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Summons.

SUMMONS AND COMPLAINT.

Filed July 2, 1926.

The State of New Jersey to Samuel Topf and Jennie Topf, you are summoned (L. s.) to answer the annexed complaint of Murray Apfelbaum, Inc., a corporation in an action at law in the New Jersey Supreme Court, Essex County. AND TAKE NOTICE that unless you file your answer to said complaint with the Clerk of the said Supreme Court, at Trenton, within 20 days after the service upon you of this writ, and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

10

WITNESS, WILLIAM S. GUMMERE, Chief Justice of the New Jersey Supreme Court, at Trenton, this 24th day of June, nineteen hundred and twenty-six.

20

EDWARD J. KELLEHER,
Clerk.

ISRAEL B. GREENE,
Attorney.

30

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Complaint.

New Jersey Supreme Court

ESSEX COUNTY.

10	MURRAY APFELBAUM, INC., a corporation,	}	<i>Plaintiff,</i>	<i>Action at Law.</i>
	<i>vs.</i>			
	SAMUEL TOPF and JENNIE TOPF,		<i>Defendants.</i>	<i>Complaint.</i>

20 Plaintiff, Murray Apfelbaum, Inc., a corporation organized and existing under and by virtue of the Laws of the State of New Jersey, with its principal office in the City of Newark, Essex County and said State, says that:

1. At all times herein mentioned, plaintiff was and still is a duly licensed real estate broker of the State of New Jersey, maintaining its principal place of business at 786 Broad street, Newark, New Jersey.
2. On or about December 12, 1925, the plaintiff, pursuant to the previous authorization and employment by the defendants, Samuel Topf and Jennie Topf, procured Christy Krivakis and Alexander Colles as purchasers of their lands and premises, commonly known and designated as 466-468 Clinton avenue, Newark, N. J., for the consideration and upon the terms and conditions mentioned in a certain written agreement entered into between the said defendants and said purchasers, whereof Exhibit "A" annexed hereto and made a part hereof is a true copy.

Complaint.

3. That simultaneously with the execution and delivery of the last mentioned agreement, the said defendants made and delivered unto the plaintiff a memorandum of agreement for the payment to plaintiff of commissions, amounting to in the aggregate of \$3,575.00 for procuring said purchasers, whereof Exhibit B annexed hereto and made a part hereof is a true copy.

4. That by the terms of the agreement for the sale and purchase of said lands and premises referred to in paragraph 2 hereof, the defendants agreed to convey said lands and premises to said purchasers by Warranty Deed, subject to certain mortgage encumbrances, tenancies and encroachments therein enumerated, but free and clear of all other encumbrances and restrictions, and title to pass on or before the 10th day of March, 1926.

5. That an examination of the title to said lands and premises disclosed to said purchasers, that the said lands and premises were subject to a restriction contained in the Deed of Stafford R. W. Heath to his grantee one of the predecessors in title of said defendants, which restriction among other things provided that the owner shall not erect a building or dwelling less than fifteen feet from the inside line of the sidewalk at Hillside avenue.

6. That by reason of said restriction, the defendants cannot convey unto said purchasers the title they agreed to convey under the terms of said agreement and by reason of said restriction, the purchasers have refused to accept a conveyance thereto.

7. By reason of the failure to close title to said lands and premises, due to the fault of the

Complaint—Exhibit "A."

defendants, plaintiff is entitled, under the terms of said agreement to the commission thereunder agreed to be paid by the defendant to the plaintiff.

10 8. Plaintiff has demanded said commissions from the defendants, but the defendants have failed, refused and neglected to pay the same to plaintiff.

Plaintiff demands judgment for the sum of \$3,575.00.

ISRAEL B. GREENE,
Attorney for Plaintiff.

20 EXHIBIT "A."

20 This agreement made the 12th day of December in the year of our Lord, one thousand nine hundred and twenty-five, between, SAMUEL TOPF AND JENNIE TOPF, his wife of the City of Newark, in the County of Essex and State of New Jersey, party of the first part; and CHRISTY KRAVAKIS AND ALEXANDER COLLIS of the City of Newark, in the County of Essex and State of New Jersey, parties
30 of the second part, WITNESSETH;

40 That the said party of the first part, for and in consideration of the sum of One hundred and thirty-five thousand dollars (\$135,000) to be paid and satisfied as hereinafter mentioned and also in consideration of the covenants and agreements hereinafter mentioned made and entered into by the said parties of the second part 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

Complaint—Exhibit "A."

of the second part, their heirs and assigns, by Deed of Warranty free from all encumbrances, except as hereinafter provided on or before the 10th day of March, next ensuing the date hereof, all that lot, tract or parcel of land and premises hereinafter particularly described, situate, lying and being in the City of Newark, County of Essex and State of New Jersey 10

BEGINNING at a corner formed by the intersection of the southerly line of Clinton Avenue with the Easterly line of Hunterdon Street; and running thence (1) along the said side of Hunterdon Street south seventeen degrees, thirty-two minutes, west one hundred feet; thence (2) south seventy-four degrees, thirteen minutes east parallel with Clinton Avenue fifty-four feet; thence (3) north seventeen degrees, thirty-two minutes east one hundred feet to the said southerly line of Clinton Avenue aforesaid; thence (4) along the same north seventy degrees, thirteen minutes west, fifty-four feet to the corner aforesaid and the point and place of BEGINNING. 20

Being the same premises conveyed to the said party of the first part by Minnie Miller, et als by Deed dated January 31, 1923, and recorded in the Register's Office of Essex County on February 2, 1923. 30

The above premises are to be conveyed subject to a mortgage in the sum of \$40,000 held by Stuart C. Squier, et al, Trustees and subject also to a second mortgage in the original sum of \$17,000 and which there remains due a balance of \$14,000, and subject also to the following leases:— Lease of the corner store on the first floor of premises #468 Clinton Avenue, Newark, New Jersey, together with part of the cellar underneath the store, held by Harry Erskowitz, 40

Complaint—Exhibit "A."

for five years from November 1st, 1924, at a yearly rental of \$2,700 for the first two years and for the yearly rent of \$3,000 for the remaining three years; lease of middle store and premises #466 Clinton Avenue, Newark, New Jersey, and part of cellar underneath said store held by Pauline Bennett, for the term of three years from the first day of April, 1925, at a yearly rent of \$1320 for the first year of said term and at the rent of \$1500 for the last two years of said term; Lease of Jacob Keller for the easterly store of said premises and part of cellar underneath said store for term of three years from April 1st, 1924, at the yearly rent of \$780 for the first year of said term and \$900 for the last two years of said term; Lease of Samuel A. Cohen for corner apartment consisting of six rooms and bathroom and on second floor; part of cellar of premises #468 Clinton Avenue, Newark, New Jersey, for term of five years from 1st day of October, 1923, at yearly rent of \$1200; Lease of Anthony Zamberletty for front apartment consisting of five rooms and bathroom on second floor of premises #466 Clinton Avenue for term of two years from May 1st, 1925, at the yearly rent of \$780, all of which leases have been exhibited to the said party of the second part, said premises are also conveyed subject to all existing tenancies, tenants thereunder paying their rent monthly.

Said premises are conveyed subject also to encroachments and conditions as appears on survey made by Lehlback Brothers, dated January 9, 1923.

And the said Christy Kravakis and Alexander Collis for themselves, heirs, executors and administrators doth covenant, promise and agree to

Complaint—Exhibit "A."

and with the said party of the first part, their heirs, executors, administrators and assigns that they the said party of the second part will pay and satisfy or cause to be paid and satisfied, unto the said party of the first part the said sum of \$135,000 as and for the purchase money of the foregoing described lands and premises in the following manner, that is to say:

\$5,000 upon execution of these presents, the receipt whereof is hereby acknowledged, \$40,000 by assuming a mortgage on said premises, held by Stuart C. Squier, et al, Trustees \$14,000 by assuming a mortgage in the original sum of \$17,000 of which there remains due a balance of \$14,000, \$41,000 by executing and delivering to the said party of the first part simultaneously with the delivery of the Deed aforesaid, a purchase money bond and mortgage covering said premises, and of even date with said Deed, in the said sum of \$41,000, bond to be in double that amount, conditioned for payment of said principal sum of \$41,000 in three years from date thereof and interest on said principal sum to be computed from the date thereof at the rate of 6% per annum, and to be paid semi-annually. Said purchase money bond and mortgage shall contain the usual 60 day interest default clause, and the usual 90 day tax assessment default clause, and the usual insurance clause that the party of the second part will keep the premises insured in an insurance company or companies and in an amount approved by the party of the first part and assign said policy of insurance to the said party of the first part, and a clause that neither the mortgagors, nor their heirs or assigns of the mortgagor shall be entitled to any credits on said mortgage, or the interest payable thereon for taxes, which may be levied on the mortgaged

Complaint—Exhibit "A."

premises for any part of the said taxes. Said mortgage shall also contain a clause that the mortgagors or their heirs or assigns may pay off the same with interest to date of payment, at any time before maturity. Said mortgage shall also by its terms provide that the said mortgage of \$40,000 and the said mortgage of \$17,000, which are prior liens on said premises be paid and satisfied of record; then and in that event the said parties of the first part will simultaneously postpone the lien of the said purchase money mortgage to the lien of any mortgage that the said party of the second part may place on the said premises, in lieu of said two mortgages, providing said new mortgage shall not exceed an amount in excess of \$65,000, or in case said new mortgage shall exceed said amount, the amount of said excess shall be simultaneously paid to the said party of the first part herein in reduction of the amount due on the principal of the purchase money mortgage, and the balance of the said purchase money mortgage, to wit the sum of \$35,000 or such sum or sums which on adjustment herein provided shall be found to be due, to be paid—in cash on the closing of title and delivery of deed aforesaid.

30 The aforesaid Deed of Warranty shall contain a provision that said premises are to be conveyed subject to the aforesaid purchase money mortgage in the sum of \$41,000.

Said purchase money mortgage shall also contain a provision that same shall not be postponed to any other mortgage in case the prior mortgages are paid and cancelled of record as aforesaid, if any default has been made in said purchase money mortgage, or in case there are any intervening equities.

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Complaint—Exhibit "A."

Said purchase money mortgage shall also contain a provision that the same shall become immediately due and payable upon the institution of any foreclosure proceedings, through any prior mortgages.

The rents for the said premises, insurance premiums, water rents, taxes and interest on mortgage, if any, shall be adjusted, apportioned and allowed as to the day of delivery of said Deed. 10

Gas and electric fixtures, gas stoves, hot water heaters, chandeliers, carpets, linoleum, mats and matting in halls, screen shades, awnings, ash-cans, heating apparatus, if any, and all other personal property appurtenant to be used in the operation of said premises, is represented to be owned by the seller, and is included in this sale. 20

In case the premises shall suffer injury beyond the ordinary wear and tear, except by fire, 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 expressly understood and agreed that the title to the lands and premises hereby agreed to be conveyed is not derived from any Martin Act proceedings or any act for the sale of land for non-payment of municipal taxes and assessments, or adverse possession. 30

It is understood and agreed that the party of the first part shall notify the insurance company that the above premises are under contract of sale to Christy Krivakis and Alexander Collis, and that loss under said policies, if any, should be payable as interest may appear.

And it is further agreed by the parties to these presents that the said party of the second 40

Complaint—Exhibit "B."

part, their heirs and assigns may enter into and upon the said lands and premises on the 10th day of March next ensuing the date hereof, and from thence take the rents, issues and profits to themselves and their use.

10 And it is further agreed by the parties hereto that the said Deed of Warranty should be delivered and received at the office of Groskin & Moriarty, Essex Building, Newark, New Jersey, between the hours of ten in the forenoon and four o'clock in the afternoon on the said tenth day of March, next ensuing the date hereof.

The parties of the first part represent that they have remedied all violations of the Tenement House Act of which they have had any notice.

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

Samuel Topf (L. s.)
Jennie Topf (L. s.)
Ch. Krivakis (L. s.)
Alexander Colles (L. s.)

Signed, sealed and delivered in the presence of

30 Witness as to Sam Topf and Jennie Topf
J. H. Fuerstman Morris Weissner

Exhibit "B"

40 If and when title to premises #466-468 Clinton Avenue, Newark, New Jersey, is passed and the full consideration paid, pursuant to the contract for sale between Samuel Topf and Jennie Topf, his wife and Christy Krivokis and Alexander Collis, dated December 12th, 1925, we agree to

Complaint—Exhibit "B."

pay the sum of 3½ per cent on the first \$20,000.00 of the purchase price and 2½ percent on the balance thereof to Murray Apfelbaum, Inc. as its commission for affecting the consumation of the sale and payment of the consideration for said premises, pursuant to the terms of said contract, it being distinctly understood that we shall not be under any obligation whatsoever to pay the above sum or any other sum or sums of money hereunder, if for any reason not due to our default, title to said premises is not closed and the full consideration paid as aforesaid, and we shall be liable only in the event of passing of title or in the event of failure to pass title, through our default.

(signed) Samuel Topf
" Jennie Topf. 20

Dated December 12th, 1925.

30

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Answer.

ANSWER.

Filed July 15, 1926.

NEW JERSEY SUPREME COURT.

10

ESSEX COUNTY.

MURRAY APFELBAUM, INC., a corporation,

Plaintiff,

vs.

SAMUEL TOPF and JENNIE TOPF,
Defendants.

Action at Law.

Answer.

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The defendants, Samuel Topf and Jennie Topf, residing in the City of Newark, County of Essex and State of New Jersey, answering the complaint, say that:

1. As to the statements contained in paragraph 1 of the complaint, defendants have not any knowledge or information thereof sufficient to form a belief.

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2. They deny paragraph 2 of the complaint, except that they admit that an agreement, in writing, was made between them and Christy Krivakis and Alexander Collis, dated the Twelfth day of December, 1925, but as to the contents of said paper writing they refer thereto when the same shall be produced.

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3. They deny paragraph 3 of the complaint, except that they admit that a writing was delivered to plaintiff by defendant, Samuel Topf, dated the Twelfth day of December, 1925, but as

Answer.

to the contents of said writing they refer thereto when the same shall be produced.

4. They deny paragraph 4 of the complaint, except that they admit that an agreement, in writing was made between them and Christy Krivakis and Alexander Collis, dated the Twelfth day of December, 1925, but as to the contents of said paper writing they refer thereto when the same shall be produced.

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5. They deny paragraph 5 of the complaint.

6. They deny paragraph 6 of the complaint.

7. They deny paragraph 7 of the complaint.

8. They deny paragraph 8 of the complaint, except that they admit that they have not paid any commissions to the plaintiff.

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GROSKEN & MORIARTY,
Attorneys of Defendants.

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Stipulation.

STIPULATION.

Filed November 24, 1926.

NEW JERSEY SUPREME COURT.

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ESSEX COUNTY.

MURRAY APFELBAUM, INC., a corporation,

Plaintiff,

vs.

SAMUEL TOPF and JENNIE TOPF,
Defendants.

Action at Law.

Stipulation.

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Counsel for the plaintiffs and defendants in the above-entitled cause, hereby stipulate as follows:

1. That the motion to strike out the answer of the defendants filed herein returnable on Monday, August 23, 1926, at 10 A. M., before the Honorable William S. Gummere, at the County Court House, Newark, N. J., be and the same is hereby continued until Saturday, September 18, 1926, at the same hour and place aforesaid.

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2. That for the purpose of said motion and for all other purposes, the plaintiff's complaint herein be, and be deemed to have been amended so that paragraph 5 thereof shall read as follows:

5. That an examination of the title to said lands and premises disclosed to said purchasers that the said lands and premises are subject to the following restriction, appearing of record:

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Stipulation.

In Deed recorded in Book M 24 of Deeds, Essex County, N. J., page 95:

"The said party of the second part hereby covenanting and agreeing for himself, his heirs and assigns to and with said Stafford R. W. Heath, party of the first part, his heirs and assigns not to use or permit or cause to be used the above described land and premises or any part thereof for any lager beer or other brewing or for any manufactory of any noxious, noisome or hurtful ingredients, substance, compound or thing which may be deemed or taken as a nuisance to the owner or owners, occupant or occupants of any adjacent land or for any use or purpose whatsoever which may or shall be deemed or taken as a nuisance to the owner or owners, occupant or occupants of said adjacent land. This covenant being made expressly subject to the rights of the public in Vanderpool Street which has been heretofore dedicated to public use by said Stafford R. W. Heath and is shown on a map about to be filed in the office of the Register of Essex County and subject to the right of the City of Newark to open Belmont Avenue across said premises as shown on the City Map. And that in erecting a building or dwelling, party of the second part shall place the same not less than fifteen feet off the inside line of the sidewalks of Hillside Avenue."

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In Deed recorded in book S 27 of Deeds, Essex County, N. J., page 237:

"Covenants on party of the second part, their heirs and assigns that there shall not be erected upon said land or any part thereof any brewery, slaughter-house, glue or chemical factory of any kind, any beer saloon, beer cellar or place in which beer, wines or liquors shall be sold, or any building in which shall be carried on any business, offensive, noxious or detrimental to the use

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Stipulation.

of said land or the adjoining or contiguous land or any part of same for private residence nor shall said land be used for any purpose which could create a nuisance."

3. It is further stipulated that the answer of the defendants, for the purpose of said motion, stand as is, without amendment.

Dated August 20, 1926.

ISRAEL B. GREENE,
Attorney for Plaintiff.

McCARTER & ENGLISH,
Attorneys for Defendants.

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Postea.

POSTEA.

Filed May 19, 1927.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

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MURRAY APFELBAUM, INC., a corporation,

Plaintiff,

vs.

SAMUEL TOPF and JENNIE TOPF,
Defendants.

Action at Law.

Postea.

This cause was tried before Circuit Court Judge Worrall F. Mountain, to whom said cause had been duly referred for trial by an order of the Chief Justice of the State of New Jersey, at the Essex Circuit, and a jury on May 10th and May 11th, 1927.

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At the conclusion of the plaintiff's case, the Court, on motion of the defendants, non-suited the plaintiff.

WORRALL F. MOUNTAIN,
Circuit Court Judge.

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Murray Apfelbaum, direct.

NEW JERSEY SUPREME COURT.

ESSEX CIRCUIT.

May 10, 1927.

10	MURRAY APFELBAUM, INC., <i>Plaintiff,</i>	}	<i>Action at Law.</i>
	<i>vs.</i> SAMUEL TOPF and JENNIE TOPF, <i>Defendants.</i>		

Before Hon. Worrall F. Mountain, J., and a jury.

20 For the plaintiff appears Israel B. Greene.
For the defendants appear Grosken & Moriarty, (by Arthur F. Egner).
(A jury is called and sworn.)
Mr. Greene opens for the plaintiff.
Mr. Egner opens for the defendants.

MURRAY APFELBAUM, sworn in behalf of the plaintiff.

30 *Direct examination* by Mr. Greene.

Q You are the president of Murray Apfelbaum, Inc., plaintiff in this case? A Yes, sir.

Q Are you and your company duly authorized real estate brokers? A Yes, sir.

Q In the State of New Jersey? A Yes.

Q Did you, pursuant to authorization from the defendants Samuel Topf and Jennie Topf, procure Mr. Alexander Collis and Christie Krivakis as purchasers for Mr. and Mrs. Topf's property on Clinton avenue? A Yes, sir.

40

Murray Apfelbaum, direct.

Q You have a written contract for your company's commission? A Yes, sir.

Q I show you a paper dated December 12, 1925, purporting to have been signed by Samuel Topf and Jennie Topf, is that the commission paper? A Yes.

10

Mr. Greene: I offer in evidence agreement for the payment for the commission between Samuel and Jennie Topf and Murray Apfelbaum, Inc., dated December 12, 1925.

Mr. Egner: No objection.

(Commission agreement is marked Ex. P. 1.)

(Exhibit P. 1 read to jury.)

Q Now, I show you an agreement dated the 12th day of December, 1925, between Samuel and Jennie Topf, his wife, parties of the first part and Christie Krivakis and Alexander Collis as parties of the second part, and I ask you if this is a contract for the sale and purchase which was entered into as the result of your company's effort? A Yes.

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Mr. Greene: I offer in evidence contract between Samuel and Jennie Topf his wife, and Christie Krivakis and Alexander Collis dated the 12th day of December, 1925.

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(Same is marked Ex. P. 2.)

(Ex. P. 2 read to jury.)

Q Has your commission been paid? A No, sir.

Q Have you demanded it? A What is that?

Q Have you demanded your commission from the defendants? A Yes.

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Joseph A. Fuerstman, direct.

Cross examination by Mr. Egner.

Q You were not present when this commission was signed? A No, sir.

10 Mr. Greene: I offer in evidence the stipulation entered into between counsel for the plaintiff and the defendants which has no date on it.

Mr. Egner: No objection.
(Same is marked Ex. P. 3.)

JOSEPH A. FUERSTMAN, sworn in behalf of the plaintiffs.

20 *Direct examination by Mr. Greene.*

Q You are a counsellor-at-law in the State of New Jersey? A An attorney-at-law in the State of New Jersey.

Q How long have you been practicing law in this State? A Twelve years.

Q In December, 1925, did you represent Mr. Krivakis and Mr. Collis in the purchase of the property in question? A Yes, sir.

30 Q Did you apply to the Fidelity Union Mortgage and Title Guaranty Company for a report on this property? A I did not apply for a report.

Q Did you obtain a report? A I did.

Q I show you the report of the Fidelity Union Mortgage & Title Guaranty Company dated February 1, 1926, and I ask you if you have seen this paper? A Yes.

40 Q Did you mail that paper or call the contents therein alleged to the attention of Mr. Topf or his attorney? A Through his attorney.

Motion for Non-suit.

Q Who is that? A Mr. Grosken.

Q Henry L. Grosken? A Yes, sir.

Q Do you remember when you sent that to him? A Sometime after.

Mr. Egner: Perhaps we can shorten things up. We are willing to admit that the purchasers under this agreement refused to take title because of this alleged restriction. I will admit that on the record. 10

Cross examination by Mr. Egner.

Q By the way, your office and Murray Apfelbaum's office at this time were adjoining? A Yes, sir.

Q You were present when this commission agreement Exhibit P. 1 was signed, were you not? A Yes. 20

Q The original agreement as to commissions had been prepared by Mr. Moriarty, had it not?

Mr. Greene: I object as immaterial and not proper cross examination.

The Court: Sustain the objection.

PLAINTIFF RESTS.

30 Mr. Egner: I respectfully move for a non-suit on the ground that the situation has not been disclosed which would have entitled the plaintiff to a commission under the commission agreement. As your Honor has observed the only proof here is the agreement under which the premises were to be sold for \$135,000 to the purchasers and this commission agreement which reads: "If and when title to 466-468 Clinton avenue, 40

Motion for Non-suit.

10 Newark, New Jersey, was passed, and the full consideration paid pursuant to the contract for sale between Samuel Topf and Jennie Topf his wife and Christie Krivakis and Alexander Collis dated December 12, 1925, we agree to pay the sum of three and a half per cent. of the first \$20,000 on the purchase price and two and a half per cent. on the balance thereof to Murray Apfelbaum, Inc., as its commission for effecting the consummation of the sale by him in the consideration of said premises according to the terms of said contract." Now, under the agreement it seems there can be absolutely no recovery until and when title passes and the consideration was paid.

20 The agreement then continues, "It being distinctly understood that we shall not be under any obligation whatsoever to pay the above sum, or any other sum or sums of money hereinunder if for any reason not due to our default title to said premises is not closed and the full consideration paid as aforesaid, and we shall be liable only in the event of passing of title or in the event of failure to pass title through our default." It seems to me that the term "default" as used must mean the personal default of the vendors, it must mean their deliberate failure to pass title where there is no reason why their own control, why they should not pass title. Of course, we have a matter of defense which I cannot refer to now as to the materiality of this restriction.

(Argument.)

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Motion for Non-suit.

The Court: I do not think the case of Feist & Feist is applicable. It seems to me that the parties when they came to draw up this contract tried to accomplish the very thing they did not want. If they undertook to draw it briefly instead of at great length they might have been successful so far as my decision is concerned on this motion. They start off in the first part of this contract with the broker and clearly indicate in that part of the contract that they would not pay any commission for the consummation of the sale of the property to the broker until the title to the premises had passed and the full consideration was paid. Then, they went on and said, "It being distinctly understood we shall not be under obligation whatever to pay any sum hereunder, if for any reason not due to our default title to the said premises is not closed and the full consideration paid as aforesaid; and we shall be liable only in the event of passing of title or in the event of failure to pass title through our default." It seems to me there is no clearer default, if it is a fact, then for a person who has a piece of property to be unable to convey it owing to conditions or restrictions upon it discovered after they have agreed to sign a warranty deed. I think that "default" in this contract means inability to perform. I think the case is more similar to the case of *Ludwig* against *Aberbach* where the land owner agreed to pay commission on delivery of the deed to a purchaser and the agent was entitled to commission and he procured a purchaser ready, willing and able to buy,

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Motion for Non-suit.

though the proposed purchaser because of the defective title refused to accept the deed.

10 The situation is about this: That a broker under a contract of sale agreed to find a purchaser for certain property. The broker does not know anything about the title to the property; his contract is to get someone to buy it, and for it he is paid a certain amount of money. If the owner of the property says to the broker, "I will not pay your commission until title has passed; I won't be liable in the event of failure to pass title unless it is my default and was my default," and the broker gets a person to take the property and it is found out afterwards that the owner has defective title, whose fault is that? It is not the purchaser's fault or default. (Is it not the owner's fault or default?) I think it is better to say that the owner, who should have some knowledge of what he is contracting to sell when he agrees to give a warranty deed, is in default if he signed the contract and is unable to give one. Whether he is able to give one or not is a question of fact we do not have to consider at this time and I will deny your motion and you may have an exception.

30 Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Egner: I offer in evidence a stipulation of the parties in respect to the zoning ordinance of the City of Newark.

Mr. Greene: I object to its admissibility on the following grounds:

40 First, that the zoning ordinance and the amendment or supplement thereto of the

Motion for Non-suit.

City of Newark are not set up in the answer and is new matter.

Second, it is irrelevant and immaterial to the issues involved in this suit as fixed by the pleadings.

10 Third, it is incompetent to vary or affect the terms of the contract between the plaintiff and defendant and the agreement between the defendant and the purchaser. The rights of the parties are fixed by agreement and this agreement is the measure of their rights and the zoning ordinance was not provided for in this agreement.

20 Fourth, the restrictions in the deed are encumbrances in perpetuity, and the zoning ordinance is subject to be varied, modified or repealed, and if repealed the restrictions of the deed would still be operative.

Fifth, in so far as the zoning ordinance attempts to limit the property to specific uses such as are without the police powers of the State, it is unconstitutional and in violation of both state and federal constitution and beyond the power of the legislature to make.

30 Sixth, that this State, or the municipality of the City of Newark cannot by any legislative act or attempted act breach or affect the obligation of contracts between parties.

(Argument.)

Adjourned to Wednesday, May 11, 1927, at 10 o'clock, A. M.

Motion for Non-suit Granted.

SECOND DAY.

Wednesday, May 11, 1927.

Continued pursuant to adjournment.

10 Present, counsel as before stated.

The Court: I have determined to change my mind as to the non-suit. I have read and re-read this agreement several times and am going to grant the non-suit on the construction of the agreement. The first part of the agreement is repugnant with the last part of the agreement. As I said yesterday had the parties terminated it about half-way through, there isn't any question, of course, that this action would not lie, but in order to distinctly interpret what was perfectly plain up to that moment they proceeded to add these words, "It being distinctly understood we shall not be under any obligation whatever to pay the above sum," that is, the broker's commission "or any other sum or sums of money hereunder if for any reason not due to our default." That last clause is the troublesome clause, "Title to said premises is not closed and the full consideration paid as aforesaid, and we shall only be liable in the event of failure to pass title through out default or in the event of passing title."

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As I read the entire contract, bearing in mind the repugnancy I have spoken of, I feel that the construction of this contract means that "our default" means, "our failure," "our refusal to perform," and on that ground I will reconsider the motion made

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Exhibit P. 1.

yesterday and grant the motion for non-suit so that plaintiff's counsel may have an exception.

Exception noted as ground of appeal.

EXHIBIT P. 1.

If and when title to premises #466-468 Clinton Avenue, Newark, New Jersey, is passed and the full consideration paid pursuant to the contract for sale between Samuel Topf and Jennie Topf, his wife and Christy Krivakis and Alexander Collis, dated December 12th, 1925, we agree to pay the sum of 3½ per cent on the first \$20,000.00 of the purchase price and 2½ percent on the balance thereof to Murray Apfelbaum, Inc. as its commission for affecting the consumation of the sale and payment of the consideration for said premises, pursuant to the terms of said contract, it being distinctly understood that we shall not be under any obligation whatsoever to pay the above sum or any other sum or sums of money hereunder, if for any reason not due to our default, title to said premises is not closed and the full consideration paid as aforesaid, and we shall be liable only in the event of passing of title or in the event of failure to pass title, through our default.

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(signed) Samuel Topf
" Jennie Topf.

Dated December 12th, 1925.

Exhibit P. 2.

EXHIBIT P. 2.

THIS AGREEMENT, MADE the Twelfth day of December in the year of our Lord One Thousand Nine Hundred and Twenty-five.

10 BETWEEN Samuel Topf and Jennie Topf, his wife, of the City of Newark in the County of Essex and State of New Jersey party of the First Part;

AND Christy Krivakis and Alexander Collis, of the City of Newark in the County of Essex and State of New Jersey party of the Second Part;

20 WITNESSETH, That the said party of the first part, for and in consideration of the sum of One Hundred Thirty-five Thousand (\$135,000.00) dollars to be paid and satisfied as hereinafter mentioned, and also in consideration of the covenant 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, their heirs and assigns, by Deed of Warranty free from all encumbrance, except as hereinafter provided on or before the
30 Tenth day of March next ensuing the date hereof, all that lot, 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.

40 BEGINNING at the corner formed by the intersection of the southerly line of Clinton Avenue with the easterly line of Hunterdon Street; and running thence (1) along said side of Hunterdon Street south seventeen degrees thirty-two minutes west one hundred feet; thence (2) south seventy four degrees thirteen minutes east parallel with

Exhibit P. 2.

Clinton Avenue fifty-four feet; thence (3) north seventeen degrees thirty-two minutes east one hundred feet to said southerly line of Clinton Avenue aforesaid; and thence (4) along the same north seventy-four degrees thirteen minutes west fifty-four feet to the corner aforesaid, and the point or place of BEGINNING.

10 Being the same premises conveyed to the said party of the first part by Minnie Miller, et al, by deed dated January 31st, 1923, and recorded in the Register's Office of Essex County, on February 2, 1923. Being premises commonly known and designated as #466-468 Clinton Avenue, Newark, N. J.

20 The above premises are to be conveyed subject to a mortgage in the sum of Forty Thousand (\$40,000.00) Dollars held by Stuart C. Squier, et al, trustees, and subject also to a second mortgage in the original sum of Seventeen Thousand (\$17,000.00) Dollars, on which there remains due a balance of Fourteen Thousand (\$14,000.00) Dollars; and subject also to the following leases: Lease of the corner store on the first floor of premises #468 Clinton Avenue, Newark, N. J., together with part of cellar underneath said store held by Harry Ershkowitz, five (5) years, from November 1, 1924, at the yearly rent of
30 Twenty-seven Hundred (\$2700.) Dollars for the first two (2) years and for the yearly rent of Three Thousand (\$3,000.00) Dollars for the remaining three (3) years. Lease of middle store on premises #466 Clinton Avenue, Newark, N. J. and part of cellar underneath said store held by Pauline Bennett, for the term of three (3) years, from the first day of April, 1925, at the yearly rent of Thirteen Hundred and Twenty (\$1320.00) Dollars for the first year of said term and at
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Exhibit P. 2.

the rent of Fifteen Hundred (\$1500.00) Dollars for the last two (2) years of said term. Lease of Jacob Keller, for the easterly store of said premises and part of cellar underneath said store for the term of three (3) years, from April 1, 1924, at the yearly rent of Seven Hundred and Eighty (\$780.) Dollars for the first year of said term and at the yearly rent of Nine Hundred (\$900.00) Dollars for the last two years of said term. Lease of Samuel A. Cohen for the corner apartment, consisting of six (6) rooms and bath room and on second floor part of cellar of premises #468 Clinton Avenue, Newark, N. J., for the term of five (5) years from the first day of October, 1923, at the yearly rent of Twelve Hundred (\$1200.00) Dollars. Lease of Anthony Zamberletty for the front apartment, consisting of five (5) rooms and bath room, on the second floor of premises #466 Clinton Avenue, for the term of two (2) years from May 1, 1925, at the yearly rent of Seven Hundred and Eighty (\$780.00) Dollars, all of which leases have been exhibited to the said party of the second part. Said premises are conveyed subject also to all other existing tenancies, tenants thereunder paying their rents monthly.

Said premises are to be conveyed subject also to encroachments and conditions as appears on survey made by Lehlbach Brother, dated January 9th, 1923.

AND the said Christy Krivakis and Alexander Collis, for themselves, their heirs, executors and administrators, doth covenant, promise and agree to and with the said party of the first part, their heirs, executors, administrators and assigns, that they the said party of the second part, will pay and satisfy or cause to be paid and satisfied, unto

Exhibit P. 2.

the said party of the first part, the said sum of One Hundred Thirty-five Thousand (\$135,000.00) Dollars as and for the purchase money of the foregoing described land and premises, in the following manner, that is to say:

Five Thousand (\$5,000.00) Dollars upon the execution of these presents, the receipt whereof is hereby acknowledged, Forty Thousand (\$40,000.) Dollars by assuming a mortgage on said premises held by Stuart C. Squier et al, trustees, Fourteen Thousand (\$14,000.00) Dollars by assuming a mortgage in the original sum of seventeen (\$17,000.00) Thousand Dollars, on which there remains due a balance of Fourteen Thousand (\$14,000.00) Dollars, Forty-one Thousand (\$41,000.00) Dollars by executing and delivering to the said party of the first part simultaneously with the delivery of the deed aforesaid, a purchase money Bond and Mortgage, covering said premises and of even date with said deed, in said sum of Forty-one Thousand (\$41,000.00) Dollars, Bond to be in double that amount, conditioned for the payment of said principal sum of Forty-one Thousand (\$41,000.00) Dollars in three (3) years from the date thereof and interest on said principal sum to be computed from the date thereof at and after the rate of six per cent per annum and to be payable semi-annually. Said purchase money bond and mortgage shall contain the usual sixty (60) day interest default clause and the usual ninety (90) day tax and assessment default clause and the usual insurance clauses that the party of the second part their heirs or assigns will keep said premises insured in an insurance company or companies and in an amount approved by the party of the first part, and assign said policy of insurance to the

Exhibit P. 2.

said party of the first part and a clause that neither the mortgagors, nor the heirs or assigns of the mortgagors shall be entitled to any credits on said mortgage or the interest payable thereon for taxes which may be levied on the mortgaged premises or any part of said taxes. Said mortgage shall also contain a clause that the mortgagors or their heirs or assigns may pay off the same with interest to date of payment, at any time before maturity. Said mortgage shall also by its term provide that should the said mortgage of Forty Thousand (\$40,000.00) Dollars, and the said mortgage of Seventeen Thousand (\$17,000.00) Dollars, which are prior liens on said premises be paid and satisfied of record, then and in that event, the said party of the first part will simultaneously postpone the lien of said purchase money mortgage to the lien of any mortgage that the said party of the second part may place on said premises in lieu of said two mortgages, providing said new mortgage shall not exceed an amount in excess—of \$65,000.00, or in case said new mortgage shall exceed said amount, the amount of said excess shall be simultaneously paid to the said party of the first part herein in reduction of the amount due on the principal of said purchase money mortgage, and the balance of said purchase price to wit, the sum of \$35,000.00 or such sum or sums, which on adjustment herein provided shall be found to be due shall be paid—in cash on the closing of title and delivery of deed aforesaid.

The aforesaid Deed of Warranty shall contain a provision that said premises are to be conveyed subject to the aforesaid purchase money mortgage in the sum of \$41,000.00.

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Exhibit P. 2.

Said purchase money mortgage shall also contain a provision that same shall not be postponed to any other mortgage in case the prior mortgages are paid and cancelled of record as aforesaid, if any default has been made in said purchase money mortgage or in case there are any intervening equities.

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Said purchase money mortgage shall also contain a provision that the same shall become immediately due and payable upon the institution of any foreclosure proceedings through any prior mortgages.

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.

20

Gas and electric fixtures, gas stoves, hot water heaters and chandeliers, carpets, linoleum, mats and matting in halls, screen, shades, awnings, ash cans, heating apparatus, if any, and all other personal property appurtenant to or used in the operation of said premises is represented to be owned by seller and is included in this sale.

In case the premises shall suffer injury beyond the ordinary wear and tear except by fire, 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.

30

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

It is understood and agreed that the party of the first part shall notify the insurance company

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Exhibit P. 2.

that the above premises are under contract of sale to Christy Krivakis and Alexander Collis, and that loss under said policies, if any, should be payable as interest may appear.

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

20 AND IT IS FURTHER AGREED, by the parties hereto, that the said Deed of Warranty shall be delivered and received at the office of Grosken & Moriarty, Essex Building, Newark, N. J. between the hours of 10 in the forenoon and 4 o'clock in the afternoon on the said Tenth day of March next ensuing the date hereof.

The parties of the first part represent that they have remedied all violations of the Tenement House Act of which they have had any notice.

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

30 SAMUEL TOPF (L. S.)
JENNIE TOPF (L. S.)
C KRIVAKIS (L. S.)
ALEXANDER COLLIS (L. S.)

Signed, Sealed and Delivered in the presence of

Witness as to Sam Topf & Jennie Topf, M. Apfelbaum, Morris Weisser

ACKNOWLEDGMENT ANNEXED.

Exhibit P. 3.

EXHIBIT P. 3.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

MURRAY APFELBAUM, INC., a corporation, 10
Plaintiff,
vs.
SAMUEL TOPF and JENNIE TOPF, 10
Defendants. 20
Action at Law.
Stipulation.

It is hereby agreed by and between the plaintiff and the defendant and by and between their respective attorneys as follows:—

1. Two deeds of the defendants' chain of title, one from E. Luther Joy and wife, to John H. Breakenridge, et al., recorded June 1, 1893, in Book S-27 of Deeds for Essex County, New Jersey, on pages 237-239 and the other from said John H. Breakenridge, et al, to William B. Wilson and Anna J. Wilson, his wife, recorded June 20, 1893, in the Register's Office of Essex County, New Jersey, in Book U-27 of Deeds for said County, on pages 317, etc. contained the following covenant:— 30

This conveyance is made subject to the following express covenant on the part of said party of the second part, their heirs and assigns that there shall not be erected upon said land or any part thereof, any brewery slaughter house, glue or chemical factory of any kind any beer saloon, beer cellar or place in which beer, wines or liquors shall be sold or any building in which shall be carried on any business offensive noxious or detrimental to the use of said land or the adjoin- 40

Exhibit P. 3.

ing or contiguous land or any part of the same for private residence nor shall said land be used for any purpose which could create a nuisance. The said party of the first part hereby agree that all deeds hereafter made by them for any portion of the remainder of said tract now standing in the name of E. Luther Joy as owner on Clinton Avenue and Bergen Street shall contain the above written restrictive clause and covenant on the part of the purchaser.

2. Said covenant is not contained in or referred to in any subsequent deeds in defendants' chain of title, except that the subsequent deed of Levi Kaufman and wife to Hattie Kaufman recorded June 20th, 1902, recites that the same is made subject to existing encumbrances. This deed was subsequently cut off by foreclosure.

3. Said covenant has not been cancelled or released by any instrument of record in any Register's Office in the State of New Jersey.

ISRAEL B. GREENE,
Attorney for Plaintiff.

McCARTER & ENGLISH,
Attorneys for Defendants.

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Notice and Grounds of Appeal.

NOTICE AND GROUNDS OF APPEAL.

Filed May 20, 1927.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

MURRAY APPELBAUM, INC., a corporation,
Plaintiff,
vs.
SAMUEL TOPF and JENNIE TOPF,
Defendants.

Action at Law.
Notice and Grounds of Appeal.

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To Grosken & Moriarty, Esqs., attorneys of defendants, or to whom it may concern:

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TAKE NOTICE that the plaintiff in the above-entitled cause appeals to the New Jersey Court of Errors and Appeals, in the last resort in all causes, from the judgment of non-suit entered in this cause in favor of the defendants and against the plaintiff on the following grounds, to wit:

1. Because the Supreme Court (Trial Court) erred in directing a judgment of non-suit against the plaintiff and in favor of the defendants when thereunto moved by counsel for the defendants, whereas said Court should have denied said motion, and should have submitted to the jury for decision the questions involved in the issue.

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Dated May 19, 1927.

Respectfully,

ISRAEL B. GREENE,
Attorney for Plaintiff-Appellant.

40

Notice and Grounds of Appeal.

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

10 AARON VAN POZNAK, being duly sworn, on his oath deposes and says that on May 19, 1927, he did serve a true copy of the within notice and grounds of appeal upon Grosken and Moriarty, attorneys for the defendants, by leaving a copy thereof with Miss Reskin employed in their office at 31 Clinton St., Newark, N. J.

AARON VAN POZNAK.

Sworn and subscribed to before me
this 19th day of May, 1927.

20 ISRAEL B. GREENE,
Master in Chancery of N. J.

30

40

New Jersey Court of Errors and Appeals

MURRAY APFELBAUM, INC., a }
corporation, }
Plaintiff-Appellant, }
vs. }
SAMUEL TOPF and JENNIE TOPF, }
Defendants-Respondents. }
On Appeal from Supreme Court.
Sat below, MOUNTAIN, C. C. J.

BRIEF OF APPELLANT.

Statement.

This is an appeal from a judgment of *non-suit* entered by the trial court. The plaintiff, a real estate brokerage corporation, brought this suit against the defendants to recover \$3,675.00 commissions upon a written contract, reading as follows (p. 27):

“If and when title to premises #466-468 Clinton Avenue, Newark, New Jersey, is passed and the full consideration paid, pursuant to the contract for sale between Samuel Topf and Jennie Topf, his wife, and Christy Kravakis and Alexander Collis, dated December 12th, 1925, we agree to pay the sum of 3½ per cent. on the first \$20,000.00 of the purchase price and 2½ per cent. on the balance thereof to Murray Apfelbaum, Inc., as its commission for affecting the consummation of the sale and payment of the consideration for said premises, pursuant to the terms of said contract, *it being distinctly understood* that we shall *not* be under any obligation whatsoever to pay the above sum or any other sum or sums of money hereunder, if for any reason *not* due to our *default*, title to said premises is *not* closed, and the full consideration paid as aforesaid, *and we shall be liable only in the*

event of passing of title or in the event of failure to pass title, through our default.
(Italics are mine.)

(Signed) Samuel Topf
Jennie Topf

Dated, December 12th, 1925."

The selling price was \$135,000 (Exhibit P. 2, p. 28). By the contract of sale, the defendants agreed to convey the premises to the purchasers, *free and clear* of encumbrances, excepting certain mortgages, leases, and facts shown by survey, which are immaterial on this appeal.

An examination of the title by the purchasers disclosed that the premises were subject to the following deed restrictions, of record (P. 20; Exhibit P. 3, p. 35):

"This conveyance is made subject to the following express covenant on the part of the said party of the second part, their heirs and assigns, that there shall not be erected upon said land or any part thereof, any brewery, slaughter house, glue or chemical factory of any kind, any beer saloon, beer cellar or any place in which beer, wines or liquors shall be sold or any building in which shall be carried on any business offensive, noxious or detrimental to the use of said land or the adjoining or contiguous land or any part of the same for private residence nor shall said land be used for any purpose which would create a nuisance. The said party of the first part hereby agree that all deeds hereafter made by them for any portion of the remainder of said tract now standing in the name of E. Luther Joy as owner on Clinton Avenue and Bergen Street shall contain the above written restrictive clause and covenant on the part of the purchaser."

By a written stipulation offered in evidence, the defendants admitted that these restrictions

were contained in the defendants' chain of title and that they had not been released or cancelled (Exhibit P. 3, pp. 20, 35). The defendants also admitted that the title didn't pass because the purchasers rejected the deed by reason of these restrictions (p. 21).

Upon these facts, the plaintiff rested its case, and contended that it was entitled to recover upon commission agreement because the failure to pass title (resulting from the defendants' inability to give a deed, free of restrictions, in accordance with the contract of sale) was the defendants' "*default*" within the meaning of the commission contract.

Motion for Non-suit Denied.

At the close of the plaintiff's case, counsel for the defendants moved for a *non-suit* on two grounds *only* (pp. 21-22):

(1) That under the commission agreement there could be no recovery *until* and *when* title passed and the consideration was paid.

(2) That the word "*default*" as used meant "*the personal default of the vendors*" * * * "*their deliberate failure to pass title.*"

The purchasers' right to reject the title because of these restrictions was not questioned.

The trial judge overruled both contentions. In disposing of the motion he said (pp. 23, 24):

"It seems to me that there is no clearer default, if it is a fact, than for a person who has a piece of property to be unable to convey it owing to conditions or restrictions upon it discovered after they have agreed to sign a warranty deed. I think that '*default*' in this contract means inability to perform. I think the case is more similar

to the case of *Ludwig* against *Aberbach* (S. C. 132 A. 241, 4 Misc. R. 169), where the land owner agreed to pay commission on delivery of the deed to a purchaser and the agent was entitled to commission and he procured a purchaser ready, willing and able to buy, though the proposed purchaser because of the defective title refused to accept the deed.

"The situation is about this: That a broker under a contract of sale agreed to find a purchaser for certain property. The broker does not know anything about the title to the property; his contract is to get someone to buy it, and for it he is paid a certain amount of money. If the owner of the property says to the broker, 'I will not pay your commission until title has passed; I won't be liable in the event of failure to pass title, unless it is my default and was my default,' and the broker gets a person to take the property and it is found out afterwards that the owner has defective title, whose fault is that? It is not the purchaser's fault or default. Is it not the owner's fault or default? I think it is better to say that the owner, who should have some knowledge of what he is contracting to sell when he agrees to give a warranty deed, is in default if he signed the contract and is unable to give one. Whether he is unable to give one or not is a question of fact we do not have to consider at this time and I will deny your motion and you may have an exception."

Counsel for the defendants thereupon proceeded with the defense (p. 24). Shortly thereafter the Court adjourned.

Granting of Non-suit.

When the Court reconvened the following morning, the trial judge, much to the surprise of counsel, announced that he had changed his mind about the motion of non-suit, and that he would grant a non-suit on the construction of the agreement. He said (pp. 26-27):

"I have determined to change my mind as to the non-suit. I have read and re-read this agreement several times and am going to grant the non-suit on the *construction* of the agreement. *The first part of the agreement is repugnant with the last part of the agreement.* As I said yesterday, had the parties terminated it about half-way through, there isn't any question, of course, that this action would not lie, but in order to distinctly interpret what was perfectly plain up to that moment they proceeded to add these words, 'It being distinctly understood we shall not be under any obligation whatever to pay the above sum,' that is, the broker's commission, 'or any other sum or sums of money hereinunder if for any reason not due to our default.' That last clause is the *troublesome* clause, 'Title to said premises is not closed and the full consideration paid as aforesaid, and we shall only be liable in the event of failure to pass title through our default or in the event of passing title.'

"As I read the entire contract, bearing in mind the repugnancy I have spoken of, I feel that the construction of this contract means that '*our default*' means '*our failure*', '*our refusal to perform*,' and on that ground I will reconsider the motion made yesterday and grant the motion for non-suit so that plaintiff's counsel may have an exception." (Italics are mine.)

He thereupon granted a non-suit to which exception was noted, as a ground of appeal (pp. 26-27).

It is respectfully submitted that the action of the trial court was erroneous and should be reversed, to the end that a venire de novo be awarded.

ARGUMENT.

From the *last* pronouncement of the trial judge, it is not altogether clear whether he granted the non-suit because the contract was repugnant, or because he construed the word "*default*" to mean a *wilful default*. In the opening sentence, he said he would grant the non-suit "* * * on the construction of the agreement. The first part * * * is repugnant with the last part * * *." But in the concluding paragraph, he said that "* * * bearing in mind the repugnancy I have spoken of, I feel that construction of this contract means that 'our default' means 'our failure'; 'our refusal to perform,' and on that ground I will consider the motion made yesterday * * *."

As hereinbefore observed, on the first day of the trial, the same judge ruled that the word "*default*" meant an *inability* to perform, and stated that he could conceive of *no clearer default* than for a vendor to be *unable* to convey in accordance with the agreement of sale (pp. 23, 24). These two opposing views cannot be reconciled. The first view commends itself to us because the judge supported it with reason and logic, but the latter view is devoid of these virtues. By what ratiocination he was induced to abandon the first view in favor of the latter is not clear from the record.

Now, since the correctness of the Court's ruling depends upon the true construction of the word "*default*," as used in the contract, and since the

trial judge invested it with a special meaning *only* because of the alleged repugnancy of the contract, we shall first examine the usual and ordinary meaning of the word "*default*," then consider if there is any repugnancy in the contract; and if so, then whether such repugnancy justifies the stripping of the word of its ordinary meaning in favor of the Court's construction.

I.

Now it is well settled that in the construction of contracts words will be given their usual and ordinary meaning, unless such meaning will lead to an absurdity, in which case the absurdity will be prevented: *Thompson v. Trenton Water & Power Co.*, 77 N. J. L. 672, 73 A. 410; *Dime Savings Institution v. Mayor, etc. of Hoboken*, 42 N. J. L. 283; *Safety Storage Co. v. Lupenski*, 136 A. 203, 5 Adv. R. 336

In ordinary parlance, the word "*default*" means an inability, or failure to perform. The dictionary defines the word "*default*" as: "A failing or failure; fault; wrong act; failure in virtue or wisdom; a neglect or of failure to take some step necessary to secure the benefit of law; to omit; (Webster's Dictionary)."

In *Dime Savings Institution v. Mayor and Common Council of Hoboken, supra*, the word "*default*" was construed by the Supreme Court to mean a *mere failure*. This was an action in debt on an improvement certificate. In the certificate, the Mayor and City Council covenanted to use *due diligence* in making and collecting the assessment for the improvement. It also provided that if the assessment was not collected within two years from the confirmation date thereof, that the amount of the certificate would be paid upon

thirty days' notice of default in the collection of the assessment. The defendants filed many pleas and insisted among other things, that the word "default" implied *laches or negligence*. Upon demurrer the answer was stricken out, and Justice Dixon, speaking for the Court (pp. 288, 289) said:

"Default does not necessarily imply culpability; it as often signifies only failure; and in the absence of any other ground for determining the meaning, in this covenant, the rule already adverted to, that it should be construed least favorably to the party using it, would lead us to the latter sense."

In 18 C. J. 455, the word "default" is defined as follows:

"There is in the use of the word no necessary imputation of negligence, or culpability, and in the largest and most general sense it seems to mean only failing, failure, failure to perform, a failing or failure, neglect or failure, owing to lack or failure of, fault, omission. In one sense any failure is a default, whether it arises from the omission to perform a contract or from a neglect of duty, and in many reported cases the omission to pay a debt or to perform a contract is spoken of as a 'default' although there is generally present an element of wrong—an element over and above mere failure to perform, not necessarily involving any dishonesty. More specific signification of the term are: A failure upon the part of one of the contracting parties to do that which he had contracted to do, a failure in the performance or fulfillment of an obligation, the failure to perform a duty or obligation, a failure or omission to do something required, an omission to do something which one is called upon to do, omission of that which ought to be done; some omission to do that which ought to have been done by one of the parties; non-performance of duty; the non-performance of contract duty, the non-

performance of a duty, whether arising under a contract or otherwise, the non-payment by the party bound to pay without the consent of the parties having the right to waive the payment, anything wrongful, something wrongful, a wrong action, a transgression."

Other definitions of the word "default" are:

"The non-performance of a duty, whether arising under a contract, or otherwise. In its largest and most general sense it seems to mean 'failing.'" Bouvier's Law Dictionary (3rd Edition) Vol. I, p. 814.

"The omission or failure to fulfill a duty, observe a promise, discharge an obligation, or performance of an agreement." Black's Law Dictionary, p. 342.

See also "*Words and Phrases*," Vol. I (2nd Edition), p. 1264.

There are numerous cases in this State in which our Courts have freely used the word "default" to denote a mere failure, or omission to perform a duty, without any connotation of wilfulness, capriciousness or culpability. A few examples may be cited: A mortgagor's failure to pay taxes or interest under a covenant in the mortgage is a default; *Newark Trunk Co. v. Clark*, 94 N. J. E. 79, 118 A. 263. A purchaser's failure to purchase certain minimum quantities under a contract has been held to be a default; see *Vickers v. Electrozone Commercial Co.*, 67 N. J. L. 675; *Gerli v. Poidebard Silk Mfg. Co.*, 57 N. J. L. 432; *Blackburn v. Reilly*, 47 N. J. L. 290, 308. Failure to pay rent under a lease is a default; *Samuel v. Miller*, 49 N. J. L. 521; *Creveling v. West End Iron Co.*, 51 N. J. L. 34; *Commercial Trust Co. v. Wertheim Coal & Coak Co.*, 88 N. J. E. 143, 102 A. 448; *Fleming v. Fleming Hotel Co.*, 69 N. J. E. 715. For "default" in the performance of a building contract, see *Mayer*

Ice Machine Co. v. Van Voorhees (S. C.), 88 N. J. L. 7, 95 A. 735. For "default" within the meaning of the *Statute of Frauds* (debts, default, or miscarriage of another) see *Stout v. Dilts*, 4 N. J. L. 253; *Nixon v. Vanhise*, 5 N. J. L. 577; *Hartley v. Sanford*, 66 N. J. L. 627.

In none of these cases were any elements of wilfulness or culpability involved. The fact that the trial judge at first rejected the defendant's contention that the word "default" implied a personal default, and construed the word in its ordinary and usual meaning, indicates that he then understood and applied the foregoing rule of construction and that he then saw no repugnancy in the contract.

II.

Having ascertained the usual and ordinary meaning of the word "default" we will now consider whether the contract is repugnant.

Now the word "repugnant" is synonymous with *inconsistent*, *logically incompatible*, *contradictory*, and *inharmonious*. "Words and Phrases," Vol. IV (1st S. p. 3511). If clauses are different but can stand together they are *not* repugnant. *Borough of Oakland v. Board of Conservation*, etc., (S. C. 1922) 98 N. J. L. 99, 118 Atl. 787. To be repugnant the conflict must be absolutely *irreconcilable*. See "Words and Phrases," Vol. IV (2nd S. p. 288) citing *Town of Cameron v. Hicks*, 64 S. E. 832, 17 Ann. Cas. 926.

If the agreement in the case *sub judice* is to be correctly construed, resort must be had to the well-established rules of construction of contracts.

Now the *first* and most *cardinal* rule of construction is to ascertain the intention of the

parties. *International Signal Co. v. Marconi Wireless Telegraph Co.*, 89 N. J. E. 319, 104 A. 378; *Coster v. Monroe Mfg. Co.*, 2 N. J. E. 467; *Wise v. Fuller*, 29 N. J. E. 257; *Monmouth Park Ass'n v. Wallis Iron Works*, 55 N. J. L. 132; *Basic Iron Ore Co. v. Dalhke*, 5 N. J. Adv. Rep. 750; *Vickers v. Electrozone Co.*, 67 N. J. L. 665; *Ashmore v. Pa. Steam Towing Transportation Co.*, S. C. 28, N. J. L. 181, 183; *United Box Board & Paper Co. v. McEwan Bros. Co., et al.*, 76 A. 550; *Empire Rubber Mfg. Co. v. Morris*, (E. & A.) 73 N. J. L. 602, 65 A. 450; *Newcomb v. Kloeblen*, (E. & A.) 77 N. J. L. 791, 74 A. 511; *American Lithographing Co. v. American Gas Co.*, 81 N. J. L. 271, 80 Atl. 25; *Fletcher v. Interstate Chemical Co.*, (S. C. 1920), 94 N. J. L. 332, 110 A. 709.

That construction should be adopted which is *most fair and reasonable*, *Mayor, etc. v. Flynn*, 74 N. J. E. 104, 70 A. 497 (modified and reversed in part) 76 N. J. E. 607; 76 Atl. 3; *International Signal Co. v. Marconi, supra*. *Vickers v. Electrozone Co., supra*.

The agreement shall be construed as a whole and not any one particular stipulation. *Ashmore v. Pa. Steam Towing Transportation Co.*, (S. C. 28 N. J. L. 181, 183). *United Box Board & Paper Co. v. McEwan Bros. Co., et al.*, 76 A. 550.

That construction should be adopted which will render the contract operative rather than void. *Varrick v. Crane*, 4 N. J. E. 128; *Rue v. Rue*, 21 N. J. L. 369, 379. *Thompson v. Trenton Water Power Company*, 77 N. J. L. 672, 73 Atl. 410.

The language of the contract should be construed most strongly against the party using the words. *Empire Rubber Mfg. Co. v. Morris*,

(E. & A.) 73 N. J. L. 602, 65 Atl. 450; *Newcomb v. Kloeben*, (E. & A.) 77 N. J. L. 791, 74 A. 511; *American Lithographing Co. v. American Gas Co.*, 81 N. J. L. 271, 80 A. 25; *Fletcher v. Interstate Chem. Co.*, (S. C.) 94 N. J. L. 332, 110 A. 709.

With these principles in mind, let us consider whether the contract is repugnant. It must be conceded that from a grammatical and literary point of view, the contract has little to commend it or its author. It was drawn by the defendants or their attorney. It consists of one long, cumbersome sentence, containing much tautology and is copiously punctuated. Its loose form and repetitious style suggests that it was dictated in one breath, so to speak, without any attempt to be concise or precise; and the liberal punctuation by commas indicates that the one sentence was intended to express a number of consistent and coherently related ideas respecting the subject matter therein dealt with. But notwithstanding its formal imperfections, we respectfully contend that the words of the instrument in their ordinary meaning, clearly express the intention of the parties and that the contract is not repugnant. The first part of the contract is admittedly free from doubt. The defendants say, "If and when title to the premises 466-468 Clinton avenue, Newark, N. J., is passed and the full consideration paid pursuant to the contract * * * we agree to pay (the agreed commission on the purchase price) to Murray Apfelbaum, Inc., as its commission for affecting the consummation of the sale, etc., pursuant to the terms of said contract * * *." We concede that if the contract ended at this point, the plaintiff would not be entitled to recover unless and until the title actually passed, provided they

did not fraudulently or capriciously refuse to convey. *Lehrhoff v. Schwartzsky*, (N. J. S. C.) 125 A. 496, 2 Misc R. 353. ^{*Ann. v. Riddle. 81 N. J. L. 276. 79 A. 886*} But the fact that the parties intended to explain and limit the operation of the foregoing clause is clearly shown by the remainder of the sentence, which reads as follows:

"* * * it being *distinctly* understood that we shall not be under any obligation whatsoever to pay the above sum, or any other sum or sums of money hereunder, if for any reason, *not due to our default*, title to said premises is not closed, and the full consideration paid as aforesaid and *we shall be liable only in the event of passing of title, or in the event of failure to pass title through our default.*"

If we disregard the verbiage which pervades the contract and give the word "default" its ordinary meaning of "fault," failure or inability, the intent of the parties is obvious and may be paraphrased as follows:

"We will pay commissions if and when title passes, or if it does not pass because of our fault; but we will not pay commission if the title does not pass because of the purchaser's fault."

or

"We will not pay any commission unless title actually passes, or unless such failure to pass title is due to our fault."

or still in other words,

"We will not pay any commissions unless title actually passes, *provided, however*, that if title does not pass because of our fault or inability to convey, then we will pay commissions."

We fail to see any repugnancy or inconsistency in the contract by construing the word "default" in its ordinary sense because the two principal parts of the contract do not conflict with each

other. The last part of the sentence commencing with the words, "it being distinctly understood, etc." amplifies, clarifies, interprets and limits the meaning and effect of the preceding language, so as to charge the defendants with liability to pay the commissions if the failure to pass title results from their fault or inability.

It seems to us that this is the only fair and logical interpretation of which the contract is capable, and that, for the very reasons originally advanced by the trial judge when he denied the non-suit, *e. g.* (pp. 23, 24). The plaintiff is a broker. So far as the record shows, it was wholly ignorant about the facts relating to the defendants' title. It was employed by the defendants to obtain a purchaser for their property on *their* terms. One of the terms was that the conveyance would be made by warranty deed *free and clear of restrictions*. The plaintiff procured such purchasers. The defendant accepted the purchasers and entered into written articles of agreement with them. The purchasers paid a deposit of \$5,000 on account of the purchase price. Thus, the plaintiff performed all the services by it undertaken. It was naturally intended that the plaintiff should be paid for its services. The plaintiff had a right to rely, and presumably did rely, upon the defendant's ability to convey that which they had agreed to convey. It is absurd to assume that the plaintiff would have risked its efforts, time and money to procure a purchaser, under a commission agreement which might be defeated because of the defendants' inability to comply with their own terms. Had the plaintiff known about the existence of the restrictions, it might, perhaps, be argued that this encumbrance was contemplated by the parties. But the record is devoid of any

testimony showing such knowledge, nor is it contended that the plaintiff had or was chargeable with such knowledge.

We cannot perceive any logical reason for holding that the contract intended to protect the plaintiff only as against a wilful or capricious default. In the ordinary course of events, experience has shown that the dangers from defaults by vendors arising from defective titles are greater than those due to fraud or caprice. Moreover, it seems that as against a wilful default the stipulation was unnecessary. *Lehrhoff v. Schwartzsky, supra, Owen v. Radde, supra.*

To restrict the word "default" to mean a wilful default, is to adjudge that the second half of the contract is superfluous.

It is to be observed that the word "default" appears twice in the contract. It first appears in the clause which exempts the defendants from paying commission if title does not pass "for *any reason* not due to our default." Presumably, the word was used in the same general sense in both cases. In 13 C. J., p. 532, Sec. 491 C, it is said,

"Words used in one sense in one part of a contract are as a general rule deemed to have been used in the same sense in another part of the instrument, where there is nothing in the contract to indicate otherwise * * *."

And in *Pringle v. Wilson*, 156 Cal. 313, 104 Pac. 316, 24 L. R. A. (N. S.), the Court said,

"It is a familiar rule of construction that, other things being equal, words used in a certain sense in one part of the instrument are deemed to have been used in the same sense in another. As we have seen, the language in question as found in clause 15, was clearly used to mean the end of the period of

time first fixed. The words 'expiration of the term' occur in 2 other parts of the lease and it cannot be said to be clear that in either instance they were intended to convey a different meaning."

From the language of the proviso that the defendants shall not be liable for commissions because of the failure to pass title "for *any reason* not due to their (defendants') default," it is a fair inference that the converse of this idea will apply, to wit: that they (defendants) *will be liable* if title does not pass *for any reason* due to their default. Certainly, *any reason* would include a default by reason of the defendants' inability to give title in accordance with the agreement.

It is obvious from a consideration of the whole instrument, in the light of the relation of the parties, that the only contingency feared which might defeat the plaintiff's commission was a default on the part of the purchasers, either because they refused or were unable to consummate the sale. In the last few years, such or similar protective clauses have become not uncommon in brokers' commission contracts probably because, during the recent "real estate boom," brokers frequently produced irresponsible speculators as purchasers who forfeited their deposits (generally small) if they could not unload the contract at a profit, and thus left the owners liable to pay the brokers' commissions without having benefited by the broker's services. It was to guard against such a contingency that the contract was drawn as it was; but in order to protect the broker, in the event the benefits of his services were frustrated by the defendants' defaults, whether wilful or otherwise, it was distinctly provided that in such an event the plaintiff should have his commission.

It was not contended at the trial that there was any ambiguity, vagueness or uncertainty in the contract. There was nothing in either the pleadings or the evidence to sustain any special meaning to the word "default." It is significant that the idea of repugnancy occurred only to the mind of the trial judge. This ground was not even suggested by counsel for the defendants in support of his motion for the non-suit. Apparently he was satisfied that the contract was not repugnant. But even if there be any doubt as to the meaning of the word "default," the Court should not forget that the language whose want of clearness is the cause of embarrassment is that of the defendants themselves, and that, consequently, they are not in a situation to claim an indulgent interpretation of it, upon the well-established principle that the language will be construed against the party using the words. *Hoey v. Zarmon*, affirmed 40 N. J. L. 379, and the other authorities above cited.

In construing this contract the Court must be mindful of the fact that the parties knew and understood its meaning when it was executed and delivered. To adopt the conclusion of the trial judge that the contract was repugnant is to adjudicate that the parties did a vain thing by entering into a meaningless contract. In 6 *Ruling Case Law*, Sec. 227, p. 838, it is said:

"* * * The contract must be viewed from beginning to end, and all of its terms must pass in review; for one clause may modify, limit or illuminate the other. Taking its words in their ordinary and usual meaning, no substantive clause must be allowed to perish by construction unless insurmountable obstacles stand in the way of any other course. Seeming contradictions must be harmonized if that course is reasonably possible. Each of its provisions must

be considered in connection with the other and if possible effect must be given to all. A construction which entirely neutralizes one provision should not be adopted if the contract is susceptible of another which gives effect to all of its provisions. The court will look to the entire instrument, and, if possible, give such construction that each clause shall have some effect and perform some office. Likewise where a contract as a whole discloses a given intention and certain words or clauses would if taken literally defeat the intention, they will be construed if possible, so as to be consistent with the general intent."

In *Elliot on Contracts*, Sec. 1535, it is said:

"When it can reasonably be done, words or clauses apparently repugnant will be reconciled each with the other, because it cannot be assumed that the parties intended to insert inconsistent provisions. However, words which in view of the purpose of the transaction are nonsensical or repugnant with the manifest intention of the parties may be rejected as surplusage, if without them the contract may be sustained and be given effect according to the intent."

See also *Vickers v. Electrozone Co.*, *supra*.

An interpretation of the contract favorable to the defendants' contention will work injustice and oppression to the plaintiff and will unjustly enrich the defendants with the plaintiff's services without paying therefor; whereas a construction in favor of the plaintiff's view will be fair and reasonable, will appeal to common sense, and be in accord with custom and usage prevailing among brokers, and in harmony with the intention of the parties and the decisions of our courts. In this connection the decision of the Supreme Court in *Ludwig v. Aberbach*, *supra*, is apropos. That was also a brokerage case. The contract provided that the commission was

payable "upon delivery of the deed." The contract was never consummated because of a defect in the title. In the suit by the broker for commissions the owners contended that there could be no recovery because there was no "delivery of the deed" by reason of the defective title. But this plea was overruled, the Court saying,

"It was the *fault* of the prospective vendor that there was no delivery of the deed. The plaintiff has performed all that he was called upon to perform under his contract, namely, to procure a purchaser who was ready, willing and able to buy. This fact is not denied. *The reason for non-delivery of a deed was directly due to the defendants' inability to give a good title.* The plaintiff ought not to be made to suffer on that account. If it was intended that no commission was to be paid unless an actual sale was consummated by the delivery of the deed it should have been explicitly so stated in the contract. The agent has a right to rely on his principal being able to give a perfect title to a prospective purchaser. If the principal was not in such a position then he ought *not* to be permitted to escape paying the commission agreed upon by reason of his inability to deliver a good and sufficient deed for the property. It would be in harmony with the intent of the parties, as expressed in the contract, that the commissions were to be paid on the day fixed for the delivery of the deed." *See also Payne v. Turnbull* 8 INTL. 193, 81 A 350, and *Kepper v. Schlossberg* 91 N.Y. 397, 115 A 345

Since the contract is neither inherently repugnant nor rendered so by the construction of the word "default" in its ordinary meaning, the non-suit cannot be justified upon the *rationale* of the trial judge, and this judgment must be reversed.

It is, therefore, respectfully submitted that in any view of the case it must be held that the contract in question is not repugnant; that the word "default" must be given its usual and ordinary meaning, e. g. "fault" or "inability"; that the defendants have been guilty of a "default" within the meaning of the contract so as to entitle the plaintiff to recover; and that to that end the judgment of non-suit should be reversed and a venire de novo be awarded.

ISRAEL B. GREENE,
Attorney for Appellant.

New Jersey Court of Errors and Appeals

MURRAY APPELBAUM, INC., a corporation,

Plaintiff-Appellant,

vs.

SAMUEL TOPF and JENNIE TOPF,
Defendants-Respondents.

*On Appeal
from the
Supreme
Court.*

*Sat Below,
MOUNTAIN,
C. C. J.*

BRIEF FOR DEFENDANTS-RESPONDENTS.

The sole question before the Court upon this appeal is the proper construction of a commission agreement between the plaintiff and the defendants, and whether any liability upon the part of the defendants to the plaintiff had been established at the conclusion of the plaintiff's case.

Before discussing this question, it is well to advert to an error of fact in the brief of the appellant and a misapprehension apparent therein as to the rule effective in an appellate court upon the review of a judgment of non-suit.

Counsel for appellant asserts in his brief and bases an argument as to the construction of the commission agreement upon the alleged fact that the commission agreement was drawn by the defendants, or their attorney.

There is not a particle of evidence to that effect in the record. In fact, when counsel for the defendants attempted to show how the commission agreement had been prepared, such inquiry was precluded, upon objection of counsel for the plaintiff (p. 21, l. 23).

Because of the rule laid down by this Court for determining upon the propriety of a judgment of non-suit, it is not necessary to notice counsel's rather involved argument with respect to the motion for non-suit and the grounds upon which it was allowed. Suffice it to say that the judgment was founded upon the Court's construction of the meaning of the commission agreement. It is our contention that his construction was the proper one. But it is unimportant whether it was or not, if this Court, upon the entire record, is of the opinion that the judgment of non-suit should have been granted upon any ground.

Gillespie v. John W. Ferguson Co., 78 N. J. L. 470;

McCarty v. Town of West Hoboken, 93 N. J. L. 247.

The commission agreement, upon which the plaintiff's suit is based, was as follows:

"If and when title to premises #466-468 Clinton avenue, Newark, New Jersey, is passed and the full consideration paid pursuant to the contract for sale between Samuel Topf and Jennie Topf, his wife and Christy Krivakis and Alexander Collis, dated December 12, 1925, we agree to pay the sum of 3½ per cent. on the first \$20,000.00 of the purchase price and 2½ per cent. on the balance thereof, to Murray Apfelbaum, Inc., as its commission for affecting the consummation of the sale and payment of the consideration for said premises, pursuant to the terms of said contract, it being distinctly understood that we shall not be under any obligation whatsoever to pay the above sum or any other sum or sums of money hereunder, if for any reason not due to our default, title to said premises is not closed and the full consideration paid as aforesaid; and we shall be liable only in the

event of passing of title or in the event of failure to pass title through our default.

(Signed) Samuel Topf,
Jennie Topf.

Dated, December 12, 1925."

This agreement, as it recites, was entered into in connection with the execution of a contract of sale between the defendants and two persons named Krivakis and Collis. That agreement was offered in evidence as Exhibit P. 2 (p. 28). It contemplated the transfer of the title to a valuable piece of property situated at the southeast corner of Clinton avenue and Hunterdon street, in the City of Newark. The Court will take judicial notice of the fact that this location is near the centre of one of the busiest retail merchandising localities in the City of Newark. The actual centre of this locality is at the corner of Clinton avenue and Bergen street, just one block away from the premises in question. As the agreement of sale discloses (p. 29), the property consists of stores and apartments, all rented at considerable rentals, subject to which the conveyance was to be made.

When the time arrived for passing of title, the purchasers refused to take title because of an early restriction in the chain of title, of which the defendants were unaware when they made the agreement, and which forbade the erection on the premises of a brewery, slaughter house, glue or chemical factory, beer saloon, beer cellar, place in which beers, wines, or liquors shall be sold, or any business offensive, noxious, or detrimental to the use of the land, or the adjoining or contiguous land for private residences, or any use which would create a nuisance.

In view of the nature of the property and the fact that these restrictions are no more than

are imposed upon the land in this locality anyway under the laws of this State and the Zoning Ordinances of the City of Newark, it cannot be doubted that the purchasers, in refusing to take title, were not acting in good faith and that the passing of title really failed because the purchasers had changed their minds and did not want the property.

The trial judge properly construed the commission agreement.

Upon a reading of the commission agreement, it is at once obvious that it contains two parts—the first, devoted to a statement of the agreement between the parties, and the second, devoted to an endeavor to explain what had gone before.

The first part of the agreement and that which, we submit, contains all of the understanding between the parties, reads as follows:

“If and when title to premises #466-468 Clinton avenue, Newark, New Jersey, is passed and the full consideration paid pursuant to the contract for sale between Samuel Topf and Jennie Topf, his wife and Christy Krivakis and Alexander Collis, dated December 12, 1925, we agree to pay the sum of 3½ per cent. on the first \$20,000.00 of the purchase price and 2½ per cent. on the balance thereof, to Murray Apfelbaum, Inc., as its commission for affecting the consummation of the sale and payment of the consideration for said premises, pursuant to the terms of said contract.”

Had the agreement stopped there, there could, we submit, be no possible question as to its meaning. This portion of the agreement specifically provides that the commission is to be paid only “if and when” title passes and the full consideration is paid, pursuant to the contract

between the defendants and Krivakis and Collis. And the commission was to be paid as compensation to the broker not only “for effecting the consummation of the sale,” but also for effecting the “payment of the consideration for said premises, pursuant to the terms of said contract.”

As we have stated, the foregoing is all very clear and the only contingency upon which, under that part of the agreement, the broker might have recovered, notwithstanding the failure to pass title, would have been a failure to pass title because of the willful and capricious act of the vendors. That that condition was implied, even in the part of the contract now under discussion, is quite clear.

As the Supreme Court of this State said in *Lehrhoff v. Schwartsky*, 125 Atl. 496,

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

In *Hinds v. Henry*, 36 N. J. L. 328, Justice Depue said (p. 333):

“The contingency on which the plaintiff’s compensation was dependent has never arisen. To excuse the absence of proof on this subject, the plaintiff relies on a class of cases which hold that the obligee is relieved from the necessity of proving performance of the condition, where performance has been prevented by the act of the obligor. The cases on this subject are quite numerous. *Malins v. Freeman*, 4 Bing. (N. S.) 395. * * * But they will be found, without exception, to be cases in which the obligee has prevented the performance

of the condition by some wilful or fraudulent act in violation of his own undertaking, express or implied."

Now, the draftsman of the commission agreement undoubtedly had this principle in mind, and, in order that there might be no question about its application to the case in hand, he continued, by way of interpretation of what had gone before, with the concluding part of the agreement, namely:

"* * * it being distinctly understood that we shall not be under any obligation whatsoever to pay the above sum or any other sum or sums of money hereunder, if for any reason not due to our default, title to said premises is not closed and the full consideration paid as aforesaid; and we shall be liable only in the event of passing of title or in the event of failure to pass title through our default."

In view of the fact that the above follows the first part of the agreement, separated by a comma only, and that it bears a parenthetical relation to what had gone before, it must have been intended to be in explanation of the earlier part. The draftsman says, "it being distinctly understood"—that must mean, "it being distinctly understood by our agreement just expressed."

That agreement, as already pointed out, was that the commission money was to be paid only when title was passed and the consideration paid, or unless title was not passed and the consideration not paid because of a willful failure upon the part of the vendors to complete their part of the contract. The explanatory addition, we submit, added nothing to this. The vendors were still to be relieved of "any obligation whatsoever to pay the above sum, or any other sum or sums," if title was not closed and

the full consideration paid for any reason not due to the "default," that is, the willful and capricious act of the vendors. Then, in conclusion, it is stated another way, that the vendors should be liable only in the event of the passing of title, or a failure to pass title through "our default," that is, our "willful and capricious act."

That was the construction given to the contract by the Court below. We submit it is the only possible construction which permits due force to be given to the unequivocal language of the first part of the contract and which follows the settled rule that repugnancy is to be avoided and an agreement so construed as to give effect to all of its parts.

Stevens v. Coirin, 93 N. J. L. 502.

Before the Court below, as here, counsel for the appellant argued that the word "default" used in the concluding part of the agreement, was to be given the meaning of a mere failure to pass title, whether or not such failure was due to any willful or wrongful act upon the part of the vendors. It was with this thought in mind that the trial judge said that to so construe the word "default" would lead to a repugnancy between the latter part of the agreement and the unequivocal earlier part thereof. That is, of course, so. If the word "default" is to be so construed and with the result contended for by appellant, it means that the latter part of the agreement, beginning with "it being distinctly understood" operated to make void the clear and unequivocal agreement contained in the words preceding "it being distinctly understood." Now, if the word "default" is so construed with this resulting repugnancy between the first and second parts of the agreement, the plaintiff's case is not thereby advanced. In that situation the

Court would have to choose between one or the other of the portions of the agreement, since both can not be given effect. In that event, we submit, the parenthetical clause added at the end of the agreement would have to give way before the complete and unequivocal statement of the agreement found in the first clause.

As this Court has said in *Vickers v. Electrozone Co.*, 67 N. J. L. 665:

“Story, in his work on Contracts (section 660), states the rule as to repugnant clauses in contracts in another form, not dependent upon the mere order of precedence in which they are framed in the instrument, thus: ‘But whenever one portion of a contract is wholly repugnant to the rest of it, and irreconcilable with the manifest intention of the parties, as apparent upon a consideration of the whole instrument, it will be stricken out.’ Again, in section 661, in speaking of the effect of contradictory stipulations occurring in contracts, he says, ‘If the subsequent stipulation contradict and restrict what was distinctly stated, and constituted a principal inducement to the contract, it will be of no effect.’”

Counsel for appellant, in his brief, refers to various definitions of the word “default,” which have been used in court and out of court. These definitions, depending so much upon the context in which the word “default” was used, are of little assistance to us in this case. It is significant, however, that most of the definitions stress the quality of wrongfulness or transgression which is usually inherent in the word “default.” While that quality may not, under the context, be involved, it usually is involved. As Justice Dixon said in *Dime Savings Institution v. Mayor and Common Council of Hoboken*, 42 N. J. L. 283, “Default does not necessarily imply cul-

pability.” That is undoubtedly so when default is used in connection with the failure to pay money.

Here it is significant to note that the commission agreement in this case, in both uses of the word “default,” couples it with the word “our.” The commission agreement was signed by the vendors personally and the default they had in mind was some failure upon their part, “our default,” not the failure or default of *their title*, but their own personal default, that is, their failure to do something which it was in their power to do or not to do.

It is ridiculous to assume that the vendors, having distinctly stated that they were to be responsible only if and when title passed and the consideration was paid, should have said in the same breath that they were willing to be bound, notwithstanding the failure to pass title because of a matter of which they were entirely innocent, and which, in reality, constituted no bona fide reason for the rejection of the title by the purchasers. To so hold would be to make the defendants liable for the payment of this considerable sum of money merely because the vendees had repented of their bargain and were rejecting the title because of an ancient restriction which, if longer of any effect whatever, operated to benefit the property, rather than hurt it.

Furthermore, in construing the word “default” in connection with a contract to pass title to real estate, we must bear in mind the well-settled rules relating to the effect of contracts for the sale of real estate. These invariably are upon the condition, frequently expressed, but always implied, that the vendor has a good title. It is for this reason that

damages cannot, in the absence of a statute, be recovered for the breach of such a contract because of a defect in the title of a vendor.

In the leading case of *Flureau v. Thornhill*, 2 W. Bl. 1078, Chief Justice DeGrey, in setting aside a verdict for substantial damages, said:

"I think the verdict wrong in point of law. Upon a contract for a purchase, if the title proves bad, and the vendor is (without fraud) incapable of making a good one, I do not think that the purchaser can be entitled to any damages for the fancied goodness of the bargain, which he supposes he has lost."

Mr. Justice Blackstone concurred with these remarks:

"These contracts are merely upon condition, frequently expressed, but always implied, that the vendor has a good title. If he has not, the return of the deposit, with interest and costs, is all that can be expected."

Subsequent English cases attempted to introduce exceptions to the rule established by *Flureau v. Thornhill*, but these exceptions were brushed aside in *Bain v. Fothergill*, L. R. 7 H. L. 158, adopting the rule and reason in *Flureau v. Thornhill*, namely, *that contracts for the sale of real estate are merely upon condition, frequently expressed, but always implied, that the vendor has a good title.*

This rule was adopted by this Court in *Gerbert v. Congregation of the Sons of Abraham*, 59 N. J. L. 160. Justice Van Syckel there said:

"The reason which lies at the foundation of the rule in *Flureau v. Thornhill* pertains here, and is clearly expressed by Lord Hatherly in *Bain v. Fothergill*. * * *
"The foundation of the rule in *Flureau v. Thornhill* has been already more clearly expressed by my noble and learned friend

who has preceded me, in saying that having regard to the very nature of this transaction in the dealings of mankind in the purchase and sale of real estate, it is recognized on all hands that the purchaser knows on his part that there must be some degree of uncertainty as to whether, with all the complications of our law, a good title can be effectively made by his vendor, and, taking the property with that knowledge, he is not to be held entitled to recover any loss on the bargain he may have made, if, in effect, it should turn out that the vendor is incapable of completing his contract in consequence of his defective title.' "

Therefore, the contract entered into by the defendants-respondents for the sale of their property was upon the implied condition that they could make good title; and any inability to make such title cannot be construed as a "default."

Inasmuch as the appellant's right to commissions depends, not on the procuring of a purchaser, but upon the passing of title and the payment of the full consideration pursuant to the terms of the contract of sale between the vendors and the vendees, and inasmuch as the vendors cannot be held to have defaulted because of the implied condition as to their ability to make good title, appellant is not entitled to commissions.

The present case is analogous to the case of *Feist & Feist v. Ingersoll*, 2 N. J. Mis. Rep. 267, except that in the present case the condition is implied, while in *Feist & Feist v. Ingersoll*, the condition was expressed.

There the Supreme Court, in reversing the judgment of the trial court in favor of the plaintiff, said:

"The only contention upon which the motion to strike out the answer was rested was that, by the true construction of the written

contract between the plaintiff and the defendant the latter's obligation to pay the commission was complete, notwithstanding the existence of the facts set up in the answer. That agreement is in the following words: 'June 4th, 1921. The undersigned has hereby authorized Feist & Feist, Incorporated, to sell the vacant plot of ground situated on the corner of Irvington avenue and Prospect street, South Orange, N. J., to Harrison Improvement Company under articles of agreement bearing even date herewith for the sum of Fifteen Thousand Dollars (\$15,000), and for said services agrees to pay Feist & Feist, Incorporated, a sum equal to five per cent. (5%) commission upon the amount for which the property is sold.' The trial judge manifestly considered that the effect of this agreement was to impose upon the defendant the burden of paying the commission, even though the sale to the Harrison Improvement Company was not consummated. To us his conclusion seems unsound. The employment of the plaintiff was to *sell* a lot of ground to the Harrison Improvement Company for a fixed amount. The sale was to be under articles of agreement between the vendor and the vendee. Those articles provided, so the answer states in effect, that the sale should not be consummated unless and until it was ascertained that an apartment house could be erected upon the lot by the vendee and that, if it should be ascertained that no such building could be there erected, the agreement should be at an end, and the obligations of both parties thereunder should be terminated. By the very words of the agreement between the plaintiff and the defendant the former's commission was to be paid upon the amount 'for which the property is sold'—that is, the payment of the commission was dependent upon the actual sale of the property—and, as no sale was made, the condition upon which the agreement for sale was based having failed, the commission had not been earned."

Hinds v. Henry, supra, is quite like the case at Bar. There commissions were claimed upon an agreement which read as follows:

"And now be it known that, by the said quoted agreement between the said B. C. Hinds and E. T. Henry, it was fully understood that any amount over and above the sum of \$12,000 that the said B. C. Hinds might succeed in obtaining for the said property, should accrue to the use and benefit of the said B. C. Hinds, and he, the said B. C. Hinds, having succeeded in selling the said property at an advance of \$3,000, over and above the limit placed thereon, the said Eugene T. Henry hereby acknowledges himself indebted to the said B. C. Hinds in the said sum of \$3,000, payable to the said B. C. Hinds, the first half thereof (say \$1,500) at the time that the purchasers of the property hereinbefore mentioned shall pay over the first half of the purchase money, and the balance at the expiration of one year from the date of the deed for said property, without interest."

The defendant was unable to make good title, because of an outstanding tax sale.

Justice Depue, rendering the opinion of the Supreme Court, said, among other things (p. 333):

"By the contract in this case, the defendant obligated himself to pay the commissions agreed on—one-half at the time the purchasers of the property should pay the first half of the purchase money, and the balance at the expiration of one year from the date of the deed, without interest. In an action on an obligation of this kind, the pleader must aver, and it must be proved at the trial, that the contingency on which the debt is payable has happened, or that it was defeated through some fault of the obligor."

and at page 332:

"The broker may also, by special agreement with his principal, so contract as to

make his compensation dependent on a contingency which his efforts cannot control, even though it relate to the acts of this principal. A contract of that character is binding, and no action can be maintained until the contingency has arisen."

It is significant that that very careful jurist, Justice Depue, in the case just quoted, in speaking of the vendor's inability to convey a good title because of the outstanding tax sale, said:

"The sale fell through not in consequence of any default of the defendant" (page 335) (*italics ours*).

Justice Depue undoubtedly had in mind a construction of the word "default" similar to that given to the word by the Court below, namely, a willful refusal. As Justice Depue expressed it, a failure to perform because of some "willful or fraudulent act in violation of his own undertaking, expressed or implied."

In *Schwartz v. Handler*, 99 Atl. Rep. 437 (not officially reported), the Supreme Court held that where a contract between an owner of real estate and a broker provides for the payment of commissions on the sale when title passes, the broker is not entitled to recover commissions, although he has found a purchaser who has signed a contract for the sale, where such purchaser refuses to comply therewith because of imperfection in title, passage of title being a condition precedent.

Upon the entire record, it is submitted that the judgment below is entirely proper and that it should be affirmed.

Respectfully submitted,

HENRY L. GROSKEN,
EDMOND C. MORIARTY,
ARTHUR F. EGNER,
Of Counsel with Respondents.

New Jersey Court of Errors and Appeals

MURRAY APFELBAUM, INC., a corporation,

Plaintiff-Appellant,

and

SAMUEL TOPF and JENNIE TOPF,
Defendants-Respondents.

On Appeal
from
Supreme
Court.

Sat Below:
MOUNTAIN,
C. C. J.

APPELLANT'S REPLYING BRIEF.

By way of *reply* to the respondents' brief, the appellant desires to call the Court's attention to the following:

1. Counsel for the respondents have taken exception to the statement in the appellant's brief "that the commission agreement was drawn by the defendants, or their attorney," and they charge that "there is not a particle of evidence to that effect in the record" (Respondents' Brief, p. 1). That the commission agreement was prepared by Mr. Moriarty of Grosken & Moriarty, the defendants' attorneys of record, is clearly indicated by the following question asked the witness, Fuerstman, by Mr. Egner, counsel for the defendants (p. 21, ll. 23 and 24): "Q *The original agreement as to the commissions had been prepared by Mr. Moriarty, had it not?*" Mr. Fuerstman was the attorney for the purchasers and was present when the commission agreement was signed. Mr. Apfelbaum, the president of the plaintiff company, who procured the purchasers, was then not present (p. 20). We do not dispute that Mr. Moriarty was the author of the commission agreement. The question was objected to because it was not proper cross examination of said witness.

2. In referring to the premises described in the contract of sale, counsel for the respondents appeal to the Court to take "*judicial notice*" of the fact that its location is near the center of one of the busiest retail merchandising localities in the City of Newark, etc., etc. (Respondents' Brief, p. 3). This appeal is an admission that the record is devoid of any evidence on this point. This subtle attempt to supplement the record should be disregarded.

3. Counsel for the respondents further say (Respondents' Brief, p. 3) that the respondents "*were unaware*" of the existence of the restrictions in their chain of title. Here, again, counsel manifest their inclination to supply the record with testimony not offered at the trial. There is nothing in the record to justify this statement. The defendants are chargeable with knowledge of the condition of their title. *Ludwig v. Auerbach*, 132 A. 241, 4 Misc. Rep. 199.

4. The disposition of counsel for the respondents to add to the record is strikingly illustrated in the following statement appearing at pages 3 and 4 of their brief. "In view of the nature of the property, and the fact that these restrictions are no more than are imposed upon the land in this locality, anyway, under the laws of this State and the Zoning Ordinances of the City of Newark, it cannot be doubted that the purchasers, in refusing to take title were not acting in good faith, and that the passing of title really failed because the purchasers had changed their minds and did not want the property." Counsel have not referred us to any of the alleged laws of this State, nor the Zoning Ordinances which relate to the use of the premises in question. And it should be noted that the respondents' answer to the plaintiff's complaint does not set up the

asserted laws or Zoning Ordinances as defenses. At the trial the respondents admitted that the purchasers refused to take title solely because of the restrictions (p. 21), and their good faith was not challenged. The right of the purchasers to reject the title because of these restrictions was not disputed at the trial, and no authority has been cited by counsel denying such a right to the purchaser. Indeed, it is well settled that the purchasers had an absolute legal right to reject the title because of these restrictions. *Eckel v. Spitzer*, 111 N. Y. Supp. 459, 58 Misc. 467; *Terry v. Westing*, 5 N. Y. S. 99; *Dieterlein v. Miller*, 114 N. Y. A. D. 40, 99 N. Y. S. 699; *Ray v. Adam*, 60 N. Y. S. 633, and cases therein cited. See also *Krah v. Wassmer*, 75 N. J. E. 109, 71 A. 404, and *Gross v. Yeskel*, 98 N. J. E. 64, 130 A. 546, affirmed 134 A. 737, 4 A. R. 1590.

It is inconceivable how any Zoning Ordinance can affect the rights of the purchasers under their agreement. A restriction by ordinance cannot absorb or supersede the restriction in the deed. *Coues v. Hallahan*, 209 Pa. St. 224, 58 A. 158.

5. To aid in the construction of the word "*default*" in the commission contract, counsel for the respondents have referred us to the English cases of *Flureau v. Thornhill*, 3 W. Bl. 1098, and *Bain v. Fothergill*, L. R. 7 H. L. 158, and *Gerbert v. Congregation*, 59 N. J. L. 160, in this Court. An examination of these cases discloses that the only principle therein decided was, *that as between a vendor and his vendee, upon a contract for the sale of real estate if the title prove bad and the vendor is (without fraud) incapable of making a good title, the vendee is not entitled to recover damages for the loss of his bargain, but is limited to nominal damages, besides his*

down money and interest. One of the reasons for this exceptional and anomalous rule of damages is that a contract for sale of real estate is said to be upon the implied condition that the vendor has good title. The *rationale* of this rule of damages seems to be grounded principally upon the conveyancing practices in England. See note to *Crenshaw v. William*, 48 A. L. R. 24, etc. With this rule of damages we have no quarrel, but we fail to see its application to the case at bar, either on the facts or the law. None of these cases involved the construction of the word "*default*" nor did they deal with a broker's contract.

Counsel's argument seems to be this: That because the *contract of sale* is subject to an implied condition that the vendor has good title, that, therefore, the broker's agreement is subject to the same implied condition. The frivolousness of this contention is demonstrated by what was said by Justice Garrison, speaking for our Supreme Court in *Payne v. Twitchell*, 81 A. 350, 81 N. J. L. 193. The learned Justice said:

"The appellant's contention can rest only on the notion that the employment of a person to secure a buyer implies that the principal will be able to sell to such buyer or some similar undertaking of which an essential feature is the ability of the principal to convey the land when the willing buyer is produced, whence it is argued that the inability of the principal to convey relieves him from paying what he agreed to pay for a particular service that has been fully performed.

"The fallacy of this argument arises from a misconception of the nature of the employment under which the commission was promised. In such an employment the principal does not bind himself to sell or even stipulate that he will be able to convey and he

confers upon the person he employs no authority so to bind him * * * He agrees to pay for certain services. Why he wants them is his affair and does not enter into the agreement to pay for such services as the employment calls for. * * * As soon as we get rid of the notion that the ownership or the control of the land is an essential part of the agreement by one person to pay another for performing the specified services, we see at once that such employments are in law assimilated not with agreements touching interests in land or even strictly speaking with the relation of principal and agent, but rather with those special employments by which one is engaged to seek out a particular person, or a person answering to a particular description and bring such person into communication with his employer. A person who has been injured in a collision may desire to be put into communication with those who witnessed the accident. A solicitor may be seeking the heir to an estate, a mother may wish to have her child adopted, and a host of such cases may be imagined in all of which the character of the employment is not legally distinguishable from that of one who desires to be put in touch with a person who will pay a certain price for a certain piece of land. * * * The rule of law, although it has been dignified by the citation of Story and the civil lawyers, is really all summed up in the homely saying that 'a bargain is a bargain,' and a bargain once made, remains. * * *"

This case has been cited with approval in this Court in *Ettinger v. Loux*, 96 N. J. L. 522, 115 Atl. 384.

The cases cited by counsel for the respondents expressly hold that in case of a *default* (breach of contract) of a vendor (*without fraud*), nominal damages may be recovered in addition to the down money and interest. They merely dis-

tinguish between an *ordinary default* (without fraud) such as arising from a defective title, and a *wilful default*, arising from the *fraud* or *capriciousness* of the vendor. In defaults of the first class, only nominal damages are coverable, whereas in defaults of the second class, the loss of the bargain may be recovered.

The case of *Feist & Feist v. Ingersol*, 2 N. J. Misc. Rep. 267, cited by counsel for the respondents, has no application to the case at bar, because in that case the broker's contract was *expressly* made dependent upon the actual sale of the property, and as no sale was made, the commission was not earned.

The excerpt from Justice Depue's opinion in *Hinds v. Henry*, appearing at page 14 of the respondents' brief, has been misinterpreted by counsel for the respondents. This quotation, as torn out of its context, is grossly misleading. In that case the learned Justice found that the cloud on the defendant's title (the tax sale), which ultimately broke off the contract of sale, was made known to the plaintiff, the broker, when he was employed. The defect in title was sought to be remedied by litigation. The commission contract was conditioned upon an actual sale. The purchasers declined to accept anything but an unclouded title, and the contract with them fell through. In speaking of the liability of the defendant to pay commissions, Justice Depue said:

"The evidence shows that defendant made no fraudulent concealment of the defect in his title and that the plaintiff acted with full knowledge that his efforts might be made abortive by the defendant's inability to convey as was stipulated. The sale fell through, not in consequence of any default of the defendant, but was defeated by the occurrence of a contingency, the possibility of the

happening of which was known to both parties, and with respect to which they expressly contracted."

What Justice Depue meant was, that the defendant was not guilty of any default (breach of contract) because he never contracted with the plaintiff to give a clear and unencumbered title, and not having so contracted, he could not be held in default for not giving a clear title. In the case at bar, the defect in the title was not disclosed to the plaintiff, nor was it in contemplation of the parties, and the defendants *expressly* agreed to convey a free and unencumbered title.

The case of *Schwartz v. Handler*, 99 A. 437, decided by our Supreme Court, does not apply to the case at bar, because there the payment of the commission was conditioned upon actual passing of title, whereas in the case at bar it was payable *either* upon the passing of title *or* upon the failure to pass title because of respondents' default.

Respectfully submitted,

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