

New Jersey
Court of Errors and Appeals

ENEY GRUPELLI, Plaintiff and Appellant, vs. JACOB ROSEN, Defendant and Appellee.	}	On Appeal from Dis- trict Court.
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**BRIEF FOR THE PLAINTIFF IN
ERROR**

On December 19th, 1912, the defendant entered into a contract with the plaintiff to sell to plaintiff No. 155 Washington Street, Orange, New Jersey, for the sum of \$8,200 subject to a first mortgage of \$6,000 and a second mortgage of \$1,000. Two hundred dollars was paid on the execution of the contract and \$1,000 was to have been paid on the delivery of the deed. The land was to have been conveyed by deed of warranty free from all other encumbrances on January 15th, 1913. An examination of the title of the premises disclosed the fact that there were two mortgages remaining uncanceled of record for \$6,000 each besides the \$1,000-mortgage; that the taxes for 1912 had not been paid and that the legal title to the premises was not vested in Jacob Rosen. On the day appointed for closing the transfer, the parties met at the time and place appointed; that Rosen was unable to explain anything about the \$6,000-mortgage; he admitted that the taxes had not been paid and he also admitted that at

the time of the execution of the contract he had knowledge of the fact that the bank which held one of the mortgages had demanded payment thereof by February 1st then following, although he had told the plaintiff that the mortgage could stand indefinitely as long as the interest was paid. Under the circumstances the plaintiff repudiated the contract and demanded the return of his money, and this action was brought to recover the \$200 paid with interest and also the expense incurred in the examination of the title amounting to \$84.68.

The District Court gave judgment in favor of the plaintiff for the sum of \$200 and interest, amounting in all to \$204.83, but refused to include in the judgment the costs of the examination of the title although, as appears by the statement of facts, the Court found the same to be reasonable.

The only point involved in this case is as to whether in an action on contract to recover damages for the failure of the covenantor to convey, due to a defect in his title, the expenses of examination of the title can be recovered. The Supreme Court, following the recent case in this Court of *Mangonaro vs. Karl*, 87 Atl., page 94, affirmed the judgment of the District Court with costs. When this case was taken to the Supreme Court the case of *Mangonaro vs. Karl* had not been published and I respectfully insist that the plaintiff in error should not be denied the right to a careful consideration of the law involved and should not be denied the right to question the soundness of the conclusion reached in that case.

That case is contrary to the trend of the decisions of every other State in the union as well as in England, and I have found no case supporting the conclusion reached in that one, but I have found cases in this Court which have indicated a

contrary view. Moreover, that case violates one of the fundamental rules of contract which would seem to be applicable to such cases, *viz.*: on a breach of contract the damages to be awarded are those necessarily arising from the breach of the contract itself *reasonably within the contemplation of the parties at the time of the contract.*

Wolcott vs. Mount, 7 Vr., 262 at p. 271; affirmed 9 Vr., 496.

Skirm vs. Hillicker, 66 N. J. Law, 410.

Brown vs. Honiss (Ct. E. & A., 1907), 68 Atl., 150 at page 157.

Wolcott vs. Mount, 9 Vr., 496, at page 501 quotes, with approval the following from *Hadley vs. Baxendale*:

“Where two parties have made a contract, which one of them has broken, the damages which the other party ought to receive in respect of such breach, should be such as may fairly be considered either arising naturally, *i. e.*, according to the usual course of things from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it.”

And adds:

“The rule thus stated has been approved of and followed in a numerous series of decisions by both the English and American Courts as is abundantly shown by Mr. Sedgwick in his valuable work on damages.

“The present case clearly falls within the scope of this principle. The defendant, at the time of the sale, was possessed of all the facts; he was in a position to foresee with entire certainty the loss that would

fall upon the plaintiff were the warranty broken.”

Is it not the common experience that the title to premises to be conveyed is examined between the date of making the contract and the time fixed for making the transfer? Is not the fact that time is given, indicative that the parties contemplate such an examination?

Kent in his Commentaries, Vol. 4, star paging 479 says:

“The hardship of the doctrine, that the seller must respond, in every case, for the value of the land at the time of the eviction, and for useful improvements, consists in this, that no man could ever know the extent of his obligation. He could not venture to sell to a wealthy or enterprising purchaser, or in the vicinity of a growing town, without the chance of absolute ruin. The want of title, in cases of good faith, is usually a matter of mutual error, *for the buyer investigates the title when he buys.*”

If the examination of title is within the contemplation of the parties (and I believe it to be), then the covenantor is liable or should be liable. There is no hardship in this for the New Jersey statutes fix the fees for examining records and, as long as they do not exceed those fees, I see no reason why the same should not be recovered as a part of the disbursements which were within the reasonable contemplation of the parties when they entered into the contract.

Another reason why there is no hardship on the covenantor is this, when he bought he could have had the title examined and saved himself from falling into the danger of making a contract which he could not carry out. If the Court holds to the rule that expenses of examining the title can not be recovered, then it must be upon the the-

ory, that, inasmuch as both parties are innocent, the mistake is mutual; but in doing so, it must lay aside the rule that where two innocent parties must suffer, the one who made it possible must bear the loss. In addition to this it encourages a covenantor from carrying out his agreement. Not infrequently the covenantor desires to abandon his agreement and a defect is found which he could readily have cured from knowledge within his own breast. He would much prefer to merely return the deposit feeling assured of the fact that the covenantee will not take title, although desiring it, unless the defect can be remedied. It seems to me to be a bad rule and should not be adhered to by this Court.

The case of *Gerbert vs. Trustees* which was relied on in *Mangonaro vs. Karl* is not an authority. In that case the life tenant had leased the premises for a term of five years with the privilege of renewal for a further term of five years and the lease contained an option to purchase. The first five years passed during the lifetime of the life tenant. The privilege of renewal was exercised by notice but no new lease was executed and the life tenant died during the running of the second period of five years. During the first period of five years, and immediately after the execution of the lease, the lessee erected buildings on the premises. In the suit the lessee sought to recover his damages for the increase in the value of the land and also for the value of the buildings erected. The reason assigned in Kent's Commentaries is a valid one for not allowing for the buildings, and it was reiterated by Justice Van Syckel who wrote the opinion in *Gerbert vs. Trustees* when, at page 186, he said:

“Where there is a contract to convey unimproved land, and the vendee before conveyance erects buildings upon it without

the request of the vendor, it would be a rule of exceeding hardship which compels the vendor, when his title proves defective, to pay the cost of such improvements to any extent which the vendee might choose to put upon it. Such a result could not reasonably be supposed to have been within the contemplation of the parties when the contract was executed. The vendor would be compelled to pay for improvements which he did not authorize to be made, and from which he would derive no benefit whatever if the vendee failed to perform on his part."

He clearly intimates in this case that if the erection of the buildings had been within the contemplation of the parties, then the covenantee would have been entitled to recover the value of the buildings; in other words his expenses.

Gerbert vs. Trustees was decided by this Court in 1896. In 1902 this Court decided the case of *Meyer vs. Madreperla*, 39 Vr., 258 (53 Atl., 477), In the opening statement ^{Cancellor} Magie says:

in which, by various courts, the plaintiffs seek relief for the breach of a contract
 "The return to the writ of error in this case discloses an action on contract, in writing for the sale of land by defendants to them. The claim of damages for such a breach is limited to the return of the payment made by plaintiffs upon the contract and the expenses of examining the title to the land."

Later in the case he says:

"There was no conflict or contradiction in respect to the facts. It is conceded that it was thereby established that defendants entered into a written contract to sell and convey, free and clear, to plaintiffs, the lands in question, for the consideration of

\$9,000 of which sum \$500 was paid by plaintiffs to defendants, and *that the reasonable expense of a search of the title to said lands was \$100. As the existence of the contract thus sued upon was thus shown, and there was evidence as to the quantum of damages* if defendants had broken it, the direction of a verdict for defendants can only be supported upon the ground that there was no proof of a breach of the contract sufficient to warrant the jury, if the case had been submitted to them, in finding for plaintiffs, and sufficient to require such finding to be supported."

In that case the direction for the defendant was sustained, but this Court placed itself on record that the plaintiff in such a case was entitled to recover the expenses of examining the title to land.

In *Brown vs. Honiss*, 68 Atl., 150 decided by this Court in 1907, Mr. Justice Pitney cites, with approval, the well-known case of *Engel vs. Fitch*, L. R., 4 Q. B., 658, and says:

"The Court held that since the breach of contract arose, not from inability of the defendants to make a good title, but from their wilful refusal to take the necessary steps to give plaintiff possession pursuant to their contract, he could recover, not only the deposit *and the expenses of investigating the title*, but also damages for the loss of his bargain."

Again this Court appears to have approved of the rule which prevails in England and in the other States of this country that the expenses of investigating a title may be recovered in an action on contract. It is true that the opinion in *Engel vs. Fitch* assumes that in an action on contract the plaintiff may recover the deposit and expenses incurred for the examination of the title, but this

Court did not dissent from that view in deciding *Brown vs. Honiss*.

Moreover, *Gerbert vs. Trustees* is founded upon the decision in *Bain vs. Fothergill*, 7 H. L. Cas., 158 and that case clearly recognizes the rule that expenses for the examination of title are recoverable in actions on contract. On the argument of that case in the House of Lords, the judges were called in for their opinions.

Baron Pollock said (p. 173):

“It seems therefore more reasonable to treat the mere contract for the conveyance of land not as based upon an implied warranty that the vendor has power to convey, but as involving the condition that the vendor has good title and that if on examination of the abstract this turns out not to be so the vendee can not ask to be put in as good a condition as if a conveyance had been executed, *but can only recover the expenses to which he has been put.*”

This opinion was concurred in by the Chief Baron, Mr. Justice Keating and Mr. Justice Brett.

Of the Lords, Lord Chelmsford in deciding the case cites *Hadley vs. Baxendale*, 9 Eche., 341, and *Sedgwick on Damages*, 4th Ed., p. 234 and says:

“In the former case where there has been no bad faith on the part of the vendor the plaintiff can only recover what money has been paid by him with interest and *expenses*.

Lord Hatherly (p. 211), says:

“All that he is entitled to is the expense he may be put to in investigating the title.”

Lord Chelmsford in declaring against the rule in *Hopkins vs. Grazebrook*, at page 207 says:

“Upon a review of all decisions on the subject, I think that the case of *Hopkins vs.*

Grazebrook ought not, any longer to be regarded as an authority. If a person enters into a contract for the sale of a real estate, knowing that he has no title to it, nor any means of acquiring it, the purchaser can not recover damages *beyond the expenses he has incurred by an action* for the breach of the contract; he can only obtain other damages by an action for deceit."

In 39 Cyc., 1441 the same rule is laid down as follows:

"On rescinding for defect of title the purchaser is entitled to recover for expenditures incurred in examining the title and obtaining a survey of the premises."

At page 2105 it is said:

"It is now held that in all cases where the vendor has failed to convey through his inability to make title the purchaser can recover only the purchase money paid with interest *and expenses of investigating the title.*"

Note 10 on this page contains many English cases to this effect.

On page 2106 the rule in the United States as laid down as follows:

"Where the vendor, without fraud on his part, is unable to convey a good title and the defect was unknown to him at the time the contract was made, the purchaser is not entitled to recover damages for the loss of his bargain, but can recover only the purchase money paid with interest, and expenses incurred on the faith of the bargain, and nominal damages for not conveying."

The same rule is laid down in 29 Am. & Eng. Enc. of Law, 2nd Ed., p. 724; also 3 Sedgwick on Damages, 8th Ed., Sec. 1017, p. 202.

In *Maupi vs. Jackson*, 139 N. Y. App. Div., 524, the rule is laid down as follows:

“A purchaser may, on the failure of the vendor to perform, recover the expenses incurred in searching the title, and the fact that he employs a title company to search the title does not prevent him from employing an attorney for the same purpose when such employment is not unreasonable in view of the facts.”

In *Northbridge vs. Moore*, 118 N. Y. Rep., 419, the same rule is laid down as follows:

“The vendee in such a contract as this is not required to take anything less than a good marketable title and the precautionary means of ascertaining about it by examination before parting with the purchase money and accepting conveyance, are properly made available by way of protection, and unless an understanding in some manner appears to the contrary, the examination of the title by the vendee, and the reasonable expense of making it, may be regarded as in the contemplation of the parties and treated as properly incidental to the contractual situation, and consequently the amount of such expenses may, in the event of failure of the vendor to convey, be deemed special damages resulting from the breach and recoverable as such (*Bygler vs. Morgan*, (77 N. Y., 312).”

The same rule is also laid down in *McNair vs. Compton*, 35 Pa. St., 23 at 28.

I find no case holding a contrary view.

In view of the unanimity of opinion in other jurisdictions, the recent case of *Mangonaro vs. Karl* (*Ibid*), appears to be a departure which can hardly be justified by logic or precedent. In fact, it appears to be a departure from recent utter-

ances of this Court in other cases and should be reversed. The early cases in New Jersey cited in *Gerbert vs. Trustees (Ibid)*, relating to damages in actions for breach of warranty do not consider the question of expenses for examining title and presumably, in those cases, the titles were not examined. Moreover, the statement of facts shows that the defendant was guilty of deceit (Case, p. 9, l. 20-26 and case 12, l. 10-20). In view of the recent practice act, if it may be considered applicable to District Courts, there is no good reason why the District Court should not have included the expense of \$84.68 for examining the title, in the amount of the judgment.

Under either view, I respectfully submit that the judgment of the District Court should have been for the sum of \$289.51 and to that end the judgment should be reversed with direction to enter judgment for said sum.

Respectfully submitted,

CHARLES A. RATHBUN,

Attorney for and of Counsel

with the Appellant.

THE ARTHUR H. CRIST Co., Cooperstown, N. Y.
New York Office, 220 Broadway.

New Jersey Court of Errors and Appeals ¹⁰

ENEY GRUPPELLI,
Plaintiff and Appellant,

vs.

JACOB ROSEN,
Defendant and Appellee.

Action at Law.
Brief of
Defendant on
Appeal from
Supreme
Court.

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Statement of Facts.

The plaintiff entered into a contract with the defendant to sell him a house and lot at Orange, N. J., and paid the defendant the sum of Two hundred Dollars on account of the purchase price. The written contract, drawn up by the plaintiff, and set out at length in the state of case (page 8), provided that the deed was to pass on January 15th, 1913, at 3 P. M. At that time the plaintiff refused to take the title because of alleged defects therein, and also then and there refused to take the title at a later date or at any other time, because the holder of a mortgage on the property had demanded the payment of the principal, which fact was not known to the plaintiff at the time he signed the contract. 30

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POINT I.

The plaintiff is not entitled to recover anything.

10 The contract provided that the deed was to pass on January 15th, 1913, at 3 P. M. On that day defendant tendered a deed for the premises, but plaintiff, alleging defects in the title, refused to accept the deed, and further refused to receive the title at any other time. (State of case, page 12, lines 2 and 22.) In thus refusing to take title at a reasonably later day than the 15th of January, plaintiff, under the contract, was not acting within his rights. Time was not of the essence of the contract in this case.

20 In the case of *Cranwell vs. Clinton Realty Co.*, 67 N. J. E., 540; on page 546, V. C. Garrison says:

“It is well settled in this State that time is not of the essence of an agreement to convey lands unless the *parties have expressly so stipulated*, or it follows by necessary implication from the nature of the transaction.”
Citing several cases.

30 In the contract under consideration, time was not made the essence of the agreement, for the only provision made for the passing of the deed was in the following words: “*Deed to be passed on January 15, 1913, at 3 P. M., at the office of Mr. Charles A. Rathbun, law office, at No. 2 Washington Street, Morristown, N. J.*” (State of case, page 9, line 12, &c.) The plaintiff does not claim that he would not have sufficient time to raise the money to take up the first mortgage, unless the title was passed on the 15th day of January. It
40 would make no material difference if the mort-

gage held by the Orange Savings Bank were called in a few days after title had passed to the plaintiff, or a few days before. The mortgage was subject to call at any time, and surely the plaintiff, Grupelli, must have known, at the time of signing the contract, that the defendant, Rosen, could not bind the Savings Bank in any disposition of the mortgage which it might see fit to make. Moreover, it is a well known rule of law that a written agreement will be taken to embody the entire contract between the parties thereto, at the time of its execution. 10

Rogers vs. Colt, 1 Zab., 704;

McTague vs. Finnegan, 9 Dick., Ch., 454.

As the written instrument states nothing as to how long the mortgage held by the Orange Savings Bank for \$6,000 was to remain upon the property, Grupelli assumed the risk of its being called in at any time. Under the law, as laid down by this Court, parol evidence of conversations which occurred just before the making of a written contract for the sale of lands is not admissible to vary the terms of such contract, so as to render the same one of which time is of the essence. 20

King vs. Ruckman, 21 N. J. E., 599. 30

By refusing to take title within a reasonable time under a contract wherein time was not of the essence, plaintiff lost all right to recover any money which he may have paid on account.

“Where a vendee who has no right to rescind a contract of sale refuses to perform it, he cannot recover the money he has paid upon it.”

Steinback vs. Pettingill, 67 N. J. L., 36. 40

Refusing to take the title at any time, the plaintiff rescinded the contract, thereby relieving the defendant from the necessity of making a tender of the deed for the premises after having cleared all matters up as he offered to do.

10 Nowhere does it appear that the plaintiff tendered the purchase price agreed upon, neither on the 15th day of January, 1913, nor at any other time. It was necessary for him to do this in order to put himself in a position to recover the moneys paid on account.

“If either the vendor or vendee wishes to enforce the contract against the other, he immediately makes his part of the agreement precedent.”

20 Long vs. Hartwell, 34 N. J. L., 116, on page 127, etc.

Under this state of facts the plaintiff is not entitled to any judgment against the defendant.

POINT II.

30 **If the plaintiff can recover anything, it can only be the money paid on the contract and not any money expended in examining the title.**

40 At the time the case was argued in the Supreme Court, the case of Mangonaro vs. Karl had not been reported, and was not cited by me. This case, which is found in 87 Atlantic, page 94, decides this point, viz.: that the expense of investigating the title can not be recovered in the present action.

In my opinion this has been the uniform decisions of the courts of this State.

In the case of *Gerbert vs. Trustees*, 59 N. J. Law 150, at page 180, Justice Van Syckel, in announcing the opinion of this Court, said:

“That there is no substantial difference in the injury resulting, where there is an ouster after conveyance with warranty, and where there is a refusal of conveyance in pursuance of the contract to convey, when the vendor is unable to make title, which can reasonably support a rule for damages in the former case wholly different from that which prevails in the latter case, is too obvious to require discussion. 10

“The injury in both cases is the same—the loss of the property, the loss of such profits as would have been incident to increased value. 20

“The loss in both cases arises from the breach of the vendor’s *covenant on account of the defect in his title*.

“There can, therefore, be no solid basis for diversity in the rule of damages applicable to the two conditions, and the rule should be unified if there be no serious obstacle in the way,” 30

and cites with approval the case of *Stewart vs. Drake*, reported in 4th, Halstead 139.

In the case of *Morris vs. Rowan* 2nd Harrison, page 304, &c., the Supreme Court held that the damage to be recovered for a breach of a covenant of warranty is the consideration money paid with interest and costs.

In the case of *Holmes vs. Sinnickson*, 3 Green 313, the plaintiff endeavored to collect counsel fees, which the covenantee paid in defending his title. And the Court refused to allow them and said "the uniform rule is to allow the consideration money with interest and costs and no more, any counsel fee beyond this allowed in the fee bill, are no part of the legal costs, and are just as much out of the prescribed rule as buildings or improvements."

Justice Pitney in speaking for this court in the case of *Brown vs. Honnis*, 68 Atlantic, page 150, confines himself to the rule relating to the damages recoverable when there was a wilful refusal to convey, and not to a case where the purchaser refused to take title by reason of a defect which the seller could not remedy.

The appellant is now seeking to reverse the decision of the Supreme Court, because the Court refused to allow search fees, and bases his contention among other things upon the case of *Meyer vs. Madieperla*, 39 Vr., 258, an examination of this case shows that the action was brought to this court on a writ of error, because the Trial Judge had directed a verdict for the defendant. The only question raised was whether the direction was proper. On page 269 the Court says:

"The case upon which we must act involves the propriety of the direction of a verdict on uncontroverted facts which establish, by the presumptions arising therefrom, that defendant had a good title to the land plaintiffs had contracted to purchase. * * * As the proofs made out a good title at law, the direction of a verdict for the defendants upon the issue made by the pleadings was proper."

Nowhere in the case was the question of the right of the plaintiff to recover for search fees, raised.

The citation on page 6 of the plaintiff's brief is misleading, as a portion of the paragraph quoted has evidently been inadvertently omitted; it should read as follows:

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“The return to the writ of error in this cause discloses an action on contract, in which, by various courts, the plaintiffs seek relief for the breach of a contract, in writing, for the sale of land by defendant to them. The claim of damages for such a breach is limited to the return of the payment made by the plaintiffs upon the contract and the expenses of examining the title to the land. By appropriate pleas defendants deny the breach of the contract, and the cause being put at issue thereon a verdict was rendered for the defendants.”

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This was evidently the conclusion of the Court as to what appeared by the pleadings, and not the Court's opinion as to what constituted damages.

I respectfully submit that the plaintiff is not entitled to recover as part of his damages the sum of \$84.68, the expense of examining the title, and that if this court has jurisdiction at the present time to consider the whole case, it should find that the plaintiff is not entitled to recover anything against the defendant.

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WILLARD W. CUTLER,
Attorney of Defendant and Appellee.

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New Jersey Supreme Court

ENEY GRUPELLI,
Plaintiff-Appellant,
vs.
JACOB ROSEN,
Defendant.

On Appeal From District Court

STATE OF CASE

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Transcript of Judgment, State of Demand

DISTRICT COURT OF THE FIRST JUDICIAL
DISTRICT OF THE COUNTY OF MORRIS

ENEY GRUPELLI,
vs.
JACOB ROSEN.

On Contract
Demand.

30

The above named plaintiff demands of the above named defendant Five Hundred Dollars on contract for that whereas the said Jacob Rosen did covenant and agree to sell and convey unto 40

Transcript of Judgment, State of Demand

the said Eney Grupelli the premises known as No. 155 Washington Street, Orange, New Jersey by deed of warranty free from any encumbrance on or before January 15, 1913 which agreement bears date December 19, 1912 and thereupon the said Eney Grupelli did pay to said Jacob Rosen on account thereof the sum of Two
 10 Hundred Dollars and did thereafter incur an expense of Eight-four Dollars and Sixty-eight Cents in examining the title to said premises and did also incur an additional expense of Fifteen Dollars in examining the premises, etc. And whereas the title to said premises was not free and clear but in fact was encumbered by divers encumbrances and the legal title was not vested in the said Jacob Rosen so that the said Jacob Rosen was unable to convey the said premises in
 20 the manner and at the time appointed, so that the said Eney Grupelli suffered thereby loss and damage and became entitled thereby to recover the moneys so paid out and incurred as aforesaid.

And for that whereas the said Jacob Rosen theretofore had also agreed to convey the said premises in like manner to one Nicholas Marinaro receiving from the said Nicholas Marinaro the sum of One Hundred Dollars on account of the
 30 purchase price of said premises and whereas the said Jacob Rosen was unable to convey the premises in manner aforesaid and did not undertake to convey the premises in the manner aforesaid whereby the said Nicholas Marinaro became entitled thereby to recover back the moneys so paid by him as aforesaid; and whereas the said Nicholas Marinaro has heretofore assigned, transferred and set over his aforesaid
 40 claim against said Jacob Rosen to the said

Transcript of Judgment, State of Demand

Eney Grupelli, the said Eney Grupelli is entitled to recover the same and therefore he brings this suit.

Judgment will be claimed for the sum of Three Hundred and Ninety-nine Dollars and Sixty-eight Cents besides interest and costs.

CHARLES A. RATHBUN,
Att'y of Pl'ff. 10

District Court Summons

Morris County, ss:

The State of New Jersey. To any Constable in said County, or to the
(Seal) Seargeant-at-Arms of the District 20
Court of the First Judicial District
of the County of Morris:

Summon Jacob Rosen to appear before the District Court of the First Judicial District of the County of Morris, to be held at the Court House, Washington Street, (entrance on Court street), in the Town of Morristown, on the 3d day of April, 1913 at 10 o'clock in the forenoon to answer unto Eney Grupelli in an action upon contract to the damage of the plaintiff Five Hun- 30
dred dollars,
Hereof fail not.

WITNESS, OLIVER K. DAY, Esq., Judge of said Court, at Morristown in the year One Thousand Nine Hundred and thirteen.

(Signed) HARRY G. ZWENGER,
Clerk.

Transcript of Judgment, State of Demand

*Proceedings*DISTRICT COURT OF THE FIRST JUDICIAL
DISTRICT OF THE COUNTY OF MORRIS

ENEY GRUPELLI,

vs.

Plaintiff,

and

JACOB ROSEN,

Defendant.

10

Charles A. Rathbun, Plaintiff's Att'y.

Plaintiff's Costs

Summons	\$ 2.10	20
Mileage		
Listing Fee	1.50	
Att'y Fee	10.24	
	<hr/>	
Total Cost	\$13.84	
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A summons in the above stated cause was issued on the 27th day of March, 1913, returnable on the 3d day of April, 1913, wherein the plaintiff demands of the defendant the sum of Five Hundred Dollars. 30

The plaintiff filed his State of Demand April 3, 1913.

The summons was served and returned as follows:

Transcript of Judgment, State of Demand

I served the within summons March 27, 1913 on the defendant by reading it to him and giving him a copy thereof.

(Signed)

JAMES H. BRANT,
Constable.

This cause was adjourned to April 10/13.

10 This cause was adjourned to April 17/13.

April 17, 1913. The plaintiff and the defendant appearing the case was tried and determined at this time.

Atty. for Plff.—Charles A. Rathbun.

Atty. deft.—W. W. Cutler and C. A. Reed.

Witness's Plff.

Witness's Deft.

1. Eney Grupelli

2. Nicholas Marinaro

20 3. Charles A. Rathbun

1. Jacob Rosen

Exhibits

P-1. Agreement dated Dec. 19/12 signed Eney Grupelli and Jacob Rosen.

P-2. Assignment of check of Eney Grupelli from Nicholas Marinaro.

P-3. Check of Nicholas Marinaro to Jacob Rosen.

30 Decision reserved April 17, 1913.

Decision rendered May 15, 1913.

The evidence being closed the Court rendered judgment in favor of the plaintiff, and against the defendant, in the sum of Two Hundred and Four Dollars and eighty-three Cents damages with costs, whereupon judgment is entered in
40 favor of the plaintiff, and against the defendant,

Notice of Appeal and Endorsement

in the sum of Two Hundred and four Dollars and eighty-three Cents damages with costs.

Notice of appeal filed May 20, 1913.

Bond filed May 23, 1913.

State of New Jersey, }
County of Morris. } ss:

I, Harry G. Zwenger, Clerk of the District 10
Court of the First Judicial District of the County
of Morris, do hereby certify that the foregoing
is a true copy of the judgment and proceedings
in the case wherein Eney Grupelli is plaintiff and
Jacob Rosen is defendant, recorded in Docket No.
3, page 1353.

IN WITNESS WHEREOF, I have hereunto
set my hand and affixed the seal of said Court,
this 23d day of May, One thousand nine Hundred
and thirteen. 20

(Seal)

HARRY G. ZWENGER.

Notice of Appeal and Endorsement

(Filed, May 19, 1913)

DISTRICT COURT OF THE FIRST JUDICIAL
DISTRICT OF THE COUNTY OF MORRIS

30

ENEY GRUPELLI,
vs.
JACOB ROSEN.

} On Contract.
} Notice of Appeal.

*To Jacob Rosen or Willard W. Cutler, Esq., At-
torney of the said Jacob Rosen:*

You will please take notice that the plaintiff,
Eney Grupelli, hereby appeals to the New Jersey 40

State of Facts

Supreme Court from the judgment of the District Court of the First Judicial District of the County of Morris rendered in the above stated action on the fifteenth day of May, Nineteen Hundred and Thirteen.

Dated, May 15, 1913.

CHARLES A. RATHBUN,
Attorney of Plaintiff.

10

State of Facts

(Filed, May 24, 1913)

DISTRICT COURT OF THE FIRST JUDICIAL
DISTRICT OF THE COUNTY OF MORRIS

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ENEY GRUPELLI,
Plaintiff and Appellant,
vs.
JACOB ROSEN,
Defendant and Appellee.

On Contract.
State of Case for
Appeal settled
by Court.

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The parties hereto have been unable to agree upon a state of the case for appeal, I do hereby settle the case as follows:

The plaintiff, on the nineteen day of December, Nineteen Hundred and Twelve, entered into a written contract with the defendant as follows:

“Morristown, N. J., Dec. 19th, 1912.

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For the lump sum of Eighty-two hundred dollars I have here sold to Mr. Eney Grupelli my house at 155 Washington Street corner Burn Side Street and Orange, N. J. subject to 1st mtg of Six thousand dollars at 5% and a Second mtg of One

State of Facts

thousand at 6% offering to Mr. Eney Grupelli a warrantee deed—free from any encumbrances as tax, water, interest or any other assessments. Insurance to be returned to Mr. J. Rosen for whatever is about porportion from the Date of the deed. Mr. Jacob Rosen give here receipt of check No. 872—for dollars two hundred as a part payment of the twelve hundred equity resulting 10
from the 2 mtg. Ballance of \$1,000 to paid when the deed will be past. Deed to be pass on January 15-1913 at 3 p. m. at the office of Mr. Charles A. Rathbun law office at No. 2 Washington Street, Morristown, N. J.

JACOB ROSEN,

ENEY GRUPELLI,

FRANCESCO PALMIERO TESTIMONIO.”

Upon entering into the aforesaid contract, the 20
plaintiff paid to the defendant the sum of Two Hundred Dollars and, at the same time, the defendant informed the plaintiff that the mortgage for Six Thousand Dollars, mentioned in the aforesaid contract, could stand indefinitely as long as the interest was paid. After the signing of the aforesaid contract, the plaintiff employed counsel for the purpose of examining the title; that on the fifteenth day of January, at the hour of three p. m., the plaintiff and defendant met at 30
the office of Mr. Charles A. Rathbun for the purpose of closing title; that at the time of the meeting in the office of Mr. Rathbun, Mr. Rathbun informed the defendant that an examination of the title disclosed a mortgage for Six Thousand Dollars in addition to the one mentioned in the contract, and that the taxes for Nineteen Hundred and Twelve, amounting to about One Hundred and Fifty Dollars, were unpaid. He further 40
informed the defendant, and his counsel that an

State of Facts

examination of the records in the office of the Register of the County of Essex disclosed that the title to the premises came through one Bridget Mulhern who died on the fifth day of July, Eighteen Hundred and Ninety-three leaving a last will and testament which was probated before the Essex County Surrogate on July twenty-fourth, 10 Eighteen Hundred and Ninety-three, in and by which will she devised her property as follows:

“2nd. I do give, devise and bequeath all the property and estate which shall belong to or be owned by me at the time of my death to my friend Thomas Nevins of Orange, N. J. in trust, to have, hold, invest and re-invest at his direction and use the income thereof and so much of the principal as he may think necessary in the support, maintenance and education of my children until each 20 shall have arrived at the age of 21 years, at which time I direct that my said executor shall divide the surplus of my estate, if any, between my children, then surviving, legal representatives to take the share of a deceased child; in case of the death of either of my children without issue, or before arriving at the age of 21 years, so soon as the other shall have arrived at the age of 21 years, I do direct my said executor to convey and transfer the balance of the said estate to such child 30 then living or its legal representatives; in case of the death of both of my children before arriving at the age of 21 years and without issue, I direct the transfer of such surplus to such persons as would have taken my property if this will had not been made.”

That the records further disclosed that on the ninth day of November, Eighteen Hundred and Ninety-seven, upon application of Thomas Nevins, the Orphan's Court of Essex County, dis- 40 charged him from the further duties of said office,

State of Facts

and Thomas A. Davis was appointed administrator with the will annexed, and that thereafter, on August 16, 1906, the said Thomas A. Davis as administrator with the will annexed of Bridget Mulhern, conveyed the premises in question to Mary H. Mulhern and Kathryn M. Mulhern, the only heirs-at-law and next of kin of Bridget Mulhern, deceased, by deed bearing date August 16, 1906 and recorded in the Essex County Register's Office on August 18, 1906; that this deed was made without any order or sanction of any Court, and that no deed for the premises was ever given by Thomas Nevins as Trustee or by the eldest son of the said Thomas Nevins nor by any of his heirs, nor by any substituted trustee appointed by the Court or Chancery of the State of New Jersey; that the said Mary H. Mulhern and Kathryn M. Mulhern subsequently, and on the eighteenth day of October, Nineteen Hundred and Six, conveyed the premises by warranty deed to Michael Winter; that said Michael Winter subsequently gave a mortgage to the Orange Savings Bank to secure the payment of Six Thousand Dollars and covering the premises in question, and subsequently, on March 7, 1911, conveyed the premises to Herbert Austin and Max Mindlin, who, in turn, by deed bearing date April 30, 1911, conveyed the premises to Jacob Rosen, the defendant; that Jacob Rosen gave a mortgage to said Herbert Austin and Max Mindlin to secure the payment of Fifteen Hundred Dollars, which mortgage was thereafter assigned to Thomas F. Bowers and was then still outstanding as to One Thousand Dollars of principal. That the said counsel then informed his client, Eney Grupelli, and the defendant, Jacob Rosen that the title to the premises was defective and that it was encumbered by other liens other than

State of Facts

the Six Thousand Dollars mentioned in the contract thereupon the plaintiff refused to take title. The defendant then left the office of the said Charles A. Rathbun and up to the time of bringing suit, never again spoke to the plaintiff about taking title to the said premises, or never tendered to the plaintiff any deed or never informed
10 the plaintiff that he had paid off the said taxes or had paid off the other liens.

At the time of the signing of the contract aforesaid, the defendant, Jacob Rosen, had knowledge of the fact that the Orange Savings Bank, the assignee of the mortgage mentioned in the aforesaid contract had made a demand that the said mortgage be paid off by February 1st, and that at the time of the meeting for the purpose of closing title defendant's counsel told plaintiff
20 that he would have all matters cleared up as soon as possible and would then convey the property to the plaintiff, to which plaintiff would not assent because of the fact that the Orange Savings Bank had demanded payment of the mortgage by February 1st and this would leave him only two weeks to raise the money, and that delay would be out of the question and might entail further expense.

The plaintiff incurred an expense of Eighty-
30 four Dollars and Sixty-eight Cents in having the title to the premises examined and this amount was less than the legal fees and was reasonable, but was disallowed by me because, in my opinion, in an action on contract for failure to convey, the plaintiff can not recover the expenses incurred by him in the examination of the title. The defendant objected to any testimony as to the expenses incurred by the plaintiff and the same was
40 admitted and exception thereto was taken by him.

State of Facts

On the seventh day of September, Nineteen Hundred and Twelve, the defendant verbally agreed to convey to one Nicholas Marinaro the premises mentioned in the aforesaid contract and, on the said day gave to Rosen a check for the sum of One Hundred Dollars as a part of the purchase price. No written contract was ever entered into. The defendant met the said Marinaro on several occasions and demand that he either take title to the premises or that he enter into a written contract with the defendant, Rosen, in regard to the purchase of the premises, Marinaro refused to have anything more to do with the matter although the defendant, Rosen, endeavored to have Marinaro complete his contract, he the said Rosen, being entirely willing to convey the said premises to Marinaro. Before entering into the aforesaid contract with Grupelli, Rosen telephoned to Marinaro and again requested him to take the said property and informed him that he had a purchaser who would take the property but that he was willing to complete his contract with Marinaro. Marinaro again refused to take the property.

Subsequently, and before bringing this suit, Marinaro assigned to the plaintiff all his right, title and interest to the claim which he had against the defendant for the aforesaid sum of One Hundred Dollars.

Upon these facts I rendered a judgment in favor of the plaintiff and against the defendant for the sum of Two Hundred Dollars the amount of deposit paid under said contract with interest, a total of Two Hundred and Four Dollars and Eighty-three Cents, besides costs.

OLIVER K. DAY,
Judge etc. 40

204.8
44.6
289.4

Specification of Objections

NEW JERSEY SUPREME COURT

<p style="text-align: center;">ENEY GRUPELLI, Plff. & Appellant, vs. 10 JACOB ROSEN, Defendant.</p>	}	<p style="text-align: center;">On Appeal from District Court. Specification of Determinations.</p>
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The plaintiff and appellant, Eney Grupelli, in compliance with Rule 90 of the Court, hereby specifies his objections to the determinations and directions of the District Court, with respect to which he is dissatisfied in point of law, as follows, to wit:

- 20 1. The District Court found as a matter of law that the plaintiff could not recover for the expenses incurred by him in the examination of the title, whereas it should have found in favor of the plaintiff upon this point and should have included in its judgment the expenses so incurred.
2. The District Court erred in awarding judgment for the plaintiff and appellant, Eney Grupelli, against the defendant for only the amount paid at the execution of the contract, to wit:
- 30 Two Hundred Dollars with interest, whereas the said Court should have included in said judgment the expenses incurred by the plaintiff in the examination of the title.
3. The Court erred in disallowing the Marinaro portion of the claim, but should have included this in the judgment also.

CHARLES A. RATHBUN,
Att'y of Plaintiff.

Supreme Court Opinion

NEW JERSEY SUPREME COURT

JUNE TERM, 1913

ENEY GRUPELLI, Plaintiff and Appellant, vs. JACOB ROSEN, Defendant and Appellee.	}	10
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Submitted July 3, 1913; decided October 9, 1913.
On appeal from the District Court of the First Judicial District of the County of Morris.

Before Justices Garrison, Trenchard and Min-turn.

For the appellant, Charles A. Rathbun. 20

For the appellee, Willard W. Cutler.

Per curiam:

The question presented in this case was decided by our Court of errors and Appeals in Mangonaro vs. Karl, 87 Atl., 94.

The judgment below will be affirmed, with costs.

Judgment of Supreme Court 30

NEW JERSEY SUPREME COURT

ENEY GRUPELLI, Plaintiff and Appellant, vs. JACOB ROSEN, Defendant and Appellee.	}	On Appeal from District Court.
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This appeal having been argued at the present term of this Court, by Charles A. Rathbun, Coun- 40

Notice of Appeal

sel for the plaintiff and appellant, and Willard W. Cutler, Counsel for the defendant and appellee, and the Court having considered the same, and finding no cause for reversal:

IT IS THEREUPON ordered that the judgment of the District Court of the First Judicial District of the County of Morris appealed from in this
 10 cause, be affirmed with costs, and that the record be remitted to the said District Court to be proceeded with in accordance with the judgment and practice of said Court.

Entered October 13, 1913, on motion of,
 WILLARD W. CUTLER,
 Atty.

A true copy,
 Wm. C. Gebhardt,
 Clerk.

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Notice of Appeal

(Filed, October 17, 1913)

NEW JERSEY COURT OF ERRORS AND
 APPEALS

30
 ENEY GRUPELLI,
 Plaintiff and Appellant,
 vs.
 JACOB ROSEN,
 Defendant and Appellee.

40 *To Williard W. Cutler, Esq., Attorney of Defendant and Appellee:*

Notice of Appeal

Take notice that the plaintiff appeals from the judgment of the Supreme Court in the above cause affirming the judgment of the District Court of the First Judicial District of the County of Morris on the following grounds:

FIRST: Because the Supreme Court erred in affirming the judgment of the District Court of the First Judicial District of the County of Morris, which judgment denied to the plaintiff the right to recover his reasonable costs in the examination of the title involved, whereas by the law of the land it should have reversed the said judgment and directed judgment to have been entered for the further sum of Eighty-four Dollars and Sixty-eight Cents making in all Two Hundred and Eighty nine Dollars and Fifty-one Cents. 10

SECOND: That the said Supreme Court refused to reverse the judgment of the District Court of the First Judicial District of the County of Morris, which refusal was error. 20

THIRD: That the said Supreme Court refused to correct the judgment of the District Court of the First Judicial District of the County of Morris so that the same should include the reasonable costs of the plaintiff and appellant in the examination of the title, which reasonable costs, by the finding of the said District Court was Eighty-four Dollars and Sixty-eight Cents. 30

FOURTH: Because of other manifest errors appearing in the record and proceedings aforesaid.

CHARLES A. RATHBUN,
Attorney for and of Counsel with the Appellant.

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