say you would have insured except what you call the printed exceptions?

Mr. Richards: How can this now be an issue in view of the apparent ruling a few minutes ago, that the whole question was whether they would insure?

The Court: But I think he is entitled to pursue this line of examination to find out just what they would and would not insure.

Mr. Richards: I have no objection so long as I may meet it in some way.

Q. Now, Mr. Lambert, would you mind putting a map on the easel and point out on the map what you say ——

The Court: Hadn't you better take the other map down if you are not going to use it?

Mr. Richards: Why not put up the other map and take this one down; because this one has the agreement attached.

The Witness: That question, however, can be answered very much better by the examiner; because it involved going through a great deal of work with which he is more familiar.

Q. Don't you know?

A. I know there are some lands in there, but I will have to go through the title ——

Q. What I want to know is if you know. If you don't know, say so and we will get someone else.

A. Well, I don't know offhand. I will have to go through the title.

Q. Are we to understand that you cannot now while on the stand, point out to the jury what land your company was willing to insure within the usual printed exceptions?

A. No, sir; I cannot.

Q. Did the subject of the issuance of this title come to the attention of the board of directors?

A. Yes, sir.

Q. Or do you wholly determine not to insure?

A. No, sir. It came to the attention of our solicitor and also the executive committee.

Q. And the refusal to insure was the result of what, your own judgment or theirs?

A. My own judgment supported by theirs.

Q. Now, from what source did you get a description to know against what to search?

A. Protractions.

Q. Nothing more?

A. That is all, I think.

Q. Did you call on Mr. Sooy for any of his papers?

A. I don't know that. I didn't conduct the examination personally.

Q. Did you call on him?

A. No, sir.

Q. Did you ever ask him to assist you in investigating this title?

A. No, sir. I didn't investigate the title.

Q. Did you ever call on him to aid you or anyone else in the title company in the investigation of this title?

A. No, sir.

Q. Now, since the map is on the easel, will you tell us what those lines mean? For example, there

is an enclosure here and the letter "F" in what I call red. Do you know what that means?

A. Yes. They are title lines and the letters are keyed to our title papers.

Q. Is all this coloring within the title lines?

A. Yes, sir.

Q. Who is there that can tell us as to what land the company would have insured?

A. I think Mr. Wallace can tell you.

Q. Is he here?

A. Yes, sir.

Q. Mr. Lambert, do you know who made this map accompanying the agreement?

A. No, sir.

Q. Did Mr. Henkelman tell you who did make it?

A. No, sir.

(Witness excused.)

WILLIAM H. WALLACE, called as a witness on behalf of the defendant, being sworn, was examined and testified as follows:

Direct examination.

By Mr. Richards:

Q. Mr. Wallace, what is your business?

A. Title examiner.

Q. How long has that been your business?

A. Forty years.

Q. In case some of the jurors don't know, what is the business of title examining?

A. Well, the running of the records in order to find out whether a title is defective or not.

Q. Have you been engaged in this business continuously for practically forty years?

A. Every day.

Q. And do you hold any office with any title company at the present time?

A. Yes, sir.

Q. What one?

A. Title Guarantee Company of New Jersey.

Q. Where is that located?

A. Newark.

Q. And have you done any work of any particular description for the Chelsea Title Company?

A. Yes, sir, during the past three years.

Q. What kind of work did you do for them?

A. Most intricate; that could not be handled by their force.

Q. In other words, if a hard title along here, they get you to go through that?

A. Yes, sir.

Q. Now, were you given this title to this Normandy Shores proposition to investigate for the Chelsea?

A. Yes, sir.

Q. Did you make that investigation?

A. I did.

Q. Now, will you give us in a detailed way just what you reported to the Chelsea Company—by the way, whom did you report it to?

A. Mr. Lambert.

Q. Now, will you give us that detailed report of that examination and what you found?

Mr. Cole: I object to it. It is not of any importance to tell us the detailed report.

Mr. Richards: His cross-examination of the previous witness went into the question of what was insurable and what not.

The Court: I will permit this question owing to paragraph 3.

Mr. Cole: Exception.

Q. Now, will you tell the jury, if you can, about these exceptions, and do you want to use these maps for that purpose?

A. No.

Mr. Richards: I offer the map on the blackboard.

(The map offered is received in evidence and marked as an exhibit for the defendant, D2.)

Mr. Richards: I would better offer this one.

(The map offered is received in evidence and marked as an exhibit for the defendant, D3.)

Q. Now, will you tell the jury if you can about these exceptions?

A. The exceptions are all enumerated on a list of questions which I prepared and which is here. I would like to refer to it.

The Court: To refresh your recollection?

The Witness: I would like to; yes, sir.

Q. And talk real loud so that the jurors can hear over here, Mr. Wallace.

A. (Referring himself to paper):

POSTEA.

This cause was brought on for trial before Judge William Frank Sooy, Circuit Court Judge, and a jury, at the Atlantic Circuit on November 14, 1927.

And the plaintiffs having submitted their evidence, and the Court, being of opinion that it was not sufficient to entitle them to recover, ordered judgment of non-suit to be entered against them.

And the defendant having moved the Court for leave to submit to a voluntary non-suit on his counter-claim, the said motion was granted, and judgment of voluntary non-suit was ordered to be entered against the defendant on his counter-claim.

Whereupon it is adjudged that the complaint of the plaintiffs be dismissed, and it is further adjudged that the counter-claim of the defendant be dismissed, without costs.

Judgment entered November 28, 1927.

(No Costs.)

WM. S. GUMMERE,
C. J.

JUDGMENT.

NEW JERSEY SUPREME COURT.

WALTER C. SOOY and LIDA H. SOOY, *Plaintiffs,* v. CHARLES E. HENKELMAN, *Defendant.* No Costs.	Action at Law. On Postea. Judgt. for Pltffs. & Deft.

It is ordered that judgment of non-suit be and hereby is entered in favor of defendant and against the plaintiffs, on the plaintiffs' complaint, and on non-suit in favor of plaintiffs and against the defendant on the defendant's counter-claim, without costs.

Entered November 28, 1927.

On motion of
EMERSON L. RICHARDS,
Attorney for Defendant.
COLE & COLE,
Attorneys for Plaintiffs.

A true copy.
EDWARD J. KELLEHER,
Clerk.

NOTICE AND GROUNDS OF APPEAL.

(Filed December 15, 1927.)

NEW JERSEY SUPREME COURT.
ATLANTIC COUNTY.

WALTER C. SOOY and LIDA H. SOOY, *Plaintiffs,* v. CHARLES E. HENKELMAN, *Defendant.*	Action at Law. Notice and Grounds of Appeal.

To Emerson L. Richards, Esq., Attorney for Defendant:

Take notice, that the plaintiffs appeal from the whole of the judgment entered in this cause on the following ground:

1. Because the Judge directed a non-suit when he should have allowed the plaintiffs' case to be submitted to the jury.

COLE & COLE,
Attorneys of Plaintiffs-Appellants.

Dated November 28, 1927.

[ENDORSED]

Due and legal service acknowledged
this 3rd day of December, 1927.
Emerson L. Richards,
Attorney for Defendant.

New Jersey Court of Errors and Appeals

WALTER C. SOOY and LIDA H. SOOY,
Plaintiffs-Appellants,
v.
CHARLES E. HENKELMAN,
Defendant-Respondent.

ON APPEAL FROM ATLANTIC COUNTY CIRCUIT COURT.

APPELLANTS' BRIEF.

STATEMENT.

This cause was tried before Judge Sooy at the Atlantic Circuit, and at the conclusion of plaintiffs' case he ordered a non-suit, and at the conclusion of the defendant's case on his counter-claim counsel took a voluntary non-suit. From the judgment of non-suit against the plaintiffs they appeal.

The action is grounded upon a written contract for the sale of real estate. The non-suit was ordered upon the theory that the agreement was only an option and not binding on defendant as a purchaser, or, in other words, that it lacked mutuality.

ARGUMENT.

THE AGREEMENT WAS MUTUAL AND OBLIGED THE PLAINTIFFS TO SELL AND DEFENDANT TO BUY.

The action was to recover the sum of $5,000 which by the terms of the agreement was payable January 1, 1927, and also interest on the remainder of the consideration of $1,058,333.33 from January 19, 1927.

What are the indicia of mutuality? The body of the agreement names plaintiffs and defendants as parties. All signed and all acknowledged. Paragraph 8 reads:

> "It is understood and agreed that the stipulations aforesaid are to *bear on* and to bind the heirs, executors, administrators and assigns of the respective parties."

Paragraph 1 provides:

> "Said sum of one million eighty-three thousand three hundred thirty-three dollars and thirty-three cents ($1,083,333.33) is to be paid as follows: Ten thousand dollars on the execution of this agreement, the receipt whereof is hereby acknowledged (this was paid); fifteen thousand dollars ($15,000) by a promissory note made by the party of the second part in that amount payable November 1, 1926 (the promissory note was given and finally paid); five thousand dollars payable January 1, 1927; five thousand dollars ($5,000) payable April 1, 1927, the balance of one million forty-eight thousand three hundred thirty-three dollars and thirty-three cents ($1,048,333.33) to be paid within ten years from the date hereof with interest thereon at the rate of six per cent per annum, payable semi-annually, upon the unpaid balance, the interest to commence on July 19, 1926."

Paragraph 4 reads:

> "It is mutually agreed between the parties hereto that the party of the second part shall have the right to use and occupy said lands during the term of this agreement."

Paragraph 5 reads:

> "It is further agreed between the parties hereto that the title to said premises shall be good and marketable and such that either the Chelsea Title and Guaranty Company, South Jersey Title and Finance Company or Atlantic Guaranty and Title Insurance Company, of Atlantic City, New Jersey, will insure. If the said title companies refuse to insure the title as aforesaid, clear of the usual printed exceptions, except outstanding interest as shown in paragraph #3 aforesaid, the party of the second part has the option of continuing with the agreement or surrendering the same, whereupon the parties of the first part agree to return such moneys as have been paid by him on account of the purchase price." &c.

Paragraph 6 reads:

> "It is understood and agreed that the party of the second part shall attend to the filing of the map of the lands agreed to be conveyed with the proper municipal authorities, and also to lay out the streets, curbs and sidewalks accord-

ing to said map without any cost or expense to the parties of the first part."

Paragraph 7 reads:

> "If the said party of the second part shall fail to perform this contract or any part of the same, said parties of the first part shall immediately upon such failure have the right to declare the same void and retain whatever may have been paid," &c.

Counsel for respondent and the Court stressed the fact that the agreement lacked the words: "And the party of the second part agrees to buy." While the contract does not contain these words, read as a whole it is much more than an option and has all the language that attends upon a contract mutual in character. There are too many indications as shown in the quotations above as well as others contained in the agreement to justify the conclusion that the whole agreement was optional on the part of the party of the second part, defendant-respondent. If it were purely optional the language in Clause 8 which binds the parties and their heirs would be meaningless. If they are not binding upon the respondent, how could they be binding upon his heirs?

By the terms of paragraph 6, the defendant expressly agrees to do certain important things. By paragraph 4 he had the right to use and occupy the land during the term of this agreement, and this he did as was shown in the development of the proof on his counter-claim. Then the language in paragraph 5 which gives him the option to retire in the event that plaintiffs should fail to do certain things excludes the notion that the agreement was nothing more than an option. If it was nothing more than

an option the language giving him the right to exercise an option to retreat was futile and meaningless. Moreover, he actually paid the first two payments aggregating $25,000 which of itself is enough to show that he exercised his option, if an option it was, and thereby bound himself by all the terms of the agreement.

By paragraph 2 defendant-respondent expressly agrees to pay all taxes and assessments against the premises. There is present in the agreement implied language to show mutuality and express obligations on the part of the defendant. The mere absence of language that he was to buy is without legal significance if, when the contract is read as a whole, it clearly manifests a binding obligation on his part to buy, &c. This, we maintain, is obvious. If it be an option, when was the defendant to avail himself of it? There is not a word in the agreement as to time or place. Vendors could not know from anything in the contract when defendant was to avail himself of the option. But, as stated, conceding an option, it was accepted when the payments were made as provided, and which preceded the payment upon which the action was instituted. That the parties intended a mutually binding contract is clear.

In paragraph 65 of *Williston on Contracts,* Vol 1, page 115, we have:

> "An offer for a unilateral contract generally requires an act on the part of the offeree to make a binding contract. This act is consideration for the promise contained in the offer and doing it with intent to accept without more will create a contract. But an expression of mutual assent is necessary to the formation of simple contracts as well as consideration, and the fact

> that the same act must also be a manifestation of acceptance by the offeree is not always observed. On the other hand, an offer for a bilateral contract requires a promise from the offeree in order that there may be a binding contract. This promise may be inferred from any words of the offeree indicating assent to the proposed bargain and, generally, must be found by interpretation of language which does not in terms state a promise. This is, the offeree will say or write 'I accept your proposition,' or words to that effect, instead of saying 'I promise to do what you request.' So that in bilateral contracts the fact that the offeree's acceptance is also a promise, furnishing the requisite consideration, is not always observed."

That the respondent accepted is beyond dispute by the fact that he made the payments referred to.

In support of our contention that the writing is mutually binding and not a mere option see *Howland v. Bradley,* 38 Equity, page 288, in this court affirming the decree in the Court of Chancery on the opinion of the Vice-Chancellor.

The judgment of non-suit should be reversed.

Respectfully submitted,
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NEW JERSEY
Court of Errors and Appeals.

WALTER C. SOOY AND LIDA H. SOOY,
Plaintiffs-Appellants,

vs.

CHARLES E. HENKELMAN,
Defendant-Respondent.

On Appeal from Atlantic County Circuit Court.

RESPONDENT'S BRIEF.

FACTS.

The facts involved in the case on appeal are not in dispute.

The plaintiffs, in their complaint, first count, allege that by the terms of the agreement therein recited the sum of five thousand dollars was due January 1, 1927, and that it had not been paid (p. 2, line 3, State of the Case). Second count, that there was due on January 19, 1927, by terms of the agreement referred to, $31,750 interest upon the sum of $1,058,333.33 which was not paid (p. 2, lines 13 to 20, State of the Case).

In support of this complaint, the plaintiffs offered and there was received in evidence the contract referred to in the complaint. The plaintiff then rested and no other evidence was submitted. The only question before the Court then was whether or not the defendant had, by the terms of the agreement, agreed to pay $5,000, January 1, 1927, and $31,750 interest January 19, 1927. Defendant moved for non-suit on the ground that the paper offered in evidence did not contain an agreement whereby the defendant was unconditionally obliged to pay the sums of money demanded.

ARGUMENT.

The contract (pages 2, line 30, to page 6, line 30, State of the Case) is an agreement between the plaintiffs and the defendant concerning a tract of land in Atlantic County called in the case "Normandy Shores." Paragraph one of the agreement reads in part as follows:

> "Said parties of the first part, in consideration of the sum of $10,000, *do hereby agree to sell* unto the said party of the second part all that certain tract," etc., "for the sum of $1,083,333.33 * * * to be paid as follows: $10,000 on the execution of this agreement, the receipt of which is hereby acknowledged; $15,000 by a promissory note made by the party of the second part; $5,000 payable January 1, 1927, * * * balance of $1,048,-333.33 to be paid within ten years with interest at the rate of 6 per cent. payable semi-annually upon the unpaid balance, interest to commence January 19, 1926."

The important considerations in reviewing this paragraph will be to note that while the plaintiffs agree to sell, *the defendant did not agree to buy,* the land described in the agreement; and while the price was fixed and $10,000 was to be paid in cash and $15,000 by note,

there was *no promise* by the defendant to pay any other sums of money.

While it forms no part of the proof in this case and had not been fully developed at the time of the taking of the non-suit in the counter-claim, there is a substantial reason why the agreement was thus framed and why the defendant was to assume no personal obligation. The reason was the defendant was obtaining an option that was to be turned over to the stockholders of a corporation that had previously defaulted in an agreement to purchase the land in question. The reason is given here because it gives a rational explanation of why there was no agreement to buy or to pay on the part of the defendant.

The contract is not to be interpreted by inference as contended for in appellants' brief. The question to be decided is does the contract *prima facia* show an express promise by the defendant to pay $5,000 on January 1, 1927, and interest on the million dollars on January 19, 1927? The contract contains no such promise and does not support the allegations contained in the first and second count of the complaint.

Plaintiffs in their brief now argue that the agreement by inference did obligate the defendant to pay the sums sued upon and that the agreement was one for the sale of lands, and calls to witness other parts of the agreement to show that such was the intention of the parties.

It is first submitted that if the contract was to be altered in its text to show an intent other than that expressed in the agreement, then the contract should first have been reformed to show the actual intent before being made the subject of a suit to recover money under the unreformed contract.

The defendant points to the fourth paragraph, which gives to the defendant the right to occupy the Normandy Shores property, and that paragraph six permits the defendant to file maps of the lands, and to lay out streets, curbs and side-walks, and that para-

graph seven gives the plaintiffs the right to declare the contract void upon failure by the plaintiff to perform "this contract or any part of the same."

Entry upon the land and the doing of work thereon might, under some circumstances, be evidence that the contract was intended to be one for the sale of the property, but such an inference is rebutted by other clauses in the contract. Paragraph two and paragraph three demonstrate that the contract only required that the plaintiffs should convey portions of the property when called upon by the defendant at any time within ten years.

> "Said parties agree to grant and convey such portions of the said tract from time to time during the term of this agreement upon the party of the second part paying the sum of money taxed in Schedule A."

and that (paragraph 3)

> "The plaintiffs are then, at their expense, to deliver to the defendant a deed of special warranty."

Clearly this was a mere option to purchase. Defendant did not get even an equitable title to the land. The $25,000 represented by the $10,000 in cash and the $15,000 note formed no part of the consideration for the purchase of the actual land nor apparently did the $5,000 sued upon or the $30,000 interest. Title to the land was only to pass upon the payment of specific sums of money when demanded by the defendant of the plaintiffs at any time within ten years.

That the defendants considered that the contract was an option is evident from the state of the pleadings. Defendant, in answering the complaint, denied the allegations in the first and second count, and continuing by way of further answer, alleged:

> "That on or about September 22, 1926, plaintiff and defendant entered into an agreement whereby the defendant *took an option* to purchase the lands mentioned in Exhibit attached to the complainant's complaint." (Page 7, State of the Case.)

To which the plaintiff filed a reply as follows:

> "Paragraph 1 is admitted."

So that in the state of the admitted pleadings, the paper submitted in evidence was an option and could form no basis standing alone for a recovery of the sums sued for.

2. **Is a contract that contains no specific agreement to purchase a contract for the sale of lands or an option?**

The above proposition does not seem to have been decided by any reported case in New Jersey. Such contracts have been the subject of judicial review in most of the States of the Union. And while the cases are not all in accord, the great majority of decisions are to the effect that where the seller agrees to sell but there is no specific agreement by the buyer to buy, then the contract is unilateral and amounts to nothing more than an option.

This may be so even where there are additional terms in the contract which require the buyer to do certain other things in connection with the contract. Illustrative of the interpretation of such contracts is that to be found in

Stelson v. *Haigler,* 165 *Pac.* 265.

There the contract read as follows:

> "The party of the first part sells and agrees to convey to the party of the second part by warranty deed and abstract brought down to date of transfer, the same to show a marketable title, the following described lands and waterways.
>
> "Full purchase price of the above lands and waterways being $131,000 to be paid as follows: $1,000 to be placed in escrow with the Exchange National Bank of Colorado Springs, to be turned over to the party of the first part upon the finding of marketable titles by the party of the second part; $30,000 on or about December 1, 1912; $100,000, March 1, 1928, the same to be evidenced

by a promissory note bearing interest at the rate of six per cent. per annum payable semi-annually, to be secured by a first mortgage covering the aforesaid lands and waterways."

There then followed provisions for a recision in case of a defect in title, that time was the essence of the contract, and that upon failure to perform on the day the contract should be "forfeited and determined."

The Court said:

"But under all settled rules of construction, the agreement between Stelson and Kloke was an option to purchase and not a contract of sale. Nowhere in the agreement does Kloke agree to purchase nor to make any payment nor to bind himself in any other respect aside from the forfeiture of the amount paid at the time the contract was made."

"It may be laid down as an established rule of law that unless the contract contains language which may reasonably be construed as an agreement on the part of the vendee to purchase the property, or to assume some obligation thereunder; it will be an option contract and not an agreement of sale and purchase. It is impossible to conceive of an agreement to sell and purchase without obligation on the part of the vendee to purchase; on the other hand the absence of such obligation is a distinctive characteristic of an optional contract. A contract of sale creates mutual obligations on the part of the seller to sell and on the part of the purchaser to buy, while an option gives the right to the purchaser within a limited time without imposing any obligations to purchase."

"The obligation by which one binds himself to sell and leaves it discretionary with the other party to buy is what is termed at law an option, which is simply a contract by which the owner of property agrees with another person that he shall have

the right to buy the property at a fixed price within a certain time."

Black v. *Maddox,* 104 *Ga.* 157.

"An agreement in which the owners of land undertook, in consideration of a specific sum to be paid as designated 'to sell and convey to the other party' or his assigns, the mineral interests in the land described, but containing no corresponding agreement of the party of the second part to buy and pay the stipulated sum, is a mere option."

Black v. *Maddox, supra.*

See also *Barnes* v. *Rea,* 219 *Pa.* 287.

"An application whereby one party, for a valuable consideration, binds himself to sell at a fixed price within a certain time, but makes it discretionary with the other party to purchase, is an option."

Neeson v. *Smith,* 47 *Wash.* 386.

"An option is not a contract to pay. It creates no enforcible indebtedness on the part of the person to whom it is granted."

Re Shields Bros., 134 *Iowa* 559.

"An agreement is only an option where no obligation rests on the second party to make any payment except such as may be agreed upon between the parties as a consideration to support such option, until he has made up his mind, within the time specified, to complete the purchase."

Brickell v. *Atlas Assur. Co.,* 10 *Cal. App.* 17.

An agreement reciting that the party of the first part has bargained and hereby sells and agrees to convey by warranty deed on or before a certain date to the party of the second part certain described realty, and to deliver possession before a certain date and that "if the second party shall fail to pay the second installment of the purchase price, this contract shall be null and void, and the

party of the first part shall keep said $50 as a forfeiture and damages" is an option.

Hopwood v. *McCausland,* 120 *Iowa* 218.

An agreement for the sale of real estate upon certain conditions precedent by which neither a legal nor an equitable title is conveyed to the purchaser and the provision for forfeiture showed it to be clearly the intention of the parties that such title should not pass until the purchase price was paid, is an option to purchase.

Brown v. *Thomas, 37 Kansas 282.*

In *Moore* v. *Allen,* 109 *Minn.* 139, many of the elements of the present contract were present. In that case the seller agreed to release by deed to the buyer at any time within three years the land described, which consisted of building lots at so much per lot. The party of the second part was to pay the taxes during the life of the contract and interest at the rate of 5 per cent. upon the full consideration price. He also had the right to build a house on each lot and to otherwise improve the lots; and that upon failure to complete his undertaking, the party of the first part should have the right to cancel the contract. Under this state of facts the Court held that the contract was an option and not an agreement of sale, since the buyer was not obligated to purchase.

The points of similarity, however, are that as in the instant case, the reputed buyer was obligated to pay the interest and the taxes and was given permission to improve the property. All three of these are relied upon by the plaintiff as evidence that the contract in the instant case is a contract of sale and not an option, but in the cited case the Court held that none of these things over-balanced the fact that there was no specific agreement to purchase.

"A mere right of entry upon the land for the purpose of improving it does not turn an option

into an agreement, and is not a controlling factor in the interpretation of such an agreement."

Dunaway v. *Day,* 163 *Mo.* 415.

"An agreement 'in consideration of the undertakings and agreements herein specified, the said party of the first part hereby agrees to sell unto the said party of the second part the following described real estate for the sum of $2,000,' etc., is a mere option."

57 *Neb.* 378.

A memoranda stating that A agrees to sell to B a certain house at a certain price is nothing more than an option.

Seidman v. *Rauner,* 99 *N. Y. Supp.* 862.

A contract which contains no agreement on the part of the second party to take and pay for the lands is a mere option, although it contains the further stipulation that both parties agree to comply with the above conditions.

Runck v. *Dimmick,* 51 *Tex. Civ. App.* 214.

In *Wheeling Company* v. *Elder,* 170 *Fed. Rep., p.* 215, the Court held a contract

"agree to sell and convey to H. C. Staggers, party of the second part, his heirs and assigns, all the coal, etc., in and under certain lands described, at a fixed price, etc."

was an option, not an agreement of sale.

3. The contract was unilateral.

Besides there being no agreement to purchase and no agreement to pay, there was no agreement on the part of the complainant to convey, except upon the performance of other conditions in the contract. Paragraph 3 provides that they shall convey "on receiving said payments, at the time and in the manner herein mentioned." Paragraph 4 provides that the title shall be such as either one of three specified title companies will insure.

"If the said title companies refuse to insure the title as aforesaid, the party of the second part has

the option of continuing with the agreement or surrendering the same, wherefore the parties of the first part agree to return such moneys as have been paid by him."

It is specifically provided in paragraph 5 as follows: *"Such title as parties of the first part have shall remain in them."* (Lines 14 and 15, page 5, State of the case. The contract then concludes with this paragraph:

"If the said party of the second part shall fail to perform this contract or any part of the same, the said parties of the first part shall immediately upon such failure have the right to declare the same void and retain whatever may have been paid, and all improvements that may have been made on said premises shall revert to the parties of the first part, *and this contract shall be considered null and void."*

This language is consistent only with the idea of an option, since the contract is to be absolutely void upon the failure of the party of the second part to perform the agreement. This is the usual language to be found in options.

4. The contract is in the alternative.

The party of the first part may retain whatever has been paid and all the improvements and the contract thereupon becomes null and void.

In *Brown* v. *Norcross,* 59 *N. J. Eq.* 427, *it was* held that "whether such a contract is an alternative one depends not upon the mere fact that the agreement contains such a clause, but upon the intent of the parties ascertained from the whole instrument with relation to the subject matter of the contract."

When, therefore, the contract contains no specific undertaking upon the part of the party of the second part, the conclusion must be that the clause making the contract void is a final indication of the character of the contract.

See also *Porter* v. *Williams,* 93 *N. J. Eq.* 88.

5. Acceptance.

Counsel says in his briefs that, assuming the contract was an option. It was accepted by the defendant by the payment of the $25,000. The $25,000, was paid at the time the contract was executed and was the consideration for the execution of the contract. Admittedly the defendant did nothing further in recognition of the contract. On the contrarry he refused to recognize it and this suit is for the balance of the moneys claimed to be due. How, under these circumstances, his payment of the option money could be construed as a ratification of the contract is beyond comprehension of counsel.

6. Plaintiff's contentions.

The only case cited in plaintiff's brief is *Howland* v. *Bradley,* 38 *N. J. Eq.* 288. This case is distinctly not in point because it was a suit by the party of the second part to enforce the agreement. Whether the writing was an opinion or an agreement was immaterial, because Bradley elected to enforce it if it was an option and had tendered performance. The only point being considered was—could the seller defeat Bradley's right to recover by reason of the clause that gave a third party a right to pass upon the title. As to this phase of the case, this Court approving the language of Vice-Chancellor Bird, said:

"It might have served either party to defeat the performance of the agreement, had either taken advantage of it; *it certainly would have availed the Complainant."*

What the Court might have done with the Bradley agreement if Bradley had refused to perform it is entirely another matter; the case merely being authority for the proposition that the seller cannot defeat the right of the buyer to exercise an option by alleging that he cannot give a good title. The Court of Errors and Appeals has very recently agreed with this viewpoint.

7. Tender.

There has been no election upon the part of the plaintiff to treat the contract as an agreement of sale. There is no proof in the record that he ever made any tender of a deed to the premises in order to entitle him to the recovery of any part of the purchase money. This is a suit for the purchase money. If this could be treated as an agreement for sale and a breach upon the part of the defendant, then the plaintiff should have elected to demand the entire purchase money and to have offered a deed in exchange therefor. The fact that he did not do so demonstrates that he considered that the contract was an option.

CONCLUSION.

It is respectfully submitted that the learned Circuit Court Judge was correct in directing a non-suit. No evidence had been presented as to the circumstances under which the contract in question had been made or how the parties had treated the contract—whether as an option or an agreement. There was nothing before him but the bare agreement.

There was no tender of performance on the part of the plaintiff. There was nothing to show a demand on the part of the plaintiff requiring the defendant to perform.

The pleadings *distinctly admitted that the contract was an option.* There was no specific agreement to pay the money sued for.

The legal effect of agreement in which the party of the first part agrees to sell, but there is no corresponding agreement to buy, is that the contract is unilateral and creates no obligation upon the second party to purchase.

Two tests might be suggested to determine whether or not this was a contract to sell.

1. If it was a contract to sell, then the seller could have required the buyer to specifically perform the contract. Obviously under the terms of the contract he could not have had specific performance since, under paragraph 2 of the agreement, the party of the first part was to convey only "such portions of said tract from time to time during the term of this agreement, upon the party of the second part paying to the parties of the first part of the sum of money taxed in Schedule A." Since then the party of the second part had a right of election to determine what parts of the tract he wished convey, the Court of Chancery could not have made this election for him and no specific performance could have been decreed.

2. If a contract of sale, it work an equitable conveyance of the title. Clearly the defendant took no title, either equitable or otherwise. The contract specifically provided that he was only to be entitled to a conveyance upon the payment of such parts of the total consideration as he elected to tender. Consequently, under this contract, he could have obtained no equitable title unless he first tendered the sums of money taxed in Schedule A attached to the contract and demanded conveyance. Upon such a tendered demand he would have become entitled to a specific performance and an equitable title.

Therefore, since it is universally admitted in all the cases that there is no contract of sale unless equitable title passed, and since it is clear that there could neither have been a specific performance nor any title in the party of the second part, it follows that the contract was not a contract of sale but an option to purchase.

Respectfully submitted,

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