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Summons.

THE STATE OF NEW JERSEY TO STONEHELL REALTY Co., a corporation of the State of New Jersey.

(L. S.) YOU ARE SUMMONED to answer the annexed complaint of HARRY H. MAHLENBROCK in an action at law in the New Jersey Supreme Court, Hudson County.

AND TAKE NOTICE, that unless you file your answer to said complaint with the Clerk of said Court, at Trenton, New Jersey, within twenty (20) days after service upon you of this Writ, and the annexed complaint, the plaintiff may proceed in the suit, and judgment may be entered against you.

WITNESS, William S. Gummere, Chief Justice of the New Jersey Supreme Court at Trenton, New Jersey, this 20th day of May, 1926.

EDWARD J. KELLEHER.

ARMSTRONG & MULLEN,
Attorneys for Plaintiff.

Complaint.

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

HARRY H. MAHLENBROCK,
Plaintiff,

v.

STONEHELL REALTY CO., a corporation of the State of New Jersey,
Defendant.

} Action at Law.

Plaintiff, residing in the City of Jersey City, County of Hudson and State of New Jersey, for his complaint against the defendant says that:

FIRST COUNT.

1. On or about the fifteenth day of August, 1923, the defendant, by its agents and servants employed the plaintiff herein to procure a purchaser for certain premises, then owned by the defendant.

2. On March fourteenth, 1924, plaintiff procured the Stern Realty Company, a corporation of the State of New Jersey as a purchaser for said premises who was ready, able and willing to buy on terms and at a price agreeable to the defendant.

3. On March fourteenth, 1924, plaintiff procured the execution of a written contract between the defendant herein and the said Stern Realty Company, for the sale of said premises.

4. Among other terms in said written contract, it was provided as follows:

"It is further understood by the parties hereto, that Harry Mahlenbrock was the agent who consummated this sale and that there is due him a commission of $1,750.00 payable at the conveyance of the premises."

5. Upon the date set for the closing of title by the terms of said contract or upon the adjourned date therefor, the Stern Realty Company through its agents, servants and attorneys refused to accept the title to the premises covered by the terms of said contract for the reason that the title of the defendant thereto was defective and unmarketable.

6. Thereafter the defendant and the Stern Realty Company, through their agents, servants and attorneys rescinded the contract and settled their differences.

7. The failure of the defendant to convey a marketable title to the Stern Realty Company was the sole fault of the defendant, its agents and servants and no fault of this plaintiff.

8. Upon procuring the purchaser aforesaid upon terms agreeable to the defendant and the execution of a written contract acknowledging this plaintiff's claim to commissions as aforesaid, this plaintiff became entitled to the said sum of $1,750.00 as and for his commission.

9. Plaintiff has demanded payment of said commissions of the defendant, but the defendant has refused and still continues to refuse to pay said commissions or any part thereof.

WHEREFORE, plaintiff demands judgment against the defendant in the sum of Seventeen hundred

and fifty dollars ($1,750.00) with interest from the fourteenth day of March, 1924, and costs of Court.

SECOND COUNT.

1. On or about the fifteenth day of August, 1923, the defendant by its agents and servants employed the plaintiff herein to procure a purchaser for certain premises then owned by the defendant.

2. On or about said day, the defendant requested the plaintiff to render on the defendant's behalf, work, labor, and effort in his calling as a real estate agent to procure a purchaser for the premises then owned by the defendant at a price agreeable to the defendant.

3. On or about said day, the defendant promised and agreed to pay to this plaintiff for work, labor and services a commission and compensation for said work, labor and effort.

4. Commencing on that day, plaintiff exercised every reasonable effort and quality on his part in his calling as real estate agent and performed great work, labor and service on behalf of the defendant in his endeavor to procure the purchaser as aforesaid.

5. Plaintiff continued his work, labor, service and efforts from said day down to and after the seventeenth day of March, 1924.

6. As a direct result of the aforesaid work, labor, services and efforts put forth by this plaintiff, a corporation known as Stern Realty Company, a corporation of the State of New Jersey was procured as a purchaser for said premises

who was ready, able and willing to buy at a price and on terms agreeable to the defendant.

7. On said date a written contract was duly entered into between the defendant and the said Stern Realty Company for the sale of said premises to the said Stern Realty Company.

8. Among other terms in said contract it was provided between the aforesaid contracting parties as follows:

> "It is further understood by the parties hereto, that Harry Mahlenbrock was the agent who consummated this sale and that there is due him a commission of $1750.00 payable at the conveyance of the premises."

9. Thereafter because of the inability of the defendant to convey to the Stern Realty Company on the date set for the closing of title in said contract a marketable title, the Stern Realty Company refused to accept the title.

10. Thereafter this plaintiff demanded payment of his commissions by the defendant in the sum of seventeen hundred and fifty dollars ($1,750.00) but the defendant refused and still continues to refuse to pay the same or any part thereof.

11. This plaintiff now sues in *quantum meruit* for the true, reasonable and just value of his work, labor, service and effort on behalf of the defendant.

WHEREFORE, plaintiff demands judgment against the defendant in the sum of seventeen hundred

and fifty dollars ($1,750.00) with interest from the fourteenth day of March, 1924, and costs of Court.

THIRD COUNT.

1. On or about the fifteenth day of August, 1923, the defendant represented to the plaintiff that it owned a clear and marketable title to certain premises.

2. On or about said date in truth and in fact, the defendant did not own a clear and marketable title to said premises and the defendant well knowing that its said representation to this plaintiff was false and untrue and that the true state of the title was not known to this plaintiff and with intent to defraud this plaintiff induced this plaintiff by said representations to render work, labor, services and effort as a real estate agent to procure a purchaser for said premises at a price agreeable to the defendant for which services the defendant promised and agreed to pay this plaintiff a commission as compensation.

3. Relying upon said representations made by the said defendant, to this plaintiff, this plaintiff rendered work, labor, services and effort as a real estate agent from on or about the fifteenth day of August, 1923, until and after March seventeenth, 1924. On March seventeenth, 1924, this plaintiff still relying on said false and intentional representations, procured the Stern Realty Company, a purchaser ready, able and willing to purchase the premises owned by the defendant upon terms agreeable to the defendant and plaintiff on that day procured the execution of a written contract for the sale of said premises, from the defendant to the Stern Realty Company.

4. The terms of said contract provided among other things as follows:

> "It is further understood by the parties hereto, that Harry Mahlenbrock was the agent who consummated this sale and that there is due him a commission of $1,750.00 payable at the conveyance of the premises."

5. Upon procuring the execution of said written contract between the aforesaid parties and upon procuring a purchaser for said premises on terms agreeable to the defendant who was ready, able and willing to purchase said premises, this plaintiff became entitled to commissions and compensation for said services in the sum of ($1750) seventeen hundred and fifty dollars.

6. Thereafter and upon the date set for the closing of title by the terms of said contract it came to light that the defendant did not in truth and fact own a clear and marketable title to the premises which he had employed this plaintiff to sell and as a result thereof, the said Stern Realty Company refused to take the title which the defendant had.

7. Plaintiff has demanded of the defendant payment of said commissions in the sum of seventeen hundred and fifty dollars ($1750.00) but the defendant has refused to pay the same or any part thereof on the ground that under the terms of said contract no conveyance ever took place.

8. As result of the fraud as aforesaid practiced upon this plaintiff by the defendant this plaintiff has sustained damages in the sum of seventeen hundred and fifty dollars ($1750.00) with interest from the fourteenth day of March, 1924.

WHEREFORE, plaintiff demands judgment against the defendant in the sum of seventeen hundred and fifty dollars ($1750.00) with interest from the fourteenth day of March, 1924, and costs of Court.

Dated, Jersey City, N. J., May 19th, 1926.

ARMSTRONG & MULLEN,
Attorneys for Plaintiff.

Answer.

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

HARRY H. MAHLENBROCK,
Plaintiff,

v.

STONEHELL REALTY CO., a corporation of New Jersey,
Defendant.

} Action at Law.

The defendant a corporation of the State of New Jersey having its principal place of business in Jersey City, New Jersey answering the complaint of the plaintiff says that:

ANSWER TO FIRST COUNT.

1. It denies Paragraph One.
2. It denies Paragraph Two.
3. It admits Paragraph Three.
4. It admits Paragraph Four.
5. It admits Paragraph Five in that the Stern Realty Company refused to accept title to the

premises but denies that the title of the defendant thereto was defective and unmarketable.

6. It admits Paragraph Six.
7. It denies Paragraph Seven.
8. It denies Paragraph Eight.
9. It admits Paragraph Nine.

ANSWER TO SECOND COUNT.

1. It denies Paragraph One.
2. It denies Paragraph Two.
3. It denies Paragraph Three.
4. It denies Paragraph four.
5. It denies Paragraph Five.
6. It denies Paragraph Six.
7. It admits Paragraph Seven.
8. It admits Paragraph Eight.
9. It denies Paragraph Nine.
10. It admits Paragraph Ten.

ANSWER TO THIRD COUNT.

1. It denies Paragraph One.
2. It denies Paragraph Two.
3. It denies Paragraph Three.
4. It admits Paragraph Four.
5. It denies Paragraph Five.
6. It denies Paragraph Six.
7. It admits Paragraph Seven.
8. It denies Paragraph Eight.

Answer.

SEPARATE DEFENSE TO ALL COUNTS.

1. This defendant says that under the terms of the contract set forth in the complaint, the said commission of $1750.00) was only payable to the plaintiff upon the actual conveyance of the premises.

2. No conveyance of the premises was ever affected.

3. There is nothing due from the defendant to the plaintiff under the contract set forth in the complaint.

SEPARATE DEFENSE TO SECOND COUNT.

1. This defendant says that said plaintiff acted in the transaction described in the second count of the complaint as a real estate agent selling the land for or on account of the owner and is barred from receiving any commission therefor unless the authority for selling such land is in writing, signed by the owner or his authorized agent with the rate of commission stated thereon, by virtue of the Statute in such case made and provided which said statute is entitled "An act for the prevention of fraud and perjuries, March 27th, 1874" with the acts amendatory thereto and supplementary thereof.

2. By virtue of said statute the plaintiff cannot recover on any alleged contract for the reasonable value of his alleged services.

ROBERT CAREY,
Attorney for Defendant.

Reply.

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

HARRY H. MAHLENBROCK,
Plaintiff,

v.

STONEHELL REALTY CO., a corporation of New Jersey,
Defendant.

} Action at Law.

Plaintiff by way of reply to the answer filed by the defendant herein says that:

REPLY TO SEPARATE DEFENSE TO ALL COUNTS.

1. Plaintiff denies each and every allegation contained in Paragraph One of the defendant's answer under the heading of separate defense to all counts.

2. Plaintiff admits that no conveyance of the premises was ever effected, as set forth in Paragraph Two in the defendant's answer under separate defense to all counts, but alleges that other rights and benefits were substituted by the defendant and the Stern Realty Company in place of the benefit of conveyance and that the failure of the conveyance was caused solely by the failure of the defendant to perform its contract.

3. Plaintiff denies each and every allegation contained in Paragraph Three of the defendant's answer under the heading of separate defense to all counts.

Postea.

REPLY TO SEPARATE DEFENSE TO SECOND COUNT.

1. Plaintiff admits so much of Paragraph One set up in the defendant's answer under the heading of separate defense to second count, as states that plaintiff acted in the transaction described in the second count of the complaint as a real estate agent selling the land for or on account of the owner, but denies the balance of said paragraph except the existence of the statute.

2. Plaintiff denies each and every allegation contained in Paragraph Two of the defendant's answer set up under separate defense to second count.

ARMSTRONG & MULLEN,
Attorneys for Plaintiff.

Postea.

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

HARRY H. MAHLENBROCK,
Plaintiff,

v.

STONEHELL REALTY CO., a Corporation of New Jersey,
Defendant.

} Action at Law.

This case was tried before Honorable Henry E. Ackerson, Circuit Court Judge, with a jury, at the Hudson Circuit, on the twentieth day of January, nineteen hundred and twenty-seven.

Trial.

The said Judge directed the jury to return a verdict against the defendant and in favor of the plaintiff for two thousand twelve dollars and fifty cents ($2,012.50) and the jury did accordingly return a verdict against the defendant and in favor of the plaintiff for the said sum of two thousand twelve dollars and fifty cents ($2,012.50).

Dated, Jersey City, N. J., January 24th, 1927.

HENRY E. ACKERSON, JR.,
Judge.

Trial.

HUDSON COUNTY SUPREME COURT.

Before—Hon. HENRY E. ACKERSON, JR., Judge and a Jury.

HARRY H. MAHLENBROCK
v.
STONEHELL REALTY COMPANY.

Jersey City, January 20, 1927.

APPEARANCES:

ARMSTRONG & MULLEN, Esqrs., for the Plaintiff, by ARTHUR MULLEN, Esq.
ROBERT CAREY, Esq., for the Defendant.

A jury was duly empanelled; being found satisfactory, they were sworn.
Counsel opened to the jury.

HARRY H. MAHLENBROCK, called as a witness for the plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. Mullen:

Q. Mr. Mahlenbrock, where do you live? A. 716 Ocean Avenue; my office is 742 Ocean Avenue.

Q. What is the nature of your business? A. Real estate and insurance.

Q. On the 15th day of August, 1923, were you a duly licensed real estate broker in New Jersey? A. Yes, sir.

Q. Do you know the defendant Stonehell Realty Company? A. Yes, sir.

Q. Of what does the Stonehell Realty Company consist? A. Mr. Stone and Mr. Mitchell.

Q. Do you also know the Stern Realty Company? A. Yes, sir.

Q. And who does that business consist of? A. I believe it is Moses Stern and Mr. Jacob Wacker, who are the principal stockholders, as far as I know.

Q. On or about the first day of August, or during the month of August, 1923, did the defendant Stonehell Realty Company retain you as agent to sell certain property owned by them?

Mr. Carey: I object to that word "retained," as rather an expression of a conclusion.

Mr. Mullen: I withdraw that.

Q. When did you first have a conversation with the defendants, the two gentlemen who composed the Stonehell Realty Company, with reference to the sale of property out of which this commission

arose? A. Well, it was some time during August, 1923, that I called on Mr. Stone about his garages.

Q. What took place at that meeting? A. I asked Mr. Stone if he wanted to sell this proposition down there and he said he had not made up his mind, he didn't know what he was going to do. In fact he said he didn't know what price to put on it.

Q. Did you see the property you were undertaking to sell? A. Yes, sir.

Q. What was the nature of it? A. Individual garages.

Q. How many? A. I don't know exactly. I believe about fifty-eight.

Q. What price did Mr. Stone ask? A. Mr. Stone didn't ask; because I have had a lot of experience with individual garages having made several sales. Mr. Stone didn't know exactly what to ask for the garages—

Q. What did you do? A. I said, "If you get seventy thousand dollars you will be getting a good price."

Q. Did he say anything to you with reference to acting for him as agent? A. He told me if I could produce a purchaser for it, to go ahead.

Q. Thereafter did you ever find a purchaser or prospective purchaser? A. I found several, well one was Michael Hockstein.

Q. When did you procure him? A. Some time in December, I believe, the next year.

Q. During the period between the time you had your first conference with Mr. Stone and the time you met Mr. Hockstein, did you do anything with reference to the property? A. Yes, I advertise in the paper, a blind ad, for four or five months.

Q. Did you do anything else? A. I brought several clients down to look at it.

Q. Did you introduce those clients to Mr. Stone? A. No, not all of them.

Q. What else did you do besides advertising and taking down several persons? A. Mr. Hockstein agreed to—

Mr. Carey: I object to what Mr. Hockstein said.

The Court: Who is he?

The Witness: A prospective purchaser.

Q. Just say what you did. Did you ever ask Mr. Hockstein to make you an offer for the property? A. The offer made in my office there on January 2nd, Mr. Stone, and I believe we also saw Mr. Mitchell, was sixty thousand dollars for the property; in other words, if I got all cash above the first mortgage, they were going to sell it at sixty thousand dollars.

Q. All cash above the first mortgage meant how much cash at the time? A. Thirty-five thousand dollars cash.

Q. And this Mr. Hockstein was a prospective purchaser on those terms? A. Yes, sir.

Q. What did Mr. Stone do about that; did they enter into an agreement at that time? A. They agreed to make the sale provided they got thirty-five thousand dollars cash. When they met in my office, why Mr. Hockstein didn't tell me that he was trying to ring in second mortgages in lieu of cash, for all cash.

Q. And then what happened? A. Well, they made no deal. Mr. Stone and Mr. Hockstein could not agree. In other words, if Mr. Hockstein told me he had second mortgages I would have cashed in on the second mortgages and made the deal.

Q. At that time this present defendant was willing to sell the property for sixty thousand dollars cash? A. Yes, sir.

Q. After that when did you next bring a prospective purchaser to Mr. Stone? A. On and off, when I had buyers out for individual garages I showed them the place.

Q. Thereafter did you ever bring any other person to see Mr. Stone? A. I brought Mr. Jacob Wacker, he was to buy the place.

The Court: Why worry about all these other people?

Q. When did you bring the next party down to see Mr. Stone? A. Some time in February.

Q. Who was that party? A. I brought Moses Stern down there.

Q. He is one of the gentlemen who compose the Stern Realty Company? A. Yes, sir.

Q. Was the contract entered into between Moses Stern and the Sonehell Realty Company? A. Not then. A contract was to be entered into, trying to arrange a contract between Jacob Wacker and the Stonehell Realty Company.

Q. And when was that first meeting? A. About February; I could not tell you the exact dates.

Q. What year? A. I believe it was 1925.

Q. Now, what did you do after that towards bringing about this contract? A. I brought Mr. Stern down to see Mr. Stone, and Mr. Stone agreed to sell the garages to Jacob Wacker for seventy thousand dollars, and I was to get two and a half per cent. commission.

Mr. Carey: I ask that that be stricken out.

The Court: Yes, that would have to be in

writing. The eventual terms would have to be in writing.

Was that the one which resulted in the sale?

The Witness: Yes, sir.

The Court: Haven't you got a written memorandum of that?

Mr. Mullen: The contract has been admitted by the pleadings.

The Court: There is no contract in evidence.

Mr. Mullen: It has been admitted by the pleadings.

The Court: Even then, we ought to have a look at it. We can't take the thing out of the air.

Mr. Mullen: Wasn't there a motion made to strike out the testimony?

Mr. Carey: No.

Mr. Mullen: Or an objection?

Mr. Carey: I object to the question, and I ask to strike out the last answer, because in order to establish any such fact it would have to be in writing under the statute.

Q. Was there an agreement entered into that day? A. Yes, sir.

Q. And that was an agreement between Mr. Stern and the Stonehell Realty Company? A. It was an agreement between the Stonehell Realty Company and me.

Q. What was the nature of that agreement?

Mr. Carey: I object to what the agreement was. If he has any agreement produce it.

Mr. Mullen: A notice to produce has been served upon Mr. Carey for that.

Mr. Carey: We have no such agreement; never had.

Mr. Mullen: Will counsel state whether notice to produce such agreement has been served upon him?

Mr. Carey: No, I don't know of any such notice.

Mr. Mullen: I call upon Mr. Carey to produce in accordance with Paragraph 2 of the notice to produce served upon him in accordance with the act, such agreement?

Mr. Carey: We say that there is not and never has been any such contract as referred to by counsel.

Mr. Carey: I submit that the only contract that we are interested in is the one that they are suing upon in the complaint, and I object to the question as to what is the nature of this other agreement.

The Court: Objection sustained.

Adjourned to 10 A. M. January 21, 1927.

January 21, 1927, 10 A. M.

Trial of the case resumed pursuant to adjournment.

HARRY H. MAHLENBROCK resumed the stand.

Direct examination by Mr. Mullen (continued):

Q. What date did you procure the Stern Realty Company, or one of its members, to sign an agreement with the Stonehell Realty Company? A. About the first of February.

Q. What year was that? A. 1925.

Q. Where was that contract signed? A. Why,

I don't know where that first contract was signed, but Mr. Scheetz handed me the signed contract.

The Court: Who is he?

The Witness: In Judge Carey's office.

Q. About what date was that? A. Some time in February, the first part of February, I could not tell you the exact date.

Q. Between what parties was that contract? A. Between Jacob Wacker and the Stonehell Realty Company.

Q. And the amount of money?

Mr. Carey: I think the contract will have to speak for itself.

Mr. Mullen: It has been consented that a certified copy of the contract between Jacob Wacker and the Stonehell Realty Company be admitted in evidence.

Mr. Carey: This is not the contract. This is the contract (indicating another copy).

Q. This purports to be a contract between the Stonehell Realty Company and Jacob Wacker; is that the contract you referred to now? A. Yes, sir.

Mr. Mullen: I offer that contract in evidence.

Mr. Carey: I have no objection.

(Accepted and marked as Plaintiff's Exhibit P-1 of this date.)

Q. This is a contract between the Stonehell Realty Company and Jacob Wacker, being one of the persons who afterwards was a member of the Stern Realty Company, is that correct? A. Yes, sir.

Q. Now, thereafter, Mr. Mahlenbrock, was another contract executed? A. Yes, sir.

Q. And between what parties was that contract executed? A. Between the Stern Realty Company and the Stonehell Realty Company.

Q. I show you what purports to be the certified copy of that contract, and ask you if you recognize it? A. Well, I only got a glance at it.

Mr. Carey: We admit this is a certified copy.

Mr. Mullen: I offer this contract in evidence.

(Accepted and marked as Plaintiff's Exhibit P-2 of this date.)

Mr. Mullen: That is the reason I am trying to straighten out the court on this. This last contract is dated March 17, 1924. Now on Plaintiff's Exhibit 1, which is the first contract offered, there is the absence of a date where the date should be at the beginning of the contract. The acknowledgment, however, is by E. P. Henry, as secretary, and is dated on the 6th day of February, 1924.

Q. I would ask you, Mr. Mahlenbrock, if you can fix approximately the date when that first contract was executed? A. Well, I could not tell you the exact date on that occasion, but in Judge Carey's office they handed this contract to have it signed by Jacob Wacker to me.

Q. Did you procure Mr. Wacker's signature to that contract? A. I did not.

Mr. Carey: It is not signed by Mr. Wacker, you will note.

Mr. Mullen: No.

Q. Would you say that this contract is supposed to be or should have been dated on the 6th day of February, 1924?

Mr. Carey: Objected to as entirely immaterial.

The Court: Sustained.

Q. Can you give us what the date was when this contract was delivered to you as an executed instrument of the Stonehell Realty Company?

Mr. Carey: I object to that as immaterial. The contract speaks for itself.

Q. Do you know that date? A. Not the exact date.

Q. Well, about what date? A. It must have been a day or two later than it is dated.

Q. On the 6th of February? A. Yes, sir.

The Court: A day or two later?

The Witness: Mr. Scheetz, of Judge Carey's office got Mr. Mitchell to sign this. Then I went down to Judge Carey's office, and they handed me the contract to have it signed by my clients.

The Court: I don't see the pertinency of it yet.

Q. Was this contract executed and delivered to you some time during the month of February, 1924? A. Yes, sir.

Q. How long a time elapsed between the execution and delivery of that contract to you and the execution and delivery of this contract, showing you now Plaintiff's Exhibit P-2? A. Well, I took this contract out to Mr. Wacker's lawyer. Mr. Wacker's lawyer did not like the contract the way it was drawn.

Q. Who was Mr. Wacker's lawyer? A. Mr. Dembe.

Q. In Bayonne? A. Bayonne.

Q. And then what did you do? A. Then they were to get together and draw up a contract between Carey's office and Dembe's office in Bayonne.

Q. Between what parties was that new contract to be drawn? A. Mr. Dembe insisted that it be in the Stern Realty Company.

Q. Did Mr. Carey still continue to represent the Stonehell Realty Company? A. Yes, sir.

Q. And then this contract was drawn? A. Yes, sir.

Q. And when was this contract drawn? A. This contract was drawn between the lawyers.

Q. What date was that contract drawn? A. I think about a month later, because I made several trips back and forth.

Q. This contract P-2 was drawn about a month later than this contract P-1, which was drawn about the 6th day of February, 1924? A. Yes, sir.

Q. That would make this contract then about the 6th day of March, 1924, is that correct? A. Well, approximately, I don't know the exact dates on it.

Q. But that is approximately right? A. Yes, sir.

Q. So that this date on the contract, March 17, 1924, is not correct? A. I don't think it was as late as that in March.

Q. Now, this contract is dated March 17, 1924, and by its terms the title to be delivered on March 15, 1924. Now, what have you got to say as to that?

Mr. Carey: I submit that that is immaterial, irrelevant and incompetent. The only

question is the rights of the plaintiff under the complaint.

The Court: Isn't that so? The contract must speak for itself.

Mr. Mullen: This contract contains the same provision that the preceding contract contained with reference to the payment of commissions. It states: "It is further understood by the parties hereto that Harry Mahlenbrock was the agent who consummated this sale, and that there is due him a commission of $1,750, payable at the conveyance of the premises"; and by the terms of this contract title was to pass on the 15th day of March, 1924, and the contract is dated March 17th, 1924.

Q. Now, Mr. Mahlenbrock, did you ever attend at the office of Judge Carey, or any other law office, for the purpose of observing the passing of title under the terms of this contract? A. I don't understand that question.

Q. Were you ever called upon to attend at the office of any lawyer for the purpose of having this title passed? A. No, sir.

Q. You never were? A. No, sir.

Q. Were you present at the time this provision was put in this contract, or the preceding contract with reference to the payment to you of the commissions? A. On the first contract I was there when Mr. Scheetz put it in the contract.

Q. Did you agree to it or not; was that satisfactory to you or not? A. Yes, sir.

Q. At that time did you surrender to Mr. Scheetz your commission agreement for the payment of commissions which you had prior to that time?

Mr. Carey: I object to that. There is no proof of any such agreement in the case.

The Court: Sustained.

Q. Were you ever notified prior to the time that this contract was made, marked Exhibit P-1, that there was a defect of any kind whatsoever in the title offered or contracted to be sold by the Stonehell Realty Company?

Mr. Carey: I object to that as immaterial, irrelevant and incompetent.

The Court: If your purpose is to show any representation, why don't you ask him was any representation ever made to you by the Stonehell Realty Company prior to the execution of Exhibit P-1, that the title to the Stonehell Realty Company was defective?

Mr. Carey: I object to that as immaterial, irrelevant and incompetent. The question is incapable of being answered.

The Court: Yes, it cannot be answered.

Q. Did Mr. Stone of the Stonehell Realty Company ever make any representations to you as to the condition of that title?

Mr. Carey: That is objected to as immaterial, irrelevant and incompetent.

The Court: Why?

Mr. Carey: The basis of his claim at all, if any, is on the contract.

The Court: There is a third count alleging some kind of fraud.

Mr. Carey: I withdraw the objection.

Q. Was any representation made to you as to the condition of the title prior to the execution of

that contract by Mr. Stone of the Stonehell Realty Company? A. No.

Q. Was any notice given to you by Mr. Stone of the Stonehell Realty Company as to the condition of the title after the execution of the contract? A. No, sir.

Q. When did you first learn that the title had failed to pass because of defects existing in the title?

Mr. Carey: I object to that as immaterial when he first learned. There is no proof that title ever failed because of any defects.

The Court: That is true. Sustained.

Q. Do you know why this title did not pass?

Mr. Carey: I object to that as immaterial whether he knows or not. That is a conclusion.

The Court: It is pretty much of a conclution unless you ask him to state what knowledge, if any, he had; not what he knows as to why title did not pass; then he may make his own conclusion. State all you know about the situation.

Q. State all you know concerning the reasons why title did not pass?

The Court: Not what somebody told you. Did you participate in this situation? Were you there when negotiations respecting the passing of title was going on?

The Witness: No, sir.

Q. You were not there? A. No, sir.

Q. When did you learn first of the failure of the title to pass? A. I first learned, naturally—

The Court: When, March, April, May or June?

The Witness: About the latter part of April, from Mr. Dembe's office.

Q. What year? A. I am not quite sure.

Q. It was April after the date of the contract? A. After the date of the contract.

The Court: You think that was in what month?

The Witness: About the latter part of April.

The Court: That is 1924?

The Witness: 1924, the same year the contract was signed.

Q. Do you know why the differences between the Stonehell Realty Company and the Stern Realty Company, how they were eventually settled, because of the failure of this title to pass?

Mr. Carey: I object to that. That calls for a conclusion and opinion.

The Court: You are amply protected by the next question. I am going to let him answer yes or no. Do you know?

The Witness: I know that they settled up.

The Court: Do you know how?

The Witness: I don't know.

Q. What were the names of the purchasers you procured to purchase the property mentioned in this contract? What is the name of the man or men who constituted that corporation, of being the corporation? A. Mr. Jacob Wacker and Mr. Moses Stern.

Q. They were the persons who constituted the

Stern Realty Company, and this is the contract that was substituted in the place of the other contract? A. Yes, sir.

Cross examination by Mr. Carey:

Q. Let's see. You became a licensed real estate broker in July, 1923? A. About that time.

Q. I thought you said that was about the time? A. 1923, yes, about that time.

Q. And you say that was about the time you brought this man Hockstein to the attention of Mr. Sone, wasn't it; didn't you say in July, 1923? A. No, not in July.

Q. When was it you brought Hockstein, this man you mentioned who didn't have any money? A. Why, some time in December.

Q. In December, was it, or July? A. Well, it wasn't in July I brought Mr. Hockstein there.

Q. Sure about that; December? A. Some time in December. We met in my office in January.

Q. Let's see; how did it happen that Hockstein came to you and told you he wanted to buy the property? A. No, I submitted it to him.

Q. Then you called up Mr. Stone to come to your office? A. No, I saw Mr. Stone before he came to my office.

Q. You asked Mr. Stone to come to your office? A. Yes, sir.

Q. Is that the time you said there was a sixty thousand dollar cash proposition made? A. Yes, sir.

Q. Who made that sixty thousand cash proposition? A. Mr. Hockstein.

Q. Did he have sixty thousand dollars cash? A. I thought he had sixty thousand dollars.

Q. Isn't it a fact that you called Mr. Stone into

your office, and isn't it a fact you said to Mr. Stone, "I thought I was going to have a purchaser for your property, but he hasn't got any money"; do you remember that? A. No, sir.

Q. Did you tell him that the man you had hadn't any money, but had a lot of second mortgages he wanted to trade in? A. Mr. Hockstein told me down there—

Q. Right in your presence? A. Yes.

Q. That he didn't have any money? A. Yes, he had cash.

Q. More than ten dollars? A. Yes, sir.

Q. Don't you know all he had was a lot of second mortgages and he tried to get Mr. Stone to make a deal to sell this property for the second mortgages that the man Hockstein said he owned? A. No, sir.

Q. Didn't Mr. Stone say, "Nothing doing," and didn't you say, "I am sorry I brought you up here"? A. I might have said that.

Q. You might have been sorry you brought him up there because he didn't have anything when he got there? A. Yes, sir.

Q. You never saw Mr. Mitchell about this property? A. I believe I saw Mr. Mitchell about a survey.

Q. Why? A. In the course of the negotiations with Mr. Hockstein.

Q. Do you mean to say you saw Mr. Mitchell while you were negotiating with Hockstein, the fellow who didn't have any money? A. I didn't know he didn't have any money. He said he wanted to pay cash for it.

Q. He didn't have anything but second mortgages? A. That's what I was trying to tell you.

Q. And this was the man that wanted to pay

cash. You said you asked Mr. Mitchell for a survey, did you ever see Mr. Mitchell in your life about this property? A. When, in my negotiations?

Q. Did you ever speak to Mr. Mitchell in your life about it?

The Court: About this property?
The Witness: About this last property?
The Court: Yes.
The Witness: No, sir.
The Court: Who was Mitchell?
The Witness: He is a member of the Stonehell Realty Company.

Q. Didn't you know Mr. Mitchell was the president of the Stonehell Realty Company? A. Yes, sir.

Q. And you knew where Mr. Mitchell's office is here on Bergen Avenue? A. Yes, sir.

Q. Now, after this December-Hockstein performance, the next time you saw Mr. Stone or anybody about this property was when you brought Wacker down to his office, or when you brought Moses Stern to his office? A. Yes, Moses Stern.

Q. You didn't bring Wacker, you brought Moses Stern? A. Yes, sir.

Q. Or between the time, you had not spoken to Mr. Stone about this property or any property, did you? A. Yes, sir.

Q. When? A. I was talking to him—between what time?

Q. Between the time that Hockstein came and the day that you walked into Mr. Stone's office with Moses Stern? A. Yes, sir.

Q. Where was it? A. In his store on West Side Avenue.

Q. What occasion did you have to be in Mr. Stone's store between that time? A. I dropped in there and asked if he still had his garages for sale.

Q. You didn't know whether he had them for sale, and you stopped in to see if his garages were still for sale? A. Yes, sir.

Q. And then one day you dropped in with Moses Stern? A. Yes, sir.

Q. When Moses Stern came in you suggested that he would like to buy these garages if they were for sale, is that right? A. Yes, sir.

Q. What did he say? Did he tell you then that he would have to talk to Mr. Mitchell about it? A. Yes, sir.

Q. Did you say anything then about what they would sell for? A. At that time?

Q. Yes. A. Well, I told him I could get him seventy thousand dollars with part cash.

Q. Did you tell him how much cash? A. Well, that is one reason why Moses Stern went with me to dicker on the cash proposition.

Q. Did you tell him what cash? A. Mr. Stone?

Q. Yes. A. I believe we offered ten thousand dollars cash.

Q. Did he call up Mitchell at the office then, on the phone? A. Yes, sir.

Q. After he called up Mr. Mitchell on the phone, did he say they would sell for seventy thousand dollars, ten thousand dollars cash, provided they got a certain kind of terms which you then fixed? A. Yes, sir.

Q. Did you then pay the one thousand dollars on deposit? A. I believe there was one thousand dollars paid right then and there.

Q. Don't you remember there was a check drawn right then and there for one thousand dollars? A. Yes, sir.

Q. Isn't that the first transaction you had outside of the time when you called him up to see a man named Hockstein in your office? A. The first transaction?

Q. Yes, Mr. Stone? A. Well, I procured a purchaser.

Q. Did you know Wacker? A. Yes, sir.

Q. Well? A. Yes, sir.

Q. Did you know Moses Stern? A. Yes, well, I know him; yes, sir.

Q. When you paid the one thousand dollars was anything said then about drawing up the contract for the sale? A. Yes, sir.

Q. Was it referred then to my office? A. Yes, sir.

Q. You came to my office, didn't you? A. Yes, sir.

Q. And did you bring Moses Stern or Wacker? A. No, sir.

Q. You came alone, didn't you, to get a contract from me? A. Yes, sir.

Q. Mr. Scheetz telephone while you were there to get the details on which the contract was to be drawn from Mr. Mitchell? A. I don't remember that.

Q. This contract was drawn, this contract that is Marked Exhibit P-1, wasn't it, between the Stonehell Realty and Mr. Wacker? A. Yes, sir.

Q. That is the contract? A. That is the original contract.

Q. Was there a discussion at that time as to commissions, and didn't you say you would like a memorandum put into the contract so that the commissions might be paid you, and didn't Mr. Scheetz say that there was to be no commissions unless the contract was closed, the conveyance made, and we got our money?

Mr. Mullen: I object to that question.

The Court: Why?

Mr. Mullen: Because he seeks to change the verbiage of that written contract by this answer.

(Argument.)

Mr. Mullen: Objection withdrawn.

(Question read as follows): "Was there a discussion at that time as to commissions, and didn't you say you would like a memorandum put into the contract so that the commissions might be paid you, and didn't Mr. Scheetz say that there was to be no commissions unless the contract was closed, the conveyance made, and we got our money?"

A. Commission agreement was already arranged between Mr. Stone and me, what I was to get.

Q. Just answer my question, please? A. There was no discussion as to commission, but I agreed with Mr. Scheetz putting that in the contract, the way he wanted it in there.

Q. Then there must have been something said about it, if you agreed to have him put it in the contract the way he wanted it, mustn't there? A. I could not get the contract unless I let him put it in his way.

Q. You agreed to it? A. Yes, sir.

Q. No question about it, was there? A. No, sir.

Q. That was your understanding about it, wasn't it? A. After the contract was signed, yes, sir.

Q. That was your understanding about it? A. Yes, sir.

Q. The contract was handed then to you, wasn't it? A. Yes, sir.

Q. To be signed by Mr. Wacker? A. Yes, sir.

Q. It never was signed even by Mr. Wacker? A. Not this contract.

Q. Didn't you come back later, a month later, or over a month later, and present to Mr. Scheetz this paper witnessed by you. That is your handwriting on that paper (handing witness)? A. Yes, sir.

Q. You witnessed that? A. Yes.

Q. The signature of Mr. Wacker? A. Yes, sir.

Q. Transferring any interest he might have in the whole transaction to the Stern Realty Company, is that right? A. Yes, sir.

Q. That was on the 13th day of March, 1924, wasn't it? A. Yes, sir.

Q. That was drawn up in my office? A. No, sir.

Q. You didn't get it from our office, did you? A. No, sir.

Q. You brought it to our office, didn't you? A. Yes, sir.

Q. That was the day after the time the original said to pass title to Wacker and the contract was not signed? A. I believe so; I am not quite sure.

Q. Then on the strength of that you asked to have the contract redrawn to the Stern Realty Company, didn't you? A. I don't believe I asked for that.

Q. You came down to the office with this? A. As the agent between the parties concerned.

The Court: That was your purpose in bringing that down?

The Witness: Yes, sir.

Q. Mr. Scheetz then drew a contract, changed it, between them and the Stern Realty Company, in

line with this other contract? A. I don't believe Mr. Scheetz drew the contract.

Q. Who drew the contract? A. Mr. Dembe, I believe, drew the contract.

Q. If Mr. Dembe drew it, it contained the same terms as the other contract? A. Yes, was practically the same as far as I know.

The Court: You accepted the terms of the last contract with respect to commissions because they were exactly the same?

The Witness: Yes, sir.

The Court: Exactly the same, word for word; you claim your commission arose out of this last contract.

The Witness: Absolutely.

Q. You attended to the execution of the contract, didn't you? A. The last contract I am not positive of.

Q. You are not sure? A. I am not sure whether I witnessed the signatures or not of the last one.

The Court: The provision in there about your commission was satisfactory to you; you assented to it and agreed to it, is that right?

The Witness: Yes, sir.

Mr. Carey: I ask that that be marked for identification.

(Marked Exhibit D-1 for identificataion of this date.)

Redirect examination by Mr. Mullen:

Q. On cross examination you were asked if you consented to Mr. Scheetz writing into the contract a provision about the commissions in the way he

wanted, and you said all right; what did you mean by that?

The Court: No, don't tell him. Don't lead him.

Q. Was it your understanding at that time that this agreement was to be written in that form with reference to commissions?

Mr. Carey: I object to that as immaterial what he understands.

Q. When you stated he was to draw a contract up the way he wanted, was it your idea he was to write that paragraph there as it is written with regard to commissions? A. No, sir.

Q. Now at the time that he asked, or rather, at the time he delivered that contract to you or the contract preceding it, what did he demand of you before he delivered it to you?

The Court: He delivered what?

Mr. Mullen: I asked what did he demand of him before he would deliver that contract to him?

A. I had an agreement between Mr. Stone and me, as treasurer, I believe; I am not quite sure.

Q. Of the company? A. Anyhow it stated I was to get two and a half per cent.

The Court: You surrendered that?

The Witness: I surrendered it to get this contract. I had to surrender that agreement with Stone before they would give me the contract.

The Court: You did?

The Witness: Yes, sir.

The Court: You were satisfied?

The Witness: Yes, I had to be satisfied.

Q. When you surrendered that agreement, was that agreement in writing or not? A. In writing.

Q. When you surrendered that agreement to Mr. Scheetz, what did he say to you if anything, that made you deliver that commission agreement?

Mr. Carey: I object to that as incompetent, irrelevant and immaterial.

The Court: At this time I sustain the objection.

Q. Did Mr. Scheetz say anything to you with reference to your commissions, which I thought you had told the Court so far?

Mr. Carey: I object to that on the ground that it is immaterial.

A. Nothing that I know of.

MOSES STERN, sworn for the plaintiff.

Direct examination by Mr. Mullen:

Q. Where do you live? A. 379 State Street, Perth Amboy.

Q. What is your business? A. Real estate.

Q. Were you a member of the Stern Realty Company in the year 1924? A. Yes; I am president of the Stern Realty Company.

Q. You entered into this contract with the Stonehell Realty Company to purchase these garages, didn't you? A. Yes, sir.

Q. Now I show you that contract, a copy of the contract which was executed between you and the Stonehell Realty Company; can you tell me why you refused to take title to the premises that were

contracted to be conveyed to your company under that contract?

Mr. Carey: I object to him stating his reasons and opinion. If he can state any facts I imagine that might be relevant.

The Court: Well, I think you had better bring out the facts. It is perfectly proper to say what he did.

Q. Do you know why your company did not accept title to this property? A. Because Mr. Dembe told me the title has got to be straightened out.

Mr. Carey: I object to what Mr. Dembe told him.

Q. Were you ready to buy this property? A. Yes, sir.

Q. Did you have the money to buy this property with? A. Yes, sir.

Q. Were you ever notified to come and close the title? A. That was through the lawyer.

Q. Mr. Dembe was your attorney? A. Yes, sir.

Q. You were prepared at all times to comply with the terms of that contract, to deliver the cash and the mortgages required by the contract if the deed was delivered to you? A. Yes, sir.

Cross examination by Mr. Carey:

Q. You personally didn't have any money? A. Yes, I had money.

Q. Did you at that time? A. I had money, yes, sir.

Q. Don't you know that you were practically busted about that time? A. I was not busted at that time.

Q. Don't you know just prior to then you were? A. I am not busted today, either.

Q. You are down at Perth Amboy today. Why did you leave Jersey City? A. I bought a business there.

Q. You bought a business down in Perth Amboy? A. Yes, sir.

Q. You were a real estate operator up here? A. I am still an operator, too.

Q. Let's see if you were so financially strong at that time. You called at the office of Mr. Stone with real estate agent Mahlenbrock, didn't you? A. Yes, sir.

Q. To see whether you could buy that property, is that right? A. Yes, sir.

Q. You were going to buy for speculation purposes? A. Yes, sir; everybody was speculating at that time.

Q. What? A. At that time I bought.

Q. You didn't have any speculations then? A. Yes, everything was speculation that time.

Q. And you were going to contract to speculate that one? A. Well, I don't know, maybe for speculation, maybe somebody gives me a profit.

Q. You didn't have any money to put through a contract at that time? A. I had money.

Q. The day you were in Mr. Stone's office? A. I was giving a deposit for one thousand dollars in his store.

The Court: Did you have the money necessary?

The Witness: Yes, sure.

Q. Don't you know all you had was five hundred dollars, and five hundred dollars was Wacker's?

A. No, I gave my own check for one thousand dollars, and Mr. Stone went right down to the bank and certified it.

Q. Didn't Mr. Wacker put up five hundred dollars of it to you? A. No.

Q. When the contract was brought to you to be signed, it was brought in the name of Wacker, wasn't it? A. Yes, sir.

Q. Why in the name of Wacker? A. We were supposed to buy together.

Q. Why didn't you put your name in? A. I put my name there.

Q. Don't you know you had the first contract made out in the name of Wacker, not Stern at all? A. I know the first contract Mr. Stone gave me read only one thousand dollars, and which contract got to be drawn, and that is in Judge Carey's office.

Q. Didn't you ask to have the contract drawn in the name of Wacker? A. I don't remember that.

Q. Didn't Mr. Mahlenbrock bring the contract down to you in the name of Wacker? A. When he brought it down I changed to the Stern Realty Company.

Q. That was a month afterwards? A. No, no.

Q. Now, see this paper, Exhibit D-1 for identification, signed by Wacker and witnessed by Mahlenbrock, dated March 13th, over a month afterwards. Isn't that the time that you determined to get the title taken in the name of the Stern Realty Company? A. I will tell you why it was.

Q. Isn't it so. Isn't that right? A. I don't know by that paper.

Q. You remember that paper? A. Yes, sir.

Q. Wasn't that the time you determined to have

the title taken, to have it taken in the name of the Stern Realty Company? A. Yes, sir.

Q. And Wacker and you were the Stern Realty Company, is that right? A. No, he is not in the Stern Realty Company.

Q. He isn't? A. No, me and Mr. Dembe.

Q. Just you and Mr. Dembe; you have three directors? A. I am president of the company, Mr. Charles Dembe, and I think my wife is the other.

Q. You are not sure about that, are you? A. No.

Q. Then a new contract was drawn, and was signed by the Stern Realty Company, wasn't it? A. Yes, sir.

Q. After the 13th day of March? A. Yes, sir.

Q. After that paper was signed? A. Yes, sir.

Q. Is that right? A. Yes, sir.

Q. After that there was some little trouble reported to you about the title, wasn't there? A. Yes, sir.

Q. And weren't you told by Mr. Scheetz that whatever that trouble was that the title could be easily fixed up and would be? A. I didn't see Mr. Scheetz until he was down at Dembe's office, and got that straightened out.

Q. Positively? A. Yes, sir.

Q. You remember when you were down at Dembe's office, you were waiting to close the title? A. I was waiting every day to close the title.

Q. You would not wait until the time came to close title. You suggested to Mr. Dembe in fixing the description of the property lines— A. We were waiting a long time.

Q. Did you want the property then? A. Yes, sir.

Q. Didn't you get cold feet? A. I never got any cold feet.

Q. Never got cold feet on the property? A. No.

Q. Do you remember leaving Mr. Dembe's office with Mr. Scheetz on the day the matter was finally called off by you, and do you remember saying to Mr. Scheetz, "I am sorry Wacker would not wait, he has gotten cold feet, and I haven't got the money myself to put it through"? A. I didn't say anything of the kind.

Q. You didn't say that to Mr. Scheetz? A. No. I took him home in my machine—

Q. You took him home with you? A. In my machine.

Q. And you talked to him on the way? A. Yes, I was talking different things.

Q. You never mentioned this, never said you were sorry you could not get this valuable piece of property, did you? A. I told him I was anxious to get it.

Q. Didn't you tell him right then that Wacker had cold feet because you had been trying to sell your contract and hadn't gotten a nibble? A. I never mentioned Wacker's name.

Q. Did you mention the fact that you had been trying to sell your contract, but you hadn't gotten a nibble? A. I never told him that.

Q. Had you been trying to sell the property during that time? A. I had good offers on this property.

Q. Had you been trying to sell it? A. Yes, sir.

Q. Did you get a nibble? A. I had an offer of five thousand dollars profit on it.

Q. At that time; then why didn't you wait? A. Because the title was defective. I could not get any title. When I had a customer to bring down to Dembe's office he said you are crazy to sell it.

Q. Did you tell us anything about that? A. I didn't have to tell you. I told Mr. Dembe.

Q. Did you tell Mr. Stone? A. No.

Q. Did you tell Mr. Mitchell? A. No, I never see Mr. Mitchell.

Q. You never told them? A. I just saw Mr. Stone the first time when I bought it.

Q. The only time you ever saw Mr. Stone? A. When I bought the property.

Q. Why didn't you, about six weeks after the making of the contract, tell Mr. Dembe to write a letter saying that you could not wait for the title as you were a speculator and might not be able to speculate with it quickly if you had to wait? A. I asked Mr. Dembe how that title stands.

Q. Just answer my question (question read as follows): "Q. Why didn't you, about six weeks after the making of the contract, tell Mr. Dembe to write a letter saying that you could not wait for the title as you were a speculator and might not be able to speculate with it quickly if you had to wait?" A. Maybe I did or maybe I didn't.

Q. On the way home from Mr. Dembe's office with Mr. Scheetz, the day you finally withdrew from this matter and got the one thousand dollars back, didn't you go with Mr. Scheetz to Mr. Wacker's and give him five hundred dollars of the one thousand dollars? A. No, I didn't do that.

Q. Are you sure about that? A. I just took him home; I remember I took him home.

Q. What did you do with the money; put in the bank? A. Deposited it back in the bank.

Q. What bank? A. Greenville Banking and Trust Company.

Q. Did you deposit that day the one thousand dollars? A. Yes, sir.

Q. Did you give any of it to Mr. Wacker? A. I don't remember.

Q. Was there any reason why you should give it to Mr. Wacker? A. I don't remember that.

Q. You don't even remember? A. Because that was my one thousand dollars that I gave Mr. Stern.

Q. You are sure you didn't go with Mr. Scheetz and pay Mr. Wacker five hundred dollars? A. No, sir.

Redirect examination by Mr. Mullen:

Q. How did you and the Stone Realty Company dispose of your differences after you found title could not be conveyed to you? A. Mr. Dembe, I was always asking Mr. Dembe about title.

The Court: What happened; you know what you did.

Q. Did you get a release from the Stonehell Realty Company? A. Yes, we had a release.

Q. Did they pay you any money? A. Paid me back the deposit.

Q. What else did they pay, do you know? A. They didn't pay anything to me.

Q. Did you release them? A. Yes, I released them.

Q. Did you inform Mr. Mahlenbrock what was going to happen, that they were going to settle their differences? A. I didn't ask him.

Mr. Carey: I object to that as immaterial what he did. That didn't concern his commission. That would make no difference.

Q. Was an agreement entered into between the Stern Realty Company and the Stonehell Realty Company with reference to this settlement? A. No, I only seen Mr. Scheetz come down.

Q. Wasn't there an agreement made between

the Stern Realty Company through your attorney Mr. Dembe, and Mr. Scheetz of Mr. Carey's office, representing the Stonehell Realty Company? A. Yes, sir.

Q. Didn't that agreement provide, among other things, that no reference in that agreement should be made to these commissions? A. I didn't hear anything, commissions, I just got my one thousand dollars back.

Q. Did you get your search fees back? A. I don't know.

Q. Didn't they have to pay Mr. Dembe's search fees? A. I think they paid.

SAMUEL D. LEWIN, called for the plaintiff, and sworn.

Direct examination by Mr. Mullen:

Q. Where do you live? A. Bayonne.

Q. What is your business or occupation? A. I am an attorney. Most of my work is title searching.

Q. Where is your office? A. The De Witt Theatre Building, Bayonne.

Q. How long have you been admitted to the bar? A. Since July, 1923.

Q. How long have you been engaged in searching titles? A. Since the first of November, 1919.

Q. During that time how many titles have you searched, about? A. Well, I have an average of about one hundred titles a year. That includes complete searches and continuations.

Q. On behalf of Mr. Dembe, the attorney in this matter, did you search the title of the garages and the property covered in this contract? A. Yes, sir, I did.

Q. Marked Exhibit P-2? A. Yes, sir.

Q. Have you your search here? A. I have the continuation from the time of James Vreeland. Prior to that time we have the title in another search in the office.

Q. Are you prepared to render your opinion on the condition of the title as of the date of closing that title in Exhibit P-2? A. Yes, sir.

Q. Give us your opinion? A. I found from my search that the Stonehell Realty Company did not have title to a strip ten feet by fifty. This strip was situated in the center of the block. It was one hundred feet west of West Side Avenue, and one hundred feet north of Roosevelt Avenue, and approximately 147 feet of Communipaw Avenue.

The Court: That is one hundred by fifty?

The Witness: Ten by fifty. Ten feet in width and fifty feet in depth.

Q. This plot of land which the Stonehell Realty Company didn't have title to, where was that located with reference to the rest of the property covered by the contract? A. It took out practically in the center of the block.

Q. Right in the center? A. It was not the center of the property. It was in the center of the block. Took out a part of the property on the contract of the Stern Realty Company.

Q. Is this a survey? A. It is not a survey. That is a sketch I made.

The Court: You say this property ten feet wide by fifty feet in depth was in the center of the tract?

The Witness: No, not in the center. It was on the southerly boundary line.

The Court: On the southerly boundary?

The Witness: That is it took in ten feet of it.

Q. On this map or chart, where is the property to be conveyed? A. It is outlined in red there, here, way down to here (indicating).

Q. Outlined in red? A. Yes, sir.

Q. Is this the part that is shown here to which the Stonehell Realty Company didn't have title under the terms of their contract? (Indicating.) A. Yes, sir.

Mr. Mullen: I offer that in evidence.

Mr. Carey: No objection to it.

(Accepted and marked as Exhibit P-3 of this date.)

Cross examination by Mr. Carey:

Q. When did you begin to search that title? A. I don't remember the exact date, that must have been some time after the contract had been entered into.

Q. When? A. Probably about March, 1924.

Q. The latter part of March, 1924? A. I don't remember exactly. I can only get my date from the date of the contract. It was some time after the contract was entered into.

Q. When did you finish it? A. I believe the latter part of March or the early part of April.

Q. And then did you make a report as to any condition of title? A. At the time I finished the search.

Q. You searched the title all the way back? A. We had an early title in James Vreeland in the office.

Q. The title to those plots was in the Vreeland family? A. Yes, sir.

Q. And then you found the record of some deeds on it, one deed out of the Vreeland family to a man named Foye? A. No, James Vreeland died in 1895, survived by Albert J. Vreeland, a son. That is the record from the Surrogate's office. James Vreeland conveyed a tract to James E. Pyle, took in practically the width from Communipaw to Roosevelt Avenue, and about three hundred feet west of West Side Avenue.

Q. And this one conveyed— A. Conveyed to Lucy M. Vreeland, wife of Albert.

Q. I mean, we have got that in Vreeland; I want to take it out from Vreeland. Went where? A. Then Albert transferred to Andrew J. Foye.

Q. Does your record show whether that transfer was made in the form of a deed or what? A. It was a deed from Albert Vreeland to Andrew J. Foye.

Q. And the property described in the deed was conveyed back by Foye to Vreeland excepting, as you find, the little piece on the plot, the center of the block which you have described, is that right? A. Practically, except there was several deeds and the property was not conveyed back to Mr. Vreeland from Lucy Vreeland.

Q. It was the same family? A. Yes, sir.

Q. And this was the Vreeland homestead property, and you were familiar with it? A. Yes, sir.

Q. The Vreeland family homestead was right in the middle of this block? A. I think the house was somewhere in this block.

Q. And this little piece that you speak of and which is shown on that map, was almost in the center of the homestead plot, wasn't it? A. No, sir; the homestead plot came in here. The homestead plot didn't touch that at all (indicating).

Q. It was adjacent to it? A. Well, I should judge, to be exact, there was 37 feet between the two.

Q. Now at the time you searched the title, did you ascertain who was in possession of all this property, including this strip? A. You mean the physical possession?

Q. Physical possession. A. I made inquiry.

Q. You found garages on there, didn't you? A. Yes, sir.

Q. Found the Stonehell Realty Company in possession? A. I had been informed there were garages. I never made personal inspection.

Q. You knew the property? A. Only from the search.

Q. You were informed that garages were on that whole tract of property including that little strip in the center there? A. Yes, sir.

Q. You found by the record when you searched the deeds from Vreeland to Stonehell Realty Company, warranty deeds, didn't you? A. Yes, sir.

Q. In which all of this property, including that which you speak of, was described in this warranty deed from Vreeland to Stonehell? A. Yes, to which they never got title.

Q. It was all described in those deeds, wasn't it? A. Yes, sir.

Q. So that if Vreeland owned that entire tract, no matter what the records show under their deeds of warranty, title passed to the Stonehell Realty Company? A. I know when they—

Q. Just answer my question.

(Question read as follows: "Q. So that if Vreeland owned that entire tract, no matter what the records show under their deeds

of warranty, title passed to the Stonehell Realty Company?")

A. I can't say that.

Q. If they owned it, didn't title pass under their deeds of warranty?

The Court: No, certainly not. If they were there on record they certainly did not.

Mr. Mullen: I object to the statement that they owned it.

Q. If the Vreeland family owned that entire tract at the time of the execution of these deeds to the Stonehell Realty Company, under those deeds the Stonehell Realty Company got all the rights of the Vreelands?

Mr. Mullen: I object to that, "If the Vreelands owned it." There is no evidence that the Vreelands owned it.

The Court: That would be all right if you asked that question, but he has the right to ask what the situation was. Whatever they had, would pass by deed, wouldn't it?

The Witness: Yes, sir.

Q. Now, you examined the records afterwards and found the final decree of the Court of Chancery? A. No, I have not examined the record since.

Q. You are familiar with such proceedings, aren't you? A. Why yes, sir.

Q. Acquiring title proceedings? A. Yes, sir.

Q. You have them in your office affecting titles frequently? A. Yes, sir.

Q. Whenever you find the records defective by description or something of that sort, you correct

that by filing a bill and acquiring title under the statute? A. Yes, sir.

Q. You have done that lots of times? A. Yes, sir. The office has done it.

Q. In other words, in these various titles that come into your office regularly, these things happen and then you file a bill to quiet title, and if you are right, then you get the title put right, don't you? A. Yes, sir.

Q. I show you a decree of the Court of Chancery against Andrew J. Foye and others—

Mr. Mullen: I object to that being read in front of the jury, if your Honor please.

The Court: He hasn't read it.

Mr. Mullen: I object to it on the ground that this all took place after the title was to pass.

Mr. Carey: I won't waste any further time with it.

Q. From your knowledge of title law you knew that the title could be corrected, do you not? A. I did.

Q. All that would be required would be for a deed or quit-claim deed or a decree to quiet title? A. A deed to clear up the title? My understanding is that to quiet title—

Q. You don't think the Court of Chancery could grant a deed? A. They can't. I don't know how they did, to be frank.

Q. You have told us you do that in your own office? A. Yes, but I cannot understand in this situation.

Q. You knew that if we were in possession there is no difficulty about it, don't you? A. Yes, sir; but the point I cannot understand is this—

Q. You knew this also, that a bill to quiet title has got to be filed with some one in possession under color of right of title, don't you? A. Yes, sir.

Redirect examination by Mr. Mullen:

Q. Mr. Lewin, as an expert in title work, in your opinion was this title defective at the time which was set for closing? A. Yes, sir.

Q. As an expert, would this be called a defective and unmarketable title? A. It would.

Mr. Carey: Do you mean that the title was unmarketable if the deed could have been obtained for it?

The Witness: At that time.

Mr. Mullen: There is no proof that a deed was obtained.

The Witness: If a deed had been obtained.

Recross examination by Mr. Carey:

Q. If title was acquired by a decree of the Court of Chancery, it would not be marketable? A. Then it would not be marketable.

The Court: No, it would not. If that condition existed on March 15th, I don't care if you go into the next twenty-five months and fix up that title. At that time if that condition were so, it was unmarketable and you can't ask a purchaser, if that is your idea to wait indefinitely.

Mr. Carey: You can't ask him to wait an unreasonable length of time.

The Court: What is the date of the deed where you say there is this ten feet short?

The Witness: There is no deed. That was the trouble.

The Court: Don't let's quibble about it. A owns the title, he got it 100 feet in width. He makes a deed and sells 90 feet in width. That's what I want to know, when did the ten feet drop out?

Mr. Carey: 1907.

The Witness: I don't remember about that interval, but Foye got it at the time when the estate conveyed.

The Court: There must have been some deeds.

The Witness: There was a series.

The Court: You mean they shortened up?

The Witness: They lost sight of the ten feet in their fences.

The Court: You mean taking that right down along the line, they omitted this ten feet?

The Witness: That is a piece they didn't get title to.

The Court: You mean that Vreeland did that?

The Witness: No, Foye lost the ten feet.

The Court: They were lost between the deeds; who was the last one to get this piece of property?

The Witness: That title was in the Vreelands and then the ten feet was lost when it went back into the Vreelands.

CHARLES DEMBE, called and sworn on behalf of the plaintiff.

Direct examination by Mr. Mullen:

Q. What is your business or profession? A. Lawyer.

Q. When were you admitted to the bar? A. 1916.

Q. Where is your office? A. The De Witt Theatre Building, Bayonne.

Q. You have been a practicing attorney from your admission until today? A. I have.

Q. Did you represent the Stonehell Realty Company or Mr. Wacker or Mr. Stern? A. The Stern Realty Company.

Q. And Mr. Wacker and Mr. Stern? A. I did.

Q. Did you have anything to do with the drawing of the contract in evidence marked P-2, of which this is a certified copy? A. I did.

Q. Tell the Court and jury what you had to do with that. A. A draft of this contract was brought to me by Mr. Mahlenbrock and Stern, drawn by Mr. Scheetz. I re-drew the contract on our forms, that is the blank used in our office, and executed it as secretary of the Stern Realty Company, and handed it to Mr. Stern and Mr. Mahlenbrock, and they went back to Mr. Scheetz's office.

Q. Now at that time, was the provision with regard to commissions placed in the contract, the same as in the original contract? A. Well, I drew a contract in accordance with the form that was given me. I was not interested in the commissions. Whatever clause was in the contract that I had at the time was put in this contract.

Q. There was no change made as to commissions? A. As far as I was concerned.

Q. By the terms of that contract, the Stonehell Realty Company agreed to convey by warranty deed, did they not?

Mr. Carey: The contract speaks for itself.

A. Yes, sir.

Q. At the time set for the closing of the contract and conveyance of the title what happened? A. Are you talking about the deed?

Q. The date when the time arrived for the closing of the title?

The Court: To the Stern Realty Company.

A. I would have to refresh my recollection by letters. We examined the title and it was our opinion that the title, at the stage that it was when we examined it, was not marketable, and we, when I say we, I would say I got in touch with Scheetz, and explained the matter to him, and I told him what we had found by reason of the search, and then commenced a series of letters exchanged between us, and finally the matter was settled between us.

Q. Was there ever any notice served upon you on behalf of the purchaser of the vendors demanding that title be passed on a given date? A. Yes, there was.

Q. What date was set for the passing? A. They gave them until July 1st.

Q. On July 1st was title passed? A. It was not.

Q. Was the deed tendered? A. It was not.

Q. What was the reason the deed was not tendered, do you know? A. I don't know their reason. I don't know what reason they had for not tendering the deed.

Q. What reason did you have? A. I didn't refuse the deed at that time.

Q. At that time? A. I would not take the deed because I did not consider the title at that time marketable.

Q. Then they could not warrant the title? A. That was my opinion.

Q. How soon after that was an agreement entered into between the vendors and the vendees settling their differences? A. July 21st, 1924.

Q. Have you a copy of that agreement in your files? A. The agreement is recorded in Book 1531, page 540.

Q. This agreement was signed by both parties, was it, that is the original of it? A. Yes, that is my recollection. There is an agreement there, and also a copy of a quit-claim deed.

Mr. Carey: What happened I think, was, that they gave mutual releases.

Mr. Mullen: I have served notice to produce on the attorney of the defendant to produce this agreement.

Mr. Carey: We have a copy of that which was never signed.

The Court: Do you know if it was actually signed, or just releases exchanged?

The Witness: My best recollection is that the agreement was signed. I would not say positively. Quit-claim deed was delivered. I am not positive whether that agreement was signed. Mr. Scheetz says he has a copy of that agreement.

The Court: You say this was recorded?

Mr. Carey: Here is the original; no such agreement was signed.

Q. At the time of the settlement were releases delivered by the Stonehell Realty Company to the Stern Realty Company? A. I don't find any in the papers. The chances are the agreement was delivered.

The Court: Anyhow your client backed out of the bargain because you considered that title was unmarketable?

The Witness: I would not say they backed out of the bargain. I would say they did not take title.

Q. And releases were signed?

The Court: I don't mean in the sense you mean that they backed out.

Q. Is this the release (handing witness)? A. Yes, that is my signature.

Q. In addition to that did the Stonehell Realty Company give you a release? A. Yes, sir.

Mr. Mullen: I offer it in evidence.

(Accepted and marked as Plaintiff's Exhibit P-4 of this date.)

Q. At the time of this settlement was any money paid by the Stonehell Realty Company, or any one representing it to the Stern Realty Company, or any one representing it? A. A deposit was returned to me for the Stern Realty Company, plus a payment on account of our search fees. I can get the amount from the release. This is a release for $1,150. My best recollection is that Mr. Scheetz "jewed" me down $75. I am not sure on that. I think I got seventy-five instead of a hundred and fifty.

Q. In addition to receiving the money, or rather in addition to paying the money back to your client, the Stonehell Realty Company gave a general release to your client? A. That is my best recollection.

The Court: And was one given to the other party?

The Witness: There were mutual releases.

Q. And the Stonehell Realty Company received back from your client a general release? A. A quit-claim deed.

Q. And a quit-claim deed? A. Yes, sir.

Q. Was there anything else, any other papers? A. Not that I know of, there may have been.

Q. As far as you know that is all? A. Yes, sir.

Q. And one hundred and fifty dollars in addition to the deposit returned to your client was for your search fees? A. Yes, seventy-five dollars is what I took at the request of Mr. Scheetz. I think he asked me to cut it down and I did.

Cross examination by Mr. Carey:

Q. You are not familiar with the quiet title proceedings, are you? A. In this case?

Q. Yes. A. In what way? I have not examined them.

Q. Were you familiar with the quiet title proceedings? A. I don't know what you did after we settled the case.

Q. Don't you know that quiet title proceedings were brought and pending?

Mr. Mullen: I object.

A. I was informed so.

Q. Before any closing of the transaction? A. Your last word to me was on June 18, 1924.

Q. What was it, what did we say? A. You said you were proceeding to meet with all the expedition that the law demands, by proceedings, but the object I don't know, there was no mention. Probably you have that in mind.

Q. Did you call up our office to find out what? A. No, we accepted your proposition. You made a proposition in this letter, and we accepted it. I will read the letter to you.

Q. Didn't we write— A. I will read you the letter.

Q. Didn't we write you to the effect that we were proceeding to clear up the title?

Mr. Mullen: Is the letter there?

A. I can't answer before I read it. You want me to read it out loud?

Q. No, just read it to yourself. Is that the letter of June 16th? A. No, the 18th is what I am referring to you.

Q. Have you read it? A. I have read it.

Q. I said to you that we had commenced proceedings to quiet the title? A. You did so.

Q. And so on June 16th you knew that we had started these proceedings, and they were pending? A. I know that you said you started it.

Q. Now, when you knew, and I said that I had started it, you knew you could find out whether I did or not by writing a letter to the Clerk in Chancery? A. I could, yes, sir. I did not doubt your word when you said you had started proceedings. I supposed you did.

Q. When I told you that we had started proceedings in the Court of Chancery, you had no difficulty in determining whether or not that was so or not? A. I would not have to do that, if you stated you started them.

Q. You would believe me? A. Yes, sir.

Q. You had no reason to believe that proceedings were not started? A. No. I was not interested after the settlement.

Q. Because your parties did not want to wait, did they? A. What are you talking about?

Q. They didn't want to wait, did they? A. After they settled the case?

Q. I mean in June, 1924, the time that letter was written, when they were trying to get out of taking title? A. No, they didn't want to wait indefinitely.

Q. You told us they were buying it for speculation purposes, and they didn't want to wait; isn't that right? A. I would have to refresh my recollection about a conversation, to see after receipt of your letter just what I said—this letter you speak of, of June 16th was answered by us on the 17th.

Q. Yes, answer my question, please. Didn't your clients tell you that they were buying this for speculation purposes and they didn't want to wait? A. They told me they didn't want to wait until—

Q. You didn't mind, being the lawyer? A. It didn't make a bit of difference to me.

Q. As lawyers we have to wait to clear up titles regularly and frequently? A. We certainly do.

Q. In about three out of four cases? A. On plenty, we wait.

Q. As far as you were concerned, the waiting didn't make any difference? A. It didn't make any difference to me.

Q. The only persons it did make any difference to were your clients? A. It made a difference to them; they didn't want to wait indefinitely.

Q. You told us finally they would not wait? A. I wrote you a letter.

Q. We told you that we would give you a warranty deed, and we told you that we would give you a guaranty bond, and we told you that in taking the thirty thousand dollar mortgage, we would

put in the mortgage a condition and provision that the mortgage could not be assigned by us until we cleaned the matter up as far as you wanted it? A. You told me all except the part about the mortgage.

Q. Didn't tell you about the mortgage? A. If you did tell me it would not make any difference.

Q. But we told you these other things? A. Not about the mortgage.

Q. Didn't we offer in writing to put up a bond of indemnity guaranteeing that the title of the property would be cleared up? A. I said you did, but there was no talk about guaranteeing it.

The Court: Mr. Dembe, out of all this smoke all we want to know is this: Did this grantor, the defendant here in this suit, did they make every effort to put the title across? In other words, did they try to cure the title?

The Witness: Not that I know. They offered us a bond, or offered to bring a Chancery proceeding.

The Court: What more could they do? They didn't say they would not convey, did they; did they at any time say that? They wanted to convey, I am speaking now of this defendant in this suit, the owner of that property?

The Witness: Yes.

The Court: The Stonehell Realty Company. They at all times were anxious and wanted to close the sale, didn't they?

The Witness: I don't know; my dealings were with Mr. Scheetz. I never met the Stonehell Realty Company.

The Court: Well, Mr. Scheetz wanted to fix it up so that title would pass?

The Witness: Well—

The Court: Didn't he?

The Witness: He offered to give us a bond, and also—

The Court: Now, Mr. Dembe, you are a lawyer, and you don't want to quibble with the Court. You are an officer of the Court. I want to know did they ever make any objection about putting this title over. Did they refuse to go on with it?

The Witness: No, sir.

The Court: They wanted to go on with it?

The Witness: Well, I didn't hear that.

The Court: I am covering everybody that came in contact with you representing them. They wanted to get an extension of time to put through the Chancery proceeding and come to a point where title would pass?

The Witness: Yes, correct.

The Court: As far as you knew there was no objection, and they were doing all they could do to complete title?

The Witness: Yes, sir.

Redirect examination by Mr. Mullen:

Q. When was the contract entered into for the sale of this property, the last contract, Exhibit P-2? A. March 17, 1924.

Q. What date was set in that contract for closing?

Mr. Carey: The contract must speak for itself.

The Court: Was the contract drawn and executed on March 17th?

The Witness: It appears so.

The Court: How do you explain. You are the one who had charge of it?

The Witness: This contract was drawn by Mr. Scheetz first.

The Court: Did you in connection with the transaction know about the two dates of closing the title?

The Witness: On the copy that I have here it is stated, it is set for April 15th.

Q. Title did not pass on April 15th? A. It did not.

Q. When did you serve your notice that they proceed to pass title, and making time the essence of the contract? A. May 28th.

Q. When did you demand they pass title? A. July 1st.

Q. When did you receive your first knowledge that they were finally beginning to do something to clear that title? A. June 16th, I think.

Q. When did they finally come and settle with you? A. The date of the release, the 24th of July.

Q. Now, do you know whether Mr. Scheetz made any effort as the attorney for the defendant in this case to clear that title, or take any steps toward clearing that title, between the date of the contract and the date that you first served notice to make time of the essence. Do you know whether he took any steps to clear that title? A. I do not.

Q. Did he ever serve any paper or write to you or advise you that he was doing so? A. From the letter of Judge Carey June 16th.

Q. That is dated after your notice, isn't it? A. After May 28th; yes, sir.

Recross examination by Mr. Carey:

Q. Don't you know that the letter to you, written by me on June 16th on my return from Cleveland, was an answer to a letter not written by you until the 28th of May? Doesn't it so state in it? A. It was written in answer to a letter of May 28th.

Q. Written by you on the 28th of May? A. Yes, sir; right.

Q. And that was your letter in relation to the title? A. That was the letter where we set July 1st, making time of the essence.

Q. I told you in the letter I had written to you, that we had started proceedings, didn't I, that the proceedings were under way? A. You say, "We have already started proceedings in the Court of Chancery." The bill of complaint will show when you started.

Mr. Carey: Yes, the first day of June.

Q. This contract between the Stonehell Realty Company and the Stern Realty Company, dated the 17th day of March, as executed, was as now presented by you in this document, where the seals are torn off, wasn't it? A. Yes, sir.

Q. It did not say that title was to pass before the execution of the contract, did it? A. This is the original contract?

Q. This is the original contract, isn't it? A. One of the originals.

Q. It shows that the title was not to pass for a month at least after the execution of the contract? A. Yes, sir.

The Court: April 15th; now, all right, we are agreed upon that. What happened then?

The Witness: Then we examined the title and raised the objection.

The Court: When did you examine the title with reference to the date of April 15th, 1924?

The Witness: Around the 15th of April we completed it.

Q. You completed it around the 15th of April. Then around the 15th of April you learned of this condition which your associate has spoken about? A. Yes, sir.

Q. You took it up then with Mr. Scheetz? A. I did.

Q. He told you that he would see Senator Brinkerhoff, who represented the Foyes? A. No, he didn't say anything to me; he didn't say that.

Q. Do you remember he investigated the Foye family to see if they did have a quit-claim deed? A. You want to know what he said?

Q. Yes, tell me. A. He told me that he did not make the search, that somebody made it for him and he is going to take it up with him and find out about this condition.

Q. And then he told you that he was going to investigate through Senator Brinkerhoff? A. No, he did not say he wanted to explain the thing, he didn't know how it happened.

Q. Did you talk to him about it? A. To George?

Q. Yes. A. Frequently.

Q. He told you he was trying to locate the Foyes, did he? A. I don't think he said anything about it.

The Court: Did you know from what he said to you—did he say he was making some effort to clean the thing up?

The Witness: He said he was making

some effort to find out the condition of that title. I could not understand how that could be done.

Mr. Mullen: I think the time must be fixed when he said he would make that effort.

Mr. Carey: I won't press it. I don't think it is very important at this stage anyhow.

Redirect examination by Mr. Mullen:

Q. Did Judge Carey anywhere in his letters state that he had commenced or would commence this bill to clear, so that they could clear up this property? A. He said, "We have started."

Q. What is the date of that letter where Judge Carey states he started proceedings? A. June 16th.

The Court: On April 15th, 1924, was anybody on either side in a position to go ahead and close title?

The Witness: We would be in position to close it if I had advised my client I thought title was good.

The Court: Are you sure you completed your search before the 15th, or do the parties not consider that material, the date?

The Witness: Well, I would not say that positively. I know it was close to the 15th.

The Court: You don't know whether he finished then?

The Witness: I could not say whether before or after.

Q. Mr. Dembe, at the time that the Stonehell Realty Company failed to convey in accordance with the terms of the contract, after you had served the notice making of the essence, as an expert, at

that time did the Stonehell Realty Company have the right to enforce specific performance?

Mr. Carey: I object to that as immaterial, irrelevant and incompetent.

The Court: I imagine that wouldn't make any difference. The only question is whether title was good, and secondly, whether or not he did any deliberate act to refuse to convey title, that is the Stonehell.

(Argued.)

Mr. Mullen: Plaintiff rests.

Mr. Carey: I move for a nonsuit. I will take up each count separately.

Mr. Mullen: I want to object to that. Mr. Carey has moved to strike out each of the counts before Mr. Justice Minturn, and Justice Minturn denied the motion.

(After argument.)

Mr. Mullen: The second and third counts we retract.

Mr. Carey: I move for a nonsuit on the ground that there is absolutely no proof here of any right existing in this plaintiff to recover under the contract specified and referred to herein. This contract is for the benefit of third parties; this action is based entirely and exclusively upon a contract for the benefit of third parties.

(Argued.)

Recess to 2 P. M.

Afternoon Session, 2:45 P. M.

The Court: In deciding this motion there are two points that I feel must be decided, and the first of them is:

Whether or not this language, in Exhibit D-2, which is the agreement between the Stonehell Realty Company and the Stern Realty Company, dated March 17th, 1924, namely:

"It is further understood by the parties hereto that Harry Mahlenbrock was the agent who consummated this sale, and that there is due him a commission of seventeen hundred and fifty dollars, payable on the conveyance of the premises," is sufficient, in view of the testimony that has been taken here, to entitle the broker to his commission, in spite of the language that the commission is payable on the conveyance of the premises which it is conceded has never taken place.

It is to be noted that this Exhibit D-2 is a contract between the owner of the premises and a prospective purchaser.

It is a contract of sale, in which Mr. Harry Mahlenbrock, the broker, did not participate, except as he may have the advantages of it as a third party for whose benefit a contract has been made.

It has been held in this state that this is such a contract, that Mr. Harry Mahlenbrock may take advantage of it, and then it remains whether or not what has transpired here, in view of the language that the commission is payable on the conveyance of the premises, whether that is really a condition precedent in a sense that where the owner, presumably without fault upon his part, but in any event is unable to convey a perfect title, has had a person brought to him who

is ready, willing and able to purchase the premises upon the terms stated.

Well, now, the only case in this state apparently that has dealt with the situation where a broker seeks to get, as a third party, the benefit of a contract between an owner and a purchaser, for the broker's alleged benefit, is the case of Morse *v.* Connolly, in 83 N. J. Law, at page 416, and there the language is, that Mrs. E. V. Connolly, who was the owner, agreed to pay Morris W. Morse, who was the broker, a commission of two and a half per cent. for his services in the matter, on the consummation of the sale, at the time of the consummation of the sale.

But it is to be noted that in that case, while the Court says you have got to construe the meaning of consummation of the sale in the light of its being included in a contract between the owner and the purchaser, and what they intend by it, the Court was only seeking to get the meaning of that language from what the parties to the contract themselves intended at the time or circumstances under which the commission was to be paid. That was all they had, and so they said, well, that means that the commission is to be payable when the deed is delivered, and only when the deed is delivered, because that is what those parties must have had in mind.

But since the decision in that case, which was a Supreme Court case, we have a case of Ludwig *v.* Auerbach, 132 Atlantic Reporter, at page 441, and the language presumably was as stated from the opinion,

where it says, "The contract calls for a payment of commission on the delivery of a deed." There was no such delivery, because of defective title, and the district court from which this case came said that it made no difference whether the title passed so long as the broker produced a purchaser who was ready, able and willing to buy; and

Secondly, that the fact whether or not the plaintiff was duly licensed or not was no part of it.

The Court then went on to say:

"We think the cause was rightly determined. 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 the non-delivery of a deed was directly due to the defendant's inability to give a good title.

"The plaintiff ought not properly to suffer on that account. If it was intended that no commission was to be paid unless an actual sale was consummated by the delivery of a deed, it should have been explicitly so stated in the contract. The plaintiff has a right to rely upon his principal being able to give a proper 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 commissions agreed upon by reason of his inability to deliver a good and sufficient deed for the property."

Now this case was decided December 2nd, 1926.

It is unnecessary for me to cite more than the case which I have just cited, and to call attention to the language in the instrument that I am construing, namely, that the commission of seventeen hundred and fifty dollars was payable on the conveyance of the premises, and clearly imports that this commission, and it says practically that it has been earned when the time is fixed, when it ought to be paid, and that is on the conveyance of the property.

Now, what do the proofs seem to get down to, that the owner impliedly warrants, when he purports to deal with a broker; that he has got a title that is marketable, that is good, and that the agent might go ahead, relying upon that, and if the broker does do that and he does expressly state in his commission contract, or if that is not in writing, and it appears in the contract between the buyer and seller, then if it is not expressly stated that the commission is to be only paid when the deed is given, as was in the case in Ludwig *v.* Auerbach, 132 Atlantic Reporter 214, why, the owner should not be permitted then to say, where the broker has brought forth a purchaser ready, willing and able to purchase, that he can say, "Well, I find that I have not a good title."

Now, that is what the case seems to be, and I call special attention to the fact that in the case of Morse *v.* Connolly, 93 Law, to which I first referred, the thing which caused the failure of the title to be passed

was the inability of the failure of the vendee and not the vendor to come forward with his bargain, and that to my mind is vital in the position of this case, because the vendee was not the person who was employing the broker. It was the vendor, and in the other case of course he was employing the broker, and it could not be said therefore that the vendee had any implied contract with this broker, and so it was not the fault of the title which must be given by the owner of the property, but it was because the person who was going to purchase it fell down.

And so I conclude that the trend of the authorities in this state are to the effect that where language similar to the language in this case is used, namely, that the broker has earned a commission of so much money payable at the conveyance of the premises, either at the time of the conveyance of the property or at the time that the title passes, that they are thereby fixing the time when it shall happen, and it is not merely a condition precedent under such circumstances, where it is the owner's circumstances that prevent a contract from going through, because as has been indicated in this latter case, the owner could protect himself by using language clearly indicative that he was under no circumstances to be bound to pay the commission unless he delivered the deed, got the cash, and so on.

So much for that part of the case.

But the point that has given me more difficulty in this case is: the fact that this agreement is between the owner and the

purchaser, and is signed by both of them, and the only clause applying to the broker is that one which I have just read, in which his name appears, and in which it is not stated who is to receive this commission.

At first I was inclined to think that was fatal to the plaintiff's case, but upon examination of the statute, that is the Statute of Frauds, I find this language:

"No broker or real estate agent, selling or exchanging land for or on account of the owner, shall be entitled to any commission for the sale or exchange of any real estate, unless the authority for the sale or exchange of such land is in writing, and signed by the owner or his authorized agent, or the authority of the broker or real estate agent to make a sale or exchange of such land is recognized."

And I specially emphasize the word "recognized."

"In a writing or memorandum signed by the owner or his authorized agent."

Well, after all, in spite of the statute, the suit is based on an oral employment of the agent, but as a safeguard to protect owners of real estate from fraudulent claims being made, accruing out of parol, the evidence of the authority must be as actually set forth or recognized in a writing signed by whom? Only the owner.

For it would make no difference as between the two parties other than the broker himself in the transaction, how they agree to pay the commission, whether jointly, or

one pay one-third and one two-thirds, the broker having rested his right to recover upon oral agreement, could have recovery except for the bar in this particular statute which says, "must be set forth in writing," to recognize, is the word "his authority."

And so when you took the testimony here of who employed this man, then you turned to this Exhibit 2, in which it clearly appears to be the Stonehell Realty Company, you have more than the requirements the statute asks for, going outside of this document itself, because the document itself shows he is selling the property. He is the owner and he is the man who employed this broker. What difference does it make so far as the broker now is concerned, that is what I am talking about; whether or not both were to pay this broker, or only one, as between the owner and the seller themselves. This owner recognizes in this document the broker's authority.

So I conclude that the motion for a nonsuit must be denied, and I will give you an exception to my ruling in that regard.

Mr. Carey: May I state the grounds of the motion?

The Court: I thought you had.

Mr. Carey: I had not finished when the argument went on.

The grounds on which I base the motion are as follows:

There was no agency established in this case under the statute. The statute requires that agency must be established in a certain fashion in writing, or by a contract of such

character as to warrant recovery. There is no proof of any contract between the defendant and the agent in this case warranting the right of recovery.

The only basis of the plaintiff's action in this case, was a right of recovery predicated upon, not on a contract of agency (upon which it can be predicated), but upon the terms and provisions of this written contract between the vendor and the vendee, and therefore, the only benefits or rights the plaintiff could possibly have would be predicated upon that contract on the theory that it was made for his benefit. That contract is expressed in explicit words, and there can be no departure from it, or no deflection by any other construction that can be placed upon it here by the Court.

It must be taken that the words are simple and emphatic, and apparently, that being so, until the time has arrived by which any rights are to be awarded to the plaintiff in this case, he would have no right of action as against this defendant.

Also such time never arrived; there never was a conveyance of the property.

Next, I urge the further ground that if there is any ambiguity requiring explanation of this contract, outside of the use of the words themselves, the evidence of that has already been given by the plaintiff in this case, who admitted that it was understood that when that was put in it it was for the purpose of accomplishing just what we said, that under no circumstances should there be any commission until the transac-

tion was closed and the title had passed in accordance with the terms of the agreement, and the consideration should have passed to the owner.

Further, on the ground that there is no construction of the words in this contract that can be ascribed or determined to be the creation of an obligation on the part of this defendant to pay anything to anybody, and that under the proofs there is no evidence of fraud or default by the vendor in this case.

The Court: I deny your motion and will allow you an exception.

Mr. Carey: Exception.

GEORGE SCHEETZ, JR., called as a witness on behalf of the defendant, being duly sworn, testifies as follows:

Direct examination by Mr. Carey:

Q. You are a member of the Bar of this State? A. I am.

Q. You are associated with my office in the practice of law? A. Yes, sir.

Q. You have made a specialty of examination of titles there, haven't you? A. I have.

Q. Do you know Moses Stern? A. Very well.

Q. Do you know Mr. Wacker? A. I don't know Mr. Wacker so much.

Q. You know of him? A. Yes, sir.

Q. You recollect this property, do you? A. Yes, sir.

Q. Do you know the plaintiff in this suit? A. Very well.

Q. Do you recollect him coming to our office and seeing you in relation to this property? A. I do.

Q. Do you remember when it was substantially or practically when it was he came? A. Around February, 1924, the first of February.

Q. Was he alone or was some one with him? A. He was alone.

Q. And at that time did he give you any direction as to the preparation of a contract? A. He showed me a receipt signed by Mr. Albert Stone.

Q. Individually, and not as a member of a firm? A. No.

Q. He asked you to draw up a contract for the sale of this property? A. He did.

Q. Did you get in touch with Mr. Stone or Mr. Mitchell? A. I got in touch with Mr. Stone on the telephone, and asked them the details, and to draw the contract, he told me to draw.

Q. Did you then draw a contract? A. I did.

Q. And have you the contract that was drawn? A. It was offered in evidence this morning.

Q. I show you the contract that was drawn in February, 1924, and ask you if that is the instrument you refer to? A. It is.

Q. Did you draw that? A. I did.

Q. At the time of drawing that did you have any conversation with Mr. Mahlenbrock, the plaintiff in this case, in relation to the subject-matter of commission? A. I did.

Q. What was that conversation?

Mr. Mullen: I object to that on the ground that it seeks to vary the terms of a written instrument, under a contract upon which this suit is not based.

(Argued.)

The Court: Objection sustained.

Q. The subject-matter of his agency as explained thereafter? A. At that time I told him in view of the fact, that—

Mr. Mullen: Your Honor sustained the objection.

The Court: Yes; because I recall now that there was testimony given this morning as he is giving it, about these parties getting the premises at a certain figure; I think that is all in the evidence this morning. Objection sustained.

Mr. Carey: Exception.

Q. Did you have a conversation with him at the time of the preparation of that contract in relation to this clause of it which relates to commission? A. I did.

Q. At that time did he or did he not state to you that he understood that there would be no commission payable to him unless the transaction was completed, the transfer made and the purchase price of the property paid?

Mr. Mullen: I object to that on the same ground.

The Court: Sustained.

Mr. Carey: Exception.

Q. After the conversation, no matter what it was, was that clause relating to commissions put in the contract? A. It was.

Q. And at that time was it put in with the approval of the plaintiff? A. It was.

The Court: He says so.

Q. And after the contract was drawn to him, was it delivered, this Exhibit P-1? A. One copy was

delivered to Mr. Mahlenbrock to take to Bayonne and have his client sign it. The other copy I retained to have it signed by our client.

Q. Did he bring back a signed copy? A. He did not, not by Mr. Wacker.

Q. Now what happened after that? A. I was on the telephone with Mr. Dembe, and Mr. Dembe stated they represented Mr. Wacker, and that the contract rights had been assigned to the Stern Realty Company.

Q. How long after the preparation of this contract was that? A. About two weeks or more, just offhand I don't know.

Q. In that time, that two or more weeks, had you heard from anybody? A. Nobody.

Q. So that up to that time there was no contract signed by anybody? A. There was not.

Q. After you became advised that the Stern Realty Company was to take this property from Mr. Wacker, what happened? A. A contract was sent to our office, drawn by the office of Dembe & Dembe.

Q. Is that the contract that has been offered here as Exhibit P-2? A. It is.

Q. You have seen it? A. I have.

Q. When did that contract come to your attention first? A. About the first week in March.

Q. Well, was that contract executed? A. It was executed as I remember it. One contract was sent to us to have signed by our client, and then we were to exchange contracts.

Q. To whom was that delivered? A. The contract, after it was executed, was delivered to Mr. Mahlenbrock.

Q. And with the same clause in it in relation to commissions? A. The same clause.

Q. And did you have any conversation at that time with relation to commissions? A. I did.

Q. Will you state what that conversation was?

Mr. Mullen: I object to that on the same ground as before.

The Court: Sustained.

Mr. Carey: Exception.

Q. When was that contract executed, to your knowledge? A. Around the 15th day of March.

Q. Now, in the first contract is it noted that time is of the essence? A. It was noted.

Q. And is that the contract that was not signed? A. It was not signed. And that was one of the clauses that the Stern Realty Company objected to.

Q. Objected to the signing of that? A. With the clause in that time was of the essence.

Q. Did Mr. Stern, or somebody from Dembe and Dembe give you any reason why they did not want that in?

Mr. Mullen: I object to that. He is speaking about Exhibit P-1, which is not the contract upon which the suit is now based.

The Court: I understand that never was signed.

Mr. Carey: No, it never was signed.

The Court: I sustain the objection.

Mr. Carey: Exception.

Q. In this second contract there is no reference to time being of the essence? A. No, there is not.

Q. You are familiar with the real estate law well enough to know that unless it is expressed

in the contract that time is of the essence, time is not of the essence?

The Court: Would it surprise you to learn that is not the law, that that is not the law in this court? In the Court of Chancery it is, but time is always of the essence in a court of law.

Q. Now, Mr. Scheetz, after this contract was signed and delivered, when did you next hear from anybody about that property? A. Around the middle of April.

Q. You didn't hear a word from anybody until then? A. No, sir.

Q. What did you hear in the middle of April? A. I received word from Mr. Lewin that there was a question about the record title.

Q. Had that ever been brought to your attention before that? A. It had not.

Q. This was about a month then after the contract had been signed? A. Yes, sir.

Q. Now, then, when that was brought to your attention did you examine the records of that title? A. I did.

Q. What was the objection that was drawn to your attention? A. The objection was that there was no record title in the Vreelands, from whom we obtained title, to a strip of ten feet in width and fifty feet in length in the middle of the block, and the other property around it had been sold to Foye by Vreeland. This was a strip of land in the middle of the block.

Q. And did you check up all the deeds and the title in relation to that plot? A. I did.

Q. How many deeds were there there? A. Quite a few.

Q. All from whom? A. The entire strip of land was originally in the Vreeland family, and had been for many, many years. Eventually title got in Albert Vreeland in 1901, maybe before that time, but about that time he conveyed that property and some other property to Foye. Foye, within a year, or within a few months, conveyed most of that tract we are interested in back to the Vreelands, or to his wife or to himself.

Q. Or to Albert Vreeland. From your analysis of the description in those deeds, did the descriptions purport to convey all that property?

Mr. Mullen: I object unless you designate whether or not this analysis was made after notice of the defect in the title.

Mr. Carey: He said so.

(Question read as follows: "Or to Albert Vreeland. From your analysis of the description in those deeds, did the descriptions purport to convey all that property?") A. They did.

Q. Did you ever hear of any question of defect in any of these descriptions prior to the middle of April or thereabouts? A. I did not.

Q. When you checked up the description in these various deeds in your judgment did they purport to describe and cover the entire tract of property involved in this transaction? A. They did.

Q. You are personally familiar with this property? A. I am. I have lived in that neighborhood about twenty years.

Q. During that entire period of time, who has been in possession of that property? A. The Vreeland Homestead was on that lot for over forty-four years.

Q. At the time this contract was made, you were living right in that neighborhood? A. I was.

Q. Who, for the year prior to that, had been in actual physical possession of the property? A. The Vreeland family.

Q. You remember the conveyance that was made by the Vreeland family to the Stonehell Realty Company? A. Yes, sir.

Q. Who attended to the details of that title? A. I did.

Q. Did the deeds of conveyance from the Vreeland family to the Stonehell Realty Company cover this entire tract of property, including this alleged ten foot strip? A. They did.

Q. Did it cover that in toto? A. It did.

The Court: When was that deed from Vreeland into Foye that you speak of?

The Witness: The first deed from the Vreelands to Foye was 1901.

The Court: What did the deed convey back of that?

The Witness: There was about five separate deeds back.

The Court: When was the last one?

The Witness: I can tell by my notes.

The Court: Conveyed what?

The Witness: All the property. They were separate parcels, but they were conveyed back.

The Court: Let us understand; at the time Vreeland got it back they didn't have title to that ten feet by fifty, is that what you mean to say?

The Witness: Yes, at the time everything was conveyed back to the Vreelands,

except this 10 by 50, which was right in the middle of the block.

The Court: The Vreelands are the ones who conveyed to the Stonehell Realty Company?

The Witness: Yes, sir.

Q. Can you tell us from your records when this property was conveyed back to Vreeland by Foye? A. Well, the first deed from Vreeland to Foye was December 27th, 1900. That conveyed the entire tract to Foye. The next deed was shortly thereafter, within in fact four or five days. Foye conveyed back to Lucy M. Vreeland, who was the wife of Albert A. Vreeland, a large tract of land consisting of most of the premises in question.

The Court: What date?

The Witness: December 31st, 1900, the deed is dated, both recorded the same day. On January 3, 1903, the Foye Estate conveyed some of the premises back to Emily De Witt Vreeland, who was the second wife of Albert W. Vreeland; March, 1907, Foye conveyed to Albert J. Vreeland some more of this property. So that all of this property was conveyed except 10 by 50, by July 26, 1907.

Q. Now, in the description of the deed back, if you take the metes and bounds, the description, leaving out the starting points, and taking the several deeds together, would they by those descriptions embrace all of this tract? A. The descriptions were very confusing, and they were duplications on the deeds given, covering the same tracts. The description as given in the deeds will indicate that there was the intention to convey back all of

the property covering the Vreeland homestead, but there was no record description covering this particular 10 by 50.

Q. But there was an interlacing of descriptions? A. Yes, sir.

The Court: The record title, as far as it is concerned, shows that Vreeland never got back this 10 by 50?

The Witness: Exactly.

Q. Was that due to the mislocation of the beginning point in one deed? A. I think it was due to mislocation in several deeds.

Q. The beginning point was mislocated? A. Yes, sir.

Q. If the beginning point was properly located, and the location properly stated, would there be any question of discrepancy at all? A. I don't think so.

The Court: In other words it was then all right and then correct?

The Witness: Exactly.

Q. Now, if you take the relative area of each of the tracts that were conveyed back, piecing them together, they would make the complete property, would they not? A. All except this ten feet.

Q. Wouldn't that have been covered, the ten feet, if you take the area of the plot? A. I would not say that exactly, that it would cover the descriptions as the deeds are given; it seemed to indicate that it was intended to include the 10 by 50, but there was no record description.

Q. Now, in the record description of one deed, say, that there is 150 feet from a certain point,

supposing he said 100 feet from a certain point, and using the same description in the deed, wouldn't it then embrace every item of this property? A. It would.

Q. Can you refer to a deed that would bring that about? Which shows that the description gave back to the Vreelands the same property that the grantors owned? A. I can't say that there was more property conveyed back than the grantors owned. There was no conveyance back of that sort, but this description as drawn from Foye back to Vreeland and also to a party named Fugeri, which they all jibe, to get that, that leaves still this 10 by 50 in the middle of the block.

The Court: I want to interject at this time that in this suit, the situation about these deeds, if it is as intelligent to the jury as it is to the Court, they have got a very vague notion of what all this is about.

Q. When these deeds were delivered in 1907, after that who was in the possession of this ten feet by fifty? A. The Vreeland family.

Q. When the title was conveyed of the entire tract, including this 10 by 50 in the middle of the block, or wherever it was, who went into possession after the passing of title? A. The Stonehell Realty Company.

Q. Did they build upon that property? A. They did.

Q. And did they have physical possession thereafter? A. They did.

Q. When this matter was drawn to your attention in the latter part of April or thereabouts, in 1924, did you take the matter up with Mr. Dembe, as to doing anything he desired in the premises? A. I did.

Q. Was any suggestion made by him as to what he would like to have done? A. He would like to have a deed from Andrew Foye or his heirs.

Q. Did you ever investigate the whereabouts of Andrew Foye, to get him a deed? A. I did.

Q. Whom did you see? A. I saw Senator Brinkerhoff.

Q. Who is he? A. He is a practising attorney of our State, one of the oldest practising attorneys.

Q. Was he an attorney for anybody? A. He was the attorney for the Vreeland family and Foye.

Q. Were you able to locate the Foye family? A. I was not.

Q. Why not? A. He said he hadn't heard of Andrew Foye for several years, and his last known address he gave me, where he might be located, but they didn't materialize in his location.

Q. In the early part of May, immediately following, did you endeavor to locate the Foyes? A. I certainly did.

Q. Did you receive any letters from different parties that you communicated with in that respect? A. I did.

Q. Do you remember whom you wrote to at this time or communicated with? A. Well, I went to the directory and found a list of people under the name of Foye, and then the addresses that Senator Brinkerhoff gave me, and wrote letters, and asked whether they knew where Foye was.

Q. Did you find out where Andrew Foye was? A. Found out he was dead.

Q. Did you find out where his heirs were? A. I did not.

Q. Did you locate his heirs? A. I could not.

Q. Did you try? A. I certainly did.

Q. Now, during this period of trial and endeavor for these heirs, did you report to Dembe and Dembe? A. They called me up and asked me what I was doing about it, and I said I was endeavoring to obtain a deed for the property from the Foye people.

Q. Well, now, during that period of time then, you determined to adopt another course? A. I did.

Q. What? A. File a bill to quiet title in the Court of Chancery.

Q. And in order to do what? A. To make the title marketable.

Q. And did you file such a bill? A. I did.

Q. When did you file it? A. Bill was filed June the 4th.

Q. And did you communicate that fact afterwards to Mr. Dembe? A. I believe our office communicated that fact to Mr. Dembe.

Q. That is the letter referred to as the June 16th letter. I have here a letter—copy of letter, from our office, dated June 16th, to Dembe and Dembe, is that one of the letters to which you refer, in which this situation is mentioned? A. It is.

Mr. Carey: I offer that in evidence.

(Accepted and marked in evidence as Exhibit D-2 of this date.)

Q. After the bill was filed, did you clear it? A. Yes, it was.

Q. Was that course finally brought to a final decree? A. It was.

Q. I show you a certified copy of a final decree, and ask you if that is a certified copy of the decree of the Court of Chancery in that case? A. It is.

Q. That is dated the 25th day of September. In

your knowledge of the practice in the Court of Chancery, was that decree obtained in due conformance with reasonable speed? A. It certainly was.

Q. Could it have been obtained by you any sooner? A. It could not.

Q. What was done with that final decree then obtained? A. Recorded in the office of the Register of Hudson County.

Q. I note it is marked on here "Recorded in the office of the Register of Hudson County in Liber 1543 of Deeds, page 350," is that correct? A. It is.

Mr. Carey: I now offer the final decree in evidence.

(Accepted and marked as Exhibit D-3 of this date.)

Q. As a result of that final decree, from your knowledge of the law, was or was not the title to all of that property in the Stonehell Realty Company? A. It was.

Q. And pending the obtaining of this final decree, and after this matter had been drawn to your attention, when did Dembe & Dembe first insist on behalf of their client that they would not take title to this property? A. Some time, as I remember, they wrote us a letter, which was answered by our letter of June 16th.

Q. I show you a letter dated May 28th, and I draw your attention to the letter, which is from Dembe & Dembe, and ask you if that is the letter to which you refer (handing witness)? A. It is.

Recess until 10 A. M., January 24, 1927.

January 24, 1927, 10 A. M., trial of the case resumed pursuant to adjournment.

GEORGE J. SCHEETZ, JR., recalled.

Direct examination by Mr. Carey (continued):

Q. Mr. Scheetz, do you recollect the day when you were at Bayonne, when the one thousand dollars was paid back? A. I do.

Q. Whom were you with there? A. With Charlie Dembe, Mr. Moses Stern, and myself, as far as I can remember.

Q. At the closing or immediately thereafter did you have any conversation with Mr. Stern? A. I did.

Q. Will you state what it was? A. The conversation happened during the trip back from Bayonne. Moses Stern offered to take me back to my office, and when we got in the automobile to come back he stated—well, I told him—

Mr. Mullen: I object to what Mr. Stern stated, if it is in relation to anything pertaining to this particular title.

The Court: When was this conversation?

The Witness: Upon the day that we returned the one thousand dollars deposit, and on which we executed the mutual releases.

The Court: At the time the releases were executed?

The Witness: Yes, sir.

The Court: That was after they had been executed?

The Witness: Yes, it was after and on the return trip from Bayonne.

The Court: The deal was over then?

The Witness: The deal was over.

The Court: I sustain the objection.

Mr. Carey: Exception.

Q. I would like to put the question in another form so that I can get it from that angle. Did or did not Mr. Moses Stern say to you at that time that he was willing to wait to take the title, but that Mr. Wacker had cold feet and would not wait, and that he, Stern, could not wait, because he could not finance the situation?

Mr. Mullen: I object to that on the same ground.

The Court: Sustained.

Mr. Carey: It is directed to the testimony, the question given to Mr. Stern.

The Court: You see your rights were fixed by the release. The law of this State is where a broker enters into a contract to produce a purchaser ready, willing and able, and he does produce that purchaser, and the owner then enters into a contract with the so-called purchaser, the question of ready, willing and able falls out of the case. Then it becomes a question of whether or not there is performance. That is the whole case, when you come to look at it, and it isn't difficult at all. It seems at first to be difficult.

It is true that we have this Court of Appeals decision in Leschziner *v.* Bauman, in 83 Law, page 743, which upholds the doctrine in Hinds *v.* Henry, which is to the effect that where a condition or the payment of the commission is made to depend on a contingency, the parties have a right to fix their obligations; but when you come to read this latter case, and especially this one in the Supreme Court of Ludwig *v.* Aberbach, in

132 Atlantic, page 241, you immediately see the reasoning of the Court.

In the first case, the Court of Errors and Appeals dealt with a situation where there was first a contract to sell. Then it was turned into a contract to exchange and the purchaser failed to take it. There was no defective title on the part of the owner who made the commission agreement, but the purchaser fell.

Now if that were the situation here, there would be very little difficulty for the Court in following that decision, but so far as we have gone, there was a defect in the title. At least it could be cured; there is no doubt about that.

But while it is also recognized that in equity, contrary to law, that time is not of the essence of the contract, nevertheless this latter case in the Supreme Court, where it was the defect in the title of the owner that was in question, they said it made no difference about the question of the time, but the question is, did they make any condition such as you will find in several later Supreme Court cases, if title is passed, not to be paid unless or until title is passed.

But in this present case we have a payment at the conveyance of the property.

I would construe that to mean, that no commission would be due until the time for the conveyance had arrived, but where the time for the conveyance could have been made to have arrived by the owner, and it was only because he didn't have good title, and it could not come about, that in such

a case as that, the Court of Errors and Appeals did not mean by that decision that the broker would be put out of all right to his commission.

Now that is in harmony with the reasoning, but then there is a further difficulty in this case, where releases were given, and that deals with the question I am now considering. That seems to be handled conclusively in the case of Dermody *v.* N. J. Realties, Inc., which is found in Vol. 3 of Advanced Reports, No. 13, on page 702.

Mr. Carey: Is that a Supreme Court decision?

The Court: Court of Errors and Appeals.

The Court, in that case, in dealing with the situation, said: "That while this owner, even though he had a reluctant purchaser and could have forced him by specific performance to take title, he didn't see fit to do so, but stopped and took a release, it was within his power to compel him to complete the contract, but he did not," now that is the language of the Court, and the Court goes on to say: that they took back by way of damages something which was equivalent to the purchase, the agent's commission under his brokerage contract is earned, because they substituted one for the other.

I don't believe that is the situation here, but my reasoning is upheld by what they said on the facts, that he could have gone on and compelled specific performance, so that it was his fault and not the purchaser's.

I merely say that, because that is my position, and that is why I sustain the objections.

When those releases passed, that ends the matter, and from the time that the releases were given, if the plaintiff is entitled to his brokerage from that time—

Mr. Mullen: That is exactly what I want to show.

(Motion further argued.)

Mr. Carey: My object in offering this testimony is to show that the purchase was voided of this property through financial inability to carry out the contract on the part of the purchaser, rather than from any alleged defect in the title, and that is the purpose of this testimony.

The Court: My reason for denying this is that the purchaser and the owner of the property agreed on terms of sale which were expressed in writing, sufficient to conform with the Statute of Frauds, that they thereby relieved the broker from seeing that the purchaser was ready, willing and able, because the owner of the property accepted him as such, that thereafter all question about the matter was settled by releases between these parties whereby one released the other from the obligations of the contract.

To have the advantage of any such reasoning as is now urged by counsel, he should have refused to sign any release whatever, and left the matter in statu quo until this case was decided.

Mr. Carey: Your Honor will allow me an exception to the ruling?

The Court: Certainly.

Q. Now, Mr. Scheetz, at the time of the entering of the decree to quiet title, did the title to the defendant become effective, title to the property?

Mr. Mullen: I object to that.

The Court: Yes, that becomes immaterial. This was after the releases were given. As I understand, the mutual releases were given in exchange in July?

The Witness: July 19, 1924.

The Court: And that decree was in September of the same year?

The Witness: Yes, sir.

Q. The case was commenced on the 4th day of May? A. The 4th day of June.

Q. Now, Mr. Scheetz, I draw your attention to the contract for the sale of the property, dated the 17th day of March, 1924, recorded by its endorsement in the office of the Register of the County of Hudson, through the office of Dembe & Dembe, attorneys, on the 29th day of April, 1924, and I ask you if that is the contract under which the sale of this property was being prosecuted (handing witness)? A. It is.

Q. Now, is that the contract in which the provision was contained, relating to the commission, if any, to be paid to the broker? A. It is.

Q. That is the contract that has been referred to as the one prepared in the office of Dembe & Dembe? A. It is.

Q. Now I draw your attention to the fact that in that contract—

The Court: Is this in evidence?

Mr. Carey: I will offer it in evidence.

Mr. Mullen: I object for the reason that it has been admitted that the provisions with

relation to the commission is not that offered in the complaint. Judge Carey, at the outset of this trial agreed that a certified copy of this document may be used in evidence, and it has been so used as Exhibit P-2. That was the purpose for which we asked him to produce this original.

Mr. Carey: This was produced by Mr. Dembe, not by me.

(Argued.)

Mr. Carey: I want to draw attention to the fact that there was a duplicate copy of this contract drawn where time was different from this.

Mr. Mullen: That is in evidence.

The Court: Is it in evidence?

Mr. Carey: It is not. One contained the provision that title was to be closed on the 17th day of April, and this one on the record shows that title was to be closed on the 15th day of March.

The Court: I think that there is no harm done in admitting it.

(Accepted and marked Defendant's Exhibit D-4 of this date.)

The Court: I think you said, however, Mr. Scheetz, that the correct date was April 15th or 17th?

The Witness: In the copy Mr. Dembe produced it had April 15th.

The Court: Was that intended as the true date?

The Witness: Yes, sir.

The Court: There seems to be one one way and one another.

The Witness: Yes, sir.

The Court: And they were duplicates?

The Witness: Yes, sir.

Q. One had it changed to April 15th, and the other was left at March 15th. The one that was on the record was the one that had the date as March 15th? A. Exactly.

Q. And the other had the date April 17th? A. Yes, that is right.

Cross examination by Mr. Mullen:

Q. As a matter of fact, Mr. Scheetz, the contract which has last been offered in evidence is dated the 17th day of March? A. Yes, sir.

Q. And this contract was to close, when, to the best of your recollection? A. It was to close on April 15th, or thereabouts.

Q. Is this the original? A. This is one of the original contracts.

The Court: There were two?

The Witness: Yes.

Q. There were duplicates executed as originals? A. Yes, sir.

Q. Does this contract and the certified copy of the contract, which was offered in evidence and marked Exhibit P-2, contain the very same provision with regard to the commissions? A. I believe it does. I have not read both contracts.

Mr. Carey: I will admit that it does, if you will say it does.

Mr. Mullen: It does.

Q. Now, Mr. Scheetz, you testified on your direct examination that you did not know the condition of the title or the defects in it until they were pointed out to you by Mr. Dembe's list of objections? A. That is right.

Q. That is true? A. Absolutely.

Q. When did you receive that list of objections to this title from Mr. Dembe? A. Mr. Lewin came to my office.

Q. I want to know the date. A. I don't know, but between the 15th and the 20th.

Q. Now you say it was after the 15th? A. Around the month of April.

Q. Didn't you receive that prior to the 15th of April? A. I did not.

Q. You say that positively? A. Absolutely.

Q. After having received this list of objections, what did you do toward meeting them and straightening out the title? A. I went to the office of Fisk & Fisk, who represented the Vreelands, and who sold to us, and together with Mr. Anderson of that office we went to the office of Col. Brinkerhoff—I mean Senator Brinkerhoff.

Q. Just let me interrupt you there.

Mr. Carey: I think he ought to be permitted to finish.

Q. Continue, Mr. Scheetz. A. I went to the office of Senator Brinkerhoff, and Senator Brinkerhoff represented the Vreelands and the Foyes, and it was in his office that the deeds were drawn. He told us that Andrew Foye, who was his client, had not been heard of, he had not heard from him for many, many years, and the last he heard from him, he gave us some addresses.

Q. Continue, please.

The Court: What did you do?

The Witness: Then we looked up all the Foyes we could find listed in the directory, and followed up any leads that Senator Brinkerhoff gave us. There were five, we

found out, and we learned that Andrew Foye involved in this title was dead, they didn't know exactly when. They didn't know whether he was married or not. We then filed our appeal to quiet title.

Q. Well, never mind that. When did you first go to Senator Brinkerhoff's office about this title? A. Around the 20th or 25th of April, within a few days after Mr. Lewin was down to the office.

Q. Prior to the time that you received Mr. Dembe's list of objections to the title, and prior to the time you went to Senator Brinkerhoff's office, had you any knowledge of the defects in this title? A. I had not.

Q. Had you any knowledge of the particular defect in this title, which has been pointed out, namely, this 500 square feet? A. I had not.

Q. Isn't it a fact that you had an old title in your office, that is in Mr. Carey's office, prior to the time that Mr. Dembe gave you this list of objections? A. Yes, sir.

Q. And isn't it a fact that you had continued that search down to date, as of that time? A. Continued what search?

The Court: The one in Mr. Carey's office.

Q. The one in Mr. Carey's office was brought right down to date by you? A. By our searcher.

Q. Wasn't it made by you? A. I don't quite follow you, sir.

Q. Did you represent the Stonehell Realty Company, who were the purchasers of this property? A. Yes, sir.

Q. For Mr. Carey's office? A. Yes, sir.

Q. Didn't you make the search for them? A. No.

Q. Who did? A. Mr. Hermann, George A. Hermann, the searcher who was then with our office.

Q. But didn't your office retain Mr. Hermann to make that search? A. Yes, sir.

Q. Now, when Mr. Hermann made that search, didn't he develop this very defect? A. He did not.

Q. And you positively say that his report to you as a searcher did not cover this defect? A. He reported to me that the title to the premises was vested in the Vreeland people, including the 10 by 50 in question.

Q. Just a minute, let's get that straight. You say that Mr. Hermann on his original report of title to you, shows or reported that the 500 square feet in issue here was in the Vreelands? A. Yes, sir.

Q. Is that correct? A. That is what he said.

Q. When did he report that to you? A. At the time that the Stonehell people bought the property.

The Court: Did he make any reference to that strip of 10 by 50?

The Witness: He did not, except he said it was included in the plot, and on the tax maps of Jersey City, they agreed with him.

The Court: Did he refer to it?

The Witness: He did not; no, not specially.

Q. Have you that original report with you? A. Yes, sir. (Producing paper.)

Q. Mr. Scheetz, when you received this report on the condition of that title, did you go over it? A. I did not.

Q. You never went over it? A. No, sir.

Q. Didn't you go over it prior to accepting title for the Stonehell Realty Company? A. The search

was sent down to Fisk & Fisk's office, and I reported to Fisk & Fisk what my searcher had developed in the title, as to who the title was vested in and so forth, and they agreed with the searcher, so under the circumstances I didn't go over it.

Q. At the time you did go over this search with the Stonehell Realty Company, where you represented them as purchaser, and wasn't it developed that there was an issue as to this 500 square feet in the rear of this property? A. It was not.

Q. When you received Dembe & Dembe's objections did you then go over that title? A. I certainly did.

Q. Then did you find the objections were properly taken? A. Absolutely.

Q. Did you find out that this was a defective title as far as Dembe & Dembe were concerned? A. I found there was a record defect in the title.

Q. And that defect was constituted by five hundred square feet to the rear of the premises? A. Yes, sir.

Q. As an expert didn't you also find that even if contract had been drawn so as not to include the 500 square feet to your client, which your client did not have title to, that there were buildings over the five hundred feet? A. Yes, sir.

Q. So that there was an encroachment on the land of the Stonehell Realty Company, if you had correctly described the property, including the five hundred feet which your client did not have title to?

Mr. Carey: I object to this.

The Court: It may be argumentative in form.

A. Yes, sir.

George Scheetz, Jr., redirect.

Q. It would have been an encroachment anyhow? A. Yes, sir.

Q. This was a defect then, and remained a defect of title up to and including the 15th of April? A. It was a defect of record title.

Q. And that defect continued after the 15th of April up to and including what date in September? A. The 25th of September.

Redirect examination by Mr. Carey:

Q. What do you mean by defective record title? A. There was no description of the title owned by the Vreeland people in that 10 by 50.

Q. What was that due to, do you know, from the study of the record? A. Why, you say from study; the Foyes did not realize that they retained record title to the 10 by 50.

The Court: But they did retain it?
The Witness: Yes, sir.

Q. What was there about the beginning point of that property and the measurement of the various tracts that would lead you to that conclusion?

Mr. Mullen: I object to that as irrelevant and immaterial; we have gone all over that before in the contract.

The Court: I think you have gone over it, but it wouldn't do any harm to tell us.

A. Well, there was this, that there are two pieces which front on Roosevelt Avenue, covering that ten feet in question, the deeds were from the Foyes to outside people other than the Vreelands, and when they ran a description, instead of 110 feet they ran only 100 feet.

Q. Not touching that ten feet? A. Not touching the ten feet.

Robert G. Stone, direct.

Q. After that the Foyes conveyed all the property in the plot to the Vreelands excepting the description of the ten feet? A. Exactly.

Q. And was that the same property, that ten feet, that was previously covered by a deed from the Vreelands to the Foyes? A. Yes, sir.

Q. And was that ten feet a part of any special plot upon the City Map? A. That plot on the City Map was part of the Vreeland homestead plot.

Q. That was the plot conveyed to the Stonehell Realty Company? A. Yes, sir.

Q. So that in your judgment it was what they call a record defect due to misdescription? A. Absolutely.

Q. And that misdescription was readily corrected by a bill to quiet title, wasn't it? A. Yes, sir.

Q. And that ended the whole chapter, didn't it? A. Yes, sir.

Recross examination by Mr. Mullen:

Q. In your opinion it was necessary to file that bill to quiet title? A. It was.

Q. So that at the time that this particular contract P-2 provides for the sale of that property, it was not marketable, was it, it was unmarketable? A. It was.

ROBERT G. STONE, sworn for the defendant.

Direct examination by Mr. Carey:

Q. You are not a lawyer? A. No, sir.

Q. What is your business? A. Hardware business.

Q. You sell real estate, too? A. Occasionally.

Q. You were an officer of the Stonehell Realty Company? A. Yes, sir, I was.

New Jersey State Library

Q. Who was president? A. James Mitchell.

Q. Did you own or claim to own this property known as the Vreeland homestead? A. Had an interest in it.

Q. And that is your company? A. Yes, sir.

Q. And that is your company? A. Yes, sir.

Q. Do you recollect the plaintiff in this suit coming to see you in relation to this property? A. I do.

Q. Did you ever engage him as agent in this matter? A. I did not.

Q. Did your company to your knowledge? A. They did not.

Q. When was the first time he came to you? A. I don't remember, about three years ago.

Q. Where did he see you? A. In my store.

Q. When he came in, what did he say when he came in? A. Asked me if I owned the garages on Communipaw Avenue.

Q. What did you tell him? A. I said I had an interest in them.

Q. Did you afterwards get a call from him to go to his office? A. I did.

Q. Did you go there? A. I did.

Q. And whom did you meet there? A. A butcher by the name of Hockstein.

Q. What happened there, if anything? A. He said he had a buyer for all cash, and when I went there he had this fellow Hockstein in the back room, and he came out and said he was sorry that the man hadn't any money, that he said he had some money, and that all he had was some second mortgages he would like to give us, and I said, "Never mind," and I walked out indignant.

Q. Was there anything said about the price of sale? A. Not that I know of.

Q. You didn't make any price; was anything said about sixty thousand dollars at the time? A. No, sir.

Q. Did you ever have any such notion in your mind? A. No, sir.

Q. When was the next time you saw this agent? A. He came down in my store.

Q. When was that? A. I don't remember the date.

Q. Anybody with him? A. He had another customer.

Q. Who was the customer? A. A man by the name of Stern, Moses Stern.

Q. Did you know him? A. No, sir.

Q. Did you know he was coming? A. No.

Q. What was said when he came in? A. He said, "I have another customer for you."

Q. What did you say? A. I said, "Is he like the last one?" He said, "No, this man has money."

Q. Then what did you say? A. I don't remember.

Q. Did he ask you if you wanted to sell? A. He asked me if we would sell, if we wanted to sell.

Q. And what did you say? A. If we got a fair price.

Q. And what was said about price then, any offer made by you? A. He made an offer of seventy thousand dollars.

Q. What did you do about it? A. I conferred with Mr. Mitchell.

Q. Over the telephone? A. Yes, sir.

Q. Did you tell him you would put through a sale at seventy thousand dollars? A. Yes, sir.

Q. And then were contracts to be drawn? A. Yes, sir, in your office.

Q. Now, wasn't something said at that time about commission? A. Yes.

Q. What? A. Mahlenbrock said would he get commission, and I said most certainly he was entitled to commission if the deal went through.

Q. What was said further? A. Well, I said, "You realize that one thousand dollars would not cover your commission of seventy-five hundred dollars, if this man falls down on the proposition, you would get seventeen hundred and fifty dollars, and we would have one thousand dollars"; so I said, "There has to be some agreement made whereby unless this deal goes through you get no commission, and that must be arranged at Judge Carey's office."

Q. What did he say? A. Perfectly all right.

Q. If this deal fell through there would be no commission? A. Yes, and he wanted it understood that way.

Q. Was there anything said about getting money? A. Getting money?

Q. Any money, the purchase price or commission? A. The purchase price or commission?

Q. Yes. A. No.

Q. What were the exact words used as far as you could remember? A. Well, I have just told you the exact words. If he handled this deal and the deal went through and we received seventy thousand dollars, or the equivalent, all right, or there would be no commission.

The Court: You were to pay the commission, is that right?

The Witness: We were to pay the commission, gladly.

The Court: You were the Stonehell Realty Company?

The Witness: Yes, sir.

Q. You say no commissions unless the deal went through and you saw the money or the equivalent? A. I said, "That goes"—if the deal didn't go through—I knew from what he told me, I had never seen Stern, he told me that Stern was a speculator and he was buying it for speculation, and I knew when he got through changing this contract around that if he couldn't sell it he might be through with it and take that one thousand dollars loss, because it was worth a thousand dollars to gamble with.

Q. And you told him that? A. Yes, sir.

The Court: There was no doubt that your company alone agreed to pay this commission if this thing went through?

The Witness: Absolutely, we agreed to pay if the deal went through and we had the money, and the garages were off our hands.

Q. The garages were off your hands? A. I knew they were buying for speculation.

The Court: Your purchaser had nothing to do with the paying of this commission?

The Witness: No.

Q. Now, after the contract was made, as far as you and your company were concerned, were you always ready to convey title? A. Yes, sir.

Q. Did you ever know of any reason why you could not convey title? A. No.

Cross examination by Mr. Mullen:

Q. Mr. Stone, you said on your direct examination that the first time you were brought in this butcher Hockstein nothing was said about money? A. Not that I remember.

Q. And then on direct examination when you were asked about the second deal, you said that if he was like the first one where there was no money— A. I don't understand what you mean.

Q. Didn't you have a talk about sixty thousand dollars cash on the first transaction? A. No, sir.

Q. Is it or is it not true that it developed that Mahlenbrock could not get this man Hockstein to put up sixty thousand dollars cash, but what he had was— A. I don't know what he got Hockstein to do. It passed out of my mind. He had no money.

Q. What was the conversation about money at that time? A. I don't remember.

Q. May it have been sixty thousand dollars cash? If it had been would you have then been ready to convey? A. No.

Q. Why did you go down there then? A. He told me he had a purchaser.

Q. For sixty thousand dollars cash? A. Mr. Mahlenbrock told me that he could procure a purchaser for seventy-five thousand dollars. He set the price on the property, not us.

Q. Now, of course, all these remarks you have made in your testimony about the fact that you did not intend to pay commissions unless the title passed, and the conveyance was made, unless you got the money, or unless you got the equivalent of money. All these remarks could just as well have been made if you had sold to some one else without Mr. Mahlenbrock producing that some one? A. Well, I don't know.

Q. If you had a defective title, you would have had it corrected? A. I knew nothing about that.

Q. If you had a defect and you contracted to convey to some one else you would have to pay?

Mr. Carey: I object to the conclusion.

The Court: Sustained.

Q. Suppose you didn't own one-half of the property covered by the garages? A. I am not supposing.

Redirect examination by Mr. Carey:

Q. Whatever the transaction was for the Stonehell Realty Company, after conferring with Mr. Mitchell you handled it? A. Yes, sir.

The Court: Your company eventually in July took a release from this purchaser and gave him a release?

The Witness: So I understood from Judge Carey's office. I did not.

Recross examination by Mr. Mullen:

Q. Did you pay over some money, or did your company pay over some money to somebody? A. You will have to ask Judge Carey.

The Court: Don't you know?

The Witness: I presume he did.

Mr. Carey: That wasn't done by the witness, it was done by our office.

Mr. Carey: I ask to have admitted in evidence the transfer of the original contract from the Stonehell Realty Company to the purchaser.

It is now marked as Exhibit D-1 of this date.

Mr. Carey: I now offer in evidence letter of May 28, 1924, Dembe & Dembe to me, to which the other letter was an answer.

(Accepted and marked as Exhibit D-5 of this date.)

Mr. Carey: I now offer in evidence three deeds as follows: One dated June 13, 1922, from Albert A. Vreeland, unmarried, John W. Vreeland, unmarried, Helen V. Jennings and Angle T. Jennings, her husband, to the Stonehell Realty Company, recorded in Book 1450 of Deeds, page 59, on the 16th of June, 1922.

(Accepted and marked as Exhibit D-6 of this date.)

Mr. Carey: Another one from Emeline De Witt Vreeland, widow, to the Stonehell Realty Company, dated June 13, 1922, recorded in Book 1450 of Deeds, page 57, recorded on June 16, 1922.

(Accepted and marked as Exhibit D-7 of this date.)

Mr. Carey: Also deed from Emeline De Witt Vreeland, widow, to Stonehell Realty Company, dated June 13, 1922, recorded in Book 1450 of Deeds, page 55, and recorded on June 16, 1922.

Mr. Mullen: I want to note an objection to the deeds, for the reason that both the witnesses for the plaintiff and for this defendant agree that the title was defective and unmarketable on the date set for the closing.

The Court: I don't think that is a very good objection.

Mr. Carey: I now move the Court for a nonsuit upon the following grounds:

First.—That there is no agency established in this case under the statute.

The statute requires that agency must be established in definite fashion in writing, or

by contract of such character as satisfies the particular phraseology of the statute.

There is no proof of any contract here of such a character between the agent and the defendant, but the suit stands entirely and absolutely upon a written contract between the vendor and the vendee. And I will submit that it does not contain the elements of such a contract.

Mr. Carey: Then, I move for a nonsuit, on the second ground that there is no proof that the alleged contract, set forth and alleged in the complaint as against the defendant in this case, comes within the Statute of Frauds, and in this case it has been proved that the property has never been conveyed, and the contingency incident to payment never arose.

Further, that, on the ground under the law of this State, on the facts proved in this case and under the phraseology of this alleged agreement, the plaintiff cannot recover unless he first establishes, which he has not done in this case, that the conveyance of the property was arbitrarily and wilfully refused by the defendant, upon caprice, wilfulness or with improper purpose.

On the further ground that under the authority of the cases of Hinds *v.* Henry, 7 Vroom 328; Lescziner *v.* Bauman, 83 Law 743; Steinberg *v.* Mindlin, 96 Law p. 206, the plaintiff has failed to make a case, and the defendant is entitled to a nonsuit. All those are decisions of the Court of Errors and Appeals of this State.

Further upon this ground, that at the time

of the making of the contract in 1924, in which the words upon which the suit is based are set forth, the law in this State at that time, as declared by the Court of Errors and Appeals, warranted the construction upon that agreement, if it can be termed an agreement, or that obligation or memorandum, if that is what the paper may be determined in law, to the effect that a contingency was provided, and that until the satisfaction of that there could be no recovery of commission in this case, and that contingency has never happened.

Further upon the ground that it was expressly so agreed by the plaintiff in this case, if he has any agreement at all supported by the facts and the law in the case.

I further ask for a nonsuit upon the ground that where the Court of Errors and Appeals has fixed the law, that that is the law of this State, applicable to the making of any contract, and this contract in particular, and until that law has been modified or changed by the Court of Errors and Appeals that is the law. I maintain that under the authorities I have stated that has not been done.

I also move for a nonsuit on the ground that the word conveyance as used in the contract means what the word conveyance actually means. It doesn't mean when it was "sold," it means the actual conveyance, and therefore the contingency expressed has not occurred, and that in a court of law there can be no recovery against the defendant until that expressed contingency has happened, unless there has been some actual fraud on the part of the defendant, or some wilful and wanton act on the part of the defendant to prevent the happening of the contingency, which is not so in this case.

The Court: I deny your motion, and will allow you an exception.

Mr. Mullen: I ask for a direction of verdict in favor of the plaintiff on the ground that the allegations, every allegation in the complaint is admitted by the answer which has been admitted by the witnesses for the defendant on the stand. That situation under the law as outlined in the New Jersey case of Ludwig *against* Alberbach, 132 Atlantic, 241; Dermody *v.* New Jersey Realtors, Inc., Vol. 3, Adv. Rep. No. 13, page 702; Klipper *v.* Schlossberg, 115 Atl. 345; Taylor & Ross *v.* Buoninconti, 128 Atl. 603; Lehrhoff *v.* Schwartzky, 125 Atl. 497; Kislak *v.* Judge, 133 Atl. 74; Haber *v.* Goldberg, 92 N. J. L. 367; Sadler *v.* Young, 78 N. J. L. 594.

The Court: I will grant that motion, and will give Judge Carey an exception.

Mr. Carey: Your Honor will allow me exceptions to the denial of the motion for a nonsuit and to the admission of this motion of the plaintiff?

The Court: Certainly.

Thereupon the Court directed that a verdict be found in favor of the plaintiff and against the defendant.

The Court: You may take the interest from July 21st, 1924, which is accepted and conceded to be the date that the releases were signed.

Statement.

Mr. Carey: The Court will allow me an exception to that direction on the ground that that is not the proper date?

The Court: I direct a verdict in favor of the plaintiff and against the defendant for the principal sum of seventeen hundred and fifty dollars and interest two hundred and sixty-two dollars and fifty cents, total $2,012.50.

Statement.

NEW JERSEY SUPREME COURT.

HARRY H. MAHLENBROCK
v.
STONEHELL REALTY CO.
} Action at Law.

Judg't entered		Jan. 25, 1927
Damages		$2,012.50
Costs	Attorney	37.00
	Disbursements	20.41
		$2,069.91

EDWARD J. KELLEHER,
Clerk.

Exhibit P-1.—Contract of Sale.

Contract of sale for sale of property mentioned in D-4 made by Stonehell Realty Company with Jacob Wacker, bearing no date but acknowledged on February 6, 1924.

This contract of sale contains the same clause relating to plaintiff Harry Mahlenbrock as is contained in Exhibit D-4.

Exhibit P-2.

Exhibit P-2 is a certified copy of the record of the recording of the contract bearing date March 17, 1924, printed as Exhibit D-4.

Exhibit P-4.—Release.

TO ALL TO WHOM THESE PRESENTS SHALL COME OR MAY CONCERN, GREETING:

KNOW YE, THAT STERN REALTY COMPANY, a corporation of the State of New Jersey for and in consideration of the sum of ELEVEN HUNDRED FIFTY ($1150.00) DOLLARS, lawful Money of the United State of America, to it in hand paid by STONEHELL REALTY COMPANY, a corporation of the State of New Jersey, have remised, released and forever discharged, and by these Presents do, for itself, its successors and assigns, remise, release and forever discharge the said STONEHELL REALTY COMPANY, its successors and assigns of and from all and all manner of action and actions, cause and causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, ex-

tents, executions, claims and demands whatsoever, in law or in equity, which against STONEHELL REALTY COMPANY, it ever had, now has or which its successors and assigns hereafter can, shall, or may have, for, upon or by reason of any matter, cause or thing whatsoever, from the beginning of the world to the day of the date of these Presents.

IN WITNESS WHEREOF, the said party of the first part hath caused its corporate Seal to be hereto affixed and attested by its Secretary, and these presents to be signed by its President the 21st day of July, in the year of Our Lord One Thousand Nine Hundred and Twenty twenty-four.

STERN REALTY COMPANY

(Seal) By MOSES STERN
Its President

Attest:

CHARLES DEMBE
Its Secretary.

[Duly acknowledged.]

Exhibit D-1.—Assignment.

I HEREBY ASSIGN, TRANSFER AND SET OVER, my rights unto the receipt which I hold from ROBERT G. STONE, for the fifty-eight (58) garages and four (4) stores situated at Communipaw Avenue, Jersey City, N. J., under a receipt dated January , 1924, to the Stern Realty Company, and hereby authorize and empower the said ROBERT G. STONE and the STONEHILL REALTY COMPANY to enter the contract with the Stern Realty Company instead of with me.

Dated, March 13th, 1924.

J. JACOB WACKER

Witnessed by
H. H. Mahlenbrock

Exhibit D-2.—Letter of Robert Carey to Dembe & Dembe.

June 16th, 1924.

Messrs. Dembe & Dembe,
DeWitt Theatre Bldg.,
Bayonne, N. J.

Dear Sirs:

Your letter of May 28th, 1924, received, and answer to same was delayed on account of my absence from the State, attending the Republican Convention at Cleveland.

The alleged defect in the title was called to our attention about the middle of May and we immediately started investigation to endeavor to clean this matter up. We then got in touch with you on the telephone and stated we would give you a guaranty if you wanted to take title and the alleged effect would be cleaned up within a week, after title was passed.

Your letter of May 28th, informs us that you do not desire this proceedure, we therefore, have started proceedings in the Court of Chancery to remove all defects of title and will advise you as to developments.

Very truly yours,

Signed ROBERT CAREY

Exhibit D-3.—Decree in Chancery.

IN CHANCERY OF NEW JERSEY.

Between:

STONHELL REALTY COMPANY, a corporation of the State of New Jersey,

Complainant,

and

ANDREW ERNEST FOYE, *et als.*,

Defendants.

On Bill &c. Default Decree.

This matter being opened to the Court by Robert Carey, Solicitor of the complainant, and it appearing that process of subpoena calling upon the defendant to answer the complainant's bill of complaint has been duly issued and returned *non est* as against the defendant, Andrew Ernest Foye, and his heirs, devisees and personal representatives, and their or any of their heirs, devisees, executors, administrators, grantees, assigns or successors, in right, title or interest; and that notice to the said Andrew Ernest Foye, or his heirs, devisees and personal representatives, and their or any of their heirs, devisees, executors, administrators, grantees, assigns or successors, in right, title or interest, has been duly posted and published according to law. That the said defendant Andrew Ernest Foye, or his heirs, devisees, and personal representatives, and their or any of their heirs, devisees, executors, administrators, grantees, assigns or sucessors in right, title or interest, have not filed any answer to the said complaint, within the time required by law, but have wholly failed and neglected so to do:

Exhibits.

It is thereupon on this 25th day of September, 1924, on motion of Robert Carey, Solicitor of Complainant, ORDERED, that the said complainant's bill of complaint be and the same is hereby taken as confessed against the said defendant Andrew Ernest Foye, or his heirs, devisees and personal representatives, and their or any of their heirs, devisees, executors, administrators, grantees, assigns or successors in right, title or interest:

It is FURTHER ORDERED, ADJUDGED and DECREED, that the said defendant Andrew Ernest Foye, or his heirs, devisees and personal representatives and their or any of their heirs, devisees, executors, administrators, grantees, assigns or successors in right, title or interest, have no estate or interest in or encumbrance upon said lands or premises or any part thereof:

It is FURTHER ORDERED, that as to all of the said lands and premises described in said bill of complaint, to wit:

ALL that certain tract, piece or parcel of land and premises situate, lying and being in the City of Jersey City, County of Hudson and State of New Jersey, and particularly described as follows:

BEGINNING at a point in the southwesterly line of Communipaw Avenue, distant one hundred (100) feet northwesterly from the corner formed by the intersection of the northwesterly line of West Side Avenue and the southwesterly line of Communipaw Avenue:

Thence (1) northwesterly along the southwesterly line of Communipaw Avenue, sixty (60) feet to a point:

Thence (2) southwesterly and parallel with the easterly line of lot #1 in Block #530, as laid down on a map filed in the office of the Register of said Hudson County, April 17th, 1894, entitled "Map of property of Mrs. Jane Vreeland of Jersey City, N. J." and also the easterly line of lot #1 in Block #1744, as laid down on the Official Assessment Map of Jersey City, made by L. D. Fowler, 1894, one hundred and thirty feet (130) to a point:

Thence (3) northwesterly and parrallel with the southwesterly line of Communipaw Avenue, forty and eighty-two hundredths feet (40.82) to a point:

Thence (4) southwesterly thirteen and sixty-nine hundredths feet (13.69) to a point, which point is the termination of the seventh course of the premises this day conveyed to the party of the second part hereof by the heirs of Albert J. Vreeland and which point is distant northeasterly one hundred and ten (110) feet from the northeasterly line of Roosevelt Avenue:

Thence (5) southeasterly and along the line of the heirs of Albert J. Vreeland, ninety-seven and ninety-seven hundredths feet (97.97) to a point:

Thence (6) northeasterly and along the line of the heirs of Albert J. Vreeland, thirty-eight and seventy-nine hundredths feet (38.79) to a point:

Thence (7) southeasterly and along the line of the heirs of Albert J. Vreeland, three and fifty-eight hundredths feet (3.58) to a point:

Thence (8) northeasterly still along the

line of the heirs of Albert J. Vreeland, thirty-three and five hundredths feet (33.05) to a point:

Thence (9) northwesterly and along the line of the heirs of Albert J. Vreeland, one and two hundredths feet (1.02) to a point, which point is distant southwesterly seventy-five (75) feet from the southwesterly line of Communipaw Avenue:

Thence (10) northeasterly and along the line of the heirs of Albert J. Vreeland, seventy-five (75) feet to the southwesterly line of Communipaw Avenue, to the point or place of BEGINNING.

Being premises of which Lizzie M. Vreeland died seized on May 24, 1902, leaving a Last Will and Testament, probated in the Surrogate's Office of the County of Monmouth on or about June 13, 1902, in and by which she devised to her husband Albert J. Vreeland a life estate in all her real estate and upon his death devised all her real estate to such children as she should leave or have living at the time of her death, the said Albert A. Vreeland, John W. Vreeland and Helen V. Jennings, being all the children of Lizzie M. Vreeland living at her death and the said Albert J. Vreeland, having died on December 11, 1911, and,

ALSO ALL that certain tract, piece or parcel of land and premises, situate, lying and being in Jersey City, Hudson County, N. J. and particularly described as follows:

BEGINNING at a point on the southwesterly line of Communipaw Avenue, distant ninety

(90) feet northwesterly from the corner formed by the intersection of the northwesterly line of West Side Avenue and the southwesterly line of Communipaw Avenue:

Thence (1) southwesterly and along the line of the premises conveyed by Albert J. Vreeland to Wisconsin Jackson and others, one hundred and fifty-seven and twenty-nine hundredths feet (157.29) to a point, which point is distant northwesterly ninety (90) feet from the northwesterly line of West Side Avenue and which point is also distant one hundred (100) feet northeasterly from the northeasterly line of Roosevelt Avenue:

Thence (2) northwesterly sixty (60) feet to a point distant one hundred and five hundredths feet (100.05) northeasterly from the northeasterly line of Roosevelt Avenue:

Thence (3) southwesterly and parallel with the northwesterly line of West Side Avenue, one hundred and five hundredths feet (100.05) to the northeasterly line of Roosevelt Avenue:

Thence (4) northwesterly along the northeasterly line of Roosevelt Avenue, fifteen and sixty-four hundredths feet (15.64) to a point:

Thence (5) northeasterly one hundred (100) feet to a point which point is distant nineteen and sixty-two hundredths feet (19.62) northwesterly from the termination of the second course herein described:

Thence (6) northwesterly twenty-eight and fourteen hundredths feet (28.14) to a point which point is distant one hundred

(100) feet northeasterly from the northeasterly line of Roosevelt Avenue:

Thence (7) northeasterly ten (10) feet to a point which point is distant one hundred and forty-three and sixty-nine hundredths feet (143.69) southwesterly from the southwesterly line of Communipaw Avenue and which point is in the line of the premises conveyed to Lizzie M. Vreeland by deed dated December 31, 1900; recorded in liber 766 of deeds for Hudson County, at page 322.

Thence (8) southeasterly and along the line of Lizzie M. Vreeland ninety-seven and ninety-seven hundredths feet (97.97) to a point, which point is distant ten feet (10) northeasterly from the second course herein described:

Thence (9) northeasterly and along the line of Lizzie M. Vreeland, thirty-eight and seventy-nine hundredths feet (38.79) to a point:

Thence (10) southeasterly still along the line of Lizzie M. Vreeland, three and fifty-eight hundredths feet (3.58) to a point:

Thence (11) northeasterly still along the line of Lizzie M. Vreeland, thirty-three and five hundredths feet (33.05) to a point:

Thence (12) northwesterly and still along the line of Lizzie M. Vreeland one and two hundredths feet (1.02) to a point, which point is distant southwesterly seventy-five (75) feet from the southwesterly line of Communipaw Avenue:

Thence (13) northeasterly still along the line of Lizzie M. Vreeland seventy-five (75) feet to a point in the southwesterly line of Communipaw Avenue:

Thence (14) southeasterly and along the southwesterly line of Communipaw Avenue, ten (10) feet to the point or place of BEGINNING.

Being premises of which Albert J. Vreeland died seized on December 11, 1911, leaving a last will and testament probated in the Surrogate's Office of Monmouth County on or about Dec. 26, 1911, in and by which he vested in his wife, Emeline DeWitt Vreeland a life estate in and to said premises and upon her decease, devised the same to his children, the said Albert A. Vreeland, John W. Vreeland and Helen V. Jennings, being all of the children of Albert J. Vreeland, deceased, and being also his only heirs.

so far as relates to any claim thereon by or on behalf of the said defendant, Andrew Ernest Foye, or his heirs, devisees, and personal representatives, and their or any of their heirs, devisees, executors, administrators, grantees, assigns or successors in right, title or interest, or any of the title of said complainant, STONHELL REALTY COMNANY, in and to the same and every part thereof is hereby determined, fixed and settled and declared to be good.

E. R. WALKER,
C.

Respectfully advised,
BAYARD STOCKTON, A. M.

(Stamped)

A true copy.

THOMAS BARBER,
Clerk.

Recorded Hudson Co. Register's office November 13, 1924, Book 1543 of deeds at page 350, etc.

Exhibit D-4.—Original Contract of Sale.

AGREEMENT, made the 17th day of March A. D. 1924 Between STONEHELL REALTY CO. a corporation of New Jersey of the first part and STERN REALTY COMPANY a corporation of New Jersey of the second part:

The party of the first part, in consideration of the deposit hereunder agrees to sell and convey to the party of the second part, by Warranty Deed, in fee simple, free and clear of and from all encumbrances, except as hereinafter mentioned, and subject to the rights of the monthly tenants in possession, All that certain tract of land, with the buildings thereon erected, situate, lying and being in the City of Jersey City, County of Hudson and State of New Jersey, consisting of fifty-eight individual garages and four stores located on the southerly side of Communipaw Avenue distant about ninety feet west of West Side Avenue; the description in the deed to be made from an accurate survey of the premises for the sum of $70,000.00 which the party of the second part agrees to pay as follows:

On the execution hereof	$ 1,000.00
When title passes	14,000.00
By taking subject to a mortgage held by the Union Trust & Hudson County National Bank ..... which will be due Sept. 1924	25,000.00

By the party of the second part giving to the party of the first part this bond to be secured by a purchase money mortgage, which said bond and mortgage shall contain a 30 days interest de-

fault clause and 90 days municipal lien default clause, interest default clause and an agreement that the owner of the mortgaged premises will pay all taxes without claiming any deduction on account thereof. Said bond and mortgage shall be payable with interest at six per cent per annum every six months and shall run for a period of three years and shall also contain the provision that $1000 shall be paid off on account of the principal sum thereof on each and every interest day. It shall also contain the privilege that it may be extended for two years from its date upon the principal thereof being reduced to $12,000.00. During said two years no installments shall be due on account of the principal.

Said mortgage shall be in the sum of .. 30,000.00

$70,000.00

Said purchase money mortgage shall contain a subrogation agreement to the lien of a new first mortgage not exceeding $25,000.00.

Subject to the rights of tenants in possession.

Subject to such state of facts as an accurate survey will disclose. The deed is to include the lot on Roosevelt Avenue which is approximately 16 feet in width by 100 feet in depth now owned by the party of the first part.

It is further understood and agreed that this contract shall not be assigned without the written consent of the party of the first part hereof.

All taxes, water rents, insurance, interest on mortgage, rents, shall be adjusted as of the day of passing of title.

It is further understood by the parties hereto that Harry Mahlenback was the agent who consummated this sale and that there is due him a commission of $1750.00 payable at the conveyance of the premises.

The party of the first part stipulates as follows:

That until delivery of deed, the party of the first part will bear all damage in the event of fire; that the property is to be in substantially the same condition on the day of passing title as the same is in now; that the rents, insurance premiums, water rents, taxes and interest on mortgages, if any, shall be adjusted as of the day of delivery of the said deed; that gas and electric fixtures and chandeliers, porch windows and door screens, storm doors and windows, gas heaters, carpets, linoleums, mats and matting in hall, ash cans and heating apparatus, if any, belonging to the parties of the first part, are included in this sale; that all sums paid on account of this contract and the reasonable expenses of the purchaser are hereby made liens upon the property to be sold, but such liens shall not continue after default by the purchaser under this contract.

This contract is to bind the heirs, executors, administrators and assigns of the respective parties.

Full Covenant and Warranty Deed conveying the premises above described, free and clear of and from all encumbrances except as herein stated to the date thereof except as above mentioned will be delivered at the offices of Robert Carey, 75 Mont-

gomery St. Jersey City, N. J., on or before March 15, 1924.

IN WITNESS WHEREOF the parties hath caused these presents to be signed by its President, its corporate seal affixed and attested by its Secretary on the day and year first above written.

STONHELL REALTY CO.
By JAMES STONEHELL
Its President

STERN REALTY CO.
MOSES STERN
President

Signed, sealed and delivered
in the presence of

Attest:
R. G. STONE
Treas.

Attest:
CHARLES DEMBE
(Seal) Secretary

(Duly acknowledged recorded April 29, 1924)

Exhibit D-5.

H. B. DEMBE
C. H. DEMBE

S. D. LEWIN

TELEPHONE
BAYONNE 757

DEMBE & DEMBE

LAW OFFICES
DeWitt Theatre Building
Bayonne, N. J.

May 28th, 1924.

Robt. Carey, Esq.,
75 Montgomery St.,
Jersey City, N. J.

Dear Sir:—

We have taken up your proposition concerning the title to be conveyed by Stonhell Realty Co., to Stern Realty Co., under Contract of March 17th, 1924, wherein your client desires to guarantee the perfecting of the title by a Bond, and we beg to say that our client is unable to accept this proposition. As you, no doubt, know that our client is a speculating company and bought the property for that purpose and, therefore, upon their selling the property they might have difficulty in passing along the title in its present state. If it was their intention to hold the property themselves we would recommend to them to take it with a guarantee from you that the title would be perfected within a reasonable time, but in view of the fact that they have not purchased it for the purpose of holding it we cannot recommend such a course.

We desire to say further that they have now waited since April 1st, for the purpose of passing title and do not desire to have this matter held in abeyance for an indefinite time.

On their behalf, therefore, we desire to give you notice as counsel for the Stonhell Realty Company, that the Stern Realty Co., now consider time as of the essence under the said contract of March 17th, 1924, recorded in the Register's Office of Hudson County in Book 1530 of Deeds page 1 on April 29th, 1924, and to further give you notice that unless the Stonhell Realty Co., arrange to pass title under the terms of said Contract before July 1st next, said Stern Realty Co., will consider them in default under the said contract and will act accordingly.

We desire to say further that if you want us to give this notice directly to the Stonhell Realty Co., we will be glad to do so.

Awaiting to hear from you, we are,

Yours very truly,

DEMBE & DEMBE
By C H DEMBE

CHD'DW

Exhibit D-7.

Deed bearing date June 13, 1922, between Emeline DeWitt Vreeland, widow of Albert J. Vreeland, deceased, of Jersey City, Hudson County, New Jersey, party of the first part, and Stonhell Realty Company, a corporation of the State of New Jersey, party of the second part, conveying together with other property all of the property included in the contract of sale Exhibit D-4.

The above deed was duly recorded in the office of the Register of Hudson County on June 16, 1922.

Exhibit D-8.

Deed bearing date the 13th day of June, 1922, between Emeline DeWitt Vreeland, formerly Emma DeWitt Bourke, widow, of Jersey City, Hudson County, New Jersey, party of the first part, and Stonhell Realty Company, a corporation of the State of New Jersey, party of the second part, conveying together with other property all of the property included in the contract of sale Exhibit D-4.

The above deed was duly recorded in the office of the Register of Hudson County on June 16, 1922.

Notice of Appeal.

NEW JERSEY SUPREME COURT.

HARRY H. MAHLENBROCK, Plaintiff, *v.* STONEHELL REALTY CO., a corporation of the State of New Jersey, Defendant.	Action at Law.

To

ARMSTRONG & MULLEN, Esqs.,
Attorneys for Plaintiff-Appellee.

TAKE NOTICE that the defendant-appellant, Stonehell Realty Co., a corporation of the State of New Jersey, appeals to the Court of Errors & Appeals in the last resort in all causes in New Jersey, from the whole of the judgment entered in this cause.

ROBERT CAREY,
Attorney for Defendant-Appellant.

Grounds of Appeal.

(Filed February 15, 1927.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

HARRY H. MAHLENBROCK,
Plaintiff-Respondent,
v.
STONEHELL REALTY CO.,
Defendant-Appellant.
} Action at Law, on Appeal.

1. The Trial Judge refused to nonsuit the plaintiff at the end of the plaintiff's case when thereunto moved by the defendant, whereas said motion should have been granted on one or more of the following grounds urged in support of said motion:

(a) Plaintiff was not entitled to recover under the Statute of Frauds.

(b) The contract sued on does not comply with the provisions of the Statute of Frauds.

(c) There was no agency established in this case under the Statute of Frauds.

(d) The contract sued on does not contain any agreement that defendant was to pay plaintiff any sum of money.

(e) Under the terms of the contract sued on, plaintiff was only to be paid his commission upon the conveyance of the property. His right to commission was based upon the contingency of an actual conveyance which never occurred. The fact

of the conveyance of the property never occurring, was not the result of any arbitrary or wanton act of the defendant, or fraud or wilful refusal on its part to carry out the terms of the contract.

(f) The word "conveyance" used in the contract sued on, means the actual conveyance of the property and is not analogous to the word "sold."

(g) Under the law of this State, as laid down by the Court of Errors and Appeals, the plaintiff was not entitled to recover his commission.

(h) Under the law of this State, as laid down by the Court of Errors and Appeals, as it existed at the time of the execution of the contract sued on, plaintiff was not entitled to recover his commission.

(i) The right of plaintiff to recover is governed by the law of this State as it existed at the time of the execution of the contract.

(j) The contract must be construed according to the law of this State as it existed at the time of the execution of the contract.

(k) If there be any ambiguity in the wording or the meaning of the written contract sued on, the evidence was to the effect that plaintiff was entitled to his commission only upon the contingency occurring of the actual conveyance of the property.

2. The Trial Judge refused to nonsuit the plaintiff at the close of the entire case, when thereunto moved by the defendant, whereas said motion should have been granted on one or more of the following grounds urged in support of said motion:

(a) Plaintiff was not entitled to recover under the Statute of Frauds.

(b) The contract sued on does not comply with the provisions of the Statute of Frauds.

(c) There was no agency established in this case under the Statute of Frauds.

(d) The contract sued on does not contain any agreement that defendant was to pay plaintiff any sum of money.

(e) Under the terms of the contract sued on, plaintiff was only to be paid his commission upon the conveyance of the property. His right to commission was based upon the contingency of an actual conveyance which never occurred. The fact of the conveyance of the property never occurring, was not the result of any arbitrary or wanton act of the defendant, or fraud or wilful refusal on its part to carry out the terms of the contract.

(f) The word "conveyance" used in the contract sued on, means the actual conveyance of the property and is not analogous to the word "sold."

(g) Under the law of this State, as laid down by the Court of Errors and Appeals, the plaintiff was not entitled to recover his commission.

(h) Under the law of this State, as laid down by the Court of Errors and Appeals, as it existed at the time of the execution of the contract sued on, plaintiff was not entitled to recover his commission.

(i) The right of plaintiff to recover is governed by the law of this State as it existed at the time of the execution of the contract.

(j) The contract must be construed according to the law of this State as it existed at the time of the execution of the contract.

(k) If there be any ambiguity in the wording or the meaning of the written contract sued on, the evidence was to the effect that plaintiff was entitled to his commission only upon the contingency occurring of the actual conveyance of the property.

3. The direction of verdict in favor of the plaintiff by the Trial Judge was erroneous because of one or more of the following reasons:

(a) Plaintiff was not entitled to recover under the Statute of Frauds.

(b) The contract sued on does not comply with the provisions of the Statute of Frauds.

(c) There was no agency established in this case under the Statute of Frauds.

(d) The contract sued on does not contain any agreement that defendant was to pay plaintiff any sum of money.

(e) Under the terms of the contract sued on, plaintiff was only to be paid his commission upon the conveyance of the property. His right to commission was based upon the contingency of an actual conveyance which never occurred. The fact of the conveyance of the property never occurring, was not the result of any arbitrary or wanton act of the defendant, or fraud or wilful refusal on its part to carry out the terms of the contract.

(f) The word "conveyance" used in the contract sued on, means the actual conveyance of the property and is not analogous to the word "sold."

(g) Under the law of this State, as laid down by the Court of Errors and Appeals, the plaintiff was not entitled to recover his commission.

(h) Under the law of this State, as laid down by the Court of Errors and Appeals as it existed at the time of the execution of the contract sued on, plaintiff was not entitled to recover his commission.

(i) The right of plaintiff to recover is governed by the law of this State, as it existed at the time of the execution of the contract.

(j) The contract must be construed according to the law of this State as it existed at the time of the execution of the contract.

(k) If there be any ambiguity in the wording or the meaning of the written contract sued on, the evidence was to the effect that plaintiff was entitled to his commission only upon the contingency occurring of the actual conveyance of the property.

(l) If the refusal of the Trial Judge to nonsuit plaintiff was correct, then a jury question was presented, upon which defendant was entitled to have the jury pass.

(m) Defendant was entitled to have the jury pass upon the facts and the right of the plaintiff to a recovery.

4. The Trial Court erroneously overruled the questions propounded by counsel for the defendant to the witness, George Scheetz, Jr., to wit: "Q. What was that conversation?" The subject-matter of his agency as explained thereafter, which question immediately followed the question and answer, to wit: "Q. At the time of drawing that, did

you have any conversation with Mr. Mahlenbrock, the plaintiff in this case, in relation to the subject-matter of commission? A. I did."

5. The Trial Court erroneously overruled the question propounded by counsel for the defendant, to the witness, George Scheetz, Jr., to wit: "Q. At that time did he or did he not state to you that he understood that there would be no commission payable to him unless the transaction was completed, the transfer made and the purchase price of the property paid?"

6. The Trial Court erroneously overruled the question propounded by counsel for the defendant, to the witness, George Scheetz, Jr., to wit: "Q. Will you state what that conversation was?" which question immediately followed the question and answer, to wit: "Q. And did you have any conversation at that time with relation to commission? A. I did."

7. The Trial Court erroneously overruled the question propounded by counsel for the defendant to the witness, George Scheetz, Jr., to wit: "Q. Did Mr. Stern or somebody from Dembe & Dembe's office give you any reason why they did not want that in," relating to the time of the essence clause which was taken out of the contract of sale.

8. The Trial Court erroneously overruled the question propounded by counsel for the defendant to the witness, George Scheetz, Jr., to wit: "Q. Will you state what it was?" which question immediately follows the question and answer: "Q. At the closing or immediately thereafter did you have any conversation with Mr. Stern? A. I did."

ROBERT CAREY,
Attorney and Counsel of Defendant.

136MAY.1.1927

New Jersey Court of Errors and Appeals

HARRY H. MAHLENBROCK, Plaintiff-Respondent, *v.* STONEHELL REALTY COMPANY, a corporation of the State of New Jersey, Defendant-Appellant.	Action at Law. On Appeal from Supreme Court.

BRIEF FOR APPELLANT.

Statement.

This is an appeal from a judgment entered in the Supreme Court for the Hudson Circuit, on a direction of a verdict for the plaintiff in the sum of $2,012.50. The suit was brought to recover the sum of $1,750 with interest alleged to be due from the defendant to the plaintiff, a real estate broker, on the sale of certain real estate. The complaint is found on page 2 of the record. It consists of three counts, but the second and third counts were abandoned during the trial (p. 67, line 24). The complainant bases his sole right of recovery upon a clause in the contract of sale between the defendant and Stern Realty Company, Exhibit D-4, page 124; the clause in question reads as follows: "It is further understood by the parties hereto, that Harry Mahlenbrock was the agent who consummated this sale, and that there is due to him a commission of seventeen hundred and fifty dollars payable at the conveyance of the premises." The facts adduced at the trial show that after the

contract was entered into, the attorney for the purchaser complained that there was an alleged defect in the title of the defendant to the real estate. Upon this alleged defect being brought to the attention of the attorney for the defendant, the attorney for the defendant made every effort to obtain a corrective deed, and on June 16, 1924, defendant's attorney wrote to the attorney for the purchaser (Exhibit D-2, p. 117) stating that he had started proceedings in the Court of Chancery to remove any alleged defect of title. The result of the Chancery proceedings was that a decree was entered on the 25th day of September, 1924, removing the alleged defect and confirming the title of the defendant to the real estate in question (Exhibit D-3, p. 118). The attorney for the purchaser, however, wrote to the attorney for the defendant, notifying him of the purchaser's refusal to wait for the alleged defect to be removed and cancelling the contract (Exhibit D-5, p. 129).

There is therefore in this case no question of any arbitrary refusal on the part of the defendant to perform his contract. The defendant was willing and did everything possible to consummate the sale but the sale fell through because of the refusal of the purchaser to wait a reasonable time for the removing of the alleged defect of title so that the sale could be consummated.

The only basis for the complainant's right of recovery is the clause in the contract of sale hereinbefore referred to, to the effect that the commission is *payable at the conveyance of the premises.* This is all there is in any writing anywhere to indicate any right existing in the complainant to a commission. The fact is unrefuted and admitted *that there never was a conveyance of the property involved,* and this was not due to any capricious or arbitrary refusal on the part of the owner to

carry through the transaction. On the contrary it was clearly and positively proven that when a slight question of title was raised by the vendee, the vendor (the defendant) *offered to do everything within its power to put the sale through;* and furthermore it appears from the undisputed proof in the case, that the vendor had the power to make the title absolutely marketable beyond any question and actually did go through the proceedings fixed by law for this purpose, *and with the utmost diligence,* as was testified to in the case. The decree of the Court of Chancery determining the title of the defendant has been entered and recorded in the office of the Register of Hudson County. There is no pretense that at the time of the signing of the contract for sale there was any knowledge in the owner of any alleged question affecting his title of record or otherwise. *The sale fell through clearly and simply because the vendee would not wait even a reasonable time to permit the cleaning up of the alleged defect in the record title.*

Furthermore, the defendant offered to prove that the *real reason* for the contract falling through was because of the purchaser's financial inability to go through with the contract, but questions directed to this point were overruled.

The contract in question did not make time of the essence. It was proven in the case, that in the preparation of the contract, the vendee declined to have time made as of the essence and it was taken out of the draft upon the insistence of the vendee (p. 80, line 20).

The main question in this case is as to whether or not under the terms of the clause in question, a condition precedent to complainant's right of recovery of his commission was the conveyance of the property. Defendant's contention being that

the conveyance was a condition precedent and there being no conveyance, that plaintiff was not entitled to recover.

In passing we desire to call the Court's attention to the fact that the clause in question does not state from whom the commission was due or who was to pay it. The Court held that the words of the clause were not ambiguous and therefore he refused to permit parol evidence. If the Trial Court was correct in this conclusion, then plaintiff's rights are governed by a construction of the clause standing alone. Construing the clause in the contract by itself, there being no provision that defendant was to pay plaintiff anything, there can be no recovery by plaintiff.

Defendant, at the conclusion of the plaintiff's case and at the conclusion of the entire case, made a motion to nonsuit. These motions to nonsuit were denied and the Court thereupon directed a verdict for the plaintiff.

Grounds of Appeal.

There are eight grounds of appeal (p. 132).

The first ground of appeal is to the denial of the defendant's motion to nonsuit at the close of plaintiff's case.

The second ground of appeal is to the denial of the defendant's motion to nonsuit at the close of the entire case.

The third ground of appeal is to the direction of verdict in favor of the plaintiff.

The fourth, fifth, sixth, seventh and eighth grounds of appeal are to the Trial Court's action in overruling questions propounded by counsel for the defendant to George Scheetz, Jr., a witness.

Counsel relies upon all of the grounds of appeal and will argue them under different points as hereinafter set forth.

ARGUMENT.

POINT I.

The denial of defendant's motions to nonsuit at the close of plaintiff's case and at the close of the entire case was erroneous.

A.

The right of plaintiff to recover under the contract was based upon the actual conveyance of the property which never occurred. The fact of the conveyance of the property never occurring was not the result of any arbitrary or capricious or wanton act of the defendant.

Under the express terms of the clause in the contract, the commission was to be paid *"at the conveyance of the premises."* The conveyance of the property was a condition precedent to plaintiff's right to recover his commission. The words "payable at the conveyance of the premises," have a definite meaning.

In the case of *Hinds* v. *Henry,* 36 N. J. L. 328, the Supreme Court (opinion by Mr. Justice Depue) held that no action could be maintained on a contract for commission where a broker by special agreement with his principal so contracted as to make his compensation dependent on a contingency which his efforts cannot control, even though it relates to acts of his principal, *until the contingency has arisen.*

In the year 1912 after this had been the law of this State for forty years, this Court in the case of *Leschziner* v. *Bauman,* 83 N. J. L. 743, cited with approval the doctrine laid down in the case of *Hinds* v. *Henry.*

This Court held in that case by a unanimous vote, in an opinion handed down by Mr. Justice

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MINTURN, that the doctrine of the case of *Hinds* v. *Henry* had provided the rule of conduct and adjudication in this State for nearly forty years, and the Court cited with approval the finding of Mr. Justice DEPUE in the *Hinds* case.

The wording of the contract in the *Leschziner* case was more definite and more in favor of plaintiff's contention here than the contract in this case.

The contract in the *Leschziner* case provided for the payment of a commission to be paid *"on the day of passing title, or July 15th."* This Court, following the case of *Hinds* v. *Henry* without any reservation, held that this language created a condition precedent and that the contingency or condition, to wit, the passing of title, had not happened and therefore plaintiff was not entitled to recover. This Court held that it was clear that the only reason for the use of the language in the contract was to tie up the payment of commission to the actual fact of passing of title and even disregarded completely the date reference—July 15th —but held that the controlling element was the fixing of a contingency between the parties. That contingency being the closing of title.

Mr. Justice MINTURN, on page 746, says:

> "Upon the other hand, the language of the contract makes it manifest that unless title shall have passed as the result of a sale to the proposed purchaser, the contingency or condition upon which the legal right to a claim for commission is based, has not arisen and upon this aspect of the case, *Hinds* v. *Henry* is controlling and presents the legal rule which justifies the direction at the circuit."

And on page 744:

> "It will be observed that the agreement is based upon two assumptions as conditions precedent to its enforcement. The first is that title shall pass, and the second that there shall be a sale of the defendant's apartment-houses to the Home Coupon Exchange Company. The fact is conceded that *title did not pass* and the record of the case presents no question for us to consider as to the bona fide character of the objections that were urged and resulted in its failure to pass."

The Trial Court held in the case at bar that the words "payable at the conveyance of the premises," were simply words fixing a time and did not create a condition precedent. This was in entire disregard of the opinion of this Court in the *Leschziner* case and although the words in the contract in that case provided for the commission to be paid on the day of passing title, *or July 15th.*

In overruling a question propounded by counsel for the defendant, the Trial Court, on page 91, said:

> "It is true that we have this Court of Appeals decision in Leschziner *v.* Bauman, in 83 Law, page 743, which upholds the doctrine in Hinds *v.* Henry, which is to the effect that where a condition or the payment of the commission is made to depend on a contingency, the parties have a right to fix their obligations; but when you come to read this latter case, and especially this one in the Supreme Court of Ludwig *v.* Aberbach, in 132 Atlantic, page 241, you immediately see the reasoning of the Court.
>
> "In the first case, the Court of Errors and Appeals dealt with a situation where there was first a contract to sell. Then it was turned into a contract to exchange and the purchaser failed to take it. There was no defective title on the part of the owner who made the commission agreement, but the purchaser fell.
>
> "Now if that were the situation here, there would be very little difficulty for the Court in following that decision, but so far as we have gone, there was a defect in the title. At least it could be cured; there is no doubt about that."

The Trial Court denied the motions for nonsuit and directed a verdict upon the ground that the word "conveyance" in the clause in the contract was simply a method of fixing a time for the payment of the commission. If there was no ambiguity in the contract and a time was fixed for the conveyance then it made no difference as to whose fault it was, the property was not conveyed. In this case defendant attempted to prove that the real reason for the conveyance never having been made was because of the purchaser's financial inability to go through with the contract. (See page 91.) The Trial Court, however, overruled this evidence.

The Trial Court endeavored to point out that the construction placed upon similar words by this Court in the *Leschziner* case was based upon a statement of facts where there was no alleged defective title on the part of the owner. It is hard to read this construction into this Court's opinion in the *Leschziner* case, when it is remembered that the words of the contract provided for the payment of commission to be made at the time of closing title, *or July 15th.* If the reference to the closing of title was simply the fixing of time, then a time is fixed with much more certainty by the use of the words *or July 15th.*

If the Trial Court be correct in its finding that the right of plaintiff to recover under the contract in question depended upon whether the vendor defaulted or the vendee defaulted, then the Court certainly erred in overruling defendant's evidence offered to prove that it was because of the vendee's financial inability to fulfill the contract rather than any default on the part of the vendor which prevented the conveyance of the property. This latter matter will be further argued under Point III.

The word "conveyance" in the contract in the case at bar means the passing of title; it cannot

mean anything else and cannot be construed to mean the fixing of a time only and not a condition precedent under the *Hinds* and *Leschziner* cases, both of which cases are cited with approval in the case of *Steinberg* v. *Mindlin,* 96 N. J. L. 206, and followed by this Court. In this latter case, this Court distinguishes in a commission contract between the words "sold" and "conveyed," and this Court distinctly held that "sold" meant simply getting the purchaser to agree to buy, and that "conveyed" meant an actual transfer of the title. The *Steinberg* case cited with approval the *Leschziner* case, holding further that the words used in the agreement involved in the *Leschziner* case, to wit, *"on the day of passing title, or July 15th,"* meant *"payable only on the actual conveyance of the property."* 96 N. J. L. 208.

The Trial Court, in denying the motions to nonsuit, disregarded the law as laid down by this Court in the cases cited, and based its refusal to nonsuit upon the case in the Supreme Court of *Ludwig* v. *Aberbach,* 132 Atl. Rep. 241. We will contend, under another heading, that irrespective of whatever the decision in the case of *Ludwig* v. *Aberbach* may be, the law which the Trial Court was governed by in the case at bar, was that laid down by this Court in the cases cited.

Furthermore, the case of *Ludwig* v. *Aberbach,* which is the sole reliance of the plaintiff, is predicated upon facts which are not presented in this case. The failure to consummate title in the case at bar was due not to the refusal of the vendor to sell, but was due to the refusal of the vendee to permit the carrying out of the contract. Furthermore, there is nothing in the opinion in the *Ludwig* case to show that any objection to title could have been cleaned up as was the fact in the case at bar.

In the *Ludwig* case these words are used: "if it was intended that no commission was to be paid unless an actual sale was consummated by the delivery of a deed, it should have been expressly stated in the contract." In the contract in the case at bar, this was explicitly stated and the word "conveyance" is the word that was used to create the right of recovery, and that word has been construed by this Court in the cases cited to mean "only upon the conveyance."

Furthermore, it was held in the *Ludwig* case that the purchaser must be ready, willing and able to buy and that that fact was not denied. In the case at bar that fact was expressly denied and defendant's counsel attempted to prove that the reason the contract fell through was because of the purchaser's financial inability to perform and asked questions for that purpose which were overruled by the Trial Court.

B.

The contract must be construed according to the law of this State as laid down by the Court of Errors and Appeals as it existed at the time of the execution of the contract.

It is well settled law that decisions of a court of last resort in our State are to be regarded as law and should be followed by inferior courts, whatever the view of the latter may be as to their correctness unless they have been reversed or overruled. 11 Cyc., page 747. See also 56 N. J. L. 244.

In the case of *Flaucher* v. *Camden,* 56 N. J. L. 244, opinion by Mr. Justice Reed, the Supreme Court held that the decisions of the Supreme Court until reversed by the Court of Errors and Appeals, are to be considered to be the law of this State.

On page 255 the Court says:

> "The notion that a deliberative opinion of the Supreme Court in one case could be disregarded in any other cause arising in the same court or in any inferior court, and involving the same principle, would be opposed to all settled rules which control judicial conduct."

In the case of *State* v. *Toth,* 86 N. J. L. 247, Mr. Justice Trenchard writing the opinion of this Court says at the foot of page 249:

> "The decision of the Supreme Court was the law of the state until reversed by the Court of Errors and Appeals, and acts done by officials in pursuance of the law thereby declared, prior to such reversal, are valid so far as they involve the interests of the public or third persons. Flaucher *v.* Camden, 56 N. J. L. 244; Lang *v.* Bayonne, 74 *Id.* 455. And, as we have pointed out, the decision of the Supreme Court was not reversed until January 23d, 1914."

The case of *Ludwig* v. *Aberbach,* 132 Atl. Rep. 241, was decided by the Supreme Court on March 2nd, 1926. This case is the sole reliance of the plaintiff and was the case which the Trial Court followed in denying the nonsuit and directing a verdict.

In the first place, as between the decisions of this Court and the Supreme Court, the Trial Court is bound to follow the law as set down in the opinions of this Court. In the second place, the contract must be construed as the law existing at the time of the execution of the contract, and the opinion of the Supreme Court was not handed down until 1926. As hereinbefore stated, this Court had in several opinions passed upon the express point involved and under the construction of the language used given by this Court, there could be no escape from a finding that under

the decision of this Court, a condition precedent was established by the language used in the contract and plaintiff was not entitled to recover, there having been no conveyance of the property.

This must necessarily be the law as parties must enter into contracts having in view the construction to be given upon the words used as recognized by the decisions of the court of last resort. And this is not by way of estoppel but by way of precedent as stated by Mr. Justice REED in the *Flaucher* case on page 255 in the following language: "the decision of the Supreme Court in this case is effective, not by way of estoppel but as a precedent."

This must necessarily be so as otherwise there would be no stability in the law or safety in parties entering into contracts or otherwise acting in the ordinary course of business.

To hold that plaintiff is entitled to recover upon the contract, upon the facts in this case, will be tantamount to saying that the word "*conveyance*" means absolutely nothing. This Court has construed however that these words of contingency in a contract do have a clear and fixed meaning. Under the line of decisions of this Court plaintiff's right to recover under the contract is conditioned upon the conveyance of the property, and the property not having been conveyed, plaintiff is not entitled to judgment.

C.

The contract sued on does not comply with the Statute of Frauds. The contract does not contain any agreement that defendant was to pay plaintiff any sum of money.

The clause in the contract simply states that there is due to plaintiff a commission payable at the conveyance of the premises. It does not contain any promises on the part of the defendant to

pay plaintiff anything. It leaves this a matter of vague construction. Frequently commissions are paid by the vendee or split. If this paragraph be considered as a memorandum meeting the requirements of the 10th Section of the Statute of Frauds, what is it a memorandum of? The Trial Court refused to permit any parol testimony to explain this clause. The Court overruled questions propounded by counsel for the defendant directed to that point.

The Court itself however did ask the witness Robert G. Stone a question on this point, but if reliance can be placed upon the Court's question and the witness' answer, *then the proof is that the money was to be paid only after the deal went through and the defendant had the money.* The question and answer appear on page 107 as follows:

> "The Court: There was no doubt that your Company alone agreed to pay this commission if this thing went through?
>
> "The Witness: Absolutely we agreed to pay if the deal went through and we had the money, and the garages were off our hands."

Therefore if there be any ambiguity in the wording or the meaning of the written contract sued on, the uncontradicted evidence was to the effect that plaintiff was entitled to his commission only upon the occurrence of the actual conveyance of the property, defendant having its money and the garages being off its hands.

Defendant's motions for a nonsuit should have been granted.

POINT II.

The direction of verdict in favor of plaintiff by the Trial Court was erroneous.

The direction by the Court of a verdict in favor of the plaintiff was erroneous, for the same reasons as set forth under Point I to the Trial Court's denial of defendant's motion to nonsuit. The same arguments urged under Point I apply equally to this point, and counsel makes such under this point as though the arguments under Point I were here repeated.

There is the further added argument under this point that if the refusal of the Trial Judge to nonsuit plaintiff was correct, then a jury question was presented upon which defendant was entitled to have the jury pass.

The jury were entitled to pass upon the facts in the case and the understanding of the parties.

The direction of verdict was erroneous.

POINT III.

The Trial Court erroneously overruled the questions propounded by counsel for the defendant of the witness George Scheetz, Jr., which questions are set forth in the fourth, fifth, sixth, seventh and eighth grounds of appeal.

The questions which were overruled are set forth verbatim in the aforementioned grounds of appeal and appear on pages 136-137 of the record.

A.

The Trial Court erroneously overruled the questions set forth in the fourth ground of appeal.

The questions were: "Q. What was that conversation? Q. The subject matter of his agency as explained thereafter?"

The exception to the overruling of these questions appears on page 77:

The question is directed to a conversation which the witness George Scheetz, Jr. had with the plaintiff in relation to the subject-matter of the commission.

It is respectfully submitted that if the words contained in the clause in the contract, "payable at the conveyance of the premises" are not construed in accordance with the opinions of this Court in the cases cited, that then it becomes very material to determine the construction placed upon the clause by the parties at the time of the drawing of the contract. The word "conveyance" means something. It certainly does not mean "time." Counsel for defendant was endeavoring by the question to bring before the jury the construction placed upon the clause by the parties themselves at the time the contract was drawn. This testimony was relevant and it was error for the Trial Court to overrule it.

B.

The Trial Court erroneously overruled the question set forth in the fifth ground of appeal.

The question was: "Q. At the time did he or did he not state to you that he understood that there would be no commission paid to him unless the transaction was complete, the transfer made and the purchase price of the property paid?"

The exception to the overruling of this question appears on page 78.

For the same reason urged under subdivision A of this point, this question was relevant and it was error for the Trial Court to overrule it.

C.

The Trial Court erroneously overruled the question set forth in the sixth ground of appeal.

The question was: "Q. Will you state what that conversation was?"

The exception to the overruling of this question appears on page 80.

This question follows a question and answer: "Q. And did you have any conversation at the time with relation to commission? A. I did."

For the same reason urged under subdivision A of this point, this question was relevant and it was error for the Trial Court to overrule it.

D.

The Trial Court erroneously overruled the question set forth in the seventh ground of appeal.

The question was: "Q. Did Mr. Stern or somebody from Dembe & Dembe give you any reason why they did not want that in?"

The exception to the overruling of this question appears on page 80.

Referring to the preceding question it appears that by "that" in the question is meant "the clause that time was of the essence." This was peculiarly relevant in view of the fact that by this question defendant attempted to prove that the purchaser refused to have time of the essence made a part of the contract. This taken into connection with the fact that when the purchaser became aware of his financial inability to complete the purchase, he seized upon an alleged defect in the title and wrote a letter making time of the essence is very significant. Defendant was not permitted to prove these facts and his questions directed thereto were overruled.

E.

The Trial Court erroneously overruled the question set forth in the eighth ground of appeal.

The question was: "Q. Will you state what it was?"

The exception to the overruling of this question appears on page 80.

A reference to the preceding question shows that the witness by this question was being asked to state a conversation which he had with Mr. Stern at the closing or immediately thereafter.

A reference to the further statement of counsel at the top of page 91 shows that counsel by this question intended to bring out the fact that Mr. Stern, the President of the Stern Realty Company, the plaintiff, stated to Mr. Scheetz, that he was willing to take the title but that Mr. Wacker, the other member of the corporation, had cold feet and would not wait, and that he, Stern, could not wait because he could not finance the situation.

This question was overruled and counsel for the defendant was prohibited by the Trial Court from producing evidence to prove these facts. In view of the Trial Court's determination as shown on page 92 that in this case he would have been bound to follow the opinion of this Court in the *Leschziner* case, were it not for the fact that it appeared that there was an alleged defect in the title of the defendant in the property this evidence was most relevant. Defendant contended that this was not the reason for the conveyance not having been made, and endeavored to prove that the real reason was the purchaser's financial inability to go through with the contract.

The Trial Court relied upon the case of *Ludwig* v. *Aberbach,* 132 Atl. Rep. 241, and held that that case was controlling because the reason for the contract not being carried out was because of an

alleged defect of title in the defendant. He, however, refused to permit defendant to prove otherwise. In the *Leschziner* case the Court said, on page 241: "The reason for non-delivery of a deed was directly due to the defendants' inability to give a good title." This was denied by the defendant in the case at bar, but the Court refused to permit defendant to prove to the contrary. A close reading of the *Ludwig* case shows that it is also necessary, even under the doctrine laid down in that case, for the broker to procure a purchaser ready, willing and able to buy. On page 241 the Court says: "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." In the case at bar, *this fact was denied,* but defendant was not permitted by the Trial Court to prove that the purchaser was not ready, willing and able to buy. It certainly was most important for the defendant to prove that *the purchaser was not ready, willing and able to buy.* This the Court refused to permit the defendant to prove, although on page 92 he indicated that if the purchaser fell down, then the case would be governed by the *Leschziner* case and plaintiff could not recover.

The overruling of this evidence offered on behalf of the defendant to prove these facts, was erroneous.

CONCLUSION.

It is respectfully submitted that the judgment below should be reversed.

ROBERT CAREY,
HARRY LANE,
Of Counsel with Defendant-Appellant.

May Term, 1927.

136MAY.1.1927

New Jersey Court of Errors and Appeals

HARRY H. MAHLENBROCK,
Plaintiff-Respondent,

vs.

STONEHELL REALTY COMPANY, a corporation of the State of N. J.,
Defendant-Appellant.

Action at Law.
ON APPEAL FROM SUPREME COURT.

BRIEF FOR PLAINTIFF-RESPONDENT.

Statement.

This is an appeal from a judgment entered in the Supreme Court for the Hudson Circuit, on a direction of a verdict for the plaintiff in the sum of $2,012.50. The action was brought to recover the sum of $1,750.00, with interest, alleged to be due from the defendant to the plaintiff, a real estate broker, under the terms of a contract for the sale of real estate, (containing a proviso for the payment of the broker's commissions (See Exhibit D-4, pages 125-126).

The clause providing for the payment of commissions reads as follows:—"It is further understood by the parties hereto, that Harry Mahlenbrock was the agent who *consummated* this *sale,* and that there is *due* to him a commission of Seventeen hundred and fifty dollars *payable at the conveyance of the premises.*"

Nearly all of the material and essential allegations of the first count of the complaint were admitted by the answer except the existence of a defect in the vendor's title. This fact was proven by the testimony of Mr. Lewin, the Attorney who searched the title on behalf of the vendee (page 46), and was admitted in the testimony of Mr. Sheets, the expert who searched the title for the defendant, (page 101). By the terms of the contract for the sale of the property in question, a warranty deed was to be delivered and the title closed on or about the 15th day of April, 1924 (page 97, line 20). On that date it developed that the vendor *did not own 500 square feet of the premises, described in the contract* (page 101, line 23).

It was further developed that upon all of the premises described in the contract including the said 500 square feet were built private garages, (page 101, lines 25 to 30). The Attorneys for the vendor were notified of the objections about the 15th day of April, 1924, (page 98, line 10). By operation of law, of course, time was of the essence. The vendee and his Attorney waited from April 15, 1924, until May 28, 1924 for the title to be cleared of the defects. On May 28, 1924, a demand was served upon the Attorneys for the vendor, by the Attorneys for the vendee that time should be of the essence of the contract and title must be passed before July 1, 1924 (See Exhibit D-5, page 129). By referring to page 95, line 19, the Court will see that no definite action was taken by the Attorneys for the vendor to file a bill in the Court of Chancery to clear the title until the 4th day of June, 1924, and that a decree was not obtained until the 25th day of September, 1924. The lack of title in the vendor to the 500 square feet included in the objection to the title remained a

defect in the title until the 25th day of September, 1924, and that even then the condition of the title would hardly be called legally marketable.

On July 21, 1924, the vendor and vendee with their respective Attorneys attended at the office of the Attorney for the vendee and upon the vendor returning the deposit and paying the search fees, mutual releases were executed between vendor and vendee in the absence of the plaintiff. This is conceded by the admission in the defendant's answer to paragraph six of the first count of the complaint and by testimony of Attorney for vendee, Mr. Dembe, (page 57) and by testimony of Attorney for vendor (page 90, line 30).

It is conceded by all parties that the plaintiff, the broker, had no knowledge of the defective condition of the title until some time after the contract had been executed. The defective condition of the title at the time set by the terms of the contract for its closing and its continued defective condition up to and after July 1, 1924, the date finally forced upon the vendor for closing, is for all practical purposes conceded to be the fact by reason of the Attorneys for the defendant, the vendor, admitting that it was necessary to file a bill in the Court of Chancery in order to clear the title (page 103, lines 25 to 30). There is not a scintilla of evidence in the record to prove that the failure of the title to pass in accordance with the terms of the contract was the fault of the broker in any degree.

ARGUMENT.

POINT I.

The denial of the defendant's motions to nonsuit at the close of the plaintiff's case and at the close of the entire case was proper.

(A)

Plaintiff-respondent contends that the right of the plaintiff to recover under the contract was not based upon the actual conveyance of the property which never occurred.

The defendant under this heading submits to this court for construction the meaning of the proviso in Exhibit D-4, relating to payment of commissions. The proviso reads as follows:

> "It is further understood by the parties hereto, that Harry Mahlenbrock was the agent who *consummated this sale,* and that there is *due* to him a commission of Seventeen hundred and fifty dollars, *payable at the conveyance of the premises.*"

The first issue is whether the words "*Payable at the conveyance of the premises*" constitute a condition precedent or not.

1. Plaintiff contends that the question of the construction to be given the words of such an agreement is for the Court alone and not for the jury especially so when the courts of this State have heretofore defined the meaning of such words and similar words and phrases. This proposition needs no citation of authorities.

2. This provision now submitted for construction was originally placed in the proposed con-

tracts by the Attorney for the defendant (vendor); (page 77, line 30; pages 79 and 80). And (Exhibits P-1 and P-2 at page 115), and was incorporated in its same form in the contract sued upon. Under the law of this state it must therefore be construed most strictly against the vendor and his Attorneys. This Court needs no authority upon this point.

3. A fair reading of the language of the provision demonstrates that the owner recognized Harry Mahlenbrock as the agent who procured the purchaser whom the owner accepted as ready, able and willing to buy on terms upon which the owner was willing to be bound. And that the commission was to be paid not for procuring a *conveyance* but for consummating the sale. The sale had been consummated and was the consideration and reason why *there is due him* a commission, "*Payable at the conveyance of the premises*". Surely if words mean anything and grammar has its rules, "*Payable at the conveyance of the premises*" describes when the payment of the *debt* is to be made. There is no ambiguity in the language for by referring to the contract a court of law must find that the time for the conveyance was April 15, 1924. Further, time was of the essence in the law court and the commissions were payable when that day arrived.

4. The appellants rely strongly on the case of *Hines* vs. *Henry,* 36 N. J. Law, page 328. It is conceded that the opinion in that case, as far as it goes, is the leading opinion on contracts between brokers and principals in this State and has been for many years. It should be stated here, however, that in that case the provision in the contract was construed to be a condition precedent, but there the parties at the time they en-

tered into the contract which was actually being construed by the Court, intended and by their language made the provision a condition precedent. All of the parties knew of the defective title and contracted subject to it. The defendant-appellant also relies strongly upon the case of *Leschziner* vs. *Bauman,* 83 N. J. Law, 743, 85 Atl. 205, but there again the Court states at page 746:

> "Upon the other hand, the language of the contract makes it *manifest* that *unless* title should be passed as a result of a sale to the proposed purchaser, the contingency or condition upon which the legal right to claim for commission is based, has not arisen and upon this aspect of the case, *Hines* vs. *Henry,* is controlling and presents the legal rule which justifies the direction at the Circuit."

In the latter case it will also be noted that the Court there said, at page 744:

> "The fact is conceded that title did not pass and the *record of the case presents no question for us to consider as to the bona fide character of the objections that were urged and resulted in its failure to pass.*"

In the case of *Haber* vs. *Goldberg,* 92 N. J. Law, 367, 105 Atl., page 874, the present Chancellor, speaking for the Court of Errors and Appeals of this State, on November 27, 1918, says at page 876 with reference to *Leschziner* vs. *Bauman:*

> "In that case Bauman agreed to pay Leschziner a commission on the date of passing title, or July 15." The transaction did not go through, because another agreement was entered into *which failed of consummation* because the proposed grantee of the brokers principal was *unable to furnish a marketable title* to the premises but was to convey by way of exchange;—not a technical exchange at

> common law, but, as part of the consideration. It was held that the contract contingent upon the sale of the property and the passing of title, and that, in the absence of proof of the fulfillment of that contingency a directon of verdict for the defendant was proper."

The case now at bar does not come within the rule of *Hines* vs. *Henry,* but rather within its exceptions. In that case the performance of the condition precedent was part of the consideration for the payment of the commissions. There was a failure of consideration. The broker was to aid in procuring the passing of title. The broker knew when he signed the final agreement for commissions of the outstanding tax title. Nor does the case at bar come within the rule of the case of *Leschziner* vs. *Bauman,* but within its exceptions. In the latter case an exchange of properties was contemplated. The vendee could not make good title to the premises he was giving in exchange for property of the vendor. Here again the agent was to accomplish something more than to bring the parties together. Here again the performance of the condition precedent was part of the consideration for the payment of commissions. Here again there is a failure on the part of the purchaser produced by the broker to perform. But in either of the above cases have you a vendor impliedly representing himself to have good title and when the agent's work has been completed avoiding his contract, on the ground that the title did not pass because the vendor's title was defective.

5. But the Courts of this State have passed on language very similar to the language now before this Court, and surrounded with practically the same facts. However, none of the following cases contain provisions for commissions to brokers so

favorable to the broker as does the provision now before the Court. For instance:—

(A)—In the case of *Taylor and Rose* vs. *Buonincontri,* 3 A. R. 881, 128 Atl. 603, the wording of the contract was as follows:—

> "This payment to be made in cash at the time of passing title to the above—property."

Judgment was recovered for the plaintiff in the Second District Court of Newark and the judgment was affirmed on appeal, the Court saying:

> "The contract sub-judice is based as a consideration, not upon the passing of title," but "In consideration of your having negotiated the purchase" the subsequent language of the contract *"At the time of passing title"* to the property must be construed to indicate the *time when* the commission will be payable, and not serve as a barrier to payment of the commissions under *any and all circumstances.* Such was the effect of your adjudication in Rauchwanger *vs.* Katzin, 82 N. J. Law, 339-82 Atl. 510."

(B)—In the case of *Dickinson* vs. *Walters,* 100 N. J. L. 62, 125 Atl. 235, the agreement read as follows:—

> "Agreed to pay brokerage for 'Negotiating sale'—'In accordance with the terms of an agreement of sale of even date.' The Court there held that the brokers were entitled to the commission, although there was no consummation of the sale and delivery of the deed."

(C)—In the case of *Rauchwanger* vs. *Katzin,* 82 N. J. Law 339—82 Atl. 510, the agreement contained the words that the commission was:

> *"To be paid on day of settlement."* The trial Court found that the plaintiffs found a

> purchaser ready and willing to purchase the property at a price that was satisfactory to the defendant, but that, owing to the objections of the defendant's wife, to convey, and the further fact that the defendant insisted as a condition of settlement that the plaintiffs reduce their claim for commission to the extent of One hundred dollars, no *"Day of Settlement"* was ever reached or fixed, and upon that ground the defendant in this suit contests payment of the plaintiff's claim for commission.
>
> The facts plainly evince that the plaintiffs perform their part of the contract by procuring a purchaser ready and willing to take title and therefore under the well settled rules of law were entitled to recover the commissions provided for in the contract and cites, Crowley *vs.* Myers, 69 N. J. Law, 245-55, Atl. 305. The Court further states: "The rule thus enunciated (Hines *vs.* Henry) was not intended to work injustice by putting it within the power of a vendor after the agent has fulfilled his part of the contract to postpone indefinitely the day of settlement, and thereby deprive the agent of the benefits of his labor and enable the vendor to profit by his own malfeasance. Citing Milbourne *vs.* Ewart, 5 T. R. 381."
>
> The Court further says: "The case of Sadler *vs.* Young, 78 N. J. Law, 594,—75 Atl. 890, fixes the personal liability of the agent for the commissions earned by performance, whether the other party to the contract is unable to perform by reason of the fact that he is not vested with the title to the property in question."

In the Rauchwanger case, the court approves *Hines* vs. *Henry,* and after a careful reading of both cases the fact is that *on the day of settlement* the vendor did not have the contemplated title. The vendor was not able to perform whether through his fault or not should make no difference as between he and the broker.

(D)—In the case of *Ludwig* vs. *Aberback,* 132 Atl. 241, the agreement read as follows:

> "Said *commission to be paid upon delivery of deed.*"

For the convenience of the Court the following is a copy of the provision in the Ludwig case with reference to the payment of commission. The Court will note the similarity between the language used in the Ludwig contract and the language now before this Court for construction.

> "And the said party of the first part hereby agrees to pay to Louis Ludwig a commission of $250. on the purchase price aforesaid, said commission to be paid in consideration of services rendered in consummating this sale; said commission to be paid upon delivery of deed."

Judgment was rendered for the broker in the Elizabeth District Court and was affirmed on appeal by the Supreme Court; where the Supreme Court said:

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

The Court in the Aberbach case points out that if the parties intend to create a condition precedent there are words for that purpose and they should be used. This point is very forcible when it is considered that the defendant's Attorney prepared the provision now before the Court. And in this case, the readiness, willingness and ability of the defendant was not denied, while in the case at bar the readiness, willingness and ability of the purchaser was passed upon by the defendant when he accepted the vendee as a purchaser and bound the vendee by a valid contract. The words of the Supreme Court in the Aberbach case meet the language and facts of this case exactly.

(E)—In the case of *Kislak* vs. *Judge,* 4 A R 788, 133 Atl., page 74, the Supreme Court says:

> "The simple question, therefore, is whether the broker is to be deprived of the commission agreed upon and earned because it transpires that his employer has not the title contemplated to be conveyed."

(F)—In the case of *Lehrhoff* v. *Schwartzky,* 125 Atl. 496, the contract provided as follows, commissions "*To be paid on the date of closing title to said premises*", judgment was rendered for the plaintiff broker, in the District Court, and the Supreme Court on appeal affirmed the judgment, stating as follows:

> "We think the Court adopted a construction consonant with sound sense, in holding

that the words imparted that the commissions should be paid on the day set for closing the title, and that payment of commissions was not made dependent upon the actual passing of title."

(See also *Alpern* vs. *Streif,* 136 Atl., page 336.)

(G)—The following cases indicate how carefully the vendor must word his contract in order to create a true condition precedent:

Duffy & Thomas, Inc., vs. *Joseph Miller,* Nov. 11, 1926; *Thelman* vs. *Holdman,* 133 Atl. 71; *Kuligowski* vs. *McCullough,* 133 Atl. 71.

(H)—In the case of *Klipper* vs. *Schlossberg,* 115 Atl. 345, 96 N. J. Law 397. An encroachment vitiated the marketable title and the vendor did not have the contemplated title.

When the words *"Payable at the conveyance of the premises"* is construed in the light shed by the foregoing cases and this Court then considers the legal meaning which the Courts of this State have given to the words *"Sale"* and *"Consummated"* there remains little doubt as to the true legal meaning of the provision used in the contract now before this Court.

Defining the words *"Sale"* and *"Consummated"* the Supreme Court of this State says in the case of *Klipper* vs. *Schlossberg,* 155 Atl. 345, decided Nov. 2, 1921, as follows:

"It becomes manifest, therefore, the word *'Sale'* in all these instances where the parties did not expressly otherwise stipulate consisted in the bringing together of the vendor and a person able and willing to purchase, upon the terms proposed. The rule is not uniform in all jurisdictions, but such is the trend of authority here. In consonance with it the corollary is equally true as declared in 4 R. C. L. 50, viz:

"The authorities are practically unanimous in holding that unless the broker and his employer have stipulated to the contrary, the broker is entitled to his compensation upon the completing of the negotiations he undertook, irrespective of whether or not the contract negotiated is ever consummated, so long as the failure to carry it through to a successful completion is not due to any fault of the broker", citing *Vinton* v. *Baldwin,* 88 Ind. 104, 45 Am. Rep. 447.

It follows therefore that the 'sale' contemplated by the parties to this contract was not the actual passing or devolution of title, but the execution of a contract of sale between the vendor and the proposed purchaser upon terms satisfactory to both. Such a contract was executed, and with the execution of that instrument the 'sale' so far as the broker was concerned, and so far as his efforts could effectuate a sale, was complete; and his legal right to compensation under the contract consequently became fixed and determined."

It therefore appears that in the case at bar the broker had procured a *"sale"* which was *"consummated"* and there was then owing to him the commission *"Payable at the time of conveyance"*. Nothing remained to be done as far as the plaintiff was concerned but the payment of money and the time was fixed for that.

Plaintiff-respondent submits that as a matter of law in view of the above cases the words *"Payable at the conveyance of the premises"* does not constitute a condition precedent or a condition at all, but merely fixes a time of payment, and certainly so when read in conjunction with the rest of the provision.

(B)

The defendant by paying the deposit and search fees to the vendee and exchanging general releases with him prevented the further performance of the contract and substituted new benefits and protections and safeguards for himself in place of the benefits secured under the valid contract of sale procured for him by the plaintiff.

1. It is the settled law of this State that one party to a mutual contract cannot prevent performance by the other and then sue the other for damages; nor can such a party having received all the benefits of a given contract then prevent further performance of the contract to the detriment of the other.

See *MacPherson* vs. *Mackay,* 91 N. J. Law 473, 103 Atl. 36; *Ludwig* vs. *Aberbach,* 132 Atl. 241; *Conklin* vs. *Kruger,* 79 N. J. Law, 326—75 Atl. 436; *Collaty* vs. *Schuman,* 75 N. J. Law 97—66 Atl. 933, Aff. 76 N. J. Law 502, 70 Atl. 190; *Stephen* vs. *Camden,* 75 N. J. Law 648—68 Atl. 69; *Johnson* vs. *Tennessee Oil,* 69 Atl. 788; 74 N. J. E. 32 and *Hinds* vs. *Henry.*

2. This proposition of law is especially pertinent to contracts similar to that now before the Court. In contracts of this nature the courts have repeatedly held that he who prevents performance must not be permitted to substitute new benefits and protections to the detriment of the broker. See cases following:—

A—In case of *Klipper* vs. *Schlossberger,* 96 N. J. L. 397, 115 Atl. 345. There was a defective title in vendor. Action for specific performance commenced. Deposit and search fees were returned to vendee. The court held that this did not affect the broker's right to commission.

B—In the case of *Dermody* vs. *N. J. Realties Inc.,* C. of E. & App., 3 A. R. 702, 128 Atl. 265, where the facts disclose that the vendor and vendee compromised their differences and then the vendor refused to pay the broker, the Chancellor, speaking for this Court, on March 23, 1925, stated

> "It is not perceived that there is any difference between the case where the vendor sued a defaulting purchaser and recovered damages for the default which precludes the idea of any repudiation of the contract sued on, as in Haber *v.* Goldberg, or entered into a substitutional contract with the defaulting purchaser and thereby, by way of compromise and agreement, securing damages which otherwise could have been recovered by suit, as in this case. We think the judge should have applied the doctrine of Haber *v.* Goldberg instead of that of Leschziner *v.* Bauman to the facts in the case at bar, and had he done so, he would have been required to award a judgment to the plaintiff against defendant.
>
> "Where a real estate agent produces a purchaser able to buy, who is accepted by the vendor, with whom he enters into a contract, but afterwards defaults and settles with the vendor by the payment of a sum of money as damages for his breach of the contract, the agent's commission under his contract with the vendor is earned, notwithstanding it was stipulated to be paid at the time of passing title, which did not pass, because the contract of settlement substitutes payment of damages to the vendor, in the place of the purchase money stipulated in the contract of sale and purchase, which contract was brought about by the agent's services."

C—In the case of *Haber* vs. *Goldberg,* 92 N. J. Law, 367, 105 Atl. 874 at page 876, C. of E. & A.

> "Now in the case at bar, the conveyances agreed to be made between the parties to the

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

Plaintiff-respondent submits that there is no difference in principle between the broker's rights in the cases above cited where a money return was accepted by the vendor in place of the contract right as a result of the default of the vendee and the case now at bar where the vendor by his failure to own the title he impliedly represented he owned accepted a release and gave a release, deposit money, and search fees to the vendee, substituting the release in place of the contract right. In the cases cited the vendor received new money consideration, in the case at bar he saved old money by getting a release and preventing suit being brought against him. He substituted the protection of the release in place of the contract right. This should not affect the broker's right to commissions (See *Dubrow* vs. *Hornstra,* 95 N. J. L. 288—112 Atl. 336.)

(C)

Answering the point raised by counsel for the defendant-appellant at the middle of page seven of his brief and continuing over to page eight, plaintiff-respondent submits that the court, by referring to pages 90 and 91 of the record, observe

that the argument is based on a false premise. The trial court sustained the objection to the question asked by the Counsel for the defendant upon the ground that the conversation to which the question was directed was had after the vendor and vendee had prevented further performance of the contract by the payment of money and exchange of releases. The court expressly states the reason for sustaining the objection on page 91 of the record although counsel did not set the reason up in his brief, but only a part of it. At no place in the record do any of the witnesses for the defense attempt to prove that the vendee, "Stern Realty Company" were unable, unwilling or not ready to perform. Further the vendor accepted the vendee as a purchaser, duly qualified, by executing a valid contract. (See *Klipper* vs. *Schlossberg, supra*) and also the case of *Dickinson* vs. *Walters,* 100 N. J. Law 62, 125 Atl. 236, where the Court says:—

> "The law is firmly settled in this State that a real estate broker earns his commission when he secures a buyer on the seller's terms, either as originally propounded or as settled by agreement between the seller and buyer. Clerk *v.* Griffin, 95 N. J. L. 508, 113 Atl. 234; Steinberg *v.* Mindlin, 96 N. J. L. 206, 207, 114 Atl. 451, where the cases on the subject are collated."

(D)

Answering the point made by the defendant-appellant at the bottom of page nine of his brief plaintiff-respondent submits that the vendee was under no duty to wait any length of time for the defendant to clear the title, but on the other hand was entitled to receive a clear title and deed on the day set for closing or on an adjourned date at the vendee's option. See case of Woodward *vs.*

Horden, 131 Atl. 62, at page 63, where the court says:—

> "It was their inability to perform, and not the inability or unwillingness of the intending purchaser, which caused the abandonment of the contract."

(E)

It is submitted that in answer to Point D, page 10 of appellant's brief, the case of *Ludwig* vs. *Aberbach,* upon which the trial court relied strongly is and has been the law of this State for many years although perhaps never before so concisely stated. See *Hinds* vs. *Henry, Rauchwanger* vs. *Katzin,* Sup. Ct., 1912. *Haber* vs. *Goldberg,* 105 Atl. 874 at 876. *Lehrhoff* vs. *Schwartzky,* 125 Atl. 496, decided in May, 1924, wherein the Court approves of the doctrine of the *Rauchwanger* case and says:

> "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."

The matter now before the Court for construction is not the meaning of the word "*Conveyance*" but the meaning of the whole provision for payment of commissions.

(F)

The appellant contends under "C" of his brief at page 12, as follows:

> "The contract sued on does not comply with the Statute of Frauds."
> "The contract does not contain an agreement that defendant was to pay plaintiff any sum of money."

1. Plaintiff-respondent answers this argument as follows: first the contract upon which this action is based as alleged in the first count of the complaint was admitted by the answer and the Statute of Frauds was not raised as a defense in the answer to the first count.

It is the established law of this State that the Statute of Frauds must be pleaded where the contract alleged in the complaint is not denied in the answer. This proposition is supported by the case of *Wakeman* vs. *Dodd,* 27 Equity 564 C. of E. and App., March term, 1876, where the Court speaks as follows:

> "But where the answer admits an agreement though only a parole one, the defendant must plead the Statute in order to obtain its protection, Fry on Spec. Perf. Sections 332, 336, 337; Brown on the Statutes of Frauds Section 511, and cases cited in note 3."
> In Walker *vs.* Hill's Executors, decided in this Court, 21 Equity, 202-203, affirmed in 22 Equity 513, the correct rule of pleading, as above given, is distinctly declared."

In the case of *McElroy* vs. *Ludlum,* 32 Equity, 831 this Court in the June term, 1880, stated the law as follows:

> "Ludlum having admitted the agreement and failing to plead the Statute, if he were the sole party to the suit, the defense would be without support."

Again this Court in the case of *Ziegner & Lane* vs. *Daeche,* 91 N. J. Law 634, 103 Atl. 82 this Court on Mar. 14, 1918, again approves of the above doctrine where it states:

> "But where a defendant admits in his plea or answer the making of the terms or agreement sued which is within the Statute of

> Frauds, he must plead the Statute if he wishes the benefit of it, except where the Plaintiff's complaint or declaration of his cause of action discloses a case within the Statute. This is the rule both at law and in equity citing Van Duyne *vs.* Vreeland, 12 N. J. Equity, 142; Porter *vs.* Wornser, 94 N. Y. 450; Wells *vs.* Monihan, 129 N. Y. 161, 29 N. E. 232."

This principal of pleading has received the uniform approval of the courts of this State since 1870 and it is still the law of this State and has been cited with approval in the following recent cases: *Maagget* vs. *Brower,* 111 Atl. 656; *Kotch* vs. *Rossi,* 120 Atl. 210; *Often* vs. *Stout,* 127 Atl. 677; *Degheri* vs. *Carobine,* 135 Atl. 531.

It is submitted in view of the above cases that the defendant is barred from having the question of the Statute of Frauds passed upon by this Court.

2. Even if failure to plead the statute were not a bar, plaintiff-respondent contends that the agreement by a fair and reasonable construction fairly complies with the Statute of Frauds. (See the case of *Lesser* vs. *Stollman,* 132 Atl. 328, decided by the Supreme Court on March 6, 1926, also the case of *Kelly* vs. *Demarest,* 111 Atl. 273, decided by the Supreme Court August 11, 1920.)

3. Plaintiff-respondent respectfully submits that the Statute of Frauds does not apply to the contract question for the reason that the defendant, the party to be bound, was not the owner of all the lands agreed to be conveyed by the terms of the contract. (See case of *Kislak* vs. *Judge,* 133 Atl., page 74) where the Court says:

> "In Murphy *v.* Lewis, 69 A. 483, 76 N. J. Law, 141, it was held in a similar case in this court that the part owner in entirety was not 'owner' in the contemplation of the tenth section of the Statute of Frauds (C. S. P. 2617),

> and was responsible to the broker. On the same theory, in Ryer *v.* Winter, 72 A. 84, 77 N. J. Law, 441, the broker was denied his commission because the employer had no legal interest at all in the premises. But in Sadler *v.* Young, 75 A. 890, 78 N. J. Law, 594, in the Court of Errors and Appeals it was held that the effect of the statute was not to require written contracts of employment in all cases as a prerequisite to the right to a commission, but to negative that right only in the case of an 'owner' unless there was a writing; and consequently that, if A. employ B. to obtain a purchaser for property of C., and promises B. a commission, the tenth section has no application, Ryer *v.* Winter was expressly disapproved, and later was itself reversed for the reasons stated in Sadler *v.* Young. See Ryer *v.* Winter, 79 A. 1119, 81 N. J. Law, 575. Since the decision in Sadler *v.* Young, we understand the rule to be that, if the employer of the broker is in fact 'owner', the requirements of section 10 as later amended (P. L. 1911, p. 703; 1918, p. 1020), must be met in order to entitle the broker to commission; but, if the employer is not 'owner', the broker who does his work is entitled to his pay, without reference to the statute. Thus, in Kruse *v.* Ferber, 103 A. 409, 91 N. J. Law, 470, the defendant's interest was that of tenant by the curtesy initiate; in Taub *v.* Shampanier, 112 A. 322, 95 N. J. Law, 349, defendant was tenant by the entirety; in Klipper *v.* Schlossberg, 115 A. 345, 96 N. J. Law, 397, there were encroachments which vitiated a marketable title. In these cases, and we think others not cited to us and which we have not taken time to collect, the underlying principle of decision is that of Sadler *v.* Young, that a party who binds himself to pay a commission to a real estate broker for procuring a purchaser for lands of which such party is not the owner is liable to the broker who has done what he was employed to do, irrespective of the statute of frauds."

(4) Answering the second contention of the defendant appellant under this head we submit that it is at this time too late to raise the point that the contract in question does not contain any agreement that defendant was to pay plaintiff any sum of money. This point in reality raises an issue as to the joinder or non-joinder of proper parties defendant. This point was not raised by the pleadings nor at the trial. The case of *Lapayowker* vs. *Levitski,* 3 A R 1565, 130 Atl. 627, stands for the proposition that

> "On a plea of general denial and showing at trial that person who should have been a defendant had been omitted, plaintiff is entitled on merits being with him, to a verdict against the defendant on the record."

To the same effect is the case of *Dittrick* vs. *Cline,* 4 A R 286, 131 Atl. 708, where the Court states the law as follows:

> "Nonjoinder of parties, which was not raised below, could not be raised on appeal."

See also the case of *Lieberman* vs. *Brothers,* 55 N. J. Law 379, 26 Atl. 82.

It is submitted that the contract now before this Court complies with tenth Section of the Statute of Frauds as amended by Chapter 273 of the Laws of 1918, at page 1020 the pertinent part of which reads as follows:

> "Or the authority of the broker or real estate agent to make a sale or exchange of such land is recognized in a writing or memorandum signed by the owner or his authorized agent, whether or not such writing or memorandum is signed by said owner or agent before or after such sale or exchange has been effected, and the rate of commission on the dollar shall have been stated therein."

The fact that another or two persons signed the memorandum only one of whom was the owner does not make the contract violate the Statute. Surely when two persons sign the owner cannot complain that another has joined with him and in that manner use as a sword the Statute that was intended as his shield. No extrinsic testimony is necessary to explain who is liable. Especially is this so when the issue of non-joinder of parties (argued above) was not raised at the trial. If the commissions were to be split the contract should have been so worded. This Court will not make such a new contract for the parties.

The important language of the Statute carrying out its protective objectives is that the right of the broker be "Recognized in writing * * *" "Signed by the owner". That requirement certainly has been complied with in the present contract when the provision for commissions and the rest of the contract for the sale of the premises are read together.

Therefore the Defendant's motions for a nonsuit should not have been granted.

POINT II.

The direction of a verdict in favor of the plaintiff was not erroneous.

The direction by the Court of a verdict in favor of the plaintiff was not erroneous, for the same reasons as set forth under Point One herein to the trial court's denial of defendant's motion to nonsuit. The same arguments urged under Point One herein apply equally to this point, as though herein again repeated.

In addition, however, it is submitted that no jury question was raised, nor were any facts essential to sustain the trial court's theory of the case left open to dispute. In truth as pointed out in the foregoing recitation of facts the defendant's witnesses confirmed the testimony of the plaintiff's witnesses and the allegations of the complaint.

That a jury question was before the Trial Court was never raised during the trial by the defendant's Counsel. Both Counsel and the Court argued the case as a pure question of construction of language. Such a question is solely for the Court. If this Court will inspect the grounds for the motion for a non-suit at the close of the plaintiff's case (pages 74, 75, 76), it will observe that the Counsel for defendant confined himself to questions of law, and rested on the meaning of the language of the contract.

And if the Court inspects the grounds for the defendant's motion for a non-suit at the close of the defendant's case (pages 110-111-112-113), again the Court will observe that no question of fact was raised and that the Counsel for the defendant relied exclusively on questions of law. At page 113 this Court will note that a verdict was directed for the plaintiff and an exception was prayed and allowed by the Court but no grounds were stated. The Trial Court was justified in considering that both plaintiff and defendant were agreed that no facts were to be determined and that the grounds (if this Court recognizes them as such where not stated on the record) raised by the exception to the direction of the verdict, were the same grounds as were raised upon each motion for a non-suit. See the

case of *Modern Homes* vs. *Long,* 133 Atl. 391, where Court says:

> "Where counsel tacitly consent to Court resting case on question of law and case is submitted in that manner no objection taken or raised at trial, neither may complain."

Moreover, under the Ludwig decision, after plaintiff's case was in plaintiffs-respondent were beyond a non-suit.

POINT III.

(A)

The Trial Court properly overruled the question set forth in the fourth ground of appeal. By referring to page 77, line 30, of the record, it will clearly appear to this Court that the object of the question was to bring forth verbal testimony to vary the terms of a written contract the subject matter of which by law is required to be in writing. In this particular instance the Court was thoroughly justified in sustaining the objection for the reason that by the evidence in the case the contracts had been drawn several times and the provision concerning the payment of commissions had remained identically the same in each proposed contract and retained its identical form in the contract upon which suit was brought. No citations are necessary to convince this Court that where parties have after much discussion and many attempts to reduce an agreement to writing and finally succeed in reducing their proposed agreement to writing, and caused the same to be mutually and formally executed, that thereafter the written agreement is binding upon the parties

and is not subject to change or variation or explanation by verbal testimony especially so where the words or language sought to be explained or varied has been formally passed upon frequently by the Courts of this State; as in the cases cited herein under Point One.

(B)

The Trial Court properly overruled the question set forth in the fifth ground of appeal.

This question may be examined by the Court at page 78 of the record. The same argument is submitted sustaining the Trial Court's ruling as was submitted under the heading 'A' next preceding this subdivision.

(C)

The Trial Court properly overruled the question set forth in the sixth ground of appeal.

This question may be found at page 80 of the record. The same reasons are urged here to sustain the ruling of the Trial Court as were urged under subdivision 'A' of this point and as were urged in support of the Trial Court herein under subdivision 'B'.

(D)

The Trial Court properly overruled the question set forth in the seventh ground of appeal.

This question may be found at page 80 of the record. It is submitted that the Court properly sustained the objection to the question here under discussion. The contract which counsel for the defendant at that time presented to the witness, was not the contract upon which suit was started and said contract was not signed or executed; furthermore had counsel for the defendant re-

ferred to the exact contract upon which the suit was based still the Court would be justified in sustaining the objection for the reason that whether time was of the essence or not made little, if any, difference in the outcome of the case and therefore would be irrelevant. Whether time was of the essence in the contract referred to or not had no bearing whatsoever upon the right of the plaintiff to recover, in fact had time been of the essence in the contract plaintiff's right to recover would be more clear.

(E)

The Trial Court properly overruled the question set forth in the eighth ground of appeal. This question may be reviewed by the Court at the top of page 80 of the record. According to the defendant-appellant's brief, but there the question was again directed to a conversation had with relation to commission. The same reasons are urged here in support of the Trial Courts ruling on this question as were urged under Point 3 Subdivision A of this brief. If counsel for the defendant-appellant under subdivision 'E' of Point 3 of his brief refers to the question to be found on page 90 and 91 which was objected to and sustained by the Trial Court, then plaintiff-respondent submits that the Court was justified in sustaining the objection for the reason that the witness testified in answer to the Court's question on page 90 of the record that the conversation referred to in the question propounded by counsel for the appellant was a conversation which took place after the exchange of releases and payment of the deposit and search fees. Conversations had by the parties or their attorneys after the execution of the releases and the payment of the search fees and deposit can

have no bearing on the plaintiff's right to recover for as the Trial Court stated in sustaining an objection to a similar question on page 91 of the record.

> The Court: You see your rights were fixed by the release. The law of this State is where a broker enters into a contract to produce a purchaser ready, willing and able, and he does produce that purchaser, and the owner then enters into a contract with the so-called purchaser, the question of ready, willing and able falls out of the case. Then it becomes a question of whether or not there is performance. That is the whole case, when you come to look at it, and it isn't difficult at all. It seems at first to be difficult.

Counsel for the defendant-appellant under this point again argues that the plaintiff did not procure a purchaser who was ready, willing and able to buy. It would seem a hardship to require the plaintiff after the vendor had released the vendee from the obligations of a valid contract the execution of which the plaintiff had procured on behalf of the vendor, to require the plaintiff to be responsible for the language or statements of the vondor or the vendee, and it would seem a further hardship to require the plaintiff to prove, under the circumstances, in the present case, that the vendee was ready, able and willing to buy the premises under the terms of the contract, when by executing the contract the vendee accepted the vendee as a duly qualified purchaser suitable to the vendor and on the vendor's written terms. (See *Klipper* vs. *Schlossberg, supra,* and cases cited.)

CONCLUSION.

It is respectfully submitted that the judgment below should be affirmed.

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New Jersey Court of Errors and Appeals

HARRY H. MAHLENBROCK, Plaintiff-Respondent, *v.* STONEHELL REALTY COMPANY, a corporation of the State of New Jersey, Defendant-Appellant.	Action at Law. On Appeal from Supreme Court.

REPLY BRIEF FOR APPELLANT.

Counsel for appellant feel that this case is fully covered in appellant's main brief. There are two contentions made in the brief for respondent, which counsel desire to briefly comment on.

A.

Under Point B at page 14 of his brief, counsel for respondent makes the point that by returning the deposit and search fees appellant changed the status and substituted a new contract. As stated in appellant's main brief, this is not so and such an argument is entirely at variance with the contentions of counsel under Point A of respondent's brief, wherein he argues that the purchaser by notice made time of the essence of the contract and on the date fixed, counsel contends that appellant was not in a position to convey a marketable title and therefore the conveyance of the property failed. Again under Point D at page 17 of respondent's brief counsel reiterates this contention.

Therefore, under respondent's own contentions, the purchaser could not have been compelled under the contract to take title after July 1st, 1924. At the foot of page 17, counsel states that *the vendee was under no duty to wait any length of time but was entitled to receive a clear title on the date set.* Therefore, it cannot be contended that by the returning of the deposit any new contract was substituted as was the case in the cases cited in respondent's brief, for the reason that if respondent's contentions are correct, then immediately after July 1st the vendee was entitled to seek and recover back at least his deposit, search fees and expenses.

B.

Undr Point 2 at page 24, counsel for respondent contends that appellant waived his right to a trial by jury upon the trial.

Counsel's argument under this point is entirely fallacious. He states on page 24 that appellant's counsel in making the motions for a nonsuit did not raise any question of fact. We assume that by his argument counsel intends that if appellant's counsel desired to reserve his right to have the jury pass upon the facts he must have urged that as a ground for nonsuit. This statement refutes itself. Upon a motion for a nonsuit, if the Court finds that there are any facts to be passed upon by the jury, a nonsuit cannot be granted. Therefore, it goes without saying that naturally counsel in making the motion for a nonsuit merely contends that upon the case as made out by the plaintiff, appellant was entitled to a nonsuit.

An observation of the record by this Court, will show that counsel were most careful not to waive their right to trial by jury, for at the conclusion of the case, counsel *did not make a motion for a*

direction of a verdict in favor of the defendant, but *simply a motion for a nonsuit.* The Court denied the motion for a nonsuit and forthwith directed a verdict for the ~~defendant~~ plaintiff, to which *exception* was duly taken.

It seems hard to conceive how appellant's counsel could have in any stronger way reserved their right to have the jury pass upon the case than by taking exactly the action that they did take, to wit: make a motion for a *nonsuit* at the close of the entire case, instead of a motion for a direction of a verdict and upon that being denied, taking an *exception* to the action of the Trial Court in directing a verdict for plaintiff.

It is most respectfully submitted that for the reasons urged in our main brief, and under the law as laid down by the decisions of this Court over a long period of years, that the judgment below should be reversed.

ROBERT CAREY,
HARRY LANE,
Of Counsel with Defendant-Appellant.

May Term 1927, No. 136.

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