INDEX

TESTIMONY.

For Plaintiff.

EXHIBITS.

NOTICE OF APPEAL.

Filed December 23, 1925.

Essex County Circuit Court

JOHN N. LLOYD,
Plaintiff,

vs.

BRADFORD G. HATHAWAY and in the alternative FRANK C. HATHAWAY or ABRAM WEINSTOCK,
Defendants.

Action at Law.

Notice of Appeal.

To William P. Hurley, attorney for plaintiff.

SIR:

PLEASE TAKE NOTICE that the defendant Abram Weinstock herein appeals from the judgment and every part thereof, rendered in the Essex County Circuit Court, to the New Jersey Supreme Court and that he will, within the time required by law, file and serve upon you his grounds of appeal in said case as required by the rules and statutes in such case made and provided.

Dated December 18, 1925.

CARL OLSAN,
Attorney of Defendant,
Abram Weinstock.

Service of a copy of the within notice of appeal is herewith acknowledged this 21st day of December, 1925.

WILLIAM P. HURLEY,
Attorney for Plaintiff.

Summons.

SUMMONS.

State of New Jersey, to Bradford G. Hathaway, Frank C. Hathaway, (SEAL) and Abram Weinstock. You are summoned to answer the annexed complaint of John N. Lloyd, in an action at law in the Essex County Circuit Court.

And take notice that unless you file your answer to said complaint with the Clerk of the Essex County Circuit Court at the Essex County Court House, in the City of Newark, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

WITNESS, William S. Gummere, Judge of the Essex County Circuit Court, at Newark, this 25th day of November, 1924.

JOHN H. SCOTT,
Clerk.

WILLIAM P. HURLEY,
Attorney.

COMPLAINT.

Plaintiff, John N. Lloyd, residing at 292 Webster avenue, Jersey City, N. J., says that:

First Count.

1. On November 22, 1923, the defendant Bradford G. Hathaway did enter into a certain contract in writing, with the plaintiff to convey to the plaintiff the property known and designated as 533, 535 and 537 Hawthorne avenue, Newark, N. J., for the sum of $11,000 payable in cash on the day of passing title, said date to be March 1, 1924, a copy of which said contract is hereto annexed and made a part hereof.

2. That on the day and date aforesaid said Bradford G. Hathaway did receive the sum of $1,000 on account of said purchase price.

3. The premises above described consist of a plot of land on the northerly line of Hawthorne avenue distant about 1344.36 feet west of Clinton Place, 75 feet wide front and rear and 100 feet deep with a one-family dwelling and barn or workshop erected thereon.

4. That on the 1st day of March, 1924, the said plaintiff did tender to the said defendant Bradford G. Hathaway the purchase price of said premises in cash and demanded a deed for the same and possession of said premises, and the said Bradford G. Hathaway refused to deliver the same to the plaintiff.

5. That on said 1st day of March, the said plaintiff did serve upon the attorney of the said Bradford G. Hathaway, a notice that on Wednesday March fifth at three o'clock in the after-

noon he would again make tender of the purchase price of said premises and would at the time demand a deed conveying good title to the premises, free from encumbrances and possession of said premises, a copy of which notice is hereto annexed and made a part hereof.

6. That on the 5th day of March, 1924, at three o'clock in the afternoon, the plaintiff did meet said Bradford G. Hathaway in response to said notice, at the office of his attorney at 185 Market street, Newark, N. J., and did again make tender in cash of said purchase price and the said defendant Bradford G. Hathaway did tender to the plaintiff a deed for said premises but that the same was not free from encumbrances but were encumbered by the interest of one Conover and the wife of said Conover under a contract for the sale of said premises, made by Myron E. Vanderhoof to said Conover, and was also encumbered by the interest of Frank C. Hathaway, and the wife of said Frank C. Hathaway under a contract for the sale of said premises made by said Conover to Frank C. Hathaway and further that one Myron E. Vanderhoof was in possession of said premises and said Bradford G. Hathaway, did not deliver possession thereof to the plaintiff.

8. That said Bradford G. Hathaway has defaulted in the performance of his said contract.

9. The said Bradford G. Hathaway represented himself to be the agent for the owner of said premises and the said Frank C. Hathaway had a contract for the sale of the same and plaintiff does not know whether the said Bradford G. Hathaway was authorized by said Frank C. Hathaway to enter into said contract, and if

Complaint.

he had he demands of said Frank C. Hathaway the damages hereinafter set forth.

10. The said Bradford G. Hathaway, represented himself to be the agent for the owner of said premises and the said Abram Weinstock had a contract for the sale of the same and plaintiff does not know whether the said Bradford G. Hathaway was authorized by said Abram Weinstock to enter into said contract, and if he had he demands of said Abram Weinstock the damages hereinafter set forth.

11. The plaintiff has been put to the cost and expenses of making a search on said premises in the sum of $50.

Plaintiff demands against the defendant Bradford G. Hathaway, or in the alternative said Frank C. Hathaway or Abram Weinstock, damages in the sum of $2,000.

WILLIAM P. HURLEY,
Attorney for Plaintiff.

Bradford G. Hathaway,
Real Estate and Insurance.
Room 405.
40 Clinton Street, Newark, N. J.

Newark, N. J., November 22nd, 23.

Received of John N. Lloyd the sum of $1,000 as deposit on the property known and designated as 533-5-7 Hawthorne Avenue, Newark, N. J. The purchase price to be Eleven Thousand Dollars ($11,000) payable in cash on date of passing title, said date to be March 1st, 1924. Money to be refunded in event owner does not accept terms.

(Signed) Bradford G. Hathaway.

Complaint.

March 1st, 1924.

To Carl Ohlen, Attorney.

You will please take notice that on Wednesday, March 5th, at 3 o'clock in the afternoon, I will appear at your office and again make tender of the purchase price of premises at 533-535-537 Hawthorne Avenue, Newark, N. J., and will at the time demand a deed conveying good title to the premises, free from encumbrances and possession of said premises.

We do not by this notice waive any default heretofore made on our contract or receipt which we hold.

Yours very truly,

(Signed) William P. Hurley,
Atty. for John C. Lloyd.

I hereby appoint and depute Fred E. Ober to serve the within writ.

Witness my hand and seal this 28th day of Nov., 1924.

Harry B. O'Connell,
Sheriff.

By Conrad Deuchler,
Under Sheriff.

Sheriff Fees, $8.10. (SEAL)

Motion to Strike Out Defendant F. C. Hathaway.

Served the within summons and complaint upon the within-named defendants Dec. 2, 1924, personally upon Bradford G. Hathaway, and Frank C. Hathaway, at 1148 Broad St., Newark, New Jersey, Dec. 3, 1924, upon Abram Weinstock by leaving a true copy thereof at his usual place of abode, 32 Wright Street, Newark, N. J., with his wife.

Harry B. O'Connell,
Sheriff.

By Fred E. Ober,
Special Deputy.

MOTION TO STRIKE OUT THE DEFENDANT FRANK C. HATHAWAY.

Filed December 9, 1924.

To William P. Hurley, Esq., attorney for the plaintiff:

TAKE NOTICE, that on Friday, December 12, 1924, at 2 P. M., at the Court House, before the Honorable Nelson Y. Dungan, Judge of our Circuit Court, or such other judge as shall be hearing motions in the Circuit Court of Essex County, and as soon thereafter as counsel may be heard, I shall move for an order to strike out the defendant Frank C. Hathaway from the complaint for the reasons that:

1. The complaint does not set up a cause of action against Frank C. Hathaway.

2. On the complaint itself, as far as this defendant Frank C. Hathaway is concerned, there is nothing to take the plaintiff's case out of the statute of frauds.

3. The complaint does not set up that the defendant Frank C. Hathaway received any money belonging to the plaintiff nor that he executed any instrument in writing that will bind this defendant.

Yours respectfully,

BENJAMIN NEWMAN,
Attorney for the Defendant Frank C. Hathaway.

Service is hereby acknowledged of a copy of the within notice this 8th day of December, 1924.

WM. P. Hurley,
Atty. of Pltf.

ANSWER OF DEFENDANT BRADFORD G. HATHAWAY.

Filed December 16, 1924.

The defendant, Bradford G. Hathaway, residing at No. 75 Lenox avenue, in the City of East Orange, Essex County, New Jersey, answering the complaint, says that:

1. He admits that he gave to the plaintiff a writing, a copy of which is annexed to the complaint as more particularly in said writing is set forth.

2. He admits paragraph 2 and alleges further that he paid said sum of $1,000 to the defendant, Abram Weinstock.

3. He admits that the property in question referred to is a parcel of land and premises on the north side of Hawthorne avenue, having erected thereon a one-family dwelling and a

barn, but as to the remainder of the facts set forth in paragraph 3 he has no precise knowledge or information and leaves that to be proved by the plaintiff.

4. He denies paragraph 4.

5. He has no knowledge or information sufficient to form a belief as to paragraph 5.

6. He admits that on March 5, 1924, the plaintiff met this defendant at the office of one Carl Olsan, but denies that said Carl Olsan was this defendant's attorney. He denies that the plaintiff made any tender to him. He denies the balance of the paragraph and avers that Abram Weinstock and wife, by their attorney then present, tendered a deed to the plaintiff.

7. He denies paragraph 8 and paragraph 9.

8. He admits that he was the agent for Abram Weinstock and avers that the said sum of $1,000 received by this defendant from the plaintiff was paid by him to the said Abram Weinstock, or to one of his attorneys, with the consent of the plaintiff.

9. He denies paragraph 11 and the balance of the complaint.

First Defense.

The plaintiff was never able, and failed and refused to take title to the lands and premises in question.

Second Defense.

This defendant alleges that the said sum of $1,000 was received by him as agent for one Abram Weinstock with the consent of the plain-

tiff, and of which fact the said plaintiff had knowledge and paid by this defendant with the knowledge and consent of this plaintiff to the said Abram Weinstock.

THIRD DEFENSE.

The plaintiff has defaulted in all the terms and particulars of his agreement to purchase said lands and premises.

FOURTH DEFENSE.

This defendant has complied with all the terms and agreements made by him with the plaintiff.

BENJAMIN NEWMAN,
Attorney for Defendant,
Bradford G. Hathaway.

ORDER.

Filed December 23, 1924.

The defendant, Frank C. Hathaway, having moved to strike out his name from the complaint in the above matter on the ground that it disclosed no cause of action against him, and this cause having been argued by Benjamin Newman, of counsel, for the defendant, and William P. Hurley, of counsel for the plaintiff, and the Court having considered the same, it is thereupon, on this 19th day of December, 1924, on motion of Benjamin Newman, attorney for the defendant, Frank C. Hathaway,

ORDERED, that the plaintiff file an amended complaint as to the defendant Frank C. Hathaway,

within five days from the making of this order, and in default thereof, it is ordered that the defendant Frank C. Hathaway be stricken from the complaint.

NELSON Y. DUNGAN,
Judge of the Essex County Circuit Court.

AMENDMENT TO COMPLAINT.

Filed December 24, 1924.

Plaintiff, John N. Lloyd, hereby amends the above complaint in the following manner:

By striking out of the original complaint paragraphs 9, 10 and 11 and inserting instead thereof the following:

9. The said Bradford G. Hathaway was duly authorized by said Frank C. Hathaway to make said contract, and said Bradford G. Hathaway did make same as agent for said Frank C. Hathaway and said Frank C. Hathaway was the person referred to as the owner therein, and said Frank C. Hathaway held a contract for the purchase of said premises and said Frank C. Hathaway is liable for the damages to the plaintiff herein referred to.

10. The said Bradford G. Hathaway was duly authorized by said Abram Weinstock to make said contract and said Bradford G. Hathaway did make same as agent for said Abram Weinstock and the said Abram Weinstock was the person referred to as the owner therein and said Abram Weinstock, or both of them, in the making of said contract, which the said Frank

C. Hathaway and Abram Weinstock deny and plaintiff demands damages against him, the said Bradford G. Hathaway, as herein set forth, only in the event that he was not authorized by the said Frank C. Hathaway or Abram Weinstock, to make said contract.

12. The plaintiff has been put to the cost and expense of making a search on said premises in the sum of $50.

Plaintiff demands against the said Frank C. Hathaway or Abram Weinstock, or in the alternative against the said Bradford G. Hathaway, damages in the sum of $2,000.

WM. P. HURLEY,
Attorney for Plaintiff.

Stipulation.

STIPULATION.

Motion having been duly made before the Essex County Circuit Court, on the 19th day of December, 1924, to strike out the complaint of plaintiff as to both Frank C. Hathaway and Abram Weinstock, and the Court having granted leave to amend the complaint, it is on this 23rd day of December, 1924, stipulated and agreed that the foregoing amendment to the complaint be duly filed in this cause, and service of a copy of said amendment to said complaint is hereby acknowledged for the defendants and answers to said complaint and said amendment shall be filed within twenty days from the date hereof.

WM. P. HURLEY,
Attorney for Plaintiff.

BENJAMIN NEWMAN,
Attorney for Defendant,
Bradford G. Hathaway.

BENJAMIN NEWMAN,
Attorney for Defendant,
Frank C. Hathaway.

CARL OLSAN,
Attorney for Defendant,
Abram Weinstock.

Service of a copy of the within complaint acknowledged this 23rd day of December, 1924.

CARL OLSAN,
Atty. for A. Weinstock.

AMENDED ANSWER OF DEFENDANT BRADFORD G. HATHAWAY.

Filed December 24, 1924.

Bradford G. Hathaway, one of the defendants in the above-stated cause, further answering the amendment to complaint, repeats his answer to the original complaint, and as to the amendments, he says:

1. He denies paragraph 9.

2. He admits paragraph 10, except that he further avers that the said Abram Weinstock was the owner of the premises in question and denies that the latter is liable for damages to the plaintiff.

3. He admits that he was the agent of Abram Weinstock and denies the balance of paragraph 11 and denies completely paragraph 12.

BENJAMIN NEWMAN,
Attorney for Defendant,
Bradford G. Hathaway.

ANSWER OF DEFENDANT FRANK C. HATHAWAY TO AMENDMENT TO COMPLAINT.

Filed December 24, 1924.

The defendant Frank C. Hathaway, answering the complaint and the amendment to complaint, says that:

1. He has no knowledge or information sufficient to form a belief as to paragraphs 1, 2, 3, 4, 5, 6, 7 and 8 of the original complaint.

2. He denies paragraph 9.

3. He has no knowledge or information sufficient to form a belief as to paragraph 10.

4. He has no knowledge or information sufficient to form a belief as to paragraph 11 and 12.

First Defense.

1. This defendant disclaims that he had anything to do with the matters in dispute in this cause and disclaims any knowledge thereof or any liability therefor.

BENJAMIN NEWMAN,
Attorney for Defendant,
Frank C. Hathaway.

ANSWER OF DEFENDANT ABRAM WEINSTOCK.

Filed December 30, 1924.

This defendant, Abram Weinstock, residing in the City of Newark, County of Essex and State of New Jersey, answering the complaint and amended complaint, says:

1. He has no knowledge or information sufficient to form a belief as to paragraphs 1, 2, 4, 5, 6 or 8 of the complaint.

2. He admits paragraph 3 of the complaint.

3. He has no knowledge or information sufficient to form a belief as to paragraph 9 of the amended complaint.

4. He denies all the allegations contained in paragraph 10 of the amended complaint, except that he admits that "he held a contract for the purchase of said premises" and further answering, defendant says that Bradford G. Hathaway, was a duly licensed real estate broker and as such, came to this defendant with an agreement providing for the purchase of the aforementioned property by and on behalf of plaintiff, which agreement is attached hereto and marked "Schedule A" and made part hereof, on the execution of which agreement by this defendant, the said plaintiff, by the said Bradford G. Hathaway, his agent aforesaid, did then and there pay this defendant a deposit of $1,000 in accordance with the terms of the agreement then and there made.

5. He has no knowledge or information sufficient to form a belief as to paragraph 11 of the amended complaint.

6. He denies all the allegations contained in paragraph 12 of the amended complaint.

First Defense.

Plaintiff was never able and wholly failed and refused to comply with any of the terms of his agreement aforementioned.

Second Defense.

Plaintiff was never able and wholly failed and refused to take title to the lands and premises in question.

Third Defense.

This defendant alleges that he received the said sum of $1,000 in accordance with the terms of an agreement entered into by himself with Bradford G. Hathaway as agent for and proper representative of the plaintiff, by and with the knowledge and consent of the plaintiff.

Fourth Defense.

Plaintiff has defaulted in all the terms, covenants, conditions and particulars of his agreement to purchase said lands and premises.

Fifth Defense.

This defendant has complied with all the terms, covenants, conditions, particulars and agreements made by him with the plaintiff.

CARL OLSAN,
Attorney for Defendant,
Abram Weinstock.

SCHEDULE A.

Know all men by These Presents, that Abram Weinstock of the City of Newark, County of Essex and State of New Jersey, hereinafter called the assignor for and in consideration of the sum of $2,500 to be paid by John N. Lloyd of the City of Jersey City, County of Hudson and State of New Jersey, hereinafter called the assignee of which $2,500 the sum of $1,000 has already been paid by the assignee to the assignor for which $1,000 this is also a receipt, the assignor hereby assigns to the assignee all his right, title and interest to a certain agreement bearing date September 14, 1923, for the purchase of premises commonly known as 533, 535-537 Hawthorne Avenue, Newark, New Jersey.

This assignment, however, is upon the express condition that the balance of the consideration hereof, that is to say, the sum of $1,500 is paid by the assignee to the assignor not later than the 15th day of March, 1924: and this assignment shall not take effect except upon the happening of the said express condition.

This assignment is upon the further condition that if the assignee shall fail to serve notice upon the assignor at the office of the latter's attorney, Carl Olsan personally, not later than February 15, 1924, which notice is to definitely and peremptorily state whether or not the assignee will consummate the purchase of the property covered by this assignment; and in the event that the assignee shall fail to serve such a notice at the time and in the manner abovestated then this assignment shall immediately be null and void.

This agreement shall become void *eo instante* if the notice served on February 15th, is that the

assignee will not consummate the purchase, it being specifically understood and agreed the deposit paid hereunto shall be retained by the assignor as liquidated damages.

It is expressly understood and agreed that time is of the essence of this assignment wherever any time is stated therein.

It is hereby mutually agreed by and between the assignor and the assignee that in the interim and until the performance of the express condition stated above, the agreement of September 14th, 1923, which is covered by this assignment shall be deposited with and remain in the possession of David H. Yonteff in escrow and that he is not to deliver up possession of that agreement to the assignee until the performance by the latter of the express condition upon which this assignment is made.

In Witness Whereof, we have hereunto set our hands and seals this First day of December, One Thousand Nine hundred and Twenty Three.

ABRAM WEINSTOCK, L. S.

Signed, sealed and delivered
in the presence of

REPLY TO ANSWER AND AMENDED ANSWER OF ABRAM WEINSTOCK.

Filed January 9, 1925.

1. Plaintiff denies that portion of paragraph 4 which states that the said Bradford G. Hathaway was the agent of the plaintiff and that as the agent of the plaintiff said Bradford G. Hathaway did pay the said defendant $1,000.00 in accordance with the terms of the agreement referred to in said paragraph and denies that the said Bradford G. Hathaway was authorized to so pay said fund in accordance with the terms of said agreement.

2. The said agreement and said paragraph are not a proper defense to said action as a matter of law, and plaintiff will move to strike out that portion of paragraph 4 referring to the same, and that portion above denied, at or before the trial of said cause.

Reply to the First Defense.

1. Plaintiff denies the first defense.

Reply to the Second Defense.

1. Plaintiff denies the second defense.

Reply to the Third Defense.

1. Plaintiff makes the same answer to the third defense as is made in paragraph 2 above stated.

Reply to the Fourth Defense.

1. Plaintiff denies the fourth defense.

REPLY TO THE FIFTH DEFENSE.

1. Plaintiff denies the fifth defense.

WILLIAM P. HURLEY,
Attorney for Plaintiff.

REPLY TO ANSWER AND AMENDED ANSWER OF BRADFORD G. HATHAWAY.

Filed January 9, 1925.

Plaintiff, replying to the answer and amended answer of Bradford G. Hathaway, says:

REPLY TO THE FIRST DEFENSE.

1. Plaintiff denies the first defense.

REPLY TO THE SECOND DEFENSE.

1. Plaintiff admits the second defense except that part which states that the plaintiff had knowledge of the agency therein referred to and that said sum was paid by the defendant to Abram Weinstock with the knowledge and consent of the plaintiff, which plaintiff denies.

REPLY TO THE THIRD DEFENSE.

1. Plaintiff denies the third defense.

REPLY TO THE FOURTH DEFENSE.

1. Plaintiff denies the fourth defense.

WILLIAM P. HURLEY,
Attorney for Plaintiff.

REPLY TO ANSWER AND AMENDED ANSWER OF FRANK C. HATHAWAY.

Filed January 9, 1925.

REPLY TO THE FIRST DEFENSE.

Plaintiff denies the first defense.

WILLIAM P. HURLEY,
Attorney for Plaintiff.

RULE FOR JUDGMENT ON VERDICT.

Filed December 17, 1925.

This cause being regularly on the list for trial at the December Term, nineteen hundred and twenty-five, of this Court, and being called and both parties appearing, and the cause being moved by the plaintiff, and a jury being impanelled and sworn, and the evidence offered by the parties submitted, and the respective parties by their counsel being heard, and the Judge having charged the jury and the jury having retired to consider of their verdict, come again into court and say they find in favor of the said plaintiff and against the said defendant Abraham Weinstock and assess the plaintiff's damage at $1,125.00,

It is, therefore, on this 16th day of December, A. D. nineteen hundred and twenty-five, ordered that judgment final be entered in favor of John N. Lloyd, the said plaintiff, against Abraham Weinstock, the said defendant, for the sum of one thousand one hundred and twenty-five dollars ($1,125.00) besides costs of suit to be taxed.

Judgment.

Rule actually entered this 16th day of December, A. D. nineteen hundred and twenty-five.

.....

Judge of the Essex County Circuit Court.

On motion of

WILLIAM P. HURLEY,
Attorney for Plaintiff.

JUDGMENT.

ESSEX COUNTY CIRCUIT COURT.

37157 JOHN N. LLOYD, *Plaintiff,* *vs.* BRADFORD G. HATHAWAY and in the alternative ABRAM WEINSTOCK.	*Action at Law.* *On Non-suit.* *Costs, $80.36.*

After verdict, judgment entered December 16, 1925:

Damage	$1,125.00
Costs	64.70
Total	$1,189.70

Benjamin Newman, attorney of defendant, Bradford G. Hathaway.

William P. Hurley, attorney of plaintiff.

Judgment.

Judgment on non-suit in the above-entitled action was rendered on the sixteenth day of December, A. D. nineteen hundred and twenty-five, in favor of the defendant Bradford G. Hathaway, and against the plaintiff John N. Lloyd for eighty dollars and thirty-six cents costs.

Judgment after verdict in the above-entitled action was rendered on the sixteenth day of December, A. D. nineteen hundred and twenty-five, in favor of the plaintiff John N. Lloyd and against the defendant Abram Weinstock for the sum of one thousand one hundred twenty-five ($1,125.00) dollars damage and sixty-four dollars and seventy cents costs of suit.

Judgment entered and signed December 16, 1925.

WILLIAM S. GUMMERE,
Judge.

JOHN H. SCOTT,
Clerk.

Appeal Bond.

APPEAL BOND.

Know all men by these present, that Abram Weinstock and the American Employers Insurance Company, a corporation organized and existing under the laws of the State of Massachusetts and duly authorized to do business in the State of New Jersey as surety, are held and firmly bound unto John N. Lloyd, in the sum of twenty-five hundred dollars ($2,500), for the payment of which sum we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated this twenty-eighth day of December, nineteen hundred twenty-five.

Whereas, a judgment was entered in the Circuit Court in and for the County of Essex, on the sixteenth day of December, nineteen hundred and twenty-five, in a suit therein depending, wherein John N. Lloyd is plaintiff and Abram Weinstock is defendant, for the sum of eleven hundred twenty-five dollars ($1,125) damages, together with costs of suit, and the defendant Abram Weinstock is about to appeal from said judgment of the Circuit Court aforesaid to the Supreme Court of the State of New Jersey.

Now the condition of this obligation is such, That if the said Abram Weinstock shall pay the costs of said appeal, whatever the result thereof, and shall pay to the said plaintiff the said judgment of the Circuit Court, so as aforesaid rendered against the said Abram Weinstock if the said appeal be not prosecuted by the said Abram Weinstock or be dismissed, then this obligation

Appeal Bond.

to be void, otherwise to remain in full force and virtue.

ABRAM WEINSTOCK. (L. S.)

Signed, sealed and delivered
in the presence of

CARL OLSAN,
As to Abram Weinstock.

AMERICAN EMPLOYERS INSURANCE CO.,

By Minnie Teifeld,
Attorney in Fact.

ARTHUR D. REEVE,
As to American Employers Ins. Co.

Approved as to form and sufficiency of surety.

MILTON M. UNGER,
Supreme Court Commissioner.

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

On this 28th day of December, 1925, before me, the subscriber, a Notary Public of New Jersey, duly commissioned and sworn, personally came Minnie Teifeld, who being by me duly sworn, on his oath, said that he is attorney in fact of the American Employers Insurance Company and that he resides in the City of Newark, that he knows the corporate seal of the said corporation; that the seal affixed to the foregoing instrument is such corporate seal; and that it was affixed by her and the said instrument was signed by her as attorney in fact of said cor-

poration by order of the Board of Directors of said corporation as the voluntary act and deed of said corporation; that said corporation has duly complied with all the requirements of Chapter 134 of the Laws of the State of New Jersey of the year 1902 and the supplements thereto and acts amendatory thereof applicable to said corporation; that the good available assets of the corporation exceed its liabilities, as such liabilities are ascertained in the manner provided in said chapter; that the American Employers Insurance Company is duly incorporated under the laws of the Commonwealth of Massachusetts and is authorized by the laws of that State and under its charter to become surety on bonds and obligations such as are mentioned in said chapter; and has on deposit with the Treasurer and Receiver General of the Commonwealth of Massachusetts at least two hundred thousand dollars ($200,000) in accordance with the provisions of Chapter 175 of Section 185 of General Laws of the Commonwealth of Massachusetts, held for the security of its obligations and has a fully paid up, safely invested and unimpaired capital of one million dollars and that the following resolutions were duly adopted by the Board of Directors of the American Employers Insurance Company on the 20th day of May, 1923:

COPIES OF RESOLUTIONS.

"That the President, or in his absence, any Vice President, may from time to time appoint Attorneys in fact to represent and act for and on behalf of, the corporation as respects its surety and fidelity business and that the President, or in his absence, any Vice President may

at any time remove any such attorney in fact and revoke all power and authority given to any such attorney in fact."

"That all (1) bonds, (2) recognizances (3) contracts of indemity and all other writings obligatory in the nature thereof shall be signed by the President, a Vice President or an Attorney in fact, and shall have the seal of the Company affixed thereto, duly attested by the Secretary, an Assistant Secretary, or an Attorney in fact."

"That Attorneys in fact may be given full power and authority to execute for and in the name and on behalf of the corporation any and all bonds, recognizances, contracts of indemnity and all other writings obligatory in the nature thereof, and any such instrument executed by any such Attorney in fact shall be as binding upon the corporation as if signed by the President and sealed and attested by the Secretary and further, Attorneys in fact are hereby authorized to verify any affidavit required to be attached to bonds, recognizances, contracts of indemnity, and all other writings obligatory in the nature thereof and are also, authorized and empowered to certify to a copy of any of the by-laws of the corporation, as well as any resolutions of the Directors having to do with the execution of bonds, recognizances, contracts of indemnity and all other writings obligatory in the nature thereof, or with regard to the powers of any of the officers of the corporation or of Attorneys in fact."

That the foregoing copies of the resolutions are exact copies of the original resolutions and the whole thereof, and that they are still in full force and effect.

MINNIE TEIFELD,
Attorney in Fact.

Appeal Bond.

Sworn and subscribed before me,
a Notary Public of New Jersey,
this 28th day of December, 1925.

ARTHUR D. REEVE,
Notary Public of New Jersey.
My commission expires November 24, 1927.

Justification of Surety,
New Jersey.

American Employers Insurance Company
of Boston, Massachusetts.

Statement, December 31, 1924.

Assets.

Government Bonds	$715,000.00
State, County or Municipal Bonds	1,498,800.00
Miscellaneous Bonds	31,360.00
Interest Due and Accrued	29,441.16
Cash on Hand and in Bank	68,732.96
Premiums in Course of Collection (not overdue)	140,861.31
Total Assets	$2,484,195.43

Liabilities.

Reserve for Losses	$142,358.00
Reserve for Commissions	45,638.71
Reserve for Unearned Premiums	367,434.00
Reserve for Taxes and Expenses Due and Accrued	25,000.00
Capital	1,000,000.00
Net Surplus	903,764.72
Surplus to Policy Holders	$1,903,764.72
Total Liabilities	$2,484,195.43

Certificate of Clerk.

ESSEX COUNTY CLERK'S OFFICE.

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

I, JOHN H. SCOTT, Clerk of the Circuit Court, in and for the County of Essex in the State of New Jersey, DO HEREBY CERTIFY that the foregoing is a true and correct copy of all the pleadings in the case of *John N. Lloyd, Plaintiff,* v. *Bradford G. Hathaway,* and in the alternative *Frank C. Hathaway or Abram Weinstock, Defendants,* prepared for appeal, and the same is taken from and compared with original copies of all pleadings and as the same now remains on the files of said office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the official seal of said Court and County at Newark, N. J., this 5th day of January, A. D. 1925.

(SEAL)

JOHN H. SCOTT,
Clerk.

ESSEX COUNTY CIRCUIT COURT.

Tuesday, December 15, 1925.

JOHN N. LLOYD,
vs.
BRADFORD G. HATHAWAY, *et al.*
Action at Law.

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

For the plaintiff appears William P. Hurley.

For the defendant Hathaway appears Benjamin Newman.

For the defendant Weinstock appears Carl Olsan.

(Counsel consent to try the case with eight jurors.)

Mr. Hurley opens for the plaintiff.

Mr. Newman opens for the defendant Hathaway.

Mr. Olsan opens for the defendant Weinstock.

JOHN N. LLOYD, plaintiff, sworn in his own behalf.

Direct examination by Mr. Hurley.

Q Mr. Lloyd, what is your business? A I am a manufacturer.

Q Where is your business located? A Poughkeepsie, New York.

Q On November 22, 1923, what was your business? A I was in the building business.

Q Where? A Jersey City.

John N. Lloyd, direct.

Q Were you a boss builder or working at the trade? A Working at the trade.

Q Did you see Mr. Bradford G. Hathaway in November, 1923? A Yes.

Q What transpired?

Mr. Olsan: I object to any conversation if that is the question.

The Court: He is a party to the suit.

Mr. Olsan: It is not binding on the defendant Weinstock.

The Witness: Through Mr. O'Neill I met Mr. Hathaway.

By Mr. Hurley.

Q Did Mr. Hathaway submit any property to you for sale? A Yes, sir.

Q What piece was it? A On Hawthorne avenue; 503, 505 and 507 Hawthorne avenue.

Q Who occupied that property? A Mr. and Mrs. Vanderhoof.

Q Are they in court? A Yes, sir.

Q Did you look at the property? A Yes, sir.

Q Did you agree to buy it? A Yes, sir.

Q Did you pay any money to Mr. Hathaway? A Yes, sir, I paid him $1,000.

Q I show you a check dated November 22, 1923, drawn by John N. Lloyd to B. G. Hathaway on the New Jersey Title & Trust Company for $1,000, endorsed "B. G. Hathaway" and ask you if that is the check you gave? A Yes, sir, that is my check.

Q Was that check paid out of your account by the bank? A Yes, sir.

Q Was that the deposit you paid on this house? A Yes.

Mr. Hurley: I offer the check in evidence.

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

Q Who certified this check? Was it you or Mr. Hathaway? A Mr. Hathaway had it certified immediately.

Q I also show you a note purporting to be signed by Mr. Hathaway dated November twenty-second, and ask you if that is Bradford G. Hathaway's signature? A Yes, sir, that is his signature.

Mr. Hurley: I offer the note in evidence.

(The same is received in evidence and marked Exhibit P. 2.)

Q After you had paid this deposit, when did you next see Mr. Hathaway? A I saw him a few days later.

Q Where? A At his office.

Q What was said at that time, if anything? A He said that he wanted $1,500 down and I told him I didn't have $1,500; that I had $1,000.

Q Was that after you gave him the check or before? A Before.

Q I am asking about afterward. Did you see him again? A Not for a few days later.

Q Did you see him then? A Yes, sir.

Q What transpired at that time? A He said, "I am very sorry to say that my brother says that the building and loan does not advance more than fifty per cent. of the property." I said, "Very well, give me my $1,000 back." So he immediately called up David Yonteff and asked him how much he would charge to make

up a release. David Yonteff said $100. I said, "I will not pay $100." So he agreed on $50.

Q Was the release signed? A Yes, I signed the release conditionally; if I could scrape the $1,000 together I would go through with the deal and the release would be destroyed, which it was, and have handed over to me a piece of paper.

Q What did the release provide? A That I would not have to go through with the specific performance of the contract.

Mr. Olsan: I object to that.

By the Court.

Q What became of the release? A It was destroyed.

Q Give us the circumstances.

Mr. Newman: If the release is destroyed and was withdrawn, I do not think it is evidential. I do not think it has anything to do with the case. He said it was withdrawn, destroyed, because of some other agreement.

By Mr. Hurley.

Q Under what circumstances was the release destroyed? A That I would not have to go through with the specific performance of the contract.

By the Court.

Q How was it physically destroyed? A Torn in shreds.

By Mr. Hurley.

Q By whom? A Mr. Hathaway.

Q In your presence? A Yes, sir.

Q Why was the release torn up? A So I would not have to go through with the specific performance.

Q Did the release provide for the return of your $1,000? A No.

Q What did it provide? A For—well, so as I would not have to go through with the specific performance, I suppose.

Mr. Olsan: I move that the answer be stricken out as not responsive.

The Court: Strike it out.

Q What did it say in the release? A All it said was I would not have to go through with the specific contract.

Q It released you from the contract? A That is what I understood.

Q What was the agreement about that release? How long was it to be held? A Only for one day.

Q What was the condition under which it was held for one day? A If I got the $1,000 together it was to be destroyed.

Q Did you get the $1,000? A Yes.

Q Did you so advise Mr. Hathaway? A I did.

Q What happened to Mr. Hathaway next? A Mr. Hathaway promised to finance it for me—

Q I mean what happened. Where was the release destroyed? A In Mr. Yonteff's office.

Q Were any papers submitted to you that date? A Yes, there was a contract passed to me that date.

Q Do you remember the date? A On or about December first.

John N. Lloyd, direct.

Q What year? A 1924.

Q 1924 or 1923? A 1923.

Q I show you a paper purporting to be an assignment bearing date the 1st of December, 1923, and ask you whether that was the paper that was handed you? A Yes, sir, that is not a contract; it is only a piece of paper.

Q Did you sign this assignment? A No, sir.

Q Did they request you to sign it? A Yes, sir. As I was reading it over they were pulling the leaves toward them and I refused to sign it, and I put it in my pocket and I went down the elevator. Mr. Hathaway went down with me and he said, "Excuse me, Lloyd, I forgot my pipe." And I haven't seen him to the present time.

Mr. Hurley: I offer in evidence an assignment made by Abraham Weinstock to John M. Lloyd, unexecuted, dated December 1, 1923, copy of which is attached to the answer of the defendant Weinstock.

The Court: It is not signed by either party?

Mr. Hurley: No.

(The assignment is received in evidence and marked Exhibit P. 3.)

By Mr. Hurley.

Q You did not sign that paper? A No, sir.

Q Did you see a copy of it signed by Mr. Weinstock? A No, sir.

Q Was any offered to you? A No, sir.

Mr. Hurley: I would like to read this to the jury at this time, if your Honor please.

The Court: I don't think it is necessary. It is an assignment of a previous assignment.

Mr. Olsan: There are certain terms I think we might as well have read now.

(Mr. Hurley reads Exhibit P. 3 to the jury.)

By Mr. Hurley.

Q Mr. Lloyd, was that copy signed by either one of you? A No, sir.

Q Did you meet Mr. Weinstock at that time? A No, sir, I never met Mr. Weinstock up to this time until the time of passing title.

Q At the time Mr. Hathaway submitted that agreement to you to sign did he submit to you an agreement dated February 14, 1923, referred to in this assignment? A Not that I know of.

Q On March 1, 1924, did you go to Mr. Olsan's office? A Yes, sir.

Q Who was there? A Mr. Olsan, and there was two other gentlemen.

Q Who were the other gentlemen? A I don't know.

Q Was Mr. Hathaway there? A Yes, and you and myself.

Q What happened on that day? A I tendered $1,000; I had $1,000 in my hand as agreed, and I offered it to Mr. Olsan and he tells me I didn't have the $1,000 in my hand.

Q Did you offer it to Mr. Hathaway or Mr. Olsan? A To Mr. Olsan.

Q As attorney for Mr. Hathaway?

Mr. Newman: I object.

Q Was Mr. Hathaway present in Mr. Olsan's office at the time? A Yes, sir.

John N. Lloyd, direct.

Q What did you demand in return for your money?

Mr. Olsan: I object to that as leading. Mr. Hurley has been leading altogether too much.

Objection sustained.

By Mr. Hurley.

Q What did you do with your money? A The $1,000?

Q Yes. A I couldn't do anything with it; they wouldn't accept it.

Q Did you show it to them? A Yes.

Q What did they say? A That they were not ready.

By the Court.

Q Who said that? A Mr. Olsan said they were not ready.

By Mr. Hurley.

Q What was said by me on that occasion?

Mr. Olsan: We might get direct evidence on that point.

The Court: It was in the presence of Mr. Hathaway.

Mr. Olsan: I would like to repeat that all this conversation with Hathaway is objected to on behalf of the defendant Weinstock on the ground that it is not binding on him.

By Mr. Hurley.

Q Was there anything said at that time about your acquiring title to the property?

The Court: Exhaust his recollection first.

Q What else happened? A On the first of March he wasn't ready.

Q Did Mr. Olsan have any papers in connection with the case? A I didn't see any papers.

Q Did you ask for anything? A I can't recall that I asked for anything. I know we asked for a title to the property.

Q What happened then? A Why, there was $2,000 they refused to accept but said on the third of March; we went there and still they were not ready but Mr. Olsan said I would have to have $10,000 to take the property and on the fifth of March he said I would have to have it. So I went there on the fifth of March and I gave it to Mr. Hurley. Mr. Hurley counted it and they couldn't give me a clear title.

Q Going back to the third of March do you remember anything more than that which you have stated? A Not at the present time.

Q On the fifth of March, did you go to the property in question? A Yes.

Mr. Hurley: I would like at this time to introduce in evidence a notice that was served on Mr. Olsan on March first, requiring the closing of the title on the fifth.

Mr. Olsan: There is no objection to the copy.

Mr. Hurley: You admit it was served on the first?

Mr. Olsan: Yes.

Mr. Hurley: I offer in evidence notice served by William N. Lloyd on Carl Olsan on March 1, 1924, notifying the said Carl Olsan that we will demand a closing on the

fifth and possession of this property. It is admitted that the notice was served March 1, 1924.

(The same is received in evidence and marked Exhibit P. 4.)

By Mr. Hurley.

Q Prior to going to Mr. Olsan's office on the fifth of March did you visit the property? A Oh, yes, I visited the property.

Q Who was with you? A Mr. Caldwell.

Q Whom did you see at the property? A Mrs. Vanderhoof.

Q Did you inquire of her about her possession of that property? A Yes.

Q After you had seen her did you return to Mr. Olsan's office? A No.

Q On March fifth when you visited Mrs. Vanderhoof's house was she in possession of the house? A Yes.

Q Where did you go when you left Mrs. Vanderhoof's house? A I went home.

Q March fifth? A That was after I had—I don't know whether I come back to your office or no.

Q Did you go anywhere else that day? A Only to Mr. Vanderhoof's house; then I came back to Broad street again.

Q Did you go anywhere that day with Mr. Caldwell and myself? A I don't recall.

Q Did you have any money with you that day? A On the fifth of March?

Q Yes. A Yes; $10,000.

Q What did you do with it? A Took it back to Jersey City.

Q Did you offer it to anybody that day? A I offered it to Mr. Olsan—rather, you had.

Q Was that after you had been to Mr. Vanderhoof's house? A After; yes.

Q About what time did you arrive at Mr. Olsan's office? A I couldn't tell you.

Q Was it in the morning or in the afternoon? A I think it was about noon.

Q Who was in Mr. Olsan's office when you arrived there? A Mr. Hathaway, Mr. Weinstock, whom I had never met before, and two other gentlemen, Mr. Caldwell, you, and I.

Q Was Mr. Olsan there? A And Mr. Olsan; with due respect to Mr. Olsan.

Q Did you offer your money on that date? A Yes, sir, on the fifth of March I offered them the $10,000.

Q Did they offer you a deed? A Did they offer me a deed?

Q What was said as to a contract at that time? A You will have to put it in another way; I don't understand.

Q Was anything said about the contract with Vanderhoof at that time? A In regards to him staying there?

Q No, in relation to his contract. A I can't answer that.

Q Was anything said in relation to Mr. Conover at that time? A Mr. Conover's wife didn't have her signature on the deed.

Q What was said about it? A I can't recall that now.

Q Do you recall any conversation in relation to Mr. Conover or his wife's signature? A No, not any more than that Conover and Hathaway, I believe, both of them were married and the curtesy of their wives was not on the deed.

Q Why were their names brought into it?

Mr. Hurley: I would like to ask the attorney for the defendant to produce the original contract between Vanderhoof and Conover and the assignment from Conover to Hathaway and the assignment from Hathaway to Weinstock.

Mr. Olsan: I never had any of them. I will admit there were assignments.

Mr. Hurley: I would like to offer in evidence at this time the original contract between Myron E. Vanderhoof and Mary F., his wife, to Arthur Conover, bearing date the 6th day of September, 1923.

(The same is received in evidence and marked Exhibit P. 5.)

By Mr. Hurley.

Q Was title rejected by me for you on that day?

Mr. Newman: I object to that as leading.

Q Was the deed offered to us?

Mr. Newman: I object to that.

Q What happened as the deed was offered?

Mr. Newman: I object to that as having been gone over once.

Q Mr. Lloyd, was a deed offered to us on that date?

Mr. Newman: What date?

Q March fifth. A I saw some papers there; I don't know what it was.

Q Was anything said as to our possession in relation to taking the deed? A I saw that you rejected the papers.

Q Do you remember any ground being stated? A The fact that it was not a clear title.

Q What were the defects we called attention to? A Conover's wife's curtesy wasn't on the deed and Frank C. Hathaway's wife's name wasn't on the deed, and it was encumbered.

Q What do you mean by encumbered? A They still lived there; I wanted to get in right away; they held it from the sixth until I don't know how many weeks afterwards.

Q Those were the grounds on which we rejected title? A Yes, sir.

Mr. Hurley: I offer in evidence letter from Carl Olsan to David Yonteff dated February 21, 1924.

(The same is received in evidence and marked Exhibit P. 6.)

(Mr. Hurley reads Exhibit P. 6 to the jury.)

Mr. Hurley: I offer in evidence letter from myself to Mr. Olsan dated March sixth.

(The same is received in evidence and marked Exhibit P. 7.)

(Mr. Hurley reads Exhibit P. 7 to the jury.)

Mr. Hurley: I offer in evidence letter from Carl Olsan to myself dated March sixth.

(The same is received in evidence and marked Exhibit P. 8.)

(Mr. Hurley reads Exhibit P. 8 to the jury.)

John N. Lloyd, direct.

Mr. Hurley: I offer in evidence letter from Mr. Olsan to myself dated March seventh.

(The same is received in evidence and marked Exhibit P. 9.)

(Mr. Hurley reads Exhibit P. 9 to the jury.)

Mr. Hurley: I offer in evidence letter from myself to Mr. Olsan dated March eighth.

(The same is received in evidence and marked Exhibit P. 10.)

(Mr. Hurley reads Exhibit P. 10 to the jury.)

By Mr. Hurley.

Q After the fifth of March, did you ever again meet Mr. Weinstock? A No, sir.

Q Or Mr. Hathaway? A No, sir, I never met Weinstock at all through this transaction.

Mr. Hurley: I would like to say that I attempted to prove his inquiry at the premises and the result was that it was objected to.

Mr. Olsan: This entire question of possession is immaterial and irrelevant. It is a sale subject to the acceptance of terms to be agreed upon by the owner.

The Court: There was never any agreement and the money has got to be paid back.

Mr. Olsan: The question is by whom?

The Court: By the person who got it. I will allow them to prove it.

Counsel for the defendant Weinstock prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

John N. Lloyd, cross.

By Mr. Hurley.

Q Did you make inquiry of Mrs. Vanderhoof? A Yes, sir.

Q Did you ask her about possession and how long she intended to stay?

Mr. Newman: I object to that as hearsay. Objection sustained.

Cross examination by Mr. Newman.

Q Mr. Lloyd, Mr. Bradford Hathaway received your $1,000 and paid it to whom? A To himself.

Q You paid it to him? A I paid it to Mr. Hathaway, yes.

Q Whom did he give that $1,000 to? A I don't know.

Q Who is Mr. Weinstock? A I don't know; I never heard of him; I didn't know who he was; I never knew Mr. Weinstock until the day we were to pass title, then he shook hands with me; I never heard his name mentioned; as I read the contract I read another name substituted.

Q Do you remember this contract that you took out of Mr. Yonteff's office, the one you stuck in your pocket? A Yes, sir.

Q Whose name was on the contract besides your own? A I saw Weinstock on it.

Q Then you did know Mr. Weinstock was interested before March? A Not until then.

Q You did know it on the contract December 1, 1923? A I never knew it until I saw it in the contract or the piece of paper; I was buying from Mr. Hathaway and not Mr. Weinstock.

Q You knew Mr. Hathaway gave it to Mr. Weinstock? A No.

Q You know it now? A I am not sure of it now.

Q What happened in Mr. Yonteff's office when this contract was tendered to you and you did not sign it? Whom did Mr. Yonteff represent? A I don't know who he represented; I don't think he represented anybody.

Q He is a lawyer? A With due respect to him I understand he is a lawyer.

Q He drew these papers? A Yes, I refused to sign them because I saw another name substituted.

Q Why didn't you ask to get the $1,000 back? A I did.

Q From whom? A Hathaway; I asked a dozen times.

Q There was a release drawn then? A Yes, sir.

Q That was destroyed? A That was destroyed.

Q You were satisfied to put up $1,000? A I was satisfied to put up $1,000 to go through with it.

Q At that time you didn't know Mr. Weinstock was the man you were doing business with? A No, I didn't.

Q You knew that he got the $1,000? A Yes.

Q You knew that he paid it over to Mr. Yonteff? A No, I made out a check payable to Hathaway.

Q Didn't you know Mr. Hathaway paid the $1,000 to Mr. Yonteff to give to Mr. Weinstock? A I didn't.

Q When did you first find out what happened to the $1,000? A I didn't think it was necessary for me to find out who had it; I gave it to Mr. Hathaway.

Q Even today you don't know what happened to your $1,000? A How is it possible for me to know what happened to it after I gave it to Mr. Hathaway?

Q Didn't Mr. Yonteff tell you that he had paid the $1,000 to Mr. Weinstock? A I can't recall it.

Q He might have told you that? A I can't remember that.

Q Do you mean to say that your lawyer went to Mr. Olsan as a complete stranger not knowing where the $1,000 was? A I don't know what became of the $1,000 after I paid it.

Q You knew that Bradford G. Hathaway wasn't the owner? A No.

Q Do you remember the receipt he gave you? A Yes, sir.

Q And in the receipt it says he was to turn it over to the owner? A No, it didn't say that in the receipt.

Q "Received of John N. Lloyd the sum of $1,000 * * * the purchase price to be $11,000 payable in cash." A Yes, sir.

Q (Reading from Exhibit P. 1.) "Money to be refunded in the event owner does not accept terms." Do you remember that? A Yes.

Q So you knew Bradford G. Hathaway was not the owner? A I knew that, yes.

Q He was only the broker selling the property for whoever had the title or the right of the title to the property? A Yes, but I didn't know what became of the $1,000.

Q When you went up to Mr. Yonteff's office what did you go for? A To sign a release.

Q Wasn't it to sign the contract which you put in your pocket? A I signed the release

the day previous and the following day I got the contract to sign.

Q You were satisfied to buy the property? A Yes, sir.

Q The price was O. K.? A Yes, sir.

Q Whom were you doing business with? Who was this owner? A I thought Mr. Vanderhoof was the owner.

Q Didn't you read this paper you put in your pocket? A As I read and I saw another name substituted I got suspicious.

Q Didn't they tell you then and there Mr. Weinstock had a contract on the property? A I will swear I never heard about it until I saw his name in the contract.

Q On March 1, 1924, you went to Mr. Olsan's office? A Yes, sir.

Q On March first? A I think it was March first.

Q How much cash did you have with you then? A $2,000.

Q That is all? A Yes, sir.

Q Was Mr. Hathaway there? A I believe he was there.

Q Was Mr. Weinstock there? A No, sir.

Q Mr. Olsan was there? A Yes.

Q Mr. Olsan was Mr. Weinstock's attorney? A Yes, sir.

Q You offered the $2,000 to Mr. Olsan? A Yes, sir.

Q At no time that you can recall did Bradford G. Hathaway tell you he had paid it to Weinstock? A No, sir.

Q Did you think he had it in his pocket? A No, I don't think every man is a burglar.

Q You were told on March first that you had to have $10,000 more cash by Mr. Olsan, the attorney for Mr. Weinstock? A Yes, sir.

John N. Lloyd, cross.

Q And did Mr. Olsan tell you that the other $1,000 was held by Mr. Weinstock? A No, sir.

Q All he asked for was $10,000 cash? A $10,000 was required to take the property over.

Cross examination by Mr. Olsan.

Q Do you know whom I represented? A I don't know.

Q Do you know today? A No, I don't.

Q When you saw this agreement with my name in it that you got December first were you represented by counsel? A December first?

Q Yes. A Mr. Hurley.

Q Was he representing you on December first? A I assure you I guess he represented me.

Q Did you take the agreement from Mr. Yonteff to Mr. Hurley? A Yes.

Q And yet, neither you or Mr. Hurley, from December first, to March first, made any move with reference to this paper? A No.

Q Did you ever get in touch with me between December and March? A Not that I know of.

Q You would know pretty definitely? A Two years ago I had lots of things to do; in two years it is pretty hard for a man to recall everything.

Q Did you ever see me before March first? A Only the time we were all over when title was to be passed.

Q That was the first time? A When I tendered the $2,000 to you.

Q That was March first? A Yes, and I saw you on the third and on the fifth and three times you were not ready.

John N. Lloyd, cross.

Q Was I ready on the fifth? A No, sir, you were not ready on the fifth.

Q Did I offer you a deed on the fifth? A Yes, you offered Mr. Hurley the deed.

Q Was it a question as to whether I was ready or not? Whether Mr. Hurley was right or I am right? A You wasn't ready on the first or the third or on the fifth; on the third of March you said I would have to have $10,000 and I brought it and laid it on the table to give me title to the property and it was rejected.

Q When? A Mr. Hurley counted it out.

Q On the fifth? A Yes.

Q Did you count it out on the table on the third? A I had it in my hands; I had $2,000 in my hands; I think it was on the third. You said that I didn't have $2,000. You remember that, don't you?

Q I am not testifying yet, Mr. Lloyd. The only question that came up with reference to this deed was as to the signature of Conover's and Hathaway's wives? A Not only that, but the house was encumbered.

Q What do you mean by that? A You are a lawyer—

The Court: Answer the question.

The Witness: On the sixth it was still occupied.

By Mr. Olsan.

Q You were there on the fifth? A I was there on the fifth; I don't know, I may have been there.

Q The day that you made this tender of $10,000 you were there? A Yes.

Q That was on the fifth? A Yes.

John N. Lloyd, cross.

Q In what condition did you see the house? A Mr. and Mrs. Vanderhoof were still living there.

Q Was it packed up? Was the furniture packed up or not? A I saw a great deal of it packed.

By Mr. Newman.

Q Then the Vanderhoofs were not going to stay there three months?

Mr. Hurley: I object to the question.

Q You really didn't want to buy this house?

Mr. Hurley: I object to that.

Objection sustained.

Q The Vanderhoofs were packed up you say? A They had a few bundles I saw.

By Mr. Olsan.

Q There is some testimony about a release that was torn up? A Yes.

Q Just to bring your mind back to that release. That release was drawn presumably to let you out of buying this property, is that it? A Yes, but it didn't say it was to get my $1,000 back.

Q I didn't ask you that. It was presumably to let you out of buying the property? A Yes.

Q Why did you consent to its being torn up? A It was made up conditionally; if I could scrape the $2,000 up it was to be destroyed, which it was.

Q You say all you needed was $2,000 in cash? A That is all.

Q Where was the rest to come from? A I was to put in $3,000 and Mr. Hathaway to advance it to make up $8,000 for the total of $11,000.

Q Was that the agreement you had with Mr. Hathaway? A Yes.

Q As a matter of fact, it is because that agreement had not been lived up to? A If I got the loan—

Q Since you didn't get the loan you were not willing to go through with the deal? A No; the best I could I would have to go through.

Q You did try to do the best? A I agreed to put in $3,000 and Mr. Hathaway was to advance it for me up to $8,000 and after he got my $1,000 he said, "I am very sorry to say that the building and loan does not loan more than fifty per cent. on the value of the property." And I said, "Give me back my $1,000," and he wouldn't do it; just he called up Mr. Yonteff and asked how much to draw up a release and he said $100. I said it is too much and we agreed on $50.

Q After Mr. Hathaway told you he could not get you the loan you tried to get your own loan? A I don't think I did.

Q Did you or did you not try? A No.

Q Did Mr. Hurley try for you? A No.

Q When did Mr. Hathaway tell you he could not get the loan for you? A A few days after I had paid him the $1,000; he fell down on his promise and he didn't put that in the receipt and I called it to his attention and he said, "That is all right, Mr. Lloyd; that is all right, Mr. Lloyd."

Adjourned to Wednesday, December 16, 1925, at 10 o'clock A. M.

SECOND DAY.

Wednesday, December 16, 1925.

Continued pursuant to adjournment.

Present, counsel as before stated.

JOHN LLOYD resumes the stand.

Cross examination by Mr. Olsan (continued).

Q Well, then, you didn't get a loan from Mr. Hathaway and you didn't get your own loan, yet, you made me a tender of $10,000. Where did you get the money? A From a friend of mine by the name of Mr. Caldwell.

Q How did you come to make me a tender of any kind? A I came to make you a tender because I had the $10,000 to make it with.

Q Why didn't you make it to Mr. Hurley? A I gave the $10,000 to Mr. Hurley and he counted it out to you.

Q Did you know then how I was interested in the matter? A Not until then.

Q Did you know then? A Yes.

Q How did you know? A I believe that you represented Mr. Weinstock.

Q Did you know? A I knew then, yes, sir.

By the Court.

Q As I understand it, Mr. Weinstock was present on the fifth? A Yes, sir, he was there.

Q Did he hear what you said about tendering the money? A Yes, sir, he was there.

David H. Yonteff, direct.

DAVID H. YONTEFF, sworn in behalf of the plaintiff.

Direct examination by Mr. Hurley.

Q Mr. Yonteff, you are a member of the Bar of this State? A I am.

Q Are you attorney for anybody involved in this suit, or were you? A I was for both parties; both Mr. Weinstock until the actual drawing of the agreement, and for Mr. Lloyd.

Q I would ask you if you drew the contract marked Exhibit P. 3, or, as I may better designate it, the assignment contract? A That is the original of which a copy was signed by one of the parties.

Q By whom was the copy signed? A A. Weinstock.

Q When did Mr. Weinstock sign that copy? A As far as I know, on the date of the instrument, December 1, 1923.

Q Did Mr. Lloyd sign the contract? A No, he never did.

Q Did he decline to sign it? A He did.

Q Did you so advise Mr. Weinstock? A Yes.

Q Did you handle the money in this transaction? A Yes, I handled the $1,000, the money given to Mr. Bradford Hathaway by check of Mr. Lloyd. I say that to distinguish it from any other money that may have been spoken of.

Q What did you do with that money? A I have the two checks here that we used to disburse that $1,000 (hands paper to Mr. Hurley).

Q Will you state the dates on which that money was paid to Mr. Weinstock or his attorney? A Do you mean the date of the check or the date actually cashed?

David H. Yonteff, direct.

Q The date delivered. A One check delivered December 1, 1923, for $600 to Carl Olsan, attorney for A. Weinstock.

Q For whom was the other check delivered? A The other was delivered to A. Weinstock.

Q On what date? A December twenty-first.

Q What was the amount of it? A $400.

Q Do you know Mr. Weinstock's signature?

Mr. Olsan: We admit receiving the checks.

Mr. Hurley: I offer both checks in evidence.

(The check for $600 is received in evidence and marked Exhibit P. 11.)

(The check for $400 is received in evidence and marked Exhibit P. 12.)

By Mr. Hurley.

Q Mr. Yonteff, have you the original contract between Mr. Vanderhoof and Mr. Arthur Conover? A Yes (handing paper to Mr. Hurley).

Q I ask you if that is a copy of the contract which has already been marked Exhibit P. 5? A I will have to compare them at length to make sure.

Q Just look over them and see if you feel that that is a copy, that is, not with exactitude, just to make sure it is a copy of the same contract, or purports to be. A There is some endorsement here that is not on the original. They were intended to be originally exact copies of each other.

Q Have you any assignments of those contracts? A Assignments that was made Septem-

ber 7, 1923, from Arthur Conover to Frank C. Hathaway.

Q Did you sign that contract as a witness? A I did.

Q That is Mr. Conover's signature? A That is Mr. Conover's signature.

Mr. Hurley: I offer the assignment in evidence.

(The same is received in evidence and marked Exhibit P. 13.)

Q Have you any further assignments? A From Frank C. Hathaway to Abraham Weinstock; that, however, is not an assignment, it is a contract.

The Court: What is the date?

Mr. Olsan: September 14, 1923.

Mr. Hurley: I offer in evidence contract whereby Frank C. Hathaway agreed to convey to Abraham Weinstock the premises 503, 505, 507 Hawthorne avenue.

(The same is received in evidence and marked Exhibit P. 14.)

By Mr. Hurley.

Q Are you acquainted with Mr. Henry Conover? A Arthur Conover.

Q Arthur Conover? A Yes.

Q Do you know, of your own knowledge, whether he is single or married? A I know he is married.

Q Was he married on the date of the assignment marked Exhibit P. 13? A He was.

Q Do you know of your own knowledge whether Mr. Frank C. Hathaway was married on the 14th of September, 1923? A Yes, he was.

David H. Yonteff, direct.

Q Have you any contract in writing between Mr. Weinstock and Mr. Bradford G. Hathaway other than those already produced? A I have a contract dated November 20, 1923, between A. Weinstock and Bradford G. Hathaway.

Mr. Hurley: I offer the contract in evidence.

(The same is received in evidence and marked Exhibit P. 15.)

(Mr. Hurley reads Exhibit P. 15 to the jury.)

By Mr. Hurley.

Q Mr. Yonteff, have you any knowledge of the part taken by Bradford G. Hathaway in the sale from Vanderhoof to Conover, from Conover to Frank Hathaway and from Frank Hathaway to Abraham Weinstock? A As I remember it—

Mr. Olsan: I object to that unless it is answered yes or no.

The Court: Answer yes or no.

The Witness: It is rather difficult to answer that one way or the other.

By Mr. Hurley.

Q Have you any personal knowledge? A I have some knowledge, yes.

Q State what knowledge you have. A Only that relationship of Bradford Hathaway as agent in a transaction from Mr. Weinstock to Mr. Lloyd but not of any prior agency on the part of Bradford Hathaway for any of the preceding parties.

David H. Yonteff, cross.

Cross examination by Mr. Olsan.

Q You say you were the attorney for Mr. Weinstock. Just what services did you render for him as such attorney? A I said I was attorney for him up to the point of rendering the agreements.

Q What services? A He came and told me at what terms he would sell and suggested I draw the agreement, and I did.

Q What agreement is that? A The agreement of sale.

Q What agreement is that? A Agreement of December 1, 1923.

Q Was I at your office when that was drawn? A When it was signed.

Q Was I at your office when that was drawn? A Not that I recall.

Q Was I or wasn't I? A I don't recall whether you were there when it was drawn; you were there when it was signed.

Q Wasn't it drawn and signed the same day? A No.

Q Are you sure about that? A That is my recollection; it was drawn the day before it was dated.

Q You don't remember my changing the terms of the original terms? A I do; those were made the day the contract was signed.

Q Now, do you remember whether that contract was drawn and signed the same day? A My recollection is still that the contract was signed the day after it was drawn; it may have been revised before signing.

By the Court.

Q In other words, a new copy drawn on the day of the signing? A Yes.

David H. Yonteff, cross.

By Mr. Olsan.

Q Are you certain that the agreement you have before you was drawn the same day it was executed?

Mr. Hurley: I object to that.

Objection sustained.

Q Were you paid for your services by Mr. Weinstock? A This is not a police court; I am not trying to represent myself as anybody's attorney. I made the answer clear that I represented Mr. Weinstock and I meant that in the generic sense; he was in my office and asked me to draw the agreements and I drew them; then, Mr. Olsan appeared with him and the agreements were modified as requested by him.

Q Will you explain what you mean by a generic sense? A I mean I represented Mr. Weinstock, not necessarily in any technical sense, but what I did I did in a representative capacity. He came to my office and asked me to draw the terms of the contract in the sale proposed by Mr. Bradford Hathaway.

Q The agreement was first proposed by Bradford Hathaway? A Yes.

Q It was in accordance with his instructions to you that you drew the agreement? A No, Mr. Hathaway did not give me instructions; it was agreed upon between Mr. Hathaway and Mr. Weinstock what the terms were to be.

Q But, Mr. Hathaway told you the terms? A Perhaps he did, but those were the terms of the agreement.

Q Did they arrive at the agreements in your office? A I can't say.

Q Was Mr. Weinstock in your office when Hathaway gave you those terms so you could draw this memorandum or agreement, as you call it? A Mr. Weinstock wasn't there the first time when Mr. Bradford Hathaway called, but he was there at a later call of Mr. Hathaway's.

Q Hathaway gave you the $1,000? A Yes.

Q Why did you pay Mr. Hathaway $600 and not $1,000 the first time? A If you will look at the agreement between Frank Hathaway and Abraham Weinstock, you will find that there is a provision that a $400 balance from A. Weinstock was to be paid to Frank Hathaway December fourteenth and it was suggested to me and agreed upon by all parties concerned, that I withhold the $400 until Mr. Weinstock showed the $400 due Mr. Hathaway.

Q You paid Mr. Weinstock $400 on December twenty-first? A Yes.

Q Why didn't you pay Frank Hathaway on December fourteenth in accordance with the contract?

Objected to.

Objection sustained.

Q In your direct examination you stated that you advised Mr. Weinstock that Lloyd never signed this agreement, is that true? A Yes, I did.

Q When? A When I first suggested to Mr. Lloyd that he sign a copy for Mr. Weinstock.

Q Do you remember the circumstances under which you advised Mr. Weinstock? A I don't remember; I know he was told either by me directly or through you; one or the other of you got the information from me, that Mr. Lloyd refused to sign his copy.

David H. Yonteff, cross.

Q Do you think you told me about it? A My recollection is that I told Mr. Weinstock.

Q You are not sure of that? A No. I am not positive.

Q I wrote you a letter on February twenty-first, Exhibit P. 6, do you recall this letter? A Yes.

Q Do you recall your answer to that letter? A No.

(Mr. Olsan reads Exhibit P. 6 to the jury.)

Q Have you your reply to that letter?

Mr. Hurley: I should think Mr. Olsan would have the reply. The witness may have a copy.

Q Is this your answer, Mr. Yonteff (handing paper to witness)? A That is my answer.

Q Why didn't you then tell me that Lloyd had refused to sign the agreement? A Because I didn't think it was material to repeat the fact that he did not sign the contract; when he had actually entered into one by his definite act.

Q But, you don't recall telling us of his failure to sign the contract? A The letter specifically calls for—

Mr. Hurley: No objection to its admission in evidence.

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

Cross examination by Mr. Newman.

Q As I understand your testimony, when you received the $1,000 from Bradford Hathaway, you were the attorney for Mr. Lloyd? A Yes.

David H. Yonteff, re-cross.

Q On Mr. Lloyd's instructions, you paid it to Mr. Weinstock? A Yes.

Re-cross examination by Mr. Olsan.

Q You drew this agreement between Mr. Weinstock and Mr. Frank Hathaway that has been introduced in evidence? A Yes.

Q And the terms of that set out that if an assignment is secured at the sum of $1,500 Bradford Hathaway was to receive $750? A If title actually closed.

Q There was no change made in this agreement? A No.

Q That still exists so far as you know, between Hathaway and Weinstock? A So far as I know.

By the Court.

Q You say there was a meeting in your office at which Mr. Hathaway and Mr. Weinstock were present? A Yes, sir.

Q And a proposed agreement was prepared to carry out the terms of the agreement which Mr. Lloyd was to sign? A Yes.

Q And Mr. Weinstock knew at that time that Mr. Lloyd was a proposed purchaser? A He knew that that was the name of the proposed purchaser.

Q And that a deposit had been put up by him of $1,000? A That is right.

By Mr. Olsan.

Q Did he know that $1,000 was put up? A Yes.

David H. Yonteff, re-cross.

Q You are positive about that? A Yes, I am positive because that was the amount receipted for.

Q The receipt was for the $600? A Yes, and I told him that $400 would be retained by me in order to insure the right of the last holder of the title.

Q You were representing Mr. Frank Hathaway? A I knew that Mr. Lloyd—I didn't represent Mr. Frank Hathaway at that time, no.

Q Why the solicitation for Mr. Frank Hathaway? A Because I wanted to be sure that all prior amounts due on the prior contract were paid.

By the Court.

Q Were you present at the subsequent meeting when this draft of agreement was presented to Mr. Lloyd in person? A My recollection is that Mr. Lloyd had expressed his dissatisfaction and his refusal to go through with the deal prior to the time that the contract was actually presented to him to sign and he threatened then to start suit and asked me to start suit, and I told him inasmuch as Mr. Weinstock had been in my office at the very beginning of these negotiations, relying on me and having no other attorney present, it would not be proper for me to start suit against him. For that reason I suggested to Mr. Lloyd to go to someone else. Mr. Weinstock already had other counsel.

Q When that occurred, had he seen the draft of contract? A Mr. Lloyd had seen the draft of the contract before he refused to go through with it.

Q Were you present when he testified here he went to the office and when he saw this contract, after reading it, he put it in his pocket, unsigned, and went out of the office? A Yes, and I subsequently took the contract signed by Mr. Weinstock to Mr. Hurley who, I found, represented him.

Q Did Mr. Weinstock or Mr. Olsan at that time know of the form of this receipt of November 22, 1923, that Mr. Hathaway had given to Mr. Lloyd, the one attached to the complaint? A I had never seen that until I saw a copy of it here. I don't think I had ever seen that before. I would like to clear up one question with regard to a letter sent to me by counsel for Mr. Weinstock. That letter asked that Mr. Lloyd be notified that unless he went through with a closing or expressed his intention to close on a certain date in accordance with that assignment, and failing to do so, the assignment would be considered off—it was not a question whether he knew of the signing or not, it was a question whether he intended to go through. Mr. Lloyd, I know, at that time was making arrangements to close, regardless of his not having signed the contract.

Re-direct examination by Mr. Hurley.

Q How many times was Mr. Lloyd in your office? A I should judge about four times.

Q Mr. Lloyd? A Yes.

Q What was the first time he came to your office, if you remember? A I think it was a day or two after the deposit was left with me by Mr. Bradford Hathaway.

Q By whom was he accompanied when he came to your office? A He may have been ac-

companied by Mr. Bradford Hathaway but my impression is he came alone.

Q He was introduced to you by Mr. Bradford Hathaway, wasn't he? A Yes.

Q Isn't it a fact that Mr. Hathaway was always present when Mr. Lloyd came to your office? A No.

Q On the day before the agreement of December 1, 1923, was signed, Mr. Lloyd was there accompanied by Mr. Hathaway, was he not? A Yes, the day that he signed the agreement Mr. Hathaway was with him.

Q On the day that the agreement was offered to Mr. Lloyd for signature Mr. Hathaway was also present, was he not? A That, I don't remember; I don't recall that.

Q The question has arisen as to whether you ever stated to Mr. Weinstock that $1,000 had been deposited. I would ask you to refer to the agreement of December first, or the proposed assignment of December first, and see what consideration that recites as having been paid? A It recites $1,000.

Q That is the copy of the agreement which Mr. Weinstock signed? A This is the one that he signed; I think that is an exact copy.

Q In his copy does it also acknowledge receipt of $1,000? A $1,000.

Q You would not be sure as to how many times Mr. Lloyd was in your office? A No.

By the Court.

Q In the preparation of this draft of contract, Mr. Lloyd did not sign, the negotiations leading up to them contemplated an actual signing of an additional contract? Did they not? A Yes, sir.

Ira W. Caldwell, direct.

By Mr. Olsan.

Q There was one contract signed by Mr. Lloyd at the same time, wasn't there? A Not that I know of.

Q Wasn't there one signed that was subsequently destroyed? A I heard him mention yesterday there was a release drawn.

Q Do you know whether or not one was signed? It must have been done at your office. A I said I don't remember.

IRA W. CALDWELL, sworn in behalf of the plaintiff.

Direct examination by Mr. Hurley.

Q Mr. Caldwell, where do you reside? A Jersey City, New Jersey.

Q What is your business? A Trucking.

Q Are you in business for yourself or employed? A A corporation.

Q What is the corporation? A New York Live Poultry Trucking Company.

Q Are you an officer of that company? A Secretary.

Q Did you accompany Mr. Lloyd and myself to the office of Mr. Olsan on the fifth of March? A I did.

Q How much did you have? A $10,000.

Q Did you offer it to Mr. Olsan for the property? A I gave it to you to offer to Mr. Olsan.

Q What occurred on that day? A As far as I remember the deed to the title was refused because the signatures of the wives of the parties that were passing the title were not on.

Q Did you visit the premises before the time set for closing on the fifth? A I did.

Q Whom did you find in possession? A I found, I think, her name was Mrs. Vanderhoof.

No cross examination.

ARTHUR E. CONOVER, sworn in behalf of the plaintiff.

Direct examination by Mr. Hurley.

Q Mr. Conover, where do you live? A Newark.

Q By whom are you employed? A Public Service.

Q In what capacity? A Secretary to the vice-president.

Q I would ask you if you are the party designated as Arthur E. Conover who signed an agreement dated the seventh of September, 1923, made by Arthur E. Conover to Frank C. Hathaway, marked Exhibit P. 13. A I signed that.

Q At the time of that signature were you single or married? A Married.

Cross examination by Mr. Olsan.

Q Were you married on March 1, 1924? A Yes.

Q Your wife was then living? A Yes.

Q Were you connected in any way with Mr. Hathaway? A No.

Q Other than your initial deposit in this contract, had you paid any money to the Vanderhoofs? A No, sir.

Q That is the only interest you had in it? A The only interest.

Q You never took any interest in this property? A None whatever.

Q Do you claim any interest in this property today? A No, sir.

Q Does your wife? A None whatever.

MARY F. VANDERHOOF, sworn in behalf of the plaintiff.

Direct examination by Mr. Hurley.

Q Mrs. Vanderhoof, were you the owner of the house located at 533, 535, 537 Hawthorne avenue? A Not solely.

Q I mean you were formerly the owner of the house? A Mr. Vanderhoof and I were.

Q You first bought this property from Jack Tennyson and the Newark Land and Improvement Company? A Yes, sir.

Q Conveyed to Myron E. Vanderhoof? A Yes.

Q You then conveyed it to—the final conveyance was to you and the property was in your name? A Not all of it. The house was in Mr. Vanderhoof's name and two lots were in my name.

By the Court.

Q It is admitted that on March first Mr. and Mrs. Vanderhoof were the joint owners of this property.

Mr. Olsan: Yes, sir.

Mary F. Vanderhoof, cross.

The Court: I suppose they did not deliver a conveyance between that time and March seventh?

Mr. Olsan: There is no ground for that conclusion. I simply admit on March first they were the owners, nothing else.

By Mr. Hurley.

Q Mrs. Vanderhoof, were you in possession of this house on March 5, 1924? A Yes, sir.

Q Were you in possession of the house on March 6, 1924? A Yes, sir.

Cross examination by Mr. Olsan.

Q On March 5, 1924, did you own this property? A March fifth?

Q Yes. A That is the day that we settled our sale. That was the day that we—

By the Court.

Q March 5, 1924? A Yes.

Q And the reference about possession on March 5 and 6, 1923, was meant to be 1924? A Yes, sir; March 5, 1924.

By Mr. Olsan.

Q Were you prepared to vacate the premises March fifth? A Not on March fifth, but we could either March sixth or seventh; everything was ready to move; we even had the van hired.

By the Court.

Q For what day? A For any day that we called if we were asked to move.

Motions for a Non-suit.

By Mr. Hurley.

Q When did you actually move out? A The twenty-sixth of April.

PLAINTIFF RESTS.

Mr. Newman: I desire to ask for a non-suit on the part of Bradford G. Hathaway.

Mr. Hurley: I do not think this motion should be pressed at this time. I am proceeding on the theory that Mr. Hathaway was the agent of Mr. Weinstock and I think the motion ought to wait until the final determination.

The Court: I will grant the motion.

Mr. Olsan: I would like to move for a non-suit in behalf of the defendant Weinstock for the following reasons: The plaintiff alleges a definite agreement and an agency on the part of one Hathaway for and on behalf of Weinstock. Even if the Court considers that the suit is against Weinstock solely, there is not one iota of proof of agency except the fact that we got $1,000. The terms and conditions and circumstances under which they were received are not in evidence. The only evidence of any agency or authority is an agreement which was not signed. There is nothing in this case to bind the defendant Weinstock.

The Court: I will deny your motion.

Counsel for defendant Weinstock prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Hurley: If the Court please, I had no knowledge whatever of the existence of the papers in Mr. Yonteff's possession until

yesterday. I would like to amend the complaint to add a further count that the contract between the parties was never accepted and that the money was received by Mr. Weinstock and that there was no contract between the parties by which the money could be retained by him.

Mr. Olsan: I object to that. We are not prepared to meet that issue.

The Court: I will deny your motion, Mr. Hurley.

Mr. Hurley: I move to strike from the answer of the defendant Weinstock paragraph 4 on the ground that it does not state a legal defense to the action.

The Court: There is no notice that I see here.

Mr. Hurley: I raised a question of law at the time.

The Court: If you had given notice of your intention, I have power to act.

Mr. Hurley: I withdraw the motion.

Mr. Olsan: I have another ground for a non-suit, that the plaintiff's refusal of this deed tendered to him was without merit in law and that the title tendered to the plaintiff was a sufficient title and good in law.

The Court: I have not yet found out what was tendered to him. I feel now that that is not a valid objection, but I do not want to make any ruling on that at the present time.

Mr. Olsan: I ask your Honor to do so.

The Court: I refuse to grant the motion on the additional ground that the wives of the assignors of the sale did not tender the

deed to the plaintiff and I refuse to grant your motion now as to what was actually tendered.

Counsel for defendant Weinstock prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

CARL OLSAN, sworn in behalf of the defendant.

Mr. Olsan: Mr. Hurley, do you want this in question and answer form?

Mr. Hurley: Any form you please, Mr. Olsan.

Mr. Olsan: I had been representing Mr. Weinstock for at least five years in all his matters and previous to December first was asked to represent him by Mr. Weinstock in a transaction between himself and one Bradford Hathaway. I called at the office with him on December first with the papers of Mr. Yonteff and we there drew and Mr. Weinstock executed the contract between Weinstock and John N. Lloyd. We received at that time a deposit and left the papers in escrow with Mr. Yonteff for the reason that we, not having title, he wanted the papers, representing Mr. Lloyd, in his possession. The agreement specified since we did not have title that on February fifteenth if the purchaser Lloyd desired to take title he was to serve on us a notice so that in the event that he refused the title we were to be prepared to have an opportunity to finance. Not receiving such a no-

tice, I sent a letter to Mr. Yonteff asking him what was Lloyd's attitude and unless he complied with the terms of that agreement we would consider the agreement at an end, and received a reply from him that he had forwarded my communication to Mr. Hurley. He was just representing Mr. Lloyd and Mr. Hurley would get in touch with me. The next thing, Mr. Hurley phoned me he was coming to close this title, and on March first came to my office. He telephoned me, as I recall, the previous evening and came early on March first, which was Saturday, as I recall it. Mr. Caldwell handed me a pile of money. I asked him to count it and found there was only $2,000.

By the Court.

Q Caldwell called the first time? A Yes, Caldwell, Lloyd and Hurley. Mr. Hurley served me that day with a notice that he would appear March fifth.

Q Did you see why he refused the tender? A I insisted upon the performance of the contract.

Q Which contract? A That we had with Lloyd.

Q Which contract are you referring to? A The only contract—

Q When I speak of contract I do not mean a legal, binding contract. The receipt that Mr. Hathaway gave Lloyd or the draft of the assignment signed by Mr. Weinstock. A We knew nothing of the receipt signed by Hathaway. That is, I personally knew nothing of it, and Mr. Weinstock did not know of it until

this suit was instituted. The first knowledge I got of it was from the pleadings.

On March fifth I tendered Mr. Lloyd this deed which I desire to offer in evidence.

(Same is received in evidence and marked Exhibit D. 2.)

By the Court.

Q A deed from A. Weinstock and Anna Weinstock, his wife, to the premises in question? A Yes, sir.

On March fifth Mr. Caldwell was there with $10,000. We did not actually count the money; I told him I would admit a tender as of that date. I tendered Mr. Lloyd and Mr. Hurley this deed, which Mr. Hurley refused because the wives of Conover and Hathaway not having joined thereon, and he refused to take it. We discussed for a few moments the legal question, but we could not agree on that question. Subsequently, this suit was instituted. There was some correspondence between us to define the issue setting forth that the only question was the signature of the wives.

Cross examination by Mr. Hurley.

Q You say you at all times considered that we were closing under the contract drawn by Mr. Yonteff? A I did not.

Q What did you say? A I said I heard nothing of the situation one way or the other until I wrote the letter of February twenty-first, and you called me up the day before March first.

Carl Olsan, cross.

Q You say you wanted the money paid on the contract not as between you and Mr. Lloyd? A That is right.

Q I would ask you to look at that contract and see how much cash it calls for. A It calls for $1,000; $400 on February fifteenth, or at least a notice then, and, I think it was, $1,500—

Q Read the contract. That states the terms. A It says the consideration of $2,500, for which $1,000 was paid, not later than the fifteenth day of March, 1924.

Q In other words, all that is called for in addition to the $1,000 Weinstock had already received, all you were entitled to under your contract was $1,500? A For an assignment of that contract. But having taken title to the premises we were entitled to our purchase price.

Q This provides only for an assignment of the contract then? A That is all.

Q On March fifth, we made the further objection that you could not deliver possession of the property? A That is true; you were also advised at that time that Mrs. Vanderhoof was waiting for a telephone call from me and she would immediately move and I was advised that Mr. Lloyd had just been there and had advised you of the facts, because as soon as he left there—

Q Do you know what was said to Mr. Lloyd? A Nothing except what was testified to yesterday.

Q What was testified? A That these people were ready to move and packed.

Q Who testified to that? A So I understood the testimony of Mrs. Vanderhoof today.

Q Isn't it a fact that Mr. Weinstock obtained from Mr. Vanderhoof a slip of paper which you

produced at the closing agreeing to leave on March sixth and isn't it a fact that Mr. Weinstock told Mrs. Vanderhoof she need not be bound by that? A We told her that if he did not want—

Mr. Olsan: I am going to ask Mr. Hurley if he will admit a conveyance previous to the March fifth attempted conveyance to Lloyd, from the Vanderhoofs to Weinstock.

Mr. Hurley: That is admitted.

(Same is received in evidence and marked Exhibit D. 3.)

By the Court.

Q When was that conveyance made? A Earlier than March fifth and the tender was made in the afternoon by Mr. Hurley, I think at three o'clock.

DEFENDANT RESTS.

JOHN N. LLOYD, the plaintiff, recalled in rebuttal.

Direct examination by Mr. Hurley.

Q Mr. Lloyd, at the time that you visited Mrs. Vanderhoof on the fifth of March, what did she state to you? A Mrs. Vanderhoof said that she had had a written agreement and that she had a verbal agreement, that she had a written agreement to move out on the sixth and that she had a verbal agreement to stay until March tenth, but she said she would not move until her new house was ready.

Cross examination by Mr. Olsan.

Q Did she tell you she was ready to move the next day if necessary? A No, sir, she did not.
Q Did you testify that in your direct examination? A No, sir, I did not.

Mr. Olsan: I move for a non-suit on the ground that the plaintiff declares on a definite agreement, in other words, I am renewing my former grounds, both as to the law as to the validity of his objection and the additional ground that the plaintiff sets up his agreement that the title should be closed as of March first and that there was no tender made on March first; and that we are entitled to a non-suit.

The Court: Motion denied.

Counsel for the defendant Weinstock prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Olsan: I ask for the direction of a verdict on the ground that the plaintiff has not established his case and that the evidence is contrary to the pleadings, in that the plaintiff has failed to support his pleadings in that he has not established facts sufficient to go to the jury, first, that his objection to the title is not a proper and legal one; and the ground of possession is not a valid one; on the further ground that the agent acted without the scope of his authority.

(Argument.)

Mr. Hurley: It is my intention to ask for the direction of a verdict on the ground that the tender was not sufficient; possession

was not delivered at the time the deed was offered; on the further ground that there is an outstanding dower interest in the wives of Arthur E. Conover and Frank Hathaway, they having had an interest in the assignment and not having joined.

Mr. Olsan: I respectfully request a direction of a verdict on the ground that the plaintiff, knowing the situation, made his tender on the count of possession and that under the circumstances he waived that condition. There is nothing in the contract to indicate that he was to get title free of encumbrances or free of anything. The Vanderhoofs, from the testimony, were ready to move and could have moved and so told Lloyd, the plaintiff, that the delivery of possession was not of the essence of the agreement; that they were ready to move the next day. If the Court finds, as a matter of law, that they were entitled to the possession, it was a sufficient compliance. Possession under the terms of this agreement was not required.

The Court: In this case the beginning of the transaction is a receipt signed by Bradford G. Hathaway which purports that he is not the owner but is acting for someone. That receipt provides for the sale at a cash price and a closing as of March first; and also contains the provision "money to be refunded in the event owner does not accept the terms."

There has been some question as to the authority of Bradford G. Hathaway that also involves some objection to the complaint. I will consider that amended to properly

raise the point which I am passing upon because I do not think it is material whether he had authority or not in the final determination of this issue because the receipt says that the money is to be refunded in the event that the owner does not accept the terms. It shows that Bradford G. Hathaway had the right to negotiate for Weinstock, that is, that he was in some way authorized to deal with this property; if he was not, the subsequent actions of Weinstock ratify the fact that he did have the right to do so. Nevertheless, the money itself was turned over by Bradford G. Hathaway to the defendant Weinstock, who accepted it. If he accepted the money then he was obliged to pass a good and sufficient title to the plaintiff or else return his money.

There were negotiations and transactions with regard to the form of agreement of sale and there never was a meeting of the minds of the two parties in this case on any such agreement, so we have to go back to the original receipt or else reject Mr. Hathaway's authority, and in that event, there was the obligation upon the part of Mr. Weinstock to return the money which he received from the plaintiff through Hathaway.

That being the case we have two propositions: either that the owner refused to accept the terms of the Hathaway receipt or that he did accept them. If he refused, the plaintiff is entitled to his money; if he did accept them—and he was bound by them—then we come to the question of performance on the part of both parties.

The time would not necessarily be of the essence under this contract so that when the parties met on March first there was an offer and a rejection but it is testified here it was with regard to the unsigned agreement and that a later arrangement was made for a subsequent tender.

I will hold that the offer made by the defendant of the deed was not a sufficient compliance of a marketable title or one which the plaintiff was entitled to receive if he was entitled to receive title, and therefore, the contract is either broken or is not carried out. In either case the plaintiff is entitled to the return of his money. I will direct a verdict against the defendant and in favor of the plaintiff plus interest as of March 5, 1924.

Counsel for defendant Weinstock prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

CHARGE TO JURY.

SMITH, *J.* Gentlemen of the jury. By direction of the Court you will return a verdict in favor of the plaintiff and against the defendant Abraham Weinstock for the sum of $1,125.

Exhibits P. 1—P. 2.

Exhibit P. 1.

55-38

THE NEW JERSEY TITLE GUARANTEE & TRUST COMPANY
83-85 Montgomery Street.

No 346 Jersey City, N. J. Nov. 22, 1923
Pay to the order of B. G. Hathaway
The Sum of One Thousand Dollars
$1,000.00/100 (Signed) John N. Lloyd
Endorsed B. G. Hathaway

Exhibit P. 2.

Telephone Market 8613

BRADFORD G. HATHAWAY
REAL ESTATE and INSURANCE
Rooms 405
40 Clinton Street, Newark, N. J.
Newark, N. J.

November 22nd, 23

Received of John N. Lloyd the sum of $1,000. as deposit on the property known and designated as 533-5-7 Hawthorne Ave. Newark N. J. The purchase price to be eleven thousand dollars ($11,000) payable in cash on date of passing title, said date to be March 1st 1924. Money to be refunded in event owner does not accept terms

Bradford G. Hathaway

Exhibit P. 3.

Know all Men by These Presents, that Abram Weinstock of the City of Newark, County of Essex and State of New Jersey, hereinafter called the assignor, for and in consideration of the sum of $2500.00 to be paid by John N. Lloyd of the City of Jersey City, County of Hudson and State of New Jersey, hereinafter called the assignee, of which $2500.00 the sum of $1000.00 has already been paid by the assignee to the assignor for which $1000.00 this is also a receipt, the assignor hereby assigns to the assignee all his right, title and interest to a certain agreement bearing date September 14th, 1923, for the purchase of premises commonly known as #533-535-537 Hawthorne Avenue, Newark, New Jersey.

This assignment, however, is upon the express condition that the balance of the consideration hereof, that is to say, the sum of $1500.00 is paid by the assignee to the assignor not later than the 15th day of March, 1924; and this assignment shall not take effect except upon the happening of the said express condition.

This assignment is upon the further condition that if the assignee shall fail to serve notice upon the assignor at the office of the latter's attorney, Carl Olsan personally, not later than February 15th, 1924, which notice is to definitely and peremptorily state whether or not the assignee will consummate the purchase of the property covered by this assignment; and in the event that the assignee shall fail to serve such a notice at the time and in the manner above stated then this assignment shall immediately be null and void.

This agreement shall also become void eo instanti if the notice served on February 15th, is

Exhibit P. 4.

that the assignee will not consummate the purchase, it being specifically understood and agreed the deposit paid hereunto shall be retained by the assignor as liquidated damages.

It is expressly understood and agreed that time is of the essence of this assignment wherever any time is stated therein.

It is hereby mutually agreed by and between the assignor and the assignee that in the interim and until the performance of the express condition stated above, the agreement of September 14th, 1923, which is covered by this assignment shall be deposited with and remain in the possession of David H. Yonteff in escrow and that he is not to deliver up possession of that agreement to the assignee until the performance by the latter of the express condition upon which this assignment is made.

In Witness Whereof we have hereunto set our hands and seals this first day of December, One Thousand Nine Hundred and Twenty-Three.

(L. S.) Abram Weinstock

Signed, Sealed and Delivered
in the presence of

Exhibit P. 4.

March 1st, 1924.

To Carl Ohlsen, Attorney.

You will please take notice that on Wednesday March 5th, at 3 o'clock in the afternoon I will appear at your office and again make tender of the purchase price of premises at 533-535-537

Exhibit P. 5.

Hawthorne Avenue, Newark, N. J., and will at the time demand a deed conveying good title to the premises, free from encumbrances, and possession of said premises.

We do not by this notice waive any default heretofore made on our contract or receipt which we hold.

Yours very truly,

William P. Hurley
Atty for John N. Lloyd

Exhibit P. 5.

Articles of Agreement, made the sixth day of September in the year of Our Lord One Thousand Nine Hundred and Twenty three. Between Myron E. Vanderhoof and Mary F. Vanderhoof, his wife, of the City of Newark in the County of Essex and State of New Jersey of the First Part; And Arthur E. Conover of the City of Newark, in the County of Essex and State of New Jersey of the Second Part; Witnesseth, That the said party of the first part, for and in consideration of the sum of Eighty five hundred dollars to be paid and satisfied as hereinafter mentioned, and also in consideration of the covenants and agreements hereinafter mentioned, made and entered into by the said party of the second part, doth agree to and with the said party of the second part, that they the said party of the first part, will well and sufficiently convey to the said party of the second part, his heirs and assigns by Deed of warranty free from all encumbrance on or before the Sixth day of March, 1924, next en-

Exhibit P. 5.

suing the date hereof, all those lots, tracts, or parcels, of land and premises, hereinafter particularly described, situate, lying and being in the City of Newark, in the County of Essex and State of New Jersey. Being known as No's. 533-535 & 537 Hawthorne Avenue in said City, being a plot of ground having a frontage on Hawthorne Avenue of 71 feet and 100 feet in depth and contains a one family frame dwelling house erected thereon and frame barn and sheds in rear thereof and being the premises now occupied by said parties of the first part.

And the said Arthur E. Conover for himself, his heirs, executors and administrators, doth covenant, promise and agree to and with the said party of the first part, their heirs, executors, administrators and assigns, that he the said party of the second part, will pay and satisfy or cause to be paid and satisfied, unto the said party of the first part the said sum of Eighty five hundred dollars as and for the purchase money of the foregoing described land and premises, in the following manner, that is to say: the sum of one hundred dollars upon execution of this agreement, receipt whereof is hereby acknowledged and the balance of eighty four hundred dollars in lawful money of United States of America on date of settlement. Taxes, water rents and insurance premiums to be adjusted to date of settlement. It is understood that the buildings erected on said premises are all within the lines thereof and that there are no encroachments and no restrictions against the use of said premises for store purposes so far as any act of the parties of the first part and their grantors is concerned.

Exhibit P. 5.

Parties of the first part hereby agree that the title to the premises in question is a good and valid legal title of record, and also that it is a marketable title, and not a Martin Act Title.

M. E. C.
M. F. V. Parties of the first part hereby agree to be responsible for any damage to the premises by reason of fire on any other cause or causes other than reasonable wear and tear, until closing of title.

M. E. C.
M. F. V. And It Is Further Agreed, by the parties to these presents, that the said party of the second part, his heirs and assigns, may enter into and upon the said land and premises on the Sixth day of March, 1924, next ensuing the date hereof, and from thence take the rents, issues and profits to his and their use.

And It Is Further Agreed, by the parties hereto, that the said Deed shall be delivered and received at the office of B. J. Fleuchaus 11 Clinton St., Newark, N. J. between the hours of ten in the forenoon and four o'clock in the afternoon on or before the said Sixth day of March, 1924 next ensuing the date hereof, but not before December 4, 1923.

M. E. C.
M. F. V. 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;

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

Myron E. Vanderhoof (L. S.)
Mary F. Vanderhoof (L. S.)
Arthur E. Conover (L. S.)

Signed, Sealed and Delivered
in the presence of

David H. Yonteff.

Exhibit P. 5.

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

BE IT REMEMBERED, That on this Sixth day of September in the year of Our Lord One Thousand Nine Hundred and twenty three before me, A Master in Chancery of New Jersey personally appeared Myron E. Vanderhoof and Mary F. Vanderhoof who, I am satisfied are the Grantors in the within Agreement named: and I having first made known to them the contents thereof, they did acknowledge that they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed: And the said Mary Vanderhoof being by me privately examined separate and apart from her husband, did further acknowledge that she signed, sealed and delivered the same as her voluntary act and deed, FREELY, without any fear threats or compulsion of her said husband.

DAVID H. YONTEFF
A Master in Chancery of New Jersey.

Exhibit P. 6.

Exhibit P. 6.

LAW OFFICES
CARL OLSAN
185 Market Street
Newark, N. J.
Telephone Market 2451

February 21st, 1924.

David H. Yonteff, Esq.,
207 Market Street.,
Newark, N. J.

Dear Sir:—

I have not heard from Mr. John N. Lloyd with reference to purchase of premises #533-55-57 Hawthorne Avenue, Newark, N. J.

Under the terms of this contract, his failure to serve me with notice not later than February 15th of his intention to consumate said purchase, or not, is of the essence.

This is therefore, to advise him through you, that should we not hear from him on or before Thursday morning, Feb 28th next, we shall consider the contract at an end, under the terms thereof, and his deposits thereunder forfeited.

I would request you to serve this Notice on Lloyd, or in the event that you cannot do so, advise me of his address at your earliest convenience and I will serve notice on him personally.

Yours very truly,

Carl Olsan
For Abram Weinstock

Co;S

Exhibit P. 7.

Exhibit P. 7.

Mar 6, 1924

Carl Ohlsen, Esq.,
185 Market Street,
Newark, N. J.

Dear Mr. Ohlsen:—

Referring to your telephone conversation in which you offered to allow the Lloyd matter to rest in abeyance until next Monday. I desire to say that Mr. Hathaway in his receipt to Mr. Lloyd called for closing on or before March 1st. We were ready on March 1st. and again yesterday and made our tender at that time, and we consider that he is in default in performance of his contract and Mr. Lloyd has instructed me to institute suit, which I will do as soon as convenient.

Yours very truly,

William P. Hurley.

Exhibit P. 8.

Exhibit P. 8.

LAW OFFICES
CARL OLSAN
185 Market Street
Newark, N. J.
Telephone Market 2451

March 6th, 1924.

William P. Hurley, Esq.,
784 Broad Street.,
Newark, N. J.

Dear Sir:

In re; Weinstock—Lloyd Title.
Hawthorne Avenue.

Confirming telephone conversation just had with you, wherein I offered to hold title open to you, not later than Monday morning, you rejected same on ground that you had already refused same and stating that "it is unnecessary for you to hold it until Monday morning, we've already rejected the title."

Please be advised therefore, that we are acting in accordance with this statement and shall look to your client for any loss and inconvenience that we may have suffered in this transaction.

I shall take up with my clients, question of suit for specific performance.

Yours very truly,

CO:S

Carl Olsan

Exhibit P. 9.

Exhibit P. 9.

LAW OFFICES
CARL OLSAN
185 Market Street
Newark, N. J.
Telephone Market 2451

March 7th, 1924.

William P. Hurley, Esq.,
786 Broad St.,
Newark, N. J.

Dear Sir:

For the purpose of clearly defining the issue with reference to the Hawthorne Avenue property, I am answering *your* letter of the 6th instant.

First, I did not offer "to allow the Lloyd matter to rest in abeyance until next Monday," but simply, "that if you so desired I will give you an opportunity to take title not later than Monday," as stated. Second, you say you were ready on March 1st, As a matter of fact you were not prepared, but I will admit a tender on your part on Wednesday following, of the purchase price, in cash, by Mr. Caldwell, presumably on behalf of Mr. Lloyd. That this tender was made to me, and that I in turn, tendered you a proper warranty deed, from the record title holder, wholly in strict accordance with our agreement in this matter. Third, this tender you refused, first, on the ground that the respective assignors of the original contract in this matter did not have their wives join in such assignments; and secondly, because, as you thought, we were not in a position to give you immediate possession, which, by the way, we were not compelled to do.

Exhibit P. 10.

As a matter of fact, your clients had called at the Hawthorne Avenue address, within half an hour before coming down to my office to close, and had been informed by Mrs. Vanderhoof that she was ready to move that afternoon, and your clients themselves, saw her effects packed and ready to move upon a telephone call from me.

I believe this clearly defines the history of this matter.

Yours very truly,

CO:S Carl Olsan

Exhibit P. 10.

March 8th, 1924.

Carl Ohlsen, Esq.,
185 Market Street,
Newark, N. J.

In re John N. Lloyd.

I have your letters of March 6th and 7th. Your statement in the letter of March 6th, somewhat surprises me as you advised me over the phone that you would enter into a contract to sell it to somebody else the same afternoon.

As to your letter of the 7th inst., I would say that we were ready to close on March 1st and you were not prepared. although you did offer to have Mr. Hathaway sign a deed when, of course he had no title and did not subsequently acquire title. As to the question of possession of the premises, I would say that I do not agree with you on the facts and I certainly cannot agree with you on the law.

Yours very truly,

William P. Hurley

Exhibits P. 11—P. 12.

Exhibit P. 11.

DAVID H. YONTEFF
Attorney at Law

No 2784
Newark, N. J. Dec. 1. 1923,
Pay to the order of Carl Olsen Atty for A. Weinstock $600 00
Six hundred no/100 .....Dollars
(Signed) David H. Yonteff.
To the Broad & Market National Bank
55-22 Newark, N. J. 55-22
Endorsed Pay to the order of A. Weinstock,
Carl Olsan atty for A. Weinstock
A. Weinstock.

Exhibit P. 12.

DAVID H. YONTEFF
Attorney at Law

No 3004
Newark, N. J. Dec. 21, 1923
Pay to the order of A. Weinstock $400 00
Four hundred no/100 .....Dollars
(Signed) D. H. Yonteff.
To the Broad & Market National Bank
55-22 Newark, N. J. 55-22
Endorsed A. Weinstock

Exhibit P. 13.

Agreement made and entered into this 7th day of September, 1923, by and between Arthur E. Conover of the City of Newark, County of Essex and State of New Jersey, party of the first part and Frank C. Hathaway of the City of Newark, County of Essex and State of New Jersey, party of the second part, WITNESSETH as follows:

The party of the first part in consideration of one dollar and other good and valuable consideration from the party of the second part, the receipt whereof is hereby acknowledged, the party of the first part hereby assigns, transfers and sets over to the party of the second part a certain contract and all the rights thereunder, which contract was made and entered into on the 6th day af September, 1923, by Myron E. Vanderhoof and Mary F. Vanderhoof, his wife, as parties of the first part and Arthur E. Conover as party of the second part and which contract is for the sale to the said Arthur E. Conover of premises commonly known as #533-535-537 Hawthorne Avenue, in the City of Newark, County of Essex and State of New Jersey.

Witness my hand and seal this 7th day of September, A. D. 1923.

ARTHUR E. CONOVER (L. S.)

David H. Yonteff

Exhibit P. 14.

Exhibit P. 14.

ARTICLES OF AGREEMENT

made the Fourteenth day of September in the year of Our Lord One Thousand Nine Hundred and twenty-three BETWEEN Frank C. Hathaway of the City of Newark in the County of Essex and State of New Jersey party of the first part; AND Abram Weinstock of the City of Newark in the County of Essex and State of New Jersey party of the second part;

WITNESSETH, That the said party of the first part, for and in consideration of the sum of Nine thousand five hundred dollars ($9500.00) to be paid and satisfied as hereinafter mentioned, and also in consideration of the covenants and agreements hereinafter mentioned, made and entered into by the said party of the second part, doth agree to and with the said party of the second part, that he the said party of the first part, will well and sufficiently convey to the said party of the second part, his heirs and assigns, by Deed of Warranty on or before the Fourtheenth day of March, 1924 next ensuing the date hereof, all those lots, tracts, or parcels, of land and premises, hereinafter particularly described situate, lying and being in the City of Newark in the County of Essex State of New Jersey

Being premises commonly known as 533-535 and 537 Hawthorne Ave.

AND the said party of the second part, for himself, his heirs, executors and administrators, doth covenant, promise and agree to and with the said party of the first part, his heirs, executors, administrators and assigns, that he the said party of the second part, will pay and

Exhibit P. 14.

satisfy, or cause to be paid and satisfied, unto the said party of the first part, the said sum of Nine thousand five hundred dollars ($9500.00) as and for the purchase money of the foregoing described land and premises, in the following manner, that is to say:

On Execution of this agreement for which this is also a receipt..... $700.00

Cash to be paid not later than December 14th, 1923 ..... 400.00

On delivery of deed, cash $8400.00

On Bond and Mortgage, same containing usual interest, tax, assessment, insurance and installment default clauses, and an agreement not to claim credit on the interest payable on bond and mortgage, by reason of any tax assessed, or to be assessed against the premises, with interest at % payable for years.. $

By assuming the mortgage at present a lien on the premises, and paying the same according to the terms thereof. $

This Contract is entered into upon the knowledge of the parties as to the value of the land and whatever buildings are upon the same, and not on any representations made as to character or quality.

And the said party of the part hereby agrees to pay to the licensed and authorized agent a commission of % on the purchase price aforesaid, said commission to be paid in consideration of services rendered in consummating this sale.

And It Is further Agreed by the parties to these presents, that the said part of the

Exhibit P. 14.

second part, his heirs and assigns, may enter into and upon the said land and premises on the 14th day of March next ensuing the date hereof, and from thence take the rents, issues and profits to his and their use.

And It Is further Agreed by the parties hereto, that the said deed of Warranty shall be delivered and received at office of David H. Yonteff, 207 Market St., Newark between the hours of ten in the forenoon and four o'clock in the afternoon on the said 14th day of March next ensuing the date hereof.

The rents of said premises, insurance premiums, water rents, taxes, and interest on Mortgage, if any, shall be adjusted, apportioned and allowed as of the day of delivery of said deed.

Gas and electric fixtures and chandeliers, carpets, linoleum, mats and matting in halls, ash cans, awnings, screens, shades, and heating apparatus, if any, are included in this sale.

The risk of loss or damage to said premises by fire or otherwise until the delivery of said deed is assumed by the party of the first part.

In case the premises shall suffer injury beyond the ordinary wear and tear, the party of the first part, shall repair the damage before the date set for delivery of said deed or make an appropriate deduction from the purchase price herein stated.

It is understood and agreed that the buildings upon said premises are all within the boundary lines of the property as described in the deed therefor, and that there are no encroachments thereon and that the buildings comply with municipal ordinances and regulations and the regulations of the New Jersey State Board of Tenement House Supervision, to be shown by the re-

Exhibit P. 14.

port of the Secretary, where such ordinances and regulations apply.

It is expressly understood and agreed that the title to the land and premises hereby agreed to be conveyed is not derived from any proceedings or any Act for the Sale of Land for non-payment of the municipal taxes or assessments.

The premises above described are sold subject to restrictions appearing of record, if any.

If at any time before the delivery of the deed the premises or any part thereof shall be or shall have been affected by any assessment or assessments which are or may become payable in annual installments of which the first installment is then due or has been paid, then for the purposes of this contract all the unpaid installments of any such assessment, including those which are to become due and payable after the delivery of the deed, shall be deemed to be due and payable and to be liens upon the premises affected thereby and shall be paid and discharged by the seller thereof, upon the delivery of the deed.

It is expressly understood and agreed that the title to these premises does not rest upon Martin Act but is a good and valid legal title of record; and this is made an express condition of this contract.

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 therefor.

Exhibit P. 15.

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

Frank C. Hathaway. (L. S.)
Abram Weinstock. (L. S.)

Signed, Sealed and Delivered in the presence of

David H. Yonteff.

CONTRACT

For the Sale of Property

Frank C. Hathaway
to
Abram Weinstock

Dated, September 14th, 1923

Exhibit P. 15.

Agreement made and entered into this twentieth day of November, 1923, by and between Abram Weinstock, party of the first part, and Bradford G. Hathaway, party of the second part, Witnesseth as follows:

In consideration of one dollar and other good and valuable consideration paid by the party of the second part to the party of the first part and in consideration of services to be rendered by the party of the second part to the party of the first part in procuring a purchaser who will pay to the party of the first part a profit of $1500.00 for the assignment to such prospective purchaser by the party of the first part of his agreement for the purchase of premises #533-

Exhibit D. 1.

535-537 Hawthorne Avenue, Newark, New Jersey, the party of the first part hereby agrees that he will pay the party of the second part as commissions the sum of $750.00 out of final payment by the said prospective purchaser.

In Witness Whereof, the parties have hereunto set their hands and seals this twentieth day of November, 1923.

(Signed) A. W. Weinstock (L. S.)

Signed, Sealed and delivered
in the presence of

David H. Yonteff.

Exhibit D. 1.

DAVID H. YONTEFF
Counsellor At Law
Chamber of Commerce Building
Newark, N. J.

Phone Market 4804

February 21, 1924.

RE: Lloyd contract.

Carl Olsan, Esq.,
185 Market St.,
Newark, N. J.

Dear Sir:

I sent your notice in the above matter to Mr. Hurley who represents Mr. Lloyd and who will bring it to the attention of Mr. Lloyd promptly. I am sure he will appreciate the extension of time you have been good enough to give him.

Sincerely yours,

D. H. Yonteff.

DHY/CDN

Exhibit D. 2.

Exhibit D. 2.

THIS INDENTURE

Made the fifth day of March, in the year of Our Lord One Thousand Nine Hundred and twenty-four Between Abram Weinstock and Annie Weinstock, his wife, of the City of Newark in the County of Essex and State of New Jersey of the First Part; And John N. Lloyd, of the City of Newark in the County of Essex and State of New Jersey of the Second Part;

Witnesseth, That the said party of the first part, for and in consideration of One Dollar and other good and valuable consideration money of the United States of America, to them in hand well and truly paid by the said party of the second part, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said party of the first part, therewith fully satisfied, contented and paid, have given, granted, bargained, sold, aliened, released, enteoffed, conveyed and confirmed, and by these presents do give, grant, bargain, sell, alien, release, enfeoff, convey and confirm to the said party of the second part, and to his heirs and assigns forever, All that certain tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the City of Newark in the County of Essex and State of New Jersey.

Beginning at a point in the Northeasterly line of Hawthorne Avenue therein distant one thousand three hundred and forty-eight feet and one hundredths of a foot Westerly from the Westerly line of Clinton Place; from thence running (1) Northerly at right angles to Hawthorne Avenue one hundred feet; thence (2) Westerly parallel

Exhibit D. 2.

with Hawthorne Avenue seventy one feet and thirty five hundredths of a foot; thence (3) Southerly at right angles to the last mentioned course one hundred feet to the Northeasterly line of Hawthorne Avenue; and thence (4) along the same Easterly seventy one feet and thirty five hundredths of a foot to the point and place of BEGINNING.

Being the same premises conveyed to the said Abram Weinstock, by deed of even date herewith, and not yet recorded.

TOGETHER with all and singular the houses, buildings, trees, ways, waters, profits, privileges and advantages, with the appurtenances to the same belonging or in anywise appertaining:

ALSO, all the estate, right, title, interest, property, claim and demand whatsoever, of the said party of the first part, of, in and to the same, and of, in and to every part and parcel thereof,

TO HAVE AND TO HOLD, all and singular the above described land and premises, with the appurtenances, unto the said party of the second part, his heirs and assigns, to the only proper use, benefit and behoof of the said party of the second part, his heirs and assigns forever:

AND THE SAID Abram Weinstock and Annie Weinstock, his wife, do for their heirs, executors and administrators covenant and grant to and with the said party of the second part, his heirs and assigns, that they the said Abram Weinstock and Annie Weinstock, his wife, are the true, lawful and right owners of all and singular the above described land and premises, and of every part and parcel thereof, with the appurtenances thereunto belonging; and that the said land and premises, or any part thereof, at the time of the sealing and delivery of these presents, are not en-

Exhibit D. 2.

cumbered by any mortgage, judgment or limitation, or by any encumbrance whatsoever, by which the title of the said party of the second part, hereby made or intended to be made, for the above described land and premises, can or may be changed, charged, altered, or defeated in any way whatsoever.

AND ALSO, that the said party of the first part now have good right, full power and lawful authority, to grant, bargain, sell and convey the said land and premises in manner aforesaid:

AND ALSO, that Abram Weinstock and Annie Weinstock, his wife, will WARRANT, secure, and forever defend the said land and premsies unto the said John N. Loyd, his heirs and assigns, forever, against the lawful claims and demands of all and every person or persons, freely and clearly freed and discharged of and from all manner of encumbrance whatsoever.

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

Abram Weinstock (L. S.)
Anna Weinstock (L. S.)

Signed, Sealed and Delivered
in the presence of

Carl Olsan.

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

BE IT REMEMBERED, That on this fifth day of March in the year of our Lord One Thousand Nine Hundred and twenty-four before me, the subscriber, A Master in Chancery of New Jer-

Exhibit D. 2.

sey, personally appeared Abram Weinstock and Annie Weinstock, his wife, who, I am satisfied are the grantors mentioned in the within Indenture, and to whom I first made known the contents thereof, and thereupon, they acknowledged that they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed: And the said Annie Weinstock, wife as aforesaid, being by me privately examined, separate and apart from her husband, acknowledged that she signed, sealed and delivered the same as her voluntary act and deed, FREELY, without any fear, threats or compulsion of her said husband.

CARL OLSAN,
Master in Chancery of New Jersey.

DEED

Abram Weinstock and Annie Weinstock, his wife.

to

John N. Lloyd

Dated March 5th, 1924.

Exhibit D. 3.

Exhibit D. 3.

THIS INDENTURE, made the Fifth day of March in the year of Our Lord One Thousand Nine Hundred and Twenty four. BETWEEN Myron E. Vanderhoof and Mary F. Vanderhoof, his wife of the City of Newark in the County of Essex and State of New Jersey of the First Part: AND Abram Weinstock of the City of Newark in the County of Essex and State of New Jersey of the Second Part:

WITNESSETH, That the said party of the first part, for and in consideration of One dollar and other good and valuable consideration lawful money of the United States of America, to them in hand well and truly paid by the said party of the second part, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said party of the first part therewith fully satisfied, contented and paid, have given, granted, bargained, sold, aliened, released, enfeoffed, conveyed and confirmed, and by these presents do give, grant, bargain, sell, alien, release, enfeoff, convey and confirm, to the said party of the second part, and to his heirs and assigns forever, ALL that certain tract or parcel of land and premises, hereinafter particularly described, situate, lying, and being in the City of Newark in the County of Essex and State of New Jersey.

Beginning at a point in the Northeasterly line of Hawthorne Avenue therein distant one thousand three hundred and forty eight feet and one hundredths of a foot Westerly from the Westerly line of Clinton Place; from thence running (1) Northerly at right angles to Hawthorne Avenue one hundred feet; thence (2)

Exhibit D. 3.

Westerly parallel with Hawthorne Avenue seventy one feet and thirty five hundredths of a foot; thence (3) Southerly at right angles to the last mentioned course one hundred feet to the Northeasterly line of Hawthorne Avenue; and thence (4) along the same Easterly seventy one feet and thirty five hundredths of a foot to the point and place of Beginning.

Being part of the same premises conveyed to the said Myron E. Vanderhoof and Mary F. Vanderhoof, his wife by deed from Newark Land and Improvement Co., bearing date December 20, 1892 and recorded in Book N 27 of deeds for Essex County on page 3; and by deed from James B. McKee bearing date March 21, 1898 and recorded in Book I 31 of deeds for said County on page 529.

TOGETHER with all and singular, the houses, buildings, trees, ways, waters, profits, privileges, and advantages, with the appurtenances to the same belonging or in anywise appertaining:

ALSO, all the estate, right, title, interest, property, claim and demand whatsoever, of the said party of the first part, of, in and to the same, and of, in and to every part and parcel thereof,

TO HAVE AND TO HOLD, all and singular the above described land and premises, with the appurtenances, unto the said party of the second part, his heirs and assigns, to the only proper use, benefit and behoof of the said party of the second part, his heirs and assigns forever; and the said Myron E. Vanderhoof and Mary F. Vanderhoof do for themselves, their heirs, executors and administrators covenant and grant to and with the said party of the second part his heirs and assigns, that they the said Myron E. Vanderhoof and Mary F. Vanderhoof, are

Exhibit D. 3.

the true, lawful and right owners of all and singular the above described land and premises, and of every part and parcel thereof, with the appurtenances thereunto belonging; and that the said land and premises, or any part thereof, at the time of the sealing and delivery of these presents, are not encumbered by any mortgage, judgment or limitation, or by any encumbrance whatsoever, by which the title of the said party of the second part, hereby made or intended to be made for the above described land and premises, can or may be changed, charged, altered or defeated in any way whatsoever:

AND ALSO, that the said party of the first part now have good right, full power and lawful authority, to grant, bargain, sell and convey, the said land and premises in manner aforesaid

AND ALSO, that they the said Myron E. Vanderhoof and Mary F. Vanderhoof will WARRANT, secure and forever defend the said land and premises unto the said Abram Weinstock, his heirs and assigns, forever, against the lawful claims and demands of all and every person or persons, freely and clearly freed and discharged of and from all manner of encumbrances whatsoever.

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

Myron E. Vanderhoof (L. S.)
Mary F. Vanderhoof (L. S.)

Signed, sealed and delivered
in the presence of

Benjamin J. Fleuchaus.

Exhibit D. 3.

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

BE IT REMEMBERED, That on this Fifth day of March in the year of Our Lord One Thousand Nine Hundred and Twenty Four, before me, the subscriber, a Master in Chancery of New Jersey, personally appeared Myron E. Vanderhoof and Mary F. Vanderhoof, his wife, who, I am satisfied are the grantors mentioned in the within Indenture, and to whom I first made known the contents thereof, and thereupon they acknowledged that they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed:

And the said Mary F. Vanderhoof, being by me privately examined, separate and apart from her husband, acknowledged that she signed, sealed and delivered the same as her voluntary act and deed, FREELY, without any fear, threats or compulsion of her said husband.

BENJAMIN J. FLEUCHAUS,
Master in Chancery of New Jersey.

DEED
Myron E. Vanderhoof and Mary F. Vanderhoof, his wife
To
Abram Weinstock.
Dated, March 5 1924.

RECEIVED in the Register's office of the County of Essex, N. J. on the 10th day of March A. D., 1924 at 10:31 o'clock in the forenoon and Recorded in Book D. 70 of DEEDS for said County, on pages 44-45.

Howard S. Dodd,
Register.

GROUNDS OF APPEAL.

New Jersey Supreme Court

JOHN N. LLOYD, *Plaintiff-Appellee,* *vs.* ABRAM WEINSTOCK, *Defendant-Appellant.*	*On Appeal.* *Grounds of Appeal.*

The following are the grounds upon which appeal has been taken in the above-entitled cause:

1. Because the Court permitted the plaintiff Lloyd to testify as to Vanderhoof's possession of the premises on March 5th, over defendant's objection. No agreement being proven, this testimony was immaterial and irrelevant.

2. The Court erred in denying defendant's motion for non-suit at the close of plaintiff's case.

3. The Court erred in denying defendant's motion for non-suit at close of defendant's case.

4. The Court erred in denying defendant's motion for direction of verdict in defendant's favor.

5. Because the Trial Judge upon the trial of said cause directed a verdict in favor of the plaintiff and against the defendant over the objection of the said defendant, whereas said Trial Judge should have directed a non-suit or verdict

in favor of this defendant, or at least should have submitted the case to the jury for its verdict.

6. Because, upon the evidence submitted, the judgment of necessity must have been in favor of the defendant.

7. The charge of the Court is against the weight of evidence and is erroneous as a matter of law.

8. The finding of the Court is against the weight of evidence and erroneous as a matter of law.

CARL OLSAN,
Attorney of Defendant-Appellant.

Due and legal service of the within is herewith acknowledged as of time, this 2nd day of February, 1926.

WILLIAM P. HURLEY,
Atty. of Plaintiff-Appellee.

OPINION OF SUPREME COURT.

Filed November 16, 1926.

NEW JERSEY SUPREME COURT.

No. 78, May T., 1926.

JOHN N. LLOYD, *vs.* ABRAM WEINSTOCK,	*Appeal from Essex Circuit Court.*

Argued before Gummere, Chief Justice, and Justices Trenchard and Minturn.

For the appellant, Carl Olsan.

For the respondent, William P. Hurley.

PER CURIAM:

This action was brought by the plaintiff to recover the amount of a deposit of $1,000 made by him on account of the purchase money of property which he had contracted to buy from the defendant. The trial resulted in the direction of a verdict in favor of the plaintiff for the amount of his deposit, with interest, and the defendant has appealed. The principal contention is that the direction of a verdict was improper.

An examination of the state of the case discloses the following situation: The defendant, Weinstock, desired to sell a piece of property located on Hawthorne avenue, in the City of Newark, and he employed one Hathaway as his agent to obtain a purchaser for the same, the price being fixed at $11,000. Hathaway entered into negotiations with the plaintiff, with the

result that the latter agreed to buy the property for the sum named, and he paid Hathway $1,000 on account of the purchase price, and the latter turned it over to Weinstock, the defendant. When the time came for the execution of the contract and the delivery of the conveyance, a deed of general warranty, with a covenant against encumbrances, with tendered to the plaintiff, and this he refused to accept, upon the ground that there were outstanding interests in and encumbrances upon the property, which rendered the title thereto unmarketable. The facts upon which he based this claim were undisputed, and demonstrated that he was right in his contention. At the close of the trial the Circuit Judge directed a verdict in favor of the plaintiff, as has already been stated, for the amount of his deposit of $1,000, and interest.

We think, upon the facts recited, that the trial judge was justified in doing so. Weinstock being unable to perform the contract for the sale of the property made for him by Hathaway as his agent by conveying a good and marketable title thereto, the plaintiff was entitled to a return of the money paid by him on account of the purchase price.

It is further argued that the complaint does not contain an averment of the existence of several of the material facts herein recited, and that, therefore, the verdict was directed upon a cause of action not embraced in the pleadings. This, however, affords no reason for a reversal of the judgment. Section 27 of the Practice Act of 1912 provides that "No judgment shall be reversed on the ground of misdirection or the improper admission or exclusion of evidence, or *for error as to matter of pleading or procedure,* unless, after examination of the whole case, it

shall appear that the error injuriously affected the substantial rights of a party." Moreover, at the conclusion of the evidence submitted the trial court directed that the complaint be amended so as to set out the real cause of action which had been the subject of the trial before the jury, and the propriety of this judicial action is not challenged by the appellant.

For the reasons stated, the judgment under review will be affirmed, with costs to the respondent.

REMITTITUR.

NEW JERSEY SUPREME COURT.

JOHN N. LLOYD, *Plaintiff-Appellee,* *vs.* ABRAM WEINSTOCK, *Defendant-Appellant.*	*Action. at Law.* *Remittitur.*

This cause having been duly argued at the May term of this Court by Carl Olsan, of counsel with the defendant-appellant, and William P. Hurley, of counsel with the plaintiff-appellee, and the Court having considered the same and finding no error in the record or proceedings of the Essex County Circuit Court,

It is thereupon ORDERED and ADJUDGED that the judgment of the Essex County Circuit Court brought into this Court by the said appeal be affirmed with costs and that the record be remitted to the Essex County Circuit Court to be proceeded with in accordance with the judgment and practice of said Court.

Entered November 18, 1926.

On motion of

WILLIAM P. HURLEY,
Attorney for Plaintiff-Appellee.

NOTICE AND GROUNDS OF APPEAL.

Filed December 7, 1926.

NEW JERSEY SUPREME COURT.

JOHN N. LLOYD, *Plaintiff,* vs. ABRAM WEINSTOCK, *Defendant.*	*Action. at Law.* *Notice and Grounds of Appeal.*

To William P. Hurley, attorney for plaintiff.

SIR:

PLEASE TAKE NOTICE that the defendant in the above-entitled cause appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey from the whole of the judgment entered in this cause on the following ground, to wit:

1. Because the Supreme Court erred in giving judgment to the plaintiff instead of the defendant, in that:

a. Because the Court permitted the plaintiff Lloyd to testify as to Vanderhoof's possession of the premises on March 5th, over defendant's objection. No agreement being proven, this testimony was immaterial and irrelevant.

b. The Court erred in denying defendant's motion for non-suit at the close of plaintiff's case.

c. The Court erred in denying defendant's motion for non-suit at close of defendant's case.

d. The Court erred in denying defendant's motion for direction of verdict in defendant's favor.

e. Because the trial judge upon the trial of said cause directed a verdict in favor of the plaintiff and against the defendant over the objection of the said defendant, whereas said trial judge should have directed a non-suit or verdict in favor of this defendant, or at least should have submitted the case to the jury for its verdict.

f. Because, upon the evidence submitted, the judgment of necessity must have been in favor of the defendant.

g. The charge of the Court is against the weight of evidence and is erroneous as a matter of law.

h. The finding of the Court is against the weight of evidence and erroneous as a matter of law.

CARL OLSAN,
Attorney of and of Counsel with Defendant.

A true copy.

EDWARD J. KELLEHER,
Clerk.

Due and legal service of the within is herewith acknowledged as of time, this 4th day of December, 1926.

WM. P. HURLEY,
Attorney of Plaintiff.

Filed December 7, 1926.

Ed. J. Kelleher, Clerk.

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

New Jersey Court of Errors and Appeals

JOHN N. LLOYD,
Plaintiff-Appellee,

vs.

ABRAM WEINSTOCK,
Defendant-Appellant.

On Contract.

On Appeal, etc.

BRIEF OF DEFENDANT-APPELLANT.

The action on appeal here is based on a receipt issued to plaintiff by one Bradford G. Hathaway in the following language:

> "Received of John N. Lloyd the sum of $1,000 as deposit on the property known and designated as 533-5-7 Hawthorne Ave., Newark, N. J. The purchase price to be eleven thousand dollars ($11,000) payable in cash on date of passing title, said date to be March 1, 1924. Money to be refunded in event owner does not accept terms." (p. 5 of case.)

On March 20, 1923, the defendant, Weinstock, held a contract (by various assignments) for the purchase of the premises in question, 533-5-7 Hawthorne Ave., Newark, N. J. On that day he executed an agreement with Bradford G. Hathaway (Ex. P. 15, p. 99) to pay to said Hathaway the sum of Seven Hundred Fifty ($750.00) Dollars for his (Hathaway's) "procuring a purchaser who will pay to Weinstock a profit of Fifteen Hundred ($1,500) Dollars for the assignment to such prospective purchaser of his (Weinstock's) agreement for the purchase of the aforementioned premises." Subsequently on or just before December 1, 1923, Hathaway brought Weinstock to the office of David Yonteff, a prac-

ticing attorney, for the purpose of executing an agreement for this assignment (p. 58, ll. 1-38; p. 59, ll. 11-40; p. 60, ll. 1-10). An agreement (Ex. P. 3, pp. 82-83) of assignment to Lloyd was drawn, duly executed by defendant, Weinstock, and retained in escrow by David Yonteff, as was therein provided, Yonteff delivering to Lloyd a copy thereof, presumably for him to sign (p. 35, ll. 35-40; p. 36, ll. 1-20). This agreement was on condition that plaintiff assignee "would serve notice on the assignor not later than February 15, 1924, whether or not the assignee would consummate the purchase of the property covered by this assignment." No such notice was served by plaintiff assignee, whereupon on February 21, 1924, Weinstock's attorney wrote to whom he thought was Lloyd's attorney, Mr. Yonteff (Ex. P. 6, p. 88) with reference thereto, to which Yonteff replied (Ex. D. 1, p. 100). Plaintiff did nothing further until March 1st when he appeared at Olsan's office with his then attorney, Hurley, tendered $2,000 and demanded "a *title* to the property" (p. 39, ll. 10-20; p. 49, ll. 1-4; ll. 32-34; p. 50, ll. 1-20), but was told by Olsan that if he wanted title "he would have to have Ten Thousand ($10,000) Dollars to take the property" (p. 39, ll. 16-20). Plaintiff, then, on March 1, 1924 (the same day) served a notice on Olsan (Ex. P. 4, p. 83) that he would on March 5, 1924 "again make tender, etc.," adding "we do not by this notice waive any default heretofore made on our contract or receipt which we hold" (p. 84, ll. 7-10).

On March 5, 1924, in pursuance of this notice, all parties attended at Olsan's office and on plaintiff's tendering Ten Thousand ($10,000) Dollars in cash, the defendant offered plaintiff a warranty deed (Ex. D. 2, p. 101), defendant, having in

the meantime, earlier the same day, March 5, 1924, himself taken title (the original agreement between Conover and Vanderhoof provided the title be taken on or before March 6th (Ex. P. 5, p. 84). Plaintiff rejected this deed on the grounds that the wives of the prior assignors of defendant's contract had not joined therein; and because immediate possession could not be given. It is clear and uncontradicted from the testimony of plaintiff, his witness Yonteff, and defendant's witness Olsan (p. 37, ll. 13-15; p. 41, ll. 10-14; p. 44, ll. 20-24; p. 45, ll. 21-26; p. 64, ll. 10-20; p. 73, ll. 33-40) that this receipt signed by Hathaway was never called to the attention of Weinstock by Hathaway or the plaintiff or any one else until this suit had been instituted. Hathaway did dictate an agreement for Weinstock to sign (p. 59, ll. 29-30; p. 60, ll. 10-20) the form of which agreement was finally approved by defendant, Weinstock, and his attorney and was signed, executed and delivered by Weinstock (Ex. P. 3, p. 82). The fact is that this agreement was left in escrow with Yonteff who was acting for Hathaway and Lloyd, but it was never signed by Lloyd. The reason given by Lloyd (p. 33, ll. 33-40; p. 35, ll. 32-33; p. 52, the entire page) was that Hathaway not having procured for him a building and loan mortgage of $8,000 as Hathaway had promised and agreed verbally to do for him, that he did not have enough funds to finance the deal and so sought to rescind his agreement. In fact, there is testimony as to a release given by and other transactions between Hathaway and Yonteff presumably rescinding this Hathaway agreement, some time between November 22nd, when they received Lloyd's check, and December 1st, when Weinstock executed his agreement and Yonteff paid over to him the proceeds of the Lloyd check

(p. 33, ll. 20-40; p. 34, ll. 1-40; p. 35, ll. 1-40; p. 46, ll. 1-30; p. 47, ll. 37-40; p. 52, ll. 16-38). Weinstock had no knowledge of this prior transaction between Lloyd, Yonteff and Hathaway, or even is there any imputed to him; and there is nothing at all, in fact or in the record of the case, to connect Weinstock with any of those transactions.

Plaintiff obtained a copy of the Weinstock agreement on December 1st, the day it was drawn (p. 35, ll. 32-40; p. 49, ll. 12-28; p. 64, ll. 1-10), and kept in his possession from that day, December 1, 1923, to March 1st following both the Hathaway receipt, and the Weinstock contract, and was, during all that time, represented by his present counsel, Hurley. The Weinstock contract contained in itself, the name of Olsan, Weinstock's attorney, and yet neither Lloyd or his attorney, during all that time, thought fit to ascertain their rights or remedy their situation in the light of the conflicting instruments then within their knowledge and possession, or inquire as to Hathaway's authority to sign the original receipt they held until March 1, 1924, when they attempted to make Olsan a tender.

This tender in the sum of Two Thousand ($2-000) Dollars was in pursuance and performance, evidently, of the Weinstock contract of assignment. Otherwise, why a tender of only $2,000? Yet plaintiff, on making this tender, demanded not an assignment, but *title* for his $2,000 as hereinbefore stated.

POINTS I TO V INCLUSIVE.

The Court erred in denying the defendant's motion for non-suit and for direction of a verdict in defendant's favor.

A. Plaintiff seeks to establish the Hathaway memorandum (Ex. P. 2, p. 81) as being a binding contract on defendant Weinstock, signed by his duly authorized agent, Hathaway. There is not one iota of evidence in the case as to Hathaway's authority other than Exhibit P. 15, page 99, which certainly does not establish any authority in Hathaway to *sell* Weinstock's property, or to go beyond even that, and *sign an agreement* binding on him (Weinstock). In fact, the memorandum itself, as signed by Hathaway showed on its face Hathaway's authority was limited, for it provided for the acceptance of those very terms it prescribed, by the owner, which terms so expressed, the plaintiff was not diligent enough, at the very least, to ascertain were so accepted by the owner as therein required; but knowing defendant never accepted these terms (having the very agreement the defendant did propose and sign, in his possession from December to March) plaintiff now seeks to hold defendant on an agreement he knows defendant knew nothing about.

In *Thompson* v. *Killheffer,* 125 Atl. 11, the Court says * * * "it is settled by the decisions of the courts of this State that a real estate agent, employed to sell, *has no authority as* such agent, by virtue of his employment, *to enter into a binding contract for the sale.*"

Citing *Milne* v. *Kleb,* 44 N. J. Eq. 378, 14 Atl. 646;

Marsh v. *Buchan,* 46 Eq. 595, page 600, 22 Atl. 123.

In *Resky* v. *Meyer,* 119 Atl. 98, the Court says: "It has been uniformly held that the words 'sell' and 'sale' as applied to the relationship between the owner of land and a real estate broker, working to secure a purchaser of the land, import no more than the act of bringing the owner and purchaser together on terms satisfactory to both, or procuring a purchaser able, ready and willing to buy on the terms fixed by the seller; so that, for example, the broker cannot, without special authority, bind the owner by a contract of sale in his name." *Morris* v. *Ruddy,* 20 N. J. Eq. 236; *Milne* v. *Kleb,* 44 N. J. Eq. 378; 18 Atl. 646; *Lindsly* v. *Keim,* 34 Atl. 1073; *Scull* v. *Brinton,* 55 N. J. Eq. 489, 47 Atl. 740; *Freeman* v. *Van Wagenen,* 101 Atl. 55; *Yadwin* v. *Arnold,* 110 Atl. 903.

In *Milne* v. *Kleb,* 14 Atl. 646; Held, "Although an agent's authority to make contract to convey land need not be in writing, but may be by parol—yet a simple parol authority to sell, without more, will not authorize agent to sign written contract * * *."

In *Marsh* v. *Buchan,* 46 N. J. Eq. 595, at page 600—22 Atl. 128, Court says (citing *Milne* v. *Kleb,* 44 N. J. Eq. 378) * * * "And as has been held in several cases in this State, a broker to sell is not by virtue of such employment authorized to sign a written contract for his principal."

And at best, Hathaway's authority was only to "procure a purchaser who will pay * * * *for the assignment* * * * of his (Weinstock's) agreement" (p. 99, ll. 36-46).

See also *Hann* v. *Freestone,* 123 Atl. 704 (Supr. 1924), where the Court says, "It is settled that a special agent does not bind his principal, unless

his authority be strictly pursued and those dealing with him are chargeable with notice of its extent,'' citing *Cooley* v. *Perrine,* 41 N. J. L. 323; a direction to sell, therefore, nothing more appearing, would confer upon a special agent no authority beyond that of agreeing with the purchaser in regard to these component particulars.

The language of the Court in *Strauss* v. *Rabe,* 127 Atl. 188 (Ch. 1925), affirmed 130 Atl. 119. ''The purchaser's ignorance of the law that one dealing with an agent with knowledge that his authority is limited, and transgressing such limits, cannot hold the principal, as where the situation is circumscribed by terms of a written document, is no defense,'' and on page 190, ''the acts of a special agent do not bind his principal unless the former's authority is strictly pursued and those who deal with such an agent are charged with notice of the extent of such authority. The Charter of the agent's powers fixed them, and the purchaser cannot thereafter claim the benefit of any treaty with the agent not found within the contract, either expressly or by necessary implication, unless the act of the agent is either expressly or impliedly ratified by his principal. It is elementary that one who deals with an agent knowing that his authority is limited and transgressing such limits, cannot hold the principal.''

B. Paragraph 10 of the Complaint (p. 11, ll. 31-40, etc.) specifically alleges that ''Bradford G. Hathaway was duly authorized by said Abram Weinstock to make said contract'' and ''did make same as agent for said Abram Weinstock,'' meaning the memorandum, Exhibit P. 2, page 81. The defendant in his answer (p. 16, ll. 4-36) denied any agency or authority in Hathaway. The

burden of proof was on plaintiff, as shown by the cases cited under Point I, yet the plaintiff not only did *not* sustain his proof—he introduced none whatsoever. The faint effort of plaintiff in this direction (Ex. P. 15, p. 99) proves conclusively that Hathaway was but a limited agent and acted wholly and far beyond the scope and authority given him by Weinstock. Further, the testimony establishes (p. 37, ll. 13-15; p. 41, ll. 10-14; p. 44, ll. 20-24; p. 45, ll. 21-26; p. 45, ll. 35-40; p. 64, ll. 10-20; p. 73, ll. 33-40; p. 74, ll. 1-2), that Hathaway's act never was disclosed to Weinstock until this suit was instituted, that Weinstock had no knowledge thereof whatsoever, and that plaintiff made no effort, as was his duty, to ascertain the authority that was vested in Hathaway (p. 45, l. 35, etc.; p. 46, ll. 30-40; p. 47, ll. 30-33; p. 49, ll. 10-32). There being no proof of authority in Hathaway to make this agreement for Weinstock, there was nothing in evidence to bind Weinstock, either within or without the Statute of Frauds, and this defendant's motion for non-suit at close of plaintiff's case should have prevailed.

C. Plaintiff sues on the Hathaway memorandum or receipt, as on a contract which provided (Ex. P. 2, p. 81, ll. 31-33): "The purchase price to be $11,000, payable in cash on date of passing title, *said date to be March 1, 1924.*" Though it is true, time is not made of the essence, yet, clearly, plaintiff must not himself be in default. Yet by his own testimony (p. 39, ll. 12-20), uncontradicted, all the money he had and attempted to tender on March 1, 1924, the day set for closing title, was $2,000, and not $10,000, as required by what plaintiff says was his contract. "The rule that a party to a contract who has defaulted therein cannot take

advantage of his default applies to contracts for the sale of real estate and a vendee is very generally denied the right to an accounting for the amount paid by him on the purchase price, where he has failed in performing the contract on his part by not paying according to its terms. In this regard it is immaterial whether or not the contract contains a provision making time of the essence thereof and forfeiting the payments made by the vendee in the event of his default'' (L. R. A. 1918, B. p. 544). For this reason also we respectfully submit defendant's motions for non-suit, and a direction of verdict in his favor should have prevailed.

D. The tender of March 1, 1924, by plaintiff, of $2,000 was squarely in conformity with and in ratification of the agreement signed by Weinstock, which Lloyd held from December to March, and at no time repudiated; but in the same breath, plaintiff demanded for his $2,000, not the assignment of Weinstock's contract for which he had bargained, but *title* to the premises, with which demand defendant was not obliged to comply; so that plaintiff's attempted tender here was ineffectual and improper, and plaintiff, having ratified and confirmed, was in default in the performance thereof, which WAS of the essence of THIS agreement.

E. After this attempted tender of March 1, 1924, the parties again met pursuant to plaintiff's notice on March 5, 1924. Two facts relating to this meeting are of prime importance. By Exhibit P. 14, page 95, it will be noted that defendant himself was to pay $9,500 for the premises in question; by the agreement (Ex. P. 3, p. 82) signed by defendant he was to receive $1,500, making the net purchase price to plaintiff $11,000. By Exhibit P. 5, page 84, l. 39, title

was to be given by the Vanderhoofs, the original vendors, on or before March 6, 1924. Defendant was obligated to take title and thereafter it was immaterial to him whether the transaction with Lloyd took the form of an assignment or conveyance by deed. To the extent, then, of conforming to his own signed agreement, he met plaintiff on March 5th. The second fact is that even at this time and not until suit was actually instituted, did defendant have any knowledge or information whatsoever from any of the parties here involved, of the memorandum signed by Hathaway, or that plaintiff was proceeding on anything other than the agreement signed by defendant. The plaintiff might attempt to spell out a ratification of Hathaway's memorandum by defendant, but defendant did not intend or imply any ratification nor could he do so without knowledge of the thing he was to ratify. How could Weinstock possibly ratify an agreement of which concededly he knew nothing about? There is throughout this case no thought or implication of ratification. The pleadings do not allege it, or the plaintiff, at any time, claim or raise the point. The mere retention by defendant of plaintiff's deposit can, in no way, be considered ratification. Weinstock's acceptance of the money here was based on the agreement he signed, believed to be valid and binding on him, and which he at all times acted and proceeded upon (p. 79, ll. 15-20).

In 1 Am. & E. Encyc. of Law (1st Edition, Vol. 1, p. 432); The person who undertakes to ratify must do so with the knowledge of all material circumstances, or with an intent to take such liability without such knowledge. Citing *Mulford* v. *Minch,* 3 Stockt. Ch. 16.

In *Dowden* v. *Cryder,* 55 N. J. L. 329, * * * "If an agent transgresses his authority and commits a breach of trust by transferring his principal's property to pay his own debt, the principal will not be deemed to have ratified the act until he has notice of the breach of trust. If a transaction between an agent and another person be entire and be known to such other person to be a breach of trust on the part of the agent (Hathaway's memorandum, itself, is subject to acceptance by the owner and therefore limited), the principal is not bound at all, although some portions of the transaction might, if standing alone, have been within the agent's power and duty. Persons dealing with one who is known to be a special agent are chargeable with knowledge of the extent of his authority.

As said by our Court of Errors and Appeals in *Clement* v. *Young-McShea,* 70 N. J. Eq. 677, "When an agent executes a contract beyond the scope of his authority, the principal will not ordinarily be deemed to have ratified it or to be estopped from repudiating it unless he appears to have had actual or constructive notice of its terms"—and on page 683—"the claims of estoppel and ratification are both barred by a single fact * * * that the Company (defendant) had no notice either actual or constructive that the plaintiffs possessed or believed they possessed a lease for a longer term than Young's unwritten authority entitled him to give, or that its own rights, consistent with the proper exercise of his authority, were in anywise infringed. The necessity for such notice as the basis for either estoppel or ratification is clear" (and cases cited). The defendant respectfully submits, therefore, that on the close of the plaintiff's case, or on the close of the defendant's

case, the motions for non-suit and direction of verdict for defendant, should have been granted.

F. But even if defendant's tender of March 5, 1924, could be considered more than an ineffective voluntary act on his part, we respectfully submit that plaintiff's refusal thereof was unjustified, first, because the title tendered was good and second, plaintiff was not in a position to reject it.

1. Plaintiff rejected it because Conover's and Frank Hathaway's wives were not joined therein, having, as plaintiff contended, outstanding dower interests. The signatures of the wives of Conover and Hathaway to the assignments of the respective contracts, or to any deed, were not required in that Conover, Hathaway, or even Weinstock, had merely an *equitable right* that they might pursue with respect to the property; they had no *equitable estate* sufficient to support dower.

A brief summary of the various contracts and assignments herein is as follows:

Exhibit P. 5, page 84, is a contract dated September 6, 1923, between Vanderhoofs and Conover, the original contract of sale of this property. The Vanderhoofs were then the record title owners, and a deposit on this contract of $100 was paid by Conover. Nothing more was paid to the Vanderhoofs until title was actually taken by Weinstock, when the balance of the purchase price of $8,500 was paid them.

On September 7, 1923 (Ex. P. 13, p. 94), an assignment of this contract was made by Conover to Frank C. Hathaway.

On September 14, 1923 (Ex. P. 14, p. 95), Frank C. Hathaway contracted to convey title to the

premises to Weinstock, for which he held only the aforementioned assignment.

Section 1 of the Dower Act, reported in 2 Comp. Stat., page 2043, provides that, "The widow, whether alien or not, of any person dying intestate or otherwise, shall be endowed for the term of her natural life of the one full and equal third part of all the lands, tenements and other real estate whereof her husband, or any other to his use, was seized of an estate of inheritance at any time durng coverture to which she shall not have relinquished or released her right of dower by deed executed and acknowledged in the manner prescribed by law for that purpose."

The leading case on this point in New Jersey is *Yeo* v. *Mercerau,* reported in 18 N. J. L. 387, wherein the Court says, "The words, 'or any other to his use,' were inserted to reach just such case and all others, if any exist, in which *another* is seized of lands during coverture *to the use* of the husband, under such circumstances as in equity entitles the husband or his heirs to a conveyance of a legal estate and the actual *seizin* and possession of the land," citing examples:

Upon a covenant to stand seized to use of the husband and to convey, etc., upon request; or,

The husband makes a purchase and pays the money but dies before he gets a conveyance; and further,

In all cases where any person is so seized to the use of the husband as in equity would entitle him to the *legal estate* and the actual possession and *seizin* of the land itself; in other words, where in equity the husband is the true and real owner of the land itself.

(So that, where the husband or his heirs holding under a contract to purchase would not be entitled in equity to "a conveyance of a legal estate and the actual seizin and possession of the lands," because he has not done that which under the contract entitled him to a deed, and the husband conveys away his interest before the happening of that contingency, there would seem to be no dower); and at page 391, the Court continuing, says, "Neither can I persuade myself that the words 'or any other to his use' were inserted merely for the purpose of giving a widow dower of a purely technical trust estate; the dower given by the statute is the dower of the land, not of the trust or use"; the Court at page 390 saying, "This (*Yeo* v. *Mercerau*), then, is a case within the very words of the statute (see "or any other to his use").

Attention should be called at this point to the fact that none of the proposed vendees paid anything on this contract other than a small amount as a deposit, the entire purchase price having at no time been paid by them, other than on March 5, 1924, when Weinstock actually took title to these premises.

In *Eisler* v. *Halperin,* 98 Atl. 245, and in *Cushing* v. *Blake,* 30 N. J. Eq. 689, we have the broadest expressions in this State favoring dower in so-called equitable estates. The first case, *Eisler* v. *Halperin,* is one wherein the husband was actually seized of the legal and equitable title, so that the question there actually was not raised and is not in point. Apropos of this, the following expression of Hornblower, Chief Justice, in the case of *Yeo* v. *Mercerau,* 18 Law on page 390, is applicable, "If Justice Southard was right, as I have no doubt he was, in citing that the interest of the mortgagee is a mere encum-

brance or security, and that the legal estate remains in the mortgagor, then the widow is entitled to dower not under the words of our statute, not by reason of any *equitable* rights of the husband; nor because the mortgagee is seized to his use; but upon the broad legal ground that the husband continues at law to be the real owner and *remains seized* of the mortgaged premises as against all the world, except the mortgagee and those claiming under him."

In the second case, *Cushing* v. *Blake,* the question was one as to curtesy, the Court's dicta being much more broad than the issue involved required, and certainly much more broad than the law in this State today is.

In *Young* v. *Young,* 45 N. J. Eq. 27, and 16 Atl. 921, wherein a father promised and actually did make a will to his son, in consideration of the son's performing certain services, which services the son did perform, but after the son's death the father actually deeded his property in violation of this will to other children. These children instituted ejectment against the wife of the son and son's children, to which action the wife set up the defense of dower. The Court, however, ejected. On the wife's bill in equity for a decree seeking to specifically enforce the oral agreement of the father, the Court held that it would grant specific performance as to the oral agreement, but insofar as the wife's claim to dower, there was none because the son, her husband, was never seized of a legal estate of inheritance. On the granting in equity, however, of specific performance on the wife's bill, in which it was decreed that X and Y hold in trust for the wife, this brought the matter directly within the provisions of the statute, and on this phase of the case the Court decided that her dower interest did

attach. As the matter stood in the law court, however, the wife's husband, not having been seized of a legal estate of inheritance, dower would not attach, even though the contract here had actually been performed. Here the *entire* consideration *had* been paid and the husband, if alive, would have been entitled to a deed without anything more from him.

In *Geldhauser* v. *Schulz,* 116 Atl. 791, the Court held that where a husband had a remainder after a life estate in freehold, the wife of the remainder-man was not entitled to dower where the life tenant was alive, the seizin being then in the life tenant, and her husband not being seized, dower could not attach.

In *Owen* v. *Robbins,* 19 Ill. Rep. 545, the Illinois statute reads, "Equitable estates shall be subject to the widow's dower and all real estate of every description contracted for by the husband in his lifetime, title to which may be completed after his death." In the case cited, the husband contracted for purchase of some land, paid one-fourth down and secured a certificate of purchase and on the payment of the balance of the entire purchase money was to obtain a patent. Before paying the entire purchase money he conveyed his interest and on his death the wife seeks to impress dower on the interest so conveyed by him. The Court says, "This enactment has excluded mere contracts for the purchase of real estate, unless the title shall be completed after the husband's death. But it does impress a purchase of land by the husband where the *purchase money had been fully paid* by the husband and he was at the time of his death in a position to *enforce a conveyance by a bill for specific performance of the agreement;* but it would not impress a contract for the purchase of land which

has been assigned by the husband in his lifetime''; and cases therein cited, ''We have been unable to find any case which holds that a widow is dowable of land where the husband has assigned a contract for purchase, although the courts of various States have held she is dowable of an equitable estate''; to the same effect as *Williams* v. *Kinney,* 43 Hun. page 1.

In *Englis* v. *Fohey,* Supreme Court of Wisconsin reported in 116 N. W. 857, which was an action to enforce specific performance of a contract to convey land, the defendant holding under a contract for purchase of same himself, the defendant's wife (also a defendant) sets up her inchoate dower right as superior to the plaintiff's rights, the Court there held, ''The defendant Rosa had no inchoate dower right, because her husband had no title, legal or equitable, at the time he made the contract with the plaintiff, but only a mere contract RIGHT to purchase; hence when he afterwards received his title, it came to him subject to the plaintiff's right to demand a deed to that part which is in controversy.''

The text books clearly state the rule as set out in Tiffany's Real Property, 2nd Edition, Vol. 1, page 750, headed ''Interests Under Contract of Purchase.'' ''As before explained, one to whom another has contracted to convey land has what is recorded as an equitable estate in the land, and this view has been applied in some jurisdictions to the extent of giving the widow of such vendee dower in land purchased and PAID FOR by the husband, but which had not been conveyed to him at the time of his death. According to some decisions, the husband must have *paid all* and not merely a part of the purchase price before his death in order that his widow be endowed,'' citing cases in Illinois, Kentucky,

Missouri, Pennsylvania and Wisconsin * * * "And even in States where this view does not obtain, the widow is given dower *only as to the surplus value* of the land AFTER PAYMENT of the purchase money due, nor is there usually any dower right if before the purchase price was entirely paid, the husband transferred to another his interest under the contract of purchase."

And in Amer. & Eng. Encyc. of Law, 1st Ed., Vol. 5, at page 894, "*Equitable estates* must be distinguished from *equitable rights,* for even under the above statutes (as to dower) there is no dower in a mere *right* (citing *Yeo* v. *Mercerau*); therefore, to entitle the wife to dower, the husband's equity must be perfect and complete, an interest which would pass to his heirs, and not a mere *right of action* which would pass to his personal representatives. And it must be such an equitable title that equity would decree the legal title, other rights not conflicting, and not a mere *moral right* depending upon an unenforceable contract or trust. The question has repeatedly arisen in cases where the husband has not completed a purchase at the time of his death, but had paid the whole or a part of the purchase money, and in such cases, the wife's right to dower depends very much upon the terms of the contract." (In footnotes: "But there is considerable dispute as to the effect of a part payment of purchase money; some cases hold that all the purchase money must be paid.")

(The true rule seems to be that if the terms of the contract give the husband the right to the property only after the payment of all the purchase money, his wife can have no dower unless the purchase money is fully paid.)

"And dower in equitable estates differs from dower in legal estates, generally, in that the husband must die seized of the former to entitle his wife to dower. If he has aliened an equitable estate, his wife in consenting to the deed absolutely or by mortgage or other encumbrance, he has defeated dower, absolutely or *pro tanto,* as the case may be."

As in *Glenn* v. *Clark,* 53 Md. 604, where the husband bought land, paying part of the purchase money but getting no legal title, sold his equitable title absolutely, it was held that his widow had no dower.

"If a husband has agreed to buy land and paid money thereon, he may rescind the contract without subjecting the property to a claim for his wife's dower." *Owen* v. *Robbins, supra; Wheatley* v. *Calhoon,* 12 Legh., Va. 264, 37 Amer. Dec. 654.

"And a legal title acquired by the husband after he has so disposed of or encumbered an equitable estate, enures to the benefit of his assignee and does not perfect dower."

In 14 Cyc. 910, "applying the rules above stated (as to dower) to the estate of a husband who is in possession of lands under a contract for the purchase thereof, it follows that if the purchase price had been fully paid by the husband prior to his death, and no conveyance had been made to him, his widow is entitled to dower in the lands so purchased; but if the husband has not complied with the terms of the executory contract, or if for any reason he would not have been entitled to a specific performance during his lifetime, it is generally held that the right of dower will not attach. In most States a widow is not entitled to dower on the lands held

under a contract of purchase where the husband's interest was alienated during coverture."

In 27 R. C. L. 469, "where the rule prevails that a widow may have dower in an equitable estate of her husband, it would seem that she may have dower in lands which her husband holds under an executory contract of purchase; but it has been held that a husband has no such equitable interest in the property as will entitle his wife to an inchoate right of dower therein until he has made all the payments of purchase money as required by the contract, so that nothing remains to be done except the execution of a deed to him."

We respectfully submit, then, that under the cases and the better opinion prevailing in this country and England, the husbands here had a mere equitable *right* and not an equitable *estate*, which having alienated, cut off their wives without any interest passing or accruing to them as such, and that there is no dower right held by either Mrs. Conover or Mrs. Hathaway. The plaintiff was, therefore, not justified in refusing to accept the deed tendered to him on this ground of dower interests outstanding.

2a. As to the question of possession, even plaintiff's agreement (Hathaway's memo) does not stipulate or require that possession be given him on March 1st or any other time. The fact is that on March 5th, within half an hour before actually making his second tender, plaintiff Lloyd visited the premises in question and there saw all the belongings and effects of the Vanderhoofs that then remained packed and ready for transportation, and was informed by the Vanderhoofs that most of their effects were already packed and that they were then in the course of

moving (see testimony, p. 51, ll. 7-10; p. 69, ll. 31-40).

2b. By his own testimony (p. 32, ll. 21-27) Lloyd, before he purchased, visited the property, and when he paid over his money knew it was occupied by the Vanderhoofs. The possession of the Vanderhoofs was open and exclusive and *was not* adverse to Weinstock, but claimed under him. The plaintiff knew of it when he first purchased or sought to purchase this property, and made no objection as to the same.

In *Feld* v. *Kantrowitz,* 130 Atl., p. 7, and cases there cited, the Court says: "So it has come to be the settled rule that open, notorious, visible, exclusive, and uninterrupted possession is notice and puts a purchaser dealing with the record owner in duty of inquiry and constitutes constructive notice of everything he would have learned by inquiry from the person in possession.—Wood *v.* Price, 79 N. J. Eq. 620, etc., I think puts New Jersey in the category of jurisdictions that have carried the notice implied from possession and occupation of land to its logical conclusion. It is not necessary to show that the person to be affected by the notice knew of the possession. If the possession was of the character required by law, and had sufficient notoriety, certainty, and exclusiveness, the notice was a legal deduction from the fact of posession and all persons dealing with the title to the land were chargeable with notice of possession whether they had actual knowledge thereof or not." *Hodge* v. *Amerman,* 40 N. J. Eq. 99; 2 Atl. 259.

The language of Justice Minturn in *Hagelin* v. *Lehmann,* 126 Atl. 431, is especially appropriate and applicable in this case "where the purchaser knew when contracting that part of the premises

was leased, and contracted for a portion of land, the fact that the defendant could not deliver the warranty deed free from encumbrances, did not entitle the purchaser to recover deposit and search fees, though the contract called for conveyance free from encumbrances. * * * There does not seem to be any doubt that the purchaser of the property knew at the time of the execution of the contract that the second floor of the premises was occupied by tenants and that they purchased with that fact in mind."

And in *Newark Savings Institution* v. *Jones,* 37 Equity, p. 449, it was held "where an agreement for the sale of lands does not mention character of the title to be given, an implication ordinarily arises that the title to be conveyed is to be given free from encumbrances, but such implication may be rebutted by parol proof of the vendee's notice of the existence of encumbrances on the lands. And page 451 "notice is sufficient to rebut the mere implication and parol proof is on this ground admissible."

In *De Long* v. *Spring Lake, etc.,* 72 N. J. L. 126, it was held "if the encumbrance affects only the title and not the physical condition of the property, knowledge of its existence is no defense to an action on the covenants * * * nor do the pleadings show that there was any change in the physical condition of the land to indicate to the eye that it had been dedicated," etc.

2c. Until the notice served by plaintiff on March 1, 1924, plaintiff gave no intimation that possession was necessary to him. His position and situation is entirely different from that of *Eisler* v. *Halperin,* 89 N. J. L. 282 "where defendants were *unable* to put plaintiffs into poses-

sion, plaintiffs (having specially) notified defendants at or about time of executing agreement of purchase, in December, that they would have to move out of the property that they were then occupying, at the time fixed for closing of title, February 14, 15, and would require immediate possession of the premises."

2d. But going further, defendant's failure to give possession was not sufficient to warrant plaintiff's refusing this title. The testimony is clear that the Vanderhoofs were ready and would have vacated the premises by March 7th at the latest (p. 51, ll. 7-10; p. 69, ll. 31-40). Encumbrances of a trifling character are no ground for action for the purchaser's refusal to perform, 35 Cyc. 1487.

In *Herring* v. *Esposito,* 119 Atl. 765, the Court says, "A Court of Equity will not permit a vendee to break his contract for purchase of real property for some immaterial defect or encroachment or one that can be compensated for in the absence of an express stipulation or agreement that such defect does not exist."

And in *Denman* v. *Mentz,* 52 Atl. 1118, "the next representation concerns the rent. It is conceded that there was a written lease for $1,800; as a matter of course, however, the landlord had verbally consented to accept $1,500 until the tenant 'had the place started.' That what Mr. Denman (plaintiff) learned subsequently was not the cause of his unwillingness to fulfill his agreement is apparent from the fact that when he stated as an objection to taking title, that the tenant was only paying $1,500, he was informed that the $300 would, if he desired, be made good to him, or if he preferred, deducted from the contract price. The vendee's position is untenable."

In our case, plaintiff's actual position is that Hathaway having promised him a building and loan mortgage and failed to secure same, and plaintiff being unable financially to complete the transaction, attempts to reject title as an excuse to get out from under on this technical ground of possession. Here the possession was promised plaintiff definitely, not alone by the vendor, but by the parties in actual occupation of the premises, not at some future undetermined date, but as the Vanderhoofs testified, they were ready and packed to move, had van ready and could have been out not later than the seventh of March—a period of only two days.

And in *Barger* v. *Gery,* 53 Atl. 483, cited in *Standard Realty* v. *Gates,* 132 Atl. 490, Vice-Chancellor Berry says: "When the authorities speak of the hazard of litigation to which the purchaser must not be subjected—they must refer to a hazard which is to be determined by the chance of successful attack as viewed by the Court in a suit for specific performance," and at page 491, "but here there is no *defect* of title; there is not even a suggestion anywhere that the plaintiff's title is not perfect. The objection that has been made is based upon a lease held by the City of Asbury Park for a longer term of years than that specified in the contract * * * which is merely an encumbrance upon the property, and not a defect in the title * * * an encumbrance of which there might, under the circumstances of this case, be compensation to the vendee for deficiency. * * * The doubt must be considerable and rational, such as would or ought to induce a prudent man to pause and hesitate; and not based upon captious, frivolous and astute niceties, but such as to produce real bona fide hesitation in the mind of the Chancellor.

In *Waterman* v. *Taub,* 127 Atl. 676, the Court says, "The burden of proof of the non-marketability of the title admittedly was on the purchaser * * *. The alleged encroachment was a wall deviating one-half inch from a direct course, and a special encroachment on the sidewalk of from one to nine inches. The Trial Judge, however, seemed to consider this immaterial, and that conclusion, we think, may be sustained." A judgment for plaintiff in this case was affirmed by the Court of Appeals.

It is to be seen from the above cases that encumbrances of a trifling nature will not prevent a title from being good. It is clear the plaintiff's inability in this case to obtain possession on the 5th, and, as is uncontradicted by the testimony, could have obtained possession on the 7th, under the law, is not such a defect as will excuse him from performance under his contract, particularly in view of the fact that the contract, the plaintiff relies upon, itself makes no provision for possession or requiring same. As said in *Goldberg* v. *Feldman,* 70 Atl. 245, the service of a demand for immediate possession cannot be made "a condition on which he (plaintiff) will carry the agreement into effect."

It is further to be noted that the only case dealing with the question of possession in New Jersey is that of *Eisler* v. *Halperin,* 98 Atl. 245. That case is to be distinguished in that the tenant, Blacher, and his wife, who held an actual interest in the property and were in possession, absolutely refused to vacate the premises or fix a time when they would, added to the fact above discussed, that plaintiffs in that case had notified defendant of their necessity for possession. The circumstances here, of course, are different. The Vanderhoofs themselves testify that they were

ready to and could have moved on the 6th, even to the extent of having the van ready the day following the admitted tender by the plaintiff.

And the Court, on p. 278 of 89 N. J. L. (Eisler *v.* Halperin) in this case says, "when the sufficiency of a real estate title is in question in a Court of Law, that Court may receive and consider evidence tending to show that the title is vulnerable in equity (citing Herring *v.* Esposito; Barger *v.* Gery; Denman *v.* Mentz) (and here Equity would not refuse specific performance for so small and immaterial a defect)—"Delivery of possession is *normally* essential to the transfer of a good title and a vendee may reject a title not accompanied by immediate possession unless the agreement be otherwise. In the absence of any qualifying condition in the contract of sale (and there were none in the case) the purchaser is entitled to a good title—but if there be a SUBSTANTIAL defect, the vendee may rescind and recover back his payments and interest if the title has not passed * * *. The question is one whether the title was one which the purchaser was entitled to reject in its then state." Clearly indicating that even at law, the defect must be a *substantial* and not an *immaterial* one to permit the plaintiff to rescind and recover back his deposit; and in view of the fact that the Vanderhoofs did actually fix the time and promised to move, to the knowledge and assurance of plaintiff, the language of *Kadow* v. *Cronen,* 116 Atl. 427, at page 428, is pertinent. "The suggestion that the plaintiff was entitled to have the payment and satisfaction made before he paid the purchase money, is very much the same as a claim that a vendor must deliver a deed and possession of the property before the purchaser is bound to pay the purchase price, which is

clearly not the law. If each party were required to do his part before the other did his, obviously there would never be a settlement if both parties stood upon their rights. What each party is entitled to is that the other should perform at the same instant and time that he does and in contemplation of law that is exactly what takes place at every real estate settlement, although in fact, the details of the settlement may occupy one or more hours or even days in the complete performance. This is the theory upon which all so-called three-cornered settlements rest, and it is sound in principle as well as essential in practice. It does not depend for its validity upon custom * * *. We think the plaintiff did not acquire the right to forthwith repudiate his contract, but that he was in duty bound to co-operate to a reasonable extent with the defendant's evident purpose to carry through the settlement in good faith. Some reasonable expedient might have been adopted to overcome the unexpected mishap." This case is cited and approved by the Court of Errors and Appeals in *Marks* v. *Parker,* 117 Atl. 619.

And in *Van Riper* v. *Wickersham,* 77 N. J. Eq. 232, the Court says: "when the vendor in a suit for specific performance by reason of the silence or the conduct of the vendee regarding the title to be conveyed during the negotiations or in the progress of the cause, has lost an opportunity to perfect his title before decree, this opportunity will still be afforded to him by the allowance of a reasonable time, even after the entry of the decree, if it can be done without hardship to the vendee." And this even though time had been made of the essence of the agreement in the case reported.

And in 27 R. C. L., page 504, section 226, "a revocable license creates merely a tenancy at will and does not incapacitate the vendor from conveying a good title."

2e. The question is whether the plaintiff is even in position to raise the inquiry. Plaintiff had rejected the title squarely on the question of the outstanding dower rights of the wives of Conover and Hathaway, and having done so cannot base his claim for breach of contract on vendor's inability to deliver possession (27 R. C. L. page 529, section 259), * * * "If the vendor's title is in fact good, and the purchaser refuses to accept it on the ground of the vendor's want of title, he dispenses with the obligation to deliver possession and cannot base a claim of breach of contract by the vendor by showing that if he had accepted the title, it would have been out of the vendor's power to deliver possession (and citation; see also *Steinbach* v. *Pettingil,* 50 Atl. 443; *Thompson* v. *Killheffer,* 119 Atl. 770).

This defendant, therefore, respectfully submits that his motions for non-suit and for direction of verdict should have been granted and that the Supreme Court erred in affirming the judgment denying the same.

POINT VI.

The judgment of necessity must have been in favor of defendant.

Under the pleadings in this case, it was incumbent on plaintiff to prove (1) a contract made by Hathaway as the duly authorized agent of defendant Weinstock; and (2) a breach thereof. Plaintiff did prove (1) that Hathaway's authority was limited to secure a purchaser of the Weinstock contract only, and that Hathaway

acted far beyond the scope of his authority; (2) that in fact plaintiff himself was in default in not tendering the purchase price to Weinstock on March 1, 1924, as required by the Hathaway agreement. Plaintiff proved no agreement as alleged in his pleadings. There is no testimony in this case to charge Weinstock with anything other than his receipt of $1,000 for which plaintiff received, retained and acted upon an agreement other than the one he sued on.

POINT VII.

The Court's charge and direction of verdict was erroneous in fact and law.

Taking up the Court's findings (p. 78, etc.) (called "charge" in grounds of appeal):

1. (p. 78, ll. 37-40; p. 79, l. 1). The Court "considers the complaint amended to properly raise the point it is passing upon." It is difficult to gather just what amendment the Court here was considering. If the Court intended here to permit the amendment previously refused by it (p. 71, ll. 1-14) requested by plaintiff's counsel, this certainly was erroneous and prejudicial to defendant. The issue here raised would be one defendant was wholly unprepared to meet. Further, the defendant Bradford Hathaway, on whom much of both plaintiffs' and defendant's case on this point or issue depended, was absent, we believe, in Florida, and certainly this defendant should not so arbitrarily be deprived of his rights to a full and complete hearing.

In *Goodyear Tire & Rubber Co.* v. *Kruvant,* 96 N. J. L. 352, 115 Atl. 302, the Court says:
"* * * when an amendment of pleadings opens a new ground of liability or defense not before suggested, to the surprise of the other

party, a due regard for the rights of the latter requires that he should have reasonable opportunity to meet the new matter."

In *Jordan* v. *Reed,* 77 N. J. L. 584, 71 Atl 280 (E. & A. 1908): "The declaration set up contract entered into by defendant alone. Held, proof of contract of different nature entered into by defendant and others would not sustain declaration unamended. Court says, "Variance or discrepancy between a material averment in pleading and the evidence adduced in support of it was, in early times, of vital importance. Since the enactment of the provisions now embodied in the Practice Act (P. L. 1903, page 571, par. 125), variance has with us been of less consequence. Nevertheless, today it is sound law and sound reason that there must be no variance to the prejudice of the adverse party between the case declared upon and case proven, and that a recovery must be *secundum allegata et probata.*" Citing Hallock *v.* Commercial Ins. Co., 2 Dutcher 268-274; Bristow *v.* Wright, 2 Doug. 665, 667a; Martinez *v.* Runkle, 28 Vroom 111, 117, 122.

In *Gilliard* v. *Public Service Ry. Co.*, 94 Law 244; the complaint alleged that defendant was negligent in starting a trolley car from which plaintiff was alighting. The proofs showed that plaintiff stepped off the car before it stopped, being induced to do so by the conductor. The Court charged jury that defendant was liable if the conductor, by his statement to plaintiff that car was at a standstill, induced her to alight, etc.

Court says, "In our opinion, there is nothing in the language of the complaint, or in the reasonable inference to be drawn therefrom, which suggest in the slightest degree that plaintiff's injuries were the result of any such negligent act

on the part of the conductor. It is clear, therefore, that the jury were permitted to base their verdict upon an issue not raised by the pleadings, and it may well be that their finding rests upon that 'issue'."

The Supreme Court in its opinion on the original appeal of our case says, "Moreover at the conclusion of the evidence submitted the trial court directed that the complaint be amended so as to set out the real cause of action which had been subject of the trial before the jury, and the propriety of this judicial action is not challenged by the appellant." Appellant did except generally to the Court's action, (p. 80, ll. 21-23) and under the circumstances respectfully submits that this was the most direct challenge that could be made to bring up the entire charge and language and action of the Court therein contained. Plaintiff declares on a specific contract. The issue before the jury was confined strictly to the question whether that contract, so alleged, was or was not binding on defendant, or whether the contract actually signed by defendant was not binding on the plaintiff. There was no suggestion or testimony of want or failure of consideration or otherwise, in any of the testimony submitted before the jury. There was no testimony or opportunity afforded defendant to show that actually in the falling real estate market that then began to be felt, he was actually damaged. The whole theory and efforts of the parties were directed solely to the proving or disproving the contract alleged by plaintiff. And we respectfully submit that the amendment, or whatever it may have been intended by the Court, was wholly without the pleadings and the issue of the case as developed at the trial.

2a. "The receipt (p. 79, ll. 4-6) says that the money is to be refunded in the event that the owner does not accept the terms." The Court is trying to give force and effect, to make binding on defendant, a provision in an agreement, made by an agent, who by plaintiff's own proof, had absolutely no authority to make any such agreement to bind defendant thereto. Under the cases hereinabove cited under Points I-V, inclusive, this was erroneous and prejudicial to defendant.

b. Further, the Court is imposing on defendant terms of an agreement, which by the testimony he, defendant, concededly knew absolutely nothing about until this suit was instituted.

3. (P. 79, ll. 9-13) "It shows that Bradford G. Hathaway had the right to negotiate for Weinstock; that is, that he was in some way authorized to deal with this property." The proof adduced by plaintiff was that Hathaway's authority was specific and certain (Ex. P. 15, p. 99) "To procure a purchaser who will pay to the party of the first part (Weinstock) a profit of $1,500 for the assignment to such prospective purchaser of his (Weinstock's) agreement" (ll. 36-40), and nothing more nor less, a special authority, definitely limited in its scope and purpose.

4. (p. 79, l. 14) The Court speaks of ratification of the Hathaway agreement by Weinstock. How could Weinstock possibly ratify an agreement of which the proof is conclusive he knew nothing about?

5. (p. 79, ll. 15-20) As said above, Weinstock's acceptance of the money here was based on the agreement he signed, believed to be valid and binding on him, and under which he at all times acted and proceeded upon.

As to the question of "good" or "marketable" title (the latter expression, we submit, being ill-used here), we respectfully submit, as discussed under Points I-V, inclusive, was fully met, performed and executed by this defendant. His deed tendered plaintiff was of a "good" title defined under the law here cited, and all that plaintiff had bargained for, even under the Hathaway memo.

Meyer v. *Madreperla,* 53 Atl. 477. "In an action at law for breach of contract, want of good title must be established and the question whether the title is marketable is not involved."

29 A. & E. Encyc. of Law (2nd Ed.), p. 611:

"A title in order to be good must be one which is free from all encumbrances that are not of a trifling character."

And at page 612, "A title to be good must be free from reasonable doubt. This does not mean, however, a title free from *all* suspicion or possible defect, but only a title which a reasonable purchaser, well informed as to the facts and their legal bearings, willing and *anxious* to perform his contract, would, in the exercise of that prudence which business men ordinarily bring to bear upon such transactions, be willing to accept and ought to accept.

6. (p. 79, ll. 21-40) The Court's statements here are, we submit, mixed right and wrong. Certainly, we must reject Hathaway's authority to sign this memo; the proof is conclusive he had none. But it does not follow that Weinstock had to return the money. He gave the plaintiff an agreement in return, which plaintiff could have and did seek to hold him to. Further, plaintiff himself was in default, even as to the Hathaway

agreement, not having paid the purchase price of $11,000 therein on March 1, 1924; and refusing the title he *had* bargained for thereunder, as we maintain is clear, was a good title. Furthermore, the plaintiff declares on what he says is a valid agreement, seeking damages for a breach thereof, although he fails entirely to establish either allegation; and he must stand or fall on his own case.

Apropos of the Court's statement in these lines, if there were any question of ratification, certainly, the fact thereof should have been left to the jury, but this the Court did not do.

We respectfully submit, therefore, that the Court's charge here, under the pleadings and proof was in error. The Court's further finding as to the marketability of the title tendered, as argued above, is erroneous as a matter of law.

POINT VIII.

Plaintiff proved nothing within or without Section 5 of our Statute of Frauds to bind defendant in this suit.

The plaintiff, suing on a contract, to establish his cause of action, must, under the Statute of Frauds, section 5, 2 C. S. 2612, prove an agreement signed by the party to be charged thereby, or his duly authorized agent. No authority in the agent, as argued, was proven; no contract within the Statute of Frauds was proven.

Going further into the actual facts and merits of this case, plaintiff's testimony (pp. 33-45, l. 34, etc.; p. 35, ll. 32-33; p. 52, ll. 1-40) clearly shows that because Hathaway did not get him a building and loan mortgage of $8,000 as, plaintiff says,

(p. 33, ll. 34-40; p. 35, ll. 32-35; p. 52, ll. 1-38) Hathaway agreed to do, is the only and real reason plaintiff defaulted, and now, having made a bad bargain, seeks to get out from under at the expense of this, or any defendant he names, and can by chance hold. And his retaining the assignment signed by Weinstock from December 1st, 1923, to March 1st, 1924, without objection or rescission, does not bespeak good faith on his part.

In plaintiff's brief on previous appeal, plaintiff laid stress on his being a Journeyman, Unsophisticated Carpenter. He was represented by Yonteff and by Hurley throughout this entire transaction, certainly by Hurley on December 1st, 1923, which he admits (p. 49, ll. 10-22). As to his being a Journeyman Carpenter, he says: (p. 31, ll. 32-40) that he is a manufacturer and was at the time of the happening of this matter, in the building business.

Apropos of this, *Hawthorne* v. *Odenson,* 120 Atl. 802, says, "It is not to be overlooked that in ordinary or normal circumstances, neither the vendee or vendor owes to the other any duty of disclosure nor is the mere circumstance of unequal business experience or mental powers of the parties to be made the basis of unseating contracts of conveyances actually made, in the absence of natural or conventional trust relationship between the parties and its abuse." Weinstock owned no duty to Lloyd, and Lloyd was sufficiently protected by counsel in the matter.

And in *Crescent Ring* v. *Travelers Ins. Co.,* 132 Atl. 106, the Court says, "while one sued for fraud cannot set up as a defense that if the plaintiff had exercised reasonable care he would not have been defrauded; yet where no active wrong-

doing is attributed to the principal defendant, and reliance is placed upon the fraud of the agent, who was not instructed or actually or impliedly authorized to commit it, there can be no recovery by the plaintiff who could have protected himself by examing into the character of the transaction and the truthfulness of the representations made, unless the defendant with *knowledge* ratifies it."

And in *Steinbach* v. *Pettingil,* 50 Atl. 443, "Where a vendee, who has no right to rescind a contract of sale, refuses to perform it, he cannot recover the money he has paid upon it."

Plaintiff, also, by innuendo, intends to link up Weinstock with the transactions occurring in Yonteff's office between Hathaway and Lloyd, previous to December 1, 1923, particularly with reference to the release and drawing up of same. This testimony could not have been excluded since it was material to Hathaway's conduct and his liability as a defendant in this suit on that point; but there is not even a suggestion in all of it that Weinstock knew or had knowledge of this transaction. Plaintiff also speaks of the unconscionableness of the agreement signed by defendant Weinstock. The fact that Weinstock was a subsequent vendee, obligated to pay his immediate vendor an additional deposit, and to take title in the event plaintiff were to default, as he did, making it necessary for defendant to make financial arrangements to meet his obligation; the fact that he did not know Lloyd and had not even met him, and knew nothnig of his financial responsibility, if any, is sufficient to overcome any suggestion of over-reaching that defendant may be accused of, even though wrongfully. He was dealing at arms length and in ignorance of the person and reputation of his co-

contractor. Yonteff, whom defendant thought was plaintiff's attorney, thought these terms sufficiently reasonable to consent thereto on behalf of Lloyd, and certainly they were proper under the circumstances in hand.

There is no question as to the identity of the premises the contract involved. And we respectfully submit that so far as a contract of any kind herein was concerned, Lloyd clearly accepted, ratified and confirmed the contract signed by Weinstock and given to him, which he and his attorney retained from December to March and under which he made his tender of $2,000 on March 1st; and that this agreement is binding upon him.

Plaintiff raises the point that the commission of $750. to have been paid Hathaway amounted to almost 7% on the sale price. This was for an *assignment* of the contract Weinstock held, which ordinarily merits some additional compensation because of the probable difficulties in securing a purchaser who would be willing so to buy.

The absence of Hathaway was as much plaintiff's fault as defendant's. Hathaway's counsel, Mr. Newman, stated in open Court that his client was in Florida and was unable to be present, whether by design or not is unknown. There is nothing that Weinstock could testify to, as to the merits of this case, that required his taking the witness stand. It is clear he never met Lloyd, and the facts of the attempted tenders of March 1st and 5th, are admitted without contradiction, insofar as Weinstock's testimony could have added to or subtracted therefrom.

If plaintiff knew nothing about the Vanderhoof agreement and the assignments thereof before he made his tender of March 1st, where and when

did he ascertain the fact that the signatures of Conover's and Hathaway's wives were necessary to the assignments of the contracts, which he says he then knew nothing about?

Plaintiff's statement in his brief that the Vanderhoofs had a written agreement to move out on the 6th and a verbal agreement to stay until her house was ready, is not the fact, and there is no testimony in its support. There is nothing to show that she was building a new house or that any such satement was made, except Lloyd's testimony (p. 76, ll. 39-40) that Mrs. Vanderhoof told him this. This is clearly rebutted by Mrs. Vanderhoof's direct and cross examination (p. 9, ll. 30-40).

The crux of the situation as stated lies in the fact that Lloyd did rightly or wrongly, place implicit confidence in Hathaway, accepted Hathaway's promise of a building and loan mortgage, etc., even to the extent of dealing with him exclusively; and when he found that his confidence was misplaced, struck out to get out from under. Was the plaintiff Lloyd justified in trusting blindly in Hathaway, if he did, in light of the facts as they exist? *ie:*

1. He held a receipt signed by Hathaway which clearly showed his powers were limited and subject to their acceptance of another.

2. And the testimony, vague and unconvincing as it may appear in the record, of some other transaction with Hathaway, referring to a release which should normally excite suspicion, and in fact, did excite the suspicion of this plaintiff, and on this occasion plaintiff is handed an agreement signed by the party he knows he is dealing with by name at least, which he takes to his counsel then representing

him, and in the light of all of this, does absolutely nothing to ascertain from defendant:

a. Whether or not terms of his own agreement were accepted by the owner if he claimed he did not understand the writing he held.

b. Just what the authority placed in Hathaway actually was, and

c. At least advising defendant that the agreement defendant had executed was not acceptable to plaintiff, and perhaps demanding back his deposit at that time, which plaintiff was under duty clearly to do, and not sit by from December to March, permitting defendant to materially alter his possession insofar as value of this property may have been affected, and then at the very last moment hold defendant hard and fast to the bargain plaintiff knew, in December, defendant had never made.

His pleadings themselves are a wild stab to reach somebody who could make good to him for Hathaway's acts, either Bradford Hathaway, Frank Hathaway or Weinstock, anyone at all. It would be unconscionable and unjust to hold Weinstock responsible in the light of Lloyd's own carelessness and negligence, in permitting this situation to continue, at the very least, from December 1st to the following March. His rejection of the title was not bona fide, merely a clutch at a straw.

In the language of the cases above cited, when Hathaway failed him, plaintiff was no longer "willing and anxious" to buy. He admits he had no money himself to finance (only $2000 or $3000). Yet, made no attempt to secure his own loan, to finance himself. What he did do was to go through the naked formality of a tender, after ascertaining what the real situation was,

in the hope that these "astute niceties" would afford him an opportunity to get out from under. And when he rejected the title squarely on the technicality of the wives' signatures, and learned this ground was not sufficient to support him, he arranged, "astutely," to raise the question of possession; on the former appeal he practically abandoned the first, and now rests solely on the second ground, of possession; something he didn't want, knew, when he acted that he momentarily could not have, and in the light of the Vanderhoofs' willingness to give him even this, as soon as was reasonably possible, he sits back and says, "no, I have raised the point, now give me my money." Plaintiff's own failure to act, his own default, he brushes aside—he has his clutches fastened on what he thinks is a good excuse, and demands "his pound of flesh."

Weinstock in retaining the $1,000, is not accepting the Hathaway memo, and rejecting the rest. He knew nothing of its existence, even, when he received this money. He accepted the deposit on the faith and in consideration of the contract of assignment he himself signed, which plaintiff sees fit wholly to ignore. He acted throughout on this contract only, the only one of which he concededly had any knowledge at all. Plaintiff is in default of every condition therein contained. Plaintiff knew of its provisions, was legally advised as to them, and could under no circumstances sue on this agreement and recover back his deposit, being himself so glaringly in default thereon. Defendant submits, then, that under no view of this case, can nor is, plaintiff entitled to recover.

Defendant respectfully submits, on the law and the facts, he is entitled to judgment in this matter. That the judgment of the Circuit Court,

affirmed by the Supreme Court, be reversed on the grounds specified in this appeal.

Respectfully submitted,

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New Jersey Court of Errors and Appeals

JOHN N. LLOYD, *Plaintiff-Appellee,* *vs.* ABRAM WEINSTOCK, *Defendant-Appellant.*	*On Contract.* *On Appeal, etc.*

BRIEF OF PLAINTIFF-APPELLEE.

Points to be Relied upon and Citation of Authorities.

POINT 1. As the evidence was disclosed at the trial, of facts theretofore unknown to Lloyd, he could have recovered from Weinstock on the ground that he had wrongfully received the money. While the case was not brought on that theory no harm has been done by the present verdict.

POINT 2. Defendant was unable to put plaintiff in possession. Written notice had been given by Lloyd demanding possession.

Eisler v. *Halperin*, 98 Atl. 245;

McCoal v. *Jacobus*, 7 Robinson (N. Y.) 115;

Dobbs v. *Narcross*, 24 N. J. Eq. 327;

Loundsberry v. *Locander*, 25 N. J. Eq. 554, affirmed 24 N. J. Eq. 417;

De Mars v. *Koehler*, 62 N. J. L. 203.

POINT 3. Weinstock by his conduct acquiesced in and ratified the act of Bradford Hathaway in selling the property to Lloyd, if he did not so acquiesce and ratify he cannot accept Hathaway's contract in part and reject the rest.

POINT 4. Verbal authority is sufficient to authorize the agent to make an agreement in writing binding the principal to convey real estate.

Browne St. Fr., 3rd Ed., No. 370;
29 *Am. & Eng. Ency. of Law* (2nd Ed.) 861;
Long v. *Hartwell*, 5 Vr. 116, 121;
Milne v. *Kleb*, 17 Stew. Eq. 378;
Lindley v. *Keim*, 9 Dick. Ch. Rep. 418;
Scull v. *Brinton*, 10 *Id.* 489;
Tyrrell v. *O'Connor*, 11 *Id.* 448, 452;
Brown v. *Honniss*, 74 Law 501, 505;
Lindley v. *Keim*, 54 Eq. 418, 422, Err. & App.

POINT 5. Seizin of a legal estate of inheritance is not necessary.

POINT 6. Plaintiff did not sign and in fact expressly refused to sign the proposed contract, Exhibit P. 3 (pp. 82-83), and cannot be bound thereby.

Statement of Case.

The action was based upon the receipt set forth in the brief of the defendant-appellant.

It appears from the evidence that prior to the payment of this $1,000.00 by Lloyd, Hathaway, as an inducement to obtain Lloyd's money, had represented that he would get a building and loan mortgage to finance the deal. Lloyd so testified (p. 33, ll. 34-40, and p. 52, ll. 16-25), and defendant so concludes in his brief (p. 2 of brief).

When Hathaway advised Lloyd that he could not obtain a building and loan mortgage he demanded his money back. Hathaway then ar-

ranged to have a release drawn, not providing for return of Lloyd's money, but releasing him from specific performance of the contract, for which the attorney's charge was to be $100.00, afterwards reduced to $50.00 (p. 33, ll. 34, &c.; p. 35, ll. 2-10).

It appears, however, that this release was to be destroyed if Lloyd could raise an additional $1,000.00 by the next day. He did this and the release was destroyed.

Lloyd, a journeyman carpenter (p. 32, ll. 1-2), was then again led to the office of Mr. Yonteff, where he was asked to sign an agreement (Exhibit P. 3, p. 82). This agreement was prepared by Mr. Yonteff the day before and revised by Mr. Olsan before it was presented to Lloyd (p. 58, ll. 25-37). Weinstock also took part in the preparation of this agreement (p. 58, ll. 10-12).

An examination of this contract (Exhibit P. 3, p. 82) convinces one as to the attitude of these people toward the unsophisticated carpenter, Lloyd. It contained provisions that they would not dare to propose had Lloyd been represented by counsel. It purported to be an assignment, yet (ll. 25-27) it contained a provision "and this assignment shall not take effect except upon the happening of said express condition."

It acknowledged receipt of Lloyd's $1,000.00, which Weinstock was to receive upon the signing of the agreement. It provided that same should become null and void if Lloyd should fail to serve a notice that he was ready to complete thirty days before completion. It provided that time was of the essence of the contract.

It purported to assign a contract for the sale of property "bearing date September 14, 1923, for the purchase of premises commonly known

as Nos. 533-535-537 Hawthorne avenue, Newark, N. J." It did not sufficiently identify the contract. It did not name the parties between whom the contract was made. It might have assigned a contract made by a party other than Vanderhoof, who was not the owner of the property. It did not state what if any encumbrances the property was to be conveyed subject to, or the dimensions of the property, or the purchase price of the property, or various other provisions usual in such contracts.

It contained just sufficient reference to the contract to enable them to prove subsequently what contract was intended to be assigned.

The original contract was to be left in escrow, and not delivered to Lloyd. They never showed the contract of September 14, 1923, to Lloyd (p. 37, ll. 17-20).

This contract was submitted to Lloyd and never signed by him. There was no meeting of the minds and under no doctrine of law could Lloyd be held to same.

The only agreement, therefore, that is binding upon him is the receipt of November 22, 1923, set forth in full in defendants' brief (Exhibit P. 2, p. 81).

Weinstock made his agreement with Frank C. Hathaway to buy the property on September 14, 1923. On November 20, 1923, he made an agreement with Bradford Hathaway (Exhibit P. 15, p. 99) to pay him "As commissions the sum of $750.00." The contract did not state the percentage on the dollar, *but it amounts to almost 7% on the sale price of an improved piece of real estate.* It was made two days before Hathaway obtained $1,000.00 from Lloyd, and

was not a commission but the price for delivering him.

Weinstock knew that Lloyd had not signed the contract on December 1, 1923. He was so advised by Yonteff (p. 54, ll. 26-28).

If he had not been so advised in direct terms it was the business of him and his attorney to find out, yet on the very date Lloyd declined to sign the agreement a check was drawn (Exhibit P. 11, p. 93) by Mr. Yonteff to Mr. Olsan as attorney for Mr. Weinstein and endorsed by the latter to Weinstock, whereby $600.00 of Lloyd's money was paid to the latter.

What became of the balance of $400.00? Under the terms of the agreement between Frank C. Hathaway and Weinstock of September 14, 1923 (Exhibit P. 14, p. 95), Weinstock had to pay the latter $400.00 on December 14, 1923, and Weinstock deliberately used Lloyd's money to make this payment (see also testimony of Mr. Yonteff, p. 60, ll. 10-20). It was an available fund and he made use of it.

Bradford Hathaway, though a defendant and the one who knew most about the transaction, absented himself from the trial.

Weinstock did not take the stand. We, however, have his answer which binds him, in which he says (p. 16, ll. 25-37), "Bradford G. Hathaway was a duly licensed real estate broker, and as such came to this defendant with *an agreement, providing for the purchase of the aforementioned property* by and on behalf of plaintiff, which agreement is attached hereto and marked 'Schedule A,' and made part hereof, on the execution of which agreement by this defendant, the said plaintiff, by the said Bradford G. Hathaway, his agent aforesaid, did then and

there pay this defendant a deposit of $1,000 in accordance with the terms of the agreement then and there made."

He knew when he answered that Hathaway had not come to him with the agreement but that Weinstock gave Yonteff the particulars of the agreement. He also knew that Hathaway did not "then and there pay this defendant $1,000," but that he had induced Yonteff to give it to him in two checks, one for $400.00 twenty days later.

BRIEF OF ARGUMENT.

An examination of the cases cited by the defendant-appellant shows that they do not sustain the points raised by appellant. Take, for instance, the cases cited to show a lack of authority in Hathaway.

In the case of *Thompson* v. *Kilhefer,* 125 Atl. 11, was a case in which an agent sold without authority, and the purchaser stopped payment on the check. The Court held that there was no valid agreement of sale.

The case of *Resky* v. *Meyer,* 119 Atl. 98, is a case in which the owner sent out a circular letter to brokers. Resky produced a purchaser named Weiss, and Solomon, an agent for Weiss, purchased the property and resold it to Weiss. The Court held that in view of these facts Meyer, the owner, having no knowledge that Solomon was acting for Weiss, who was produced by Resky, could not be held for the commission.

The case of *Milne* v. *Kleb,* 14 Atl. 646, 44 N. J. Eq. 378, Milne was an attorney who had verbal authority to sell in 1885, which he did not execute until 1887. Defendant was in Europe when

the contract was made and had been for a year. The owner never assented to the contract. The decision of the Court was founded upon the fact that the original contract was in fact rescinded before the contract of sale was made.

The case of *Marsh* v. *Buckan,* 22 Atl. 128, 46 Eq. 595, was a case in which the Advisory Master found that the contract was procured by fraud in that the agent for the vendor had received a secret commission from the vendee.

The case of *Hann* v. *Freestone,* 123 Atl. 704, is a case in which the agent fraudulently manipulated a farm of the plaintiff and fraudulently obtained a deed from the plaintiff without ever paying the plaintiff the purchase price.

The case of *Strauss* v. *Rabe,* 127 Atl. 188, 130 Atl. 920, the Court merely held that an attorney acting for the vendor had no implied authority to extend the contract.

It is true that certain excerpts may be taken from these cases by an examination of the context of the decisions, but they throw no light upon the question at issue, that is, whether the defendant-appellant is bound by the contract sued on.

The defendant received the $1,000.00 paid by Lloyd to Hathaway, and the fact that he received it in two payments, one twenty days after the other, is evidence of a guilty knowledge on his part in receiving the same. His proposed contract with Lloyd (Exhibit P. 3), a copy of which was attached to his answer, was never accepted, ratified or confirmed by Lloyd, and if he was not bound by the contract or receipt of November 22nd (Exhibit P. 2), he had no contractual relation with Lloyd and had no right to retain

Lloyd's money. He seeks to retain in his possession the money of the plaintiff received by his own agent, Hathaway (Exhibit P. 15), retaining the benefit of the money received by his agent, and denying his authority to act for him.

Continuing on to subdivision E of the case cited by the defendant, the case of *Dowden* v. *Cryder,* 55 N. J. L. 329, is a case in which an agent was authorized to negotiate a draft for cash, and negotiated for cash and merchandise. The Court held that he exceeded his authority.

The case of *Clement* v. *Young and McShea,* 70 N. J. Eq. 677, was a case involving the leasing of a hotel at Atlantic City. The lease was signed by two directors of the company and a stranger; no notice of the lease ever came to the company.

No attempt is made by me to deny that an agent cannot exceed his authority, but when the acts of the agents are assumed and ratified as they were in this case, the question of his limited authority does not enter unless the defendant places the plaintiff in the position which he occupied before he made the contract.

Proceeding to subdivision F, we find the case of *Yeo* v. *Mercerau,* 18 N. J. L. 387, and the case of *Eisler* v. *Halperin,* 98 Atl. 245, both of which cases held that the wife is entitled to dower.

The case of *Goldhauser* v. *Schulz,* 116 Atl. 791, in which four of the judges of the Court of Errors and Appeals voted in the negative, was a case in which, upon distribution of the money arising from partition, it was held that a son's wife was not entitled to dower where his father was a tenant by the courtesy.

Under subdivision B of paragraph 2, cases are cited to sustain the contention that if Lloyd knew of Vanderhoof's possession of the premises in advance (which I do not feel the state of case shows), he cannot object thereto.

Feld v. *Kantrowitz,* 130 Atl., p. 7, was not a case in which the occupation of the premises was a ground for rejecting title, but a case wherein Feld held a one-sixth interest in the contract for the purchase of an office building unknown to Kantrowitz, and the Court held that such possession in that type of building was not notice to Feld of his interest in that contract.

Wood v. *Price,* 79 N. J. Eq. 620, is directly opposed to the point raised by the defendant. The case holds that the possession of a tenant is notice of a writ of sequestration where the tenant has attorned to the sheriff.

Newark Savings Institution v. *Jones,* 37 N. J. Eq. 449, was a case where the bank had taken under foreclosure and the presumption of their obligation to convey property free from encumbrances, that is, some tax liens, was rebutted by the testimony.

The case of *De Long* v. *Spring Lake,* 72 N. J. L. 126, *is absolutely contrary to the contention of the defendant,* as it was held that a plea was bad which set up as a defense that the plaintiff had knowledge of encumbrance at the time the deed was given.

The plaintiff raises the question in subdivision C of paragraph 2 that the plaintiff never required possession of the premises, although counsel admits and refers to Exhibit P. 4 (p. 83).

Subdivision D of paragraph 2 now sets up for the first time that the possession is of a

trifling character and no ground for refusal of the title. This contention was not raised before the trial judge, nor was it raised before the Supreme Court. The cases cited by the defendant tend to show that where there is a slight encroachment, a mortgage which may be paid at the closing, and various other minor and unimportant encumbrances for which the purchaser can be compensated without material injury it is not ground for such rescission if an offer for such compensation is made.

In subdivision E of paragraph 2 the defendant attempts to set up for the first time also, that the plaintiff having already rejected the title on another ground could not raise the question of possession. The parties met on March 1st, at which time Weinstock was not present. Hathaway, at the suggestion of his attorney, at this meeting offered to have Hathaway sign a deed when they both knew he had no title to the premises and did not subsequently acquire title (see Exhibit P. 10, p. 92, which is uncontradicted). They met again on notice (Exhibit P. 4, p. 83) on March 5th. They were not in a position to convey on March 1st, and all parties seemed to agree by their presence to the meeting on March 5th when tender was made by both parties.

The reason why Weinstock did not appear at the meeting on March 1st remains unexplained.

Much has been said in defendants' brief to convince us that Mr. Yonteff was acting as attorney for the plaintiff. If this is so why should Hathaway call Mr. Yonteff to ascertain the cost of drawing the release (p. 33, ll. 37, &c.), and why the language of the letter of Mr. Olsan to Mr. Yonteff (Exhibit P. 6, p. 88), in which the

latter is asked to "serve this notice on Lloyd, or in the event that you cannot do so advise me of his address at your earliest convenience and I will serve notice on him personally."

Much is made of the fact that on March 1st Lloyd only tendered $2,000.00. How much were they entitled to on March 1st? Vanderhoof, the owner, was not present. Hathaway offered to give a deed for property he did not own. Weinstock was not present. Weinstock did not acquire title until March 5th (Exhibit D. 3, p. 105), and then only so that he could make tender to Lloyd later in the same day. It was more than Weinstock's equity at that time (see Exhibit P. 3, p. 82).

As to Mrs. Vanderhoof's possession. She was an unwilling witness for plaintiff and her testimony (p. 68) was evasive. In answer to the question by defendant as to whether she was prepared to vacate the premises on March 5th, she replied she was not prepared to leave on the 5th, but could on the 6th or 7th (p. 69), but on page 70 on re-direct she testified she did not move until April 26th. Lloyd testified (p. 76, ll. 30-40) that she said she had a written agreement to move March 6th, and a vebal agreement to stay until the 10th, but she said she would not move until her new house was ready. *Why the written agreement and the verbal understanding?* The written agreement was to deceive Lloyd into closing. *She was not a tenant and could have been removed only by ejectment.*

POINT I.

As the evidence was disclosed at the trial, of facts therefore unknown to Lloyd, he could have recovered from Weinstock on the ground that he had wrongfully received the money. While the case was not brought on that theory, no harm has been done by the present verdict.

Attention of the Court is directed to the provision of section 27 of the Practice Act of 1912, the provisions of which are cited in the opinion of the Supreme Court (p. 112).

POINT II.

Defendant was unable to put plaintiff into possession. This has been decided by the Court of Errors and Appeals in *Eisler* v. *Halperin,* 98 Atl. 245. Notice had been given by Lloyd demanding possession.

> "If the property is in possession of a tenant at will, under an agreement to surrender on demand, this constitutes an encumbrance." *McCoal* v. *Jacobus,* 7 Robinson (N. Y.) 115.
>
> "Every purchaser of land has a right to demand a title which will put him in all reasonable security and protect him from anxiety." *Dobbs* v. *Narcross,* 24 N. J. Eq. 327.

In every contract for the sale of land an agreement is implied to make good title unless that liability is expressly excluded. *Loundsberry* v. *Locander,* 25 N. J. Eq. 554. This was a Court of Errors and Appeals case affirming the same case in 24 N. J. Eq. 417, in which case at page 419 the contract is set forth and contains no covenants as to encumbrances.

In *De Mars* v. *Koehler,* 62 N. J. L. 203, the Court of Errors and Appeals held that an out-

standing term in lands is a breach of a covenant against encumbrances. Chief Justice Magie discusses at length the definition of an encumbrance and states as follows:

> "Prof. Greenleaf declares that a breach of the covenant against encumbrances is show when the proofs establish that a 'third person has a right to or an interest in the land conveyed, to the diminution of the value of the land, though consistent with the passing of the fee by the deed of conveyance.' 2 Greenl, Evid. 242."

And again at page 205:

> "The diminution of value which is thus made a test of an encumbrance is not, however to be understood as limited to cases where the thing granted is, by reason of some outstanding right or interest in a third person, of less pecuniary worth, but also extends to and embraces cases where the grantee, by reason of such an outstanding right or interest, does not acquire by the grant the complete dominion over the thing granted, which the grant apparently gives but is or may be deprived thereby of the whole or some part of its use or possession. The diminution of pecuniary value is important in the admeasurement of damages for the breach of this covenant, but does not form the test whether an outstanding right or interest is an encumbrance or not. If the thing granted be or be liable to be diminished by the existence of an outstanding right or interest, so that the grantee does not acquire the complete dominion which the grant purports to convey, then, although the diminution of pecuniary worth may not appear and the damages may be only nominal, such right or interest is an encumbrance."

In this case there was an outstanding term of years and the learned Chief Justice went on to state at page 205 that this doctrine applies even

though the land is leased for a large rent and for a long term.

POINT III.

Weinstock by his conduct acquiesced in and ratified the act of Bradford Hathaway in selling the property of Lloyd, if he did not so acquiesce and ratify he cannot accept Hathaway's contract in part and reject the rest.

Defendant's counsel in his brief lays great stress on the question of special agency of Bradford G. Hathaway and bases his argument on the terms of contract (Exhibit P. 15, p. 99). An examination of this contract discloses the fact that it is not a contract of limited agency, but is merely an agreement to pay a commission. *This contract does not in express terms give Hathaway authority to do anything and therefore does not limit his authority to the terms of the contract.* It merely provides that in consideration of services to be rendered he is to pay compensation.

I repeat at this point my reference to the answer of the defendant in which he states that "Hathaway came to this defendant with an agreement providing for the purchase of the property by and on behalf of the plaintiff."

He could not expect Hathaway to sell nor Lloyd to buy, a contract which was carefully concealed from Lloyd and only vaguely referred to Exhibit P. 3 (p. 82) when Lloyd knew nothing of the terms and conditions of the contract to be sold, not even the amount of the purchase price.

It is too well settled to give citations that the defendant cannot accept the benefits of the act

of his unauthorized agent and refuse to carry out the contract of his agent. He apparently ratified the act of his agent in selling the property rather than the contract by tendering a deed. If he did not so ratify he should have repudiated the contract and returned the money.

POINT IV.

Verbal authority is sufficient to authorize the agent to make an agreement in writing binding the principal to convey real estate.

Browne St. Fr., 3rd Ed., No. 370;
29 *Am. & Eng. Ency of Law* (2nd Ed.);
Long v. *Hartwell*, 5 Vr. 116, 121.
Milne v. *Kleb*, 17 Stew. Eq. 378;
Lindley v. *Keim*, 9 Dick. Ch. Rep. 418;
Scull v. *Brinton*, 10 *Id.* 489;
Tyrrell v. *O'Connor*, 11 *Id.* 448, 452;
Opinion of Justice Pitney, Err. & App. *Brown* v. *Honniss*, 74 Law 501, 505.

"The learned Vice-Chancellor laid down three propositions which he applied in the trial of the cause, the correctness of which has not been, and I think, could not be succussfull contested."

"The first proposition is that authority to sign a memorandum of agreement for the sale of lands may be conferred by parol, and authority so conferred will satisfy the provisions of the statute of frauds. In some states the statute of frauds has been extended so as to require that such authority shall be exhibited by writing. Reid St. Fr. No. 380. But our statute has never been so extended, and it needs no citation of authorities to show that the construction of the statute from which ours was taken, and which construction we follow, has been, however, inconsistent with its general purpose, that authority to sign a memorandum of agreement for sale of lands, which is re-

quired to be in writing, need not be conferred by writing but may be conferred by parol. Opinion of Justice Magie in *Lindley* v. *Keim*, 54 Eq. 418, 422, Err. & App.

POINT V.

Seizin of a legal estate of inheritance is not necessary.

As to Arthur Conover, he made an assignment of the contract made by the Vanderhoofs, but as to Frank C. Hathaway the situation is very different. He obtained title to the contract itself by the Conover assignment and agreed to convey to Weinstock by Exhibit P. 14 (p. 95). At the time that he agreed to convey to Weinstock he was not seized of the premises, but under our decisions his agreement was good because he may have acquired title prior to the date set for delivery of the deed, and had he done so his wife's signature could not have been procured as she did not sign and was not bound by the contract. In fact there is no evidence in the state of case, nor was there any at the trial, that Hathaway ever assigned the contract with Vanderhoof, of which the plaintiff had notice, or that the Vanderhoofs had any authority to give deed direct to Weinstock.

I respectfully submit that the judgment rendered in this case and affirmed by the Supreme Court should be affirmed.

Respectfully submitted,

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with Plaintiff-Appellee.

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New Jersey Court of Errors and Appeals

JOHN N. LLOYD, *Plaintiff-Appellee,* *vs.* ABRAM WEINSTOCK, *Defendant-Appellant.*	*On Appeal, etc.* *Points.*

Points to be Relied on and Citation of Authorities.

Sir:

Following are the points on which the plaintiff-appellant will rely on the argument of the appeal in the above-entitled cause, together with the citation of the authorities to be used therein:

POINTS I TO V.

The Court erred in denying defendant's motions for non-suit and for direction of verdict in defendant's favor.

A. There was no authority given Hathaway to sign this agreement by Weinstock.

Thompson *v.* Killhefer, 125 Atl. 11;
Resky *v.* Meyer, 119 Atl. 98;
Milne *v.* Kleb, 14 Atl. 646;
Marsh *v.* Buchan, 22 Atl. 128;
Hann *v.* Freestone, 123 Atl. 704;
Strauss *v.* Rabe, 127 Atl. 188; 130 Atl. 119.

B. Plaintiff proved no authority in Hathaway, etc.

C. Plaintiff was himself in default of performance of the agreement sued on.
L. R. A. 1918 B. p. 544.

D. Plaintiff ratified, confirmed and accepted the contract actually signed by defendant himself.

E. Defendant never ratified, accepted or confirmed the contract sued on by plaintiff.

1 Am. & Eng. Encyc. (1st Ed.) Vol. 1, p. 432.

Dowden *v.* Cryder, 55 N. J. L., 329;

Clement *v.* Young-McShea, 70 N. J. Eq., 677.

F. The title tendered plaintiff by defendant was good and plaintiff could not reject it.

1. There were no outstanding dower interests.

2 N. J. Comp. Stats., p. 2043.

Yeo *v.* Mercerau, 18 N. J. L. 387;

Eisler *v.* Halperin, 98 Atl. 245;

Cushing *v.* Blake, 30 N. J. Eq. 689;

Young *v.* Young, 45 N. J. Eq. 27;

Geldhauser *v.* Schulz, 116 Atl. 791;

Owen *v.* Robbins, 19 Ill. Rep. 545;

Englis *v.* Fohey, 116 N. W. 857;

Tiffany's Rl. Propy. (2nd Ed.) Vol. 1, p. 750.

Am. & Eng. Encyc. (1st Ed.) Vol. 5, p. 894;

Glenn *v.* Clark, 53 Md. 604;

14 Cyc. 910;

27 R. C. L. 469;

2. Plaintiff could not reject the tender made by defendant on the ground of possession.

a. He knew of the Vanderhoofs' possession before purchasing and made no agreement respecting same.

b. Knowing in advance of Vanderhoofs' possession of the premises, he cannot object thereto.

Feld *v.* Kantrowitz, 130 Atl. p. 7;
Wood *v.* Price, 79 N. J. Eq. 620;
Hodge *v.* Amerman, 2 Atl. 259;
Hagelin *v.* Lehmann, 126 Atl. 431;
Newark Savings Inst. *v.* Jones, 37 N. J. Eq. 449;
De Long *v.* Spring Lake, 72 N. J. L. 126.

c. Plaintiff never required possession of premises.

Eisler *v.* Halperin, 89 N. J. L. 282.

d. Possession here of trifling character, and no ground for purchaser's refusal to perform.

39 Cyc. 1487;
Herring *v.* Esposito, 119 Atl. 765;
Denman *v.* Metz, 52 Atl. 1118;
Barger *v.* Gery, 53 Atl. 483;
Standard Realty *v.* Gates, 132 Atl. 490;
Waterman *v.* Taub, 127 Atl. 676;
Goldberg *v.* Feldman, 70 Atl. 245;
Eisler *v.* Halperin, 98 Atl. 245; 89 N. J. L. 282;
Kadow *v.* Cronin, 116 Atl. 427;
Marks *v.* Parker, 117 Atl. 619;
Van Riper *v.* Wickersham, 77 N. J. Eq. 232.

e. Plaintiff having already rejected the title on another ground, could not raise the question of possession.

27 R. C. L. p. 529, sec 259;
Thompson *v.* Killhefer, 119 Atl. 770.

POINT VI.

The judgment of necessity must have been in favor of defendant.

POINT VII.

The Court's charge and direction of verdict was erroneous in fact and law.

Goodyear Tire & Rubber Co. *v.* Kruvant, 96 N. J. L. 352;

Jordan *v.* Reed, 77 N. J. L. 584, and cases cited;

Gilliard *v.* Public Service Ry. Co., 98 N. J. L. 244;

Meyer *v.* Madreperla, 53 Atl. 477;

29 A. & E. Encyc. (2nd Ed.) pp. 611, 612.

POINT VIII.

Plaintiff proved nothing within or without Section 5 of our Statute of Frauds to bind defendant in this case.

2 N. J. Comp. Stats. p. 2612, Sec. 5;

Hawthorne *v.* Odenson, 120 Atl. 802;

Crescent Ring *v.* Travelers Ins. Co., 132 Atl. 106;

Steinbach *v.* Pettingil, 50 Atl. 443.

Respectfully,

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Attorney for and of Counsel
with Defendant-Appellant.

To Wm. P. Hurley,
Attorney of Plaintiff-Appellee.