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10

SUMMONS.

New Jersey, ss:

The State of New Jersey to the Sheriff of Monmouth County, Greeting: We command you, that you attach the rights and credits, money and
(Seal) effects, goods and chattels, lands and tenements of Johanna Fleischmann, 20 defendant, wheresoever they may be found in your County, so that she be and appear before the New Jersey Supreme Court to be held at Trenton, on the Fifteenth day of February, next, to answer Jacob K. Safris, plaintiff, in an action at law, to the damage of the said Jacob K. Safris, plaintiff, of eleven thousand dollars, as is said. And in what manner you shall execute this, our writ, make appear to us at the day and place aforesaid; and have you then and there this writ. 30

Witness, William S. Gummere, Esquire, Chief Justice of our said Supreme Court, at Trenton aforesaid, the twenty-six day of January, A. D. 1926.

EDWARD J. KELLEHER,
Clerk.

Benjamin M. Weinberg,
Attorney. 40

COMPLAINT.

NEW JERSEY SUPREME COURT

(Filed, March 14/1926)

ESSEX COUNTY

10

JACOB K. SAFRIS, Plaintiff, vs. JOHANNA FLEISCHMANN, Defendant.	Action at Law.

20

The plaintiff, Jacob K. Safris, residing in the City of Newark, County of Essex and State of New Jersey, says:

FIRST COUNT.

1. On the 13th day of August, 1925, the plaintiff entered into a written contract with the above named defendant, whereby the plaintiff agreed to
30 purchase, and the defendant agreed to sell, for the sum of $50,000.00, all those certain lots, tracts or parcels of land, lying and being in the Borough of Bradley Beach, County of Monmouth, and State of New Jersey, known as lots #144, 145 and 146, on the official map of the aforesaid Borough of Bradley Beach, and being the same premises conveyed to the defendant by deeds recorded in Book 770, page 99, Book 654, page 98 and Book
40 577, page 102 of Deeds in the Monmouth County Clerk's Office.

2. The plaintiff paid as a deposit on account of the aforesaid purchase price, at the time hereinbefore mentioned, the sum of $5,000.00, the receipt of which was acknowledged by the defendant.

10

3. In accordance with the terms of the aforesaid agreement, it was further provided that the deed to the said property should be delivered and received at the office of William J. Blair, Professional Building, Asbury Park, New Jersey, on or before the First day of November, 1925.

4. By mutual consent of the plaintiff and the defendant, the time fixed for delivery of the deed was extended to the 13th day of January, 1926.

20

5. On the 13th day of January, 1926, plaintiff appeared at the office of William J. Blair, at the aforesaid building, between the hours of ten o'clock in the forenoon and four o'clock in the afternoon, and tendered to the defendant, the balance of the purchase price, in accordance with the terms and conditions of the aforesaid agreement.

30

6. Defendant refused to accept the balance of the purchase price due her, tendered as aforesaid, and refused to convey in accordance with the terms and conditions of the agreement mentioned, as aforesaid.

7. Although plaintiff demanded from the said defendant the said sum of $5,000.00, so paid to her as aforesaid, the said defendant refused and still does refuse to pay to the said plaintiff, the sum of $5,000.00, so paid to her as aforesaid.

40

Plaintiff demands as damages on this count, the sum of $5,000.00, being the amount of the deposit aforesaid, together with interest and costs of suit.

SECOND COUNT.

10

The plaintiff repeats all of the allegations of the foregoing count, makes them a part hereof, and further says:

1. By reason of having entered into the aforesaid agreement, plaintiff was obliged to and did make an examination of the title to the premises purchased by him, as aforesaid, and was obliged to incur disbursements for the same, the reasonable value of which is the sum of $350.00.

20

Plaintiff demands as damages on this count, the sum of $350.00, together with interest and costs of suit.

BENJAMIN M. WEINBERG,
Attorney of Plaintiff.

ORDER.

NEW JERSEY SUPREME COURT

ESSEX COUNTY

JACOB K. SAFRIS, Plaintiff, vs. JOHANNA FLEISCHMANN, Defendant.	Action at Law

The writ of attachment in this case having been returned served by the Sheriff of the County of Monmouth, to the present term duly executed, and no appearance having been entered in the said cause by the defendant, it is on this 13th day of March, in the year Nineteen Hundred and Twenty-six, on motion of Benjamin M. Weinberg, attorney of plaintiff, ORDERED, that a notice of the issuing of said attachment at whose suit, against whose estate, for what sum and when returned shall be published in the "Asbury Park Press," once a week for four successive weeks, and it is further ORDERED that Ward Kremer of Asbury Park, N. J., be appointed auditor to adjust and ascertain the amount due to the plaintiff and each of the applying creditors.

Dated March 13th, 1926.

WM. S. GUMMERE,
Chief Justice.

NOTICE OF APPEARANCE.

(Filed by Consent June 12/1926)

NEW JERSEY SUPREME COURT

ESSEX COUNTY

10

JACOB K. SAFRIS, Plaintiff, vs. JOHANNA FLEISCHMANN, Defendant.	Action at Law Attachment

20

The defendant's appearance to the suit of Jacob K. Safris, the plaintiff above named, and of any applying creditor therein, is hereby entered.

Dated May 28th, 1926.

ANDREW & TUMEN,
Attorneys for Defendant,
308 Kinmonth Bldg.,
Asbury Park, N. J.

30

40

ANSWER.

NEW JERSEY SUPREME COURT

Essex County

Jacob K. Safris, Plaintiff, vs. Johanna Fleischmann, Defendant.	Action at Law

Defendant, Johanna Fleischmann, residing in the Borough of Bradley Beach, County of Monmouth, and State of New Jersey answering the first count of the complaint says;

(1) Paragraph (1), (2), (3), and (4) of the complaint is admitted.

(2) Answering paragraph (5) of the complaint this defendant admits that the plaintiff appeared at the office of William J. Blair, but denies that the said plaintiff tendered to the defendant the balance of the purchase price referred to in said paragraph; but on the contrary this defendant states that the said defendant was at the said office aforesaid, at the time and place aforesaid, and tendered a deed in accordance with the terms of the contract referred, and was ready, able, and willing to carry out the same, and made known the same to the plaintiff; and the plaintiff at the time and place aforesaid absolutely refused to carry out the terms of the aforesaid agreement,

and informed the defendant that the deal was off, and thereupon left said office.

(3) Answering paragraph (6) this defendant denies that the plaintiff tendered her any part of
10 the purchase price in accordance with the agreement referred to in this paragraph but on the contrary this defendant states that she was then, and has always been ready, able, and willing to convey the said premises to the plaintiff in accordance with the terms and conditions of the agreement mentioned in the paragraph.

(4) Paragraph (7) of the complaint is denied.

20 ANSWERING SECOND COUNT OF THE COMPLAINT.

Defendant repeats all of the allegations of the foregoing answer and makes them a part hereof, and further answers:

(1) Answering paragraph (1) of the second count this defendant denies that the plaintiff has incurred any expenses by reason of any acts of this defendant, because she states that she was,
30 and has always been ready, willing, and able to carry out the terms of the agreement referred to in the first count of the complaint.

FIRST DEFENSE.

By reason of a further and additional defense this defendant states that the complainant never tendered himself as ready, able, and willing to
40 carry out the agreement referred to in the first

count of the complaint, and also did expressly declare on January 13th, 1926, that he would not carry out the terms of the said contract or agreement existing between the plaintiff and defendant unless the defendant would make material changes therein which would be contrary and foreign to the agreement at that time existing between the plaintiff and defendant. 10

SECOND DEFENSE

This defendant as a further and additional defense says that she was ready, able, and willing and tendered a properly executed deed to the plaintiff for the property which is the subject matter of this action in strict accordance with the terms and conditions of the agreement existing between the plaintiff and the defendant, and that the plaintiff thereupon refused to accept the same; and further this defendant says that no money was ever tendered by the plaintiff to the defendant, neither did he tender any executed mortgage to this defendant in accordance with the terms and conditions of the agreement existing between the parties. 20 30

By way of counterclaim against the plaintiff, this defendant says;

(1) On or about August 13th, 1925 the plaintiff agreed to purchase from the defendant property which is referred to in paragraph (1) of the first count of the complaint.

(2) In accordance with the terms and conditions of the said contract possession of the property 40

was to be given to the plaintiff on the first day of November, 1925.

(3) Relying upon the same, and in order to vacate the said premises so that the plaintiff
10 might have possession of them this defendant sold out at public auction divers quantities of valuable furniture to the value of $3500.00 and for which this defendant received the sum of $300.00.

(4) Also by reason of the existence of the contract of sale existing between the plaintiff and the defendant, and the fact that this property was sold through the efforts of a real estate agent to whom if the sale was consummated, this defend-
20 ant was obligated to pay the sum of $1850.00 and which sum this defendant has paid, and lost through the failure of the plaintiff to carry out the terms of the said contract of sale existing between the plaintiff and the defendant.

This defendant claims as damages on her counterclaim the sum of $5,050.00.

ANDREW & TUMEN,
Attorneys for Defendant.

REPLY TO ANSWER AND ANSWER TO COUNTERCLAIM.

NEW JERSEY SUPREME COURT

ESSEX COUNTY

JACOB K. SAFRIS, Plaintiff, vs. JOHANNA FLEISCHMANN, Defendant.	Action at Law

10

The plaintiff replies to defendant's answer to the First Count of the complaint filed herein, and says:

20

He denies the allegations in Paragraphs 2 and 3.

Plaintiff replies to defendant's answer to the second count of the complaint, and says:

He denies each and every allegation therein stated.

30

Plaintiff replies to defendant's First Defense, and says:

He denies each and every allegation in said defense contained.

Plaintiff replies to defendant's Second Defense and says:

He denies each and every allegation in said defense contained.

40

ANSWER TO COUNTERCLAIM

By way of answer to counterclaim against this plaintiff, he says:

10 1. Paragraph 1 is admitted.

2. Paragraph 2 is admitted.

3. Plaintiff has no knowledge or information sufficient to form a belief as to the allegations in Paragraphs 3 and 4, and therefore, denies the same.

NOTICE

20 Plaintiff hereby gives notice that he reserves the right to move, at or before the trial of the above said cause, to strike out the allegations in Paragraphs 3 and 4 of defendant's counterclaim, upon the ground that the same fails to disclose any right of recovery against the said plaintiff.

BENJAMIN M. WEINBERG,
Attorney for Plaintiff.

ORDER SUBSTITUTING DEFENDANT.

NEW JERSEY SUPREME COURT

ESSEX COUNTY

JACOB K. SAFRIS, Plaintiff, vs. JOHANNA FLEISCHMANN, Defendant.	Action at Law

10

It being suggested to the Court that the defendant, Johanna Fleischmann has, since the issue joined in the above said cause, died, and it appearing to the Court that Paul W. Fleischmann, is the executor of the Estate of the said Johanna Fleischmann,

20

It is hereby ORDERED, this 19th day of November, 1927, that the said Paul W. Fleischmann, as Executor of the Estate of the said Johanna Fleischmann, be and he is hereby made the defendant in the above said cause in the place of the said Johanna Fleischmann, deceased.

30

Let the above Order be entered upon the minutes of this Court and filed.

(Signed) WILLIAM S. GUMMERE,
Chief Justice New Jersey
Supreme Court.

40

We hereby consent to the making and entry of the above stated Order.

(Signed) BENJAMIN M. WEINBERG,
Attorney of Plaintiff.
10 ANDREW & TUMEN,
Attorneys of Defendant.

AMENDED ANSWER AND COUNTERCLAIM.

NEW JERSEY SUPREME COURT

Essex County

20

Jacob K. Safris, Plaintiff, vs. Paul W. Fleischmann, Executor of the Estate of Johanna Fleischmann, Deceased, Defendant.	Action at Law.

30

Defendant, Paul W. Fleischmann, Executor of the Estate of Johanna Fleischmann, Deceased, residing in the City of New York, County of New York, and State of New York, answering the first count of the complaint says:

(1) Paragraphs (1), (2), (3), and (4), of the complaint is admitted.

40

(2) Answering paragraph (5) of the complaint this defendant admits that the plaintiff appeared at the office of William J. Blair, but denies that the said plaintiff tendered to the defendant the balance of the purchase price referred to in said paragraph; but on the contrary this defendant states that the said defendant was at the said office aforesaid, at the time and place aforesaid, and tendered a deed in accordance with the terms of the contract referred to, and was ready, able, and willing to carry out the same, and made known the same to the plaintiff; and the plaintiff at the time and place aforesaid absolutely refused to carry out the terms of the aforesaid agreement, and informed the defendant that the deal was off, and thereupon left said office.

(3) Answering paragraph (6) this defendant denies that the plaintiff tendered Johanna Fleischmann, deceased, any part of the purchase price in accordance with the agreement referred to in this paragraph but on the contrary this defendant states that she was then, and has always been ready, able, and willing to convey the said premises to the plaintiff in accordance with the terms and conditions of the agreement mentioned in this paragraph.

(4) Paragraph (7) of the complaint is denied.

ANSWERING SECOND COUNT OF THE COMPLAINT

Defendant repeats all of the allegations of the foregoing answer and makes them a part hereof, and further answers:

(1) Answering paragraph (1) of the second count this defendant denies that the plaintiff has incurred any expenses by reason of any acts of this defendant, because he states that she was, and has always been ready, willing, and able to carry out the terms of the agreement referred to in the first count of the complaint.

FIRST DEFENSE

By reason of a further and additional defense this defendant states that the complainant never tendered himself as ready, able, and willing to carry out the agreement referred to in the first count of the complaint, and also did expressly declare on January 13th, 1926, that he would not carry out the terms of the said agreement or contract existing between the plaintiff and defendant unless the defendant would make material changes therein which would be contrary and foreign to the agreement at that time existing between the plaintiff and defendant.

SECOND DEFENSE

This defendant as a further and additional defense says that she, Johanna Fleischmann, deceased, was ready, able and willing and tendered a properly executed deed to the plaintiff for the property which is the subject matter of this action in strict accordance with the terms and conditions of the agreement existing between the plaintiff and the defendant, and that the plaintiff thereupon refused to accept the same; and further this defendant says that no money was ever tend-

ered by the plaintiff to the defendant, neither did he tender any executed mortgage to this defendant in accordance with the terms and conditions of the agreement existing between the parties.

By Way of Counterclaim against the plaintiff, this defendant says: 10

FIRST COUNT

(1) On or about August 13th, 1925 the plaintiff agreed to purchase from the defendant, Johanna Fleischmann, deceased, property which is referred to in paragraph (1) of the first count of the complaint.

(2) In accordance with the terms and conditions of the said contract possession of the property was to be given to the plaintiff on the first day of November, 1925. 20

(3) Relying upon the same, and in order to vacate the said premises so that the plaintiff might have possession of them this defendant sold out at public auction divers quantities of valuable furniture to the value of $3500.00 and for which this defendant received the sum of $300.00. 30

(4) Also by reason of the existence of the contract of sale existing between the plaintiff and the defendant, and the fact that this property was sold through the efforts of a real estate agent to whom if the sale was consummated, this defendant was obligated to pay the sum of $1850.00 and which sum this defendant has paid, and lost through the failure of the plaintiff to carry out the terms of the said contract of sale existing between the plaintiff and the defendant. 40

This defendant claims as damages on the first count of the counterclaim the sum of $5,050.00.

SECOND COUNT

10 (1) On the 13th day of August, 1925 the plaintiff agreed to purchase, and the defendant, Johanna Fleischmann, deceased, agreed to sell the property which is the subject matter of the plaintiff's complaint, for the sum of $50,000.00.

(2) On the 13th day of January, 1926 the plaintiff and the defendant met at the office of William J. Blair in the City of Asbury Park; and the defendant, thereupon, tendered to the plaintiff a 20 warranty deed for the property aforesaid in accordance with the terms and conditions of the contract of sale existing between the respective parties; that the plaintiff, thereupon, refused to accept the said deed from the defendant, and stated that he was not going to carry out the deal, and thereupon, left the office of the said William J. Blair aforesaid; that the defendant has been ready, and willing at all times to carry out the terms of the said contract of sale agreed 30 between the parties hereto, to all of which the plaintiff had knowledge.

(3) That between the dates of August 13th, 1925 and January 13th, 1926 the value of the property which is the subject matter of this suit had decreased in value $10,000.00, and at this time has decreased in a larger amount; that by reason of the breach of contract on the part of the plain- 40 tiff in refusing to carry out the terms of the con-

tract of sale dated August 13th, 1925, which is referred to in the plaintiff's complaint, this defendant has been damaged in the sum of $10,000.00.

10

This defendant claims as damages on the second count of the counterclaim the sum of $10,000.00.

ANDREW & TUMEN,
Attorneys of Defendant.

ANSWER TO THE SECOND COUNT OF DEFENDANT'S COUNTERCLAIM.

20

NEW JERSEY SUPREME COURT

ESSEX COUNTY

JACOB K. SAFRIS, Plaintiff, vs. PAUL W. FLEISCHMANN, Executor of the Estate of Johanna Fleischmann, deceased, Defendant.	Action at Law

30

The plaintiff replies to the Amended Answer and Counterclaim of the defendant filed herein, and says:

40

Answer to the Second Count of Defendant's Counterclaim

AS TO THE SECOND COUNT

1. He admits Paragraph 1 of the Second Count of defendant's Amended Counterclaim.

10

2. He denies Paragraph 2 thereof.

3. He denies Paragraph 3 thereof.

NOTICE

Plaintiff hereby gives notice that at the trial of the above said cause, he will move to strike out Paragraph 3 of defendant's Second Count to his
20 Amended Counterclaim, upon the ground that said defendant is not entitled as a matter of law, to the damages therein mentioned.

BENJAMIN M. WEINBERG,
Attorney of Plaintiff.

POSTEA.

NEW JERSEY SUPREME COURT

ESSEX COUNTY

JACOB K. SAFRIS, Plaintiff, vs. PAUL W. FLEISCHMANN, Executor of the Estate of Johanna Fleischmann, deceased, Defendant.	Action at Law

10

This action was tried before Judge William A. Smith, Circuit Court Judge, to whom the said cause was duly referred for trial, with a jury, in the presence of the counsel for the respective parties, at the Essex Circuit, on February 3rd, 1928.

20

Upon the Court's direction, a verdict was rendered against the plaintiff and in favor of the said defendant, on the plaintiff's claim against him, and a verdict was also directed in favor of the plaintiff and against the said defendant, on defendant's counterclaim against the said plaintiff.

30

Dated: February 8th, 1928.

WM. A. SMITH,
Judge Circuit Court.

40

JUDGMENT.

NEW JERSEY SUPREME COURT

JACOB K. SAFRIS, Plaintiff, vs. PAUL W. FLEISCHMANN, Executor of the Estate of Johanna Fleischmann, deceased, Defendant.	Action at Law On Postea

10

It is ordered that judgment be and hereby is entered in favor of defendant and against the plaintiff on the plaintiff's complaint, and in favor of plaintiff and against the defendant on the defendant's counterclaim, without costs.

20

Entered February 11, 1928.
On motion of

BENJAMIN M. WEINBERG,
Attorney for Plaintiff.

30

ANDREW & TUMEN,
Attorneys for Defendant.

No Costs.

A true copy. Fred L. Bloodgood, Clerk.

40

NOTICE OF APPEAL.

NEW JERSEY SUPREME COURT

ESSEX COUNTY

JACOB K. SAFRIS, Plaintiff, vs. PAUL W. FLEISCHMANN, Executor of the Estate of Johanna Fleischmann, deceased, Defendant.	Action at Law

10

To Stein, McGlynn & Hannoch, Attorneys of Defendant:

20

TAKE NOTICE, that the above plaintiff, Jacob K. Safris, appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey, from the whole of the judgment entered in the above entitled cause in the New Jersey Supreme Court, Essex Circuit.

Dated: April 21st, 1928.

30

BENJAMIN M. WEINBERG,
Attorney of Plaintiff.

40

GROUNDS OF APPEAL.

NEW JERSEY COURT OF ERRORS AND APPEALS

JACOB K. SAFRIS, Plaintiff-Appellant, vs. PAUL W. FLEISCHMANN, executor of the estate of Johanna Fleischmann, deceased, Defendant-Appellee.	Action at Law

10

To Stein, McGlynn & Hannoch, Attorneys of Defendant:

20

The plaintiff-appellant, as and for his grounds of appeal from the judgment entered against him in the above cause, hereby specifies and assigns the following:

1. The Court erroneously directed the jury to bring in a verdict in the above said cause in favor of the defendant, Paul W. Fleischmann, executor of the Estate of Johanna Fleischmann, deceased, and against the plaintiff, Jacob K. Safris.

30

2. The Court erred in refusing to direct a verdict for the said plaintiff against the said defendant, for the amount proved by the plaintiff.

3. The Court erred in not submitting the questions involved in the said cause to a jury for its determination.

40

Dated: April 21st, 1928.

BENJAMIN M. WEINBERG,
Attorney of Plaintiff-Appellant.

TESTIMONY.

NEW JERSEY SUPREME COURT

ESSEX CIRCUIT

Thursday, February 2, 1928

10

JACOB K. SAFRIS, vs. JOHANNA FLEISCHMANN.	Action at Law.

Before HON. WILLIAM A. SMITH, J., and a jury.

For the plaintiff appears Benjamin M. Weinberg. 20

For the defendant appear Andrew & Tumen. (By Edward R. McGlynn.)

(A jury is called and sworn.)

Mr. Weinberg opens for the plaintiff.

Mr. McGlynn opens for the defendant.

30

At one o'clock, p. m., a recess was taken for one hour.

After recess.

The Court: I suppose we had better enter on the record that the copy of the amended answer not in the transcript may be used and that there is a reply joining issue. 40

Mr. McGlynn: Yes, sir.

MAURICE J. ZUCKER sworn in behalf of plaintiff.

Direct-examination by Mr. Weinberg:

Q. Mr. Zucker, you are an attorney at law of
10 the State of New Jersey? A. I am.

Q. And you have been practicing how long? A. It will be ten years this coming June.

Q. Your office is in the City of Newark? A. Yes, sir.

Q. Have you specialized in any branch of the law? A. I have.

Q. What? A. Real estate transactions.

Q. What has been your experience in real es-
20 tate matters? A. Well, particularly during the last four or five years I have been drawing contracts for the purchase and sale of real estate and having titles examined, which constitutes practically seventy per cent of my practice.

Q. You represented the plaintiff in this case, Jacob K. Safris, for the purpose of searching the title of certain premises that he purchased from one Johanna Fleischmann? A. I did.

30 Mr. Weinberg: I offer in evidence contract between Johanna Fleischmann and Jacob K. Safris.

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

Q. Were you present at the time this contract was drawn? A. Yes, sir.

Q. Where? A. Mr. Blair's office, Professional Building, Cook Avenue, Asbury Park.

40 Q. Who is Mr. Blair? A. He is the attorney who represented Mrs. Fleischmann in this deal.

Q. After you obtained this contract, what did you do in the matter? A. I ordered an examination of the title from the Monmouth Title Company at Freehold, New Jersey.

Q. Without referring to that, after you received the report from the Monmouth Title Company did you do anything to check it up? A. I went through the abstract that was given to me. I received the abstract in the early part of November, either the 1st, or 2nd or 3rd; I don't remember which it was. When I had finished going through the abstract I wrote a letter to William J. Blair, the attorney of Mrs. Fleischmann— 10

Q. On what date? A. November 4, 1925. 20

Mr. Weinberg: Have you that, Mr. McGlynn?

Mr. McGlynn: Yes, sir.

The Court: That is to Mr. Blair?

Witness: Yes, sir.

Q. I show you a letter and ask you if you recognize that as the letter which you wrote. A. That is the letter which I wrote.

Q. Before asking about that, will you look at the agreement, Exhibit P-1, and tell me when, according to the terms therein stated, the settlement was fixed. 30

Mr. McGlynn: I object to that. The contract speaks for itself.

The Court: I will allow it.

Witness: In the agreement it recited that Mrs. Fleischmann would convey the prop- 40

erty by deed of warranty free from all encumbrances on or before the 1st day of November. In the body of the agreement that clause which states where the deed was to be delivered and when, it said between the hours of ten in the forenoon and four o'clock in the afternoon on the date of settlement next ensuing the date hereof.

10

Mr. Weinberg: I offer in evidence letter dated November 4, 1925, to William J. Blair, Esquire, which letter has just been handed to me by Mr. McGlynn of counsel for the defense.

20

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

(Mr. Weinberg reads Exhibit P-2 to the jury.)

Q. Did you receive a reply to that letter? A. I don't know whether I did or not. I don't seem to have a copy of one here.

Q. Then what was the next communication between you and Mr. Blair on the subject? A. I received a letter from Mr. Blair on November 14, 1925—

30

Q. Wait a minute. Before that, was there any other communication between you and Mr. Blair, that is, in the interim? A. I imagine there was. I may have called him on the telephone and he called me, but I have no record of any letter.

Q. You can't recall anything in between—any conversation or otherwise?

40

By Mr. McGlynn:

Q. Have you the letter dated November 14th?

A. Yes, sir.

By Mr. Weinberg:

Q. I show you a letter on the letterhead of William J. Blair, dated November 14, 1925. Can you identify that? A. Yes, I received that letter from Mr. Blair. 10

Mr. Weinberg: I offer it in evidence.

Mr. McGlynn: No objection.

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

(Mr. Weinberg reads Exhibit P-3 to the jury.) 20

Q. What was the response, if any, to that letter? A. I have no letter responding to that. May I see the letter?

Mr. McGlynn: I have a letter of November 28th from Safris direct.

Mr. Weinberg: No.

Witness: My recollection is that just prior to Thanksgiving Day of that year I went to Lakewood. I think it was the day before Thanksgiving. Passing through Freehold I went into the Court House to verify—to see whether these deeds were on record and to see whether the mortgages were cancelled. It may have been the day before Thanksgiving, or two days before. I don't think that they were on record at that time. I am not positive of that, but I know I stopped in at the Court 30 40

House in Freehold, and I think when I came back I asked my client—

Q. You know you must not give us any conversation. What was the next conversation you had with the defendant or her representative? A. My next conversation was with Mr. Blair. Mr. Blair had written a letter direct to Mr. Safris and I think I asked him to do it. I wanted to get the date to close this and go down to close it. And I have a letter dated November 6, 1925, which Mr. Safris turned over to me. It is unsigned—I couldn't tell you now whom it came from.

Q. How did you have a copy? Where is the original?

Mr. McGlynn: I have a carbon copy; I haven't the original.

Mr. Weinberg: I am asking Mr. Zucker how he come to have a copy of the original.

Witness: I think I can explain it. Mr. Blair and I were quite friendly in this deal and I think he sent me that copy of the letter. When I called him up and told him to write a letter to Mr. Safris, that must be the copy he sent me of the original that was sent to Safris. I haven't the original.

Q. That seems to be so because Mr. McGlynn's copy and this one seem to be exactly alike.

The Court: Is there any dispute that Mr. Safris got the original?

Mr. McGlynn: I don't think so.

The Court: Then by consent of counsel the letter of November 26th from Mr. Blair to the plaintiff will be admitted in evidence.

Mr. Weinberg: Before I put it in I will ask whether it is recognized as having been received by Mr. Safris and did you reply to it?

Mr. McGlynn: I have a letter replying to it. 10

Witness: I haven't any copy of it. I would like to see it.

Mr. Weinberg: I offer in evidence letter referred to, calling it a letter. It is a carbon copy.

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

Q. It was sent to your office? A. Mr. Safris has his office right next to my suit of rooms. 20

(Mr. Weinberg reads Exhibit P-4 to the jury.)

Q. That letter was apparently received on the day that title was supposed to close, dated November 26th, and mailed to you from Asbury Park. A. Yes.

Q. Calling for a closing the next day. A. Yes, sir. 30

Mr. Weinberg: I offer in evidence letter produced by the defense dated November 27th from Zucker & Goldberg to William J. Blair.

(Same is received in evidence and marked Exhibit P-5.)

(Mr. Weinberg reads Exhibit P-5 to the jury.)

40

Q. What was the step following this letter written by your partner to Mr. Blair? A. My recollection is that coming back from Lakewood I took the back road and went to Asbury Park and I dropped in at the office of Mr. McBride in Bradley Beach. I think I saw a young man—I think Mr. Wright was the man I saw. I told him I wanted to get this title closed and he asked me if I wouldn't get after Mr. Safris and arrange a closing on this thing.

Q. Who is he? A. The real estate agent.

Q. I am not interested in that. What happened between you and Mr. Blair? A. There were certain telephone conversations. Mr. Blair wanted the thing closed and I wanted the thing closed, and finally I had a telephone conversation with Mr. Blair some time between the 2nd of January and the 5th of January—

Q. What year? A. 1926—in which Mr. Blair informed me that the matter had been ironed out and that Mr. Safris and Mrs. Fleischmann had come to terms and that they were ready to close. He wrote me a letter and in the letter he told me the terms—

Q. What letter? A. January 5, 1926, which I sent to Mr. Blair.

Mr. Weinberg: Have you the letter?

Mr. McGlynn: Here is the letter.

Mr. Weinberg: I offer in evidence letter of January 5, 1926, directed to William J. Blair by Maurice J. Zucker.

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

(Mr. Weinberg reads Exhibit P-6 to the jury.)

Mr. Weinberg: That letter, bear in mind, is dated January 5, 1926.

The Court: What would the Saturday referred to there be? 10

Mr. Weinberg: Saturday would be January 9th.

Q. What was the response to that letter, if any? A. I received a mortgage from Mr. Blair—a bond and mortgage. I don't seem to see a letter. I must have received a letter also, but I don't think I have it.

Mr. Weinberg: Was there a letter? 20

Mr. McGlynn: I don't see any.

Witness: I received the bond and mortgage, and whether Mr. Blair could close on Saturday or not—

Q. Don't go into that now. You received a bond and mortgage from Mr. Blair, did you? A. Yes.

Q. You will observe in the agreement itself it is stated that of the purchase price of $50,000 for 30 this property, $15,000 was to be paid in cash, $5000 on the deposit, and $30,000 on mortgage. You speak of a $30,000 cash payment. Did you and Mr. Blair have anything to do with arranging that? A. No, sir.

Q. Whatever was done about that was done between Safris and Fleischmann? A. Correct. I insisted on the title being closed.

Q. Where did you get your information in your 40 letter of January 5th that you understand Safris

is to pay $7000 cash? A. From the telephone conversation I had with Mr. Blair as stated in that letter.

Q. That is what you mean by the telephone conversation that you had received that information
10 from Mr. Blair? A. Correct.

Q. Do you recognize or identify a bond and mortgage that are shown in typing to have been dated November 2, 1925? A. Yes.

Q. And are those the two papers that you received from Mr. Blair? A. They are.

Q. I notice that there are pencil marks over the typing and the date of November is changed to January. When was that done and who did it?
20 A. It was done in my office when I sent for Mr. Safris and his wife to sign the bond and mortgage.

Q. That is what I wanted to know. They were not in that shape when you received them—that was done by you. A. That was done by me.

Mr. Weinberg. I offer in evidence the bond and mortgage as one exhibit.

Mr. McGlynn: No objection.

30 (The same are received in evidence and marked Exhibit P-7.)

Q. In the bonds as I have already stated the word "2nd" and "November" are run through with a pencil mark, and in place you have marked, "13—January" changing the year 1925 to 1926, and wherever the payments were to occur on November in the consecutive years you have indicated January. A. Yes, sir.

40 Q. That indicates some dispute of which we are going to speak in a minute. A. Yes, sir.

Q. I notice that the mortgage is signed Jacob Safris and Celia Safris. Were those signed in your presence? A. Yes, sir.

Q. But they were not acknowledged? A. Not until I delivered.

Q. Did you witness the signature on the bond of Jacob Safris? A. Yes, sir.

Q. But you did not show that on the bond? A. Not yet.

Q. After the letter of January 5th to Blair, and the reception by you of the bond and mortgage, did you see Mr. Blair? A. I did, on the 13th of January, 1926, at 9:30 a. m. at his office at Asbury Park.

Q. Who went with you? A. I went alone with all the papers in the matter.

Q. And by "All the papers" to what do you refer? A. The bond and mortgage, the deed, my title search, Supreme Court search, U. S. District Court search, and tax search.

Q. What deed are you referring to? A. If I said deed, I meant abstract of title.

Q. Did you have anything else with you? A. I had my entire folder with me with a certified check of $7000.

Q. Have you that check here? A. I have.

Q. Is the check that I hold in my hand the check that you took to Asbury Park, check dated January 12, 1926? A. It is.

Mr. Weinberg: I offer the check in evidence.

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

Mr. McGlynn: Of course, it is understood that the cancellation stamp, and so forth, were put on afterward.

Mr. Weinberg: Oh, yes.

10 The Court: I suppose you might as well agree that it was cancelled by redeposit by the plaintiff in his own account.

Witness: Yes, sir, I got it on the 12th.

(Mr. Weinberg reads Exhibit P-8 to the jury.)

Q. The $7000 represented by this check was from whose funds? A. Mr. Safris gave me a check of $7000 the day he signed the bond and 20 mortgage. It was made out to the order of Zucker & Goldberg and was deposited in my trustee account. And I took with me my certified check to endorse it over to their order when I took title.

Q. What did you do with this check? A. Brought it with me to Asbury Park and had it there—

Q. Just a minute. Will the trip to Asbury Park be the last one in this connection? A. With the exception of one letter that I wrote to Mr. Blair 30 on October 26, 1926—

Q. I mean before I brought suit. A. That was the last.

Q. Tell us what occurred on January 13th when you were in Asbury Park. A. I got to Asbury Park. I travelled by train and went direct to Mr. Blair's office at half-past nine. About five or six minutes after I got there a gentleman by the name of Mr. Fleischmann who, I believe, was in- 40 troduced to me as Mrs. Fleischmann's son, came

in, and about a minute before or a minute after the man by the name of Mr. Wright, who was the real estate agent, came in, and we immediately sat down to close title.

By the Court:

Q. Then there were four of you there? A. Four of us, yes, sir.

Q. Go ahead. A. The first thing I started to do was to begin to check up on the title again. My recollection was that Mr. Blair had the corrected deeds there in his possession. I checked those up. He showed me a mortgage signed for cancellation for the $2500 mortgage which I recited in my letter to Mr. Blair on November 4, 1925, as stamped for cancellation. I told Mr. Blair that that mortgage is open of record in the County Clerk's office in Freehold. Mr. Blair then called up the County Clerk in Freehold in my presence and asked him to look up that fact and verify it, and the County Clerk called him up and told him that mortgage was open of record.

Q. How do you know what the County Clerk told him? A. I know that from the answer which he gave over the telephone to the County Clerk.

Q. What was that? A. These are not the exact words, but he told him that he had that mortgage in his possession and it had a stamp—I made a copy of it—I don't know whether it was a copy of it, but "Cancelled of record January 16, 1911, Joseph M. McDermott."

Q. That is what was endorsed on that $2500 mortgage? A. Yes, sir, in writing.

Q. And notwithstanding that was fifteen years before— A. (Interrupting) Yes.

Q. (Continuing) There was no cancellation of it on the actual records? A. No, sir.

By the Court:

Q. As I understand it, you looked at the record
10 and found it open? A. Yes, sir.

By Mr. Weinberg:

Q. Did you look over the records and verify these things about the deeds and the open mortgages? A. I did.

Q. So you know of your own knolwedge what the records show? A. Yes, sir, I examined the records in the recording room at Freehold.

Q. You say someone in the County Clerk's office
20 verified your statement that the cancellation had not been recorded? A. Correct.

Q. What was the next thing? A. That was disposed of—

Q. How was it disposed of? A. He was going to give me the mortgage or keep it himself and have it recorded and taken off record. I took his word that he would do it.

Q. What was the next thing? A. Then we came down to going through the bond and mortgage.
30 I told him—

Q. Wait a minute, please. You talked about a $2500 mortgage and you also spoke of another mortgage, I believe. How was that settled? A. He showed me either a cancellation or discharge which he had in his possession for the $4500 mortgage.

Q. Had that discharge or cancellation up to that date been recorded? A. To my recollection,
40 no.

Q. What were you going to do about that? A. I took his word again to see that that was cancelled of record.

Q. What about the deed from the Ocean Grove Camp Meeting Association? A. He had to correct the deeds in his possession. 10

Q. Had they been recorded? A. To my recollection they had not. He had them there in his office.

Q. And you were willing to— A. I was willing to take his word that that would be recorded.

Q. What was the next thing? A. Then I took up the question of the bond and mortgage and I said to him, "You have got November 2nd on this mortgage and you were not ready to close this 20 title on November 2nd." He said, "You told me it was going to stand as of November 2nd. In fact, November 1st was the date, and we won't make any change in it." We argued back and forth. I said, "I have to take care of my client's legal rights in this." I began to give him examples of what it meant—if it was bringing in a tremendous rent—little similies of circumstances —and I said, "The law says you have to close on the date you are ready." Then I took up the 30 question of insurance. I said, "You have $38,000 insurance on the mortgage. If that burns down no insurance company on earth wold give you $38,000 for it. It is an old shack." We argued about that, and finally—my client instructed me to use my own discretion as to what the house was worth—and I compromised with him. I said, "We are willing to put in $15,000 and I do not have to have that in the closing at all. My agree- 40

ment does not call for any such insurance. It doesn't even have an insurance clause in the mortgage."

Q. What happened? A. He agreed and I agreed that we put $15,000 on it, though no insur-
10 ance company would pay it. It was an old house.

Q. Had you seen the property? A. I had seen the property and I was in the property.

Q. In the mortgage I call your attention to the fact that the statement is incorporated that you should keep the property insured for $38,000 and which you objected to. I ask you, without going through it all, whether there is any clause in your agreement providing for any such insurance.

20

The Court: There is the usual insurance clause and the agreement.

Q. Now, then, in your own knowledge, you had ironed out the matter of the two mortgages and the deed, and you finally agreed on the question of insurance. What was the next thing that came up? A. Drawing the statement of closing of title.

Q. Yes. A. Mr. Blair wouldn't budge. He insisted that we close as of November 2nd or
30 November 1st—I notice the mortgage is torn—I think it was November 1st. I told him, "I couldn't do it. I have the $7000 check ready to close and I came down purposely for that and I couldn't under any circumstances let my client close as of that date because you were not ready and it amounted to considerable money." And there we argued.

Q. It meant a considerable sum of money
40 against whom? A. Against my client. My client

would have had to pay the insurance that had accrued on that mortgage, the taxes for November and December, and I remember correctly that they wanted interest on this $7000 check. I don't—I am not sure of this last, but I am inclined to think that they did. And we started to argue that question, and I used all the persuasion I could. I tried all I could to get this thing closed. I told Mr. Blair—I said, 'I have done all I could to bring the thing to a closing and you have proved the stumbling block. I know if it doesn't close I won't collect as much as I would if I did close.'' Finally the agent said, ''If your client will stand half I will stand half of the difference.'' Mr. Blair said then, ''I don't want you to stand any of it. These people are going to close title as of November 2nd, or they won't close at all.'' The agent then asked about the commission and Mr. Blair said, ''Don't worry about your commission. You will get it.''

Q. Was Mr. Safris there or Mrs. Fleischmann? A. Neither one. I think I inquired about it and they told me she was in New York State somewhere.

Q. Did you have the check there? A. Yes, I had the check there and I kept on looking at my watch. I didn't want to miss the eleven o'clock train back. I couldn't get another until two o'clock. I told them I wanted to get this closed and I wanted to make the train.

Q. How long were you there? A. From half-past nine until about ten minutes before a train that I left—I think it was around 11:40 or 11:50

—some train that left between half-past eleven and twelve. I don't remember the exact hour.

Q. So you were there approximately two hours. A. Approximately two hours.

Q. How far was Mr. Blair's office from the
10 railroad station? A. I imagine about four blocks.

Q. And is that how you parted? A. Here is the way I parted: I said to Mr. Blair, "Listen, I am going to leave you here. I have helped you and done things my client doesn't know anything about trying to close." I said, "Let's close this thing now." He said, "You will close as of November 1st." And finally he conceded that the agent pay half of that difference. I said, "Mr.
20 Blair, I can't do that." and I took out the check. I said, "I am tendering you the check; I am ready to give you the mortgage; I want you to close as of the date you are ready. Are you going to do it or not?" He didn't want to do it, and I said, "Goodbye." And I put my papers in the envelopes. And into my folder—and in rushing out I happened to pick up the deed and took it with me to the station and Mr. Wright came running down to the station after me and I had it in my
30 folder and I saw it and I gave it to him, but I didn't miss my train.

Q. Had the tender of the deed been made before then? A. The first tender of a deed was at that meeting, because between Mr. Blair and myself we were doing everything possible to close title. Mr. Blair never tendered anything to me nor wrote to me that he would tender it.

Q. You didn't insist on a formal tender? A.
40 No, but I wanted him at least to do something to

make my client come across and close, because I couldn't go after my client and make him close because of the fact that he didn't want to do it. I said to Mr. Blair, "If you will write him he will close because he wants the property."

Q. Why didn't you close? A. Because of the difference in the amount that she wanted. He wanted all figures as of November 1st and I maintained—"Legally you can't do that; you can't close as of that date."

Q. You were not telling it to yourself, were you, but that is what you told him? A. I mean I told him he couldn't make me close as of a date when he was not ready.

Q. There wasn't any dispute between you and Mr. Blair that the mortgages had not been cancelled at that date? A. Yes, I wanted that title closed. I said, "The mere fact that you have them in your possession does not mean they are cancelled. I want those mortgages cancelled; I want the record title correct." But when I came to close down there, as long as he had them and they were going to be cancelled, I was satisfied.

CROSS-EXAMINATION by Mr. McGlynn:

Q. For how long a time prior to January 13th was Mr. Blair in the same legal position that he was in on January 13, with reference to these alleged defects of title? A. You mean ready?

Q. Yes. You say he had what you took on January 13th, which was the mortgage for cancellation—you took the bargain and sale deed he had of the Ocean Grove Camp Meeting Association, the original of which he had in his possession, as

curing the two defects which you had mentioned in your letter of November 4th. A. Of my own knowledge I did not know that she was ready—

Q. You took the original mortgage which Mr. Blair had in his office which was receipted for
10 cancellation and you took the deed from the Ocean Grove Camp Meeting Association to Mrs. Fleischmann, curing any legal defect in the title. A. That was on January 13th.

Q. For how long a time prior to January 13th had Mr. Blair been in the same position? A. I don't know.

Q. You know, as a matter of fact, that he had been for quite some time. You received a letter
20 from him on November 14th telling you that he had this deed from the Ocean Grove Camp Meeting Association, didn't you? A. I did.

Q. And he told you he had these mortgages fixed up? A. If the letter says so.

Q. Exhibit P-3 says: "I am now in possession of bargain and sale deed," and so forth. A. I went down to verify it.

Q. He does not say that he had recorded it. The mortgage was cancelled January 16, 1911.
30 Don't you know from your examination of the record at the Monmouth County Court House that the mortgage was cancelled January 16th, 1911? A. It was not.

Q. And don't you know that the mortgage which you say the register or county clerk, or whatever they call him in Monmouth County had his stamp on saying it was cancelled? A. That was cancelled in 1926.

40 Q. You said you went to the office of the county

clerk and verified it. A. My letter says one mortgage was open of record and another mortgage was assigned to a Samuel LaBaw.

Q. You say in your letter that you question the assignment of a mortgage recorded in Book 407 of Mortgages for Monmouth County page 343. A. Correct.

Q. I show you the mortgage and ask you in what book it is recorded. A. Recorded in Book 409 of Mortgages, page 343.

Q. What mortgage was recorded in Book 407 which you say is not right? A. Here it is (indicating); mortgage of $4500.

Q. In your letter you say it is recorded in Book 407, page 343. A. 343. You haven't given me a $2500 one.

Q. Here is the $2500 mortgage. A. Book 333 page 72, exactly as I stated.

Q. Look at the next paragraph. A. Book 409, page 343.

Q. What is wrong with the second one? A. My letter is based upon my search.

Q. Was your search right or wrong? A. My search was right and based upon the facts in my search, the letter is right. If you will let me explain—

Q. No, just answer the question. Your letter in speaking of the mortgages assigned by the executors of Samuel H. LaBaw to Louisa M. LaBaw describes the mortgage as what? A. Book 409 page 343. "It appears that an attempt was made to assign these two mortgages to Louisa M. LaBaw by assignment dated September 10, 1921, and recorded in Book 82 of Assignments of

Mortgages for Monmouth County on page 441, but in the assignment, instead of referring to the mortgage of $4500 above mentioned they recite mortgage recorded in Book 409 of Mortgages for Monmouth County on page 343."

10 Q. I show you this mortgage and ask you where it recites two mortgages. A. This assigns only one mortgage.

Q. Where are the two mortgages? A. I wanted to have an assignment of the other mortgage you have there.

Q. What other mortgage? A. The $2500 mortgage.

Q. What did you need the assignment of it for?

20 A. I understood that this party Louisa M. LaBaw was a holder of both of those mortgages.

Q. Didn't your records show you that the mortgage dated November 24, 1926, $2500, recorded in Book 333 of Mortgages, page 72 had been cancelled of record January 16, 1911? A. No, sir, it had not, and the record down at Freehold did not have it so, nor did my search from the Monmouth Title Company show it.

30 Q. When did it show it was cancelled? A. It wasn't cancelled; it was open.

Q. Isn't it a fact that it was this mortgage, which bears the cancellation stamp, "February 1, 1926"? A. No, sir.

Q. Was this mortgage also open of record? A. They were both open of record.

Q. Why didn't you say that in your letter? A. I did say it in my letter.

40 Q. Show me where. A. "I find of record a mortgage made by Johanna Fleischmann to Sam-

uel H. LeBaw dated November 24, 1906, for $2500, recorded in Book 333 of Mortgages for Monmouth County on page 72. Also mortgage from Johanna Fleischmann to Samuel H. LeBaw dated January 14, 1911, in the sum of $4,500, recorded in Book 409 of Mortgages for Monmouth County on page 343." 10

Q. You don't say open of record? A. If they weren't open of record I wouldn't show it.

Q. What do you say then? A. "It appears that an attempt was made to assign these two mortgages to Louisa M. LeBaw by assignment dated September 10, 1924, and recorded in Book 82 of Assignments of Mortgages for Monmouth County on page 441, but in the assignment, instead of referring to the mortgage of $4,500 above mentioned they recite mortgage recorded in Book 409 of Mortgages for Monmouth County on page 343. I presume that you will have these mortgages ready for cancellation, but you will have to correct the assignment from the executors— 20

Q. This is the assignment, isn't it? A. Correct.

Q. Was there any attempt made to name more than one mortgage? A. No. 30

Q. $4,500, 409-343? A. Correct.

Q. I show you mortgage 409-343 and ask you what the face amount of that mortgage is. A. $4,500.

Q. Anything wrong with that assignment? A. No.

Q. Where is there any attempt to assign two mortgages? A. I will tell you that.

Q. Let us have it. A. I found the mortgages 40

open of record; I found the $2,500 mortgage dated November 24, 1906, to Samuel H. LeBaw; I found another one to Samuel H. LeBaw by assignment. I had notice of the fact that Samuel H. LaBaw was dead, and I came to the conclu-
10 sion, from looking at my search, that Samuel H. LaBaw having died and left two mortgages, the executors attempted to assign these mortgages to Louisa M. LaBaw. I didn't know that the $2,500 mortgage was cancelled of record.

Q. Was it? A. It was not on the record.

By the Court:

Q. You didn't know it was paid? A. I didn't know it was paid. That was the only conclusion
20 that I could draw.

Q. The $2,500 had been paid and not assigned?

Mr. McGlynn: It was paid January 14, 1911.

By Mr. McGlynn:

Q. You also mention that the deeds of the Ocean Grove Camp Meeting Association are not deeds, but leases. A. Correct.

30 The Court: I suppose the mortgages had better be marked in evidence.

Mr. Weinberg: If they do not prejudice my case, they may go in.

Mr. McGlynn: I will ask that they be marked for identification.

(Mortgage dated November 24, 1906, recorded in Book 333, page 72, in the amount of $2,500, is marked Exhibit D-1 for iden-
40 tification.)

(Mortgage dated January 14, 1911, recorded in Book 409, page 343, in the sum of $4,500, is marked Exhibit D-2 for identification.)

(Assignment dated September 10, 1921, recorded in Book 82 of Assignments, page 441, assigning mortgage 409-343, in the sum of $4,500, is marked Exhibit D-3 for identification.)

The Court: The $2,500 mortgage bears an endorsement. What is it?

Mr. McGlynn: The mortgagee's personal endorsement of payment made January 14, 1911. On the face of it there is a rubber stamp impression "Cancelled" January 16, 1911, Joseph McDermott, clerk. Exhibit D-2 for identification bears on the back of it the satisfaction of mortgage by the assignee, Louisa M. LeBaw, dated August 27, 1925. On the face of it is a rubber stamp impression "Cancelled" and underneath in pen and ink "February 1, 1926, Joseph McDermott, Clerk."

By Mr. McGlynn:

Q. Now, Mr. Zucker, I have shown you papers that purport to be three certified copies of the Ocean Grove Camp Meeting Association to Mrs. Johanna Fleischmann which you mention as defective because they are leases. Did you find in the body of those three instruments any clauses which in your opinion as a real estate law expert makes them leases—

The Court: Mark them.

(Certified copy of deed from Ocean Grove Camp Meeting Association to Johanna Fleishmann dated July 20, 1900, recorded in Book 654 of Deeds, page 98, is marked Exhibit D-4 for identification.)

10 (Certified copy of deed from Ocean Grove Camp Meeting Association to Johanna Fleischmann, dated September 8, 1896, recorded in Book 577 of Deeds, page 102, is marked Exhibit D-5 for identification.)

(Certified copy of deed from the Ocean Grove Camp Meeting Association to Johanna Fleischmann, dated February 3,
20 1906, recorded in Book 770 of Deeds, page 99, is marked Exhibit D-6 for identification.)

By the Court:

Q. I suppose that the difficulty is that the clerk recorded those as leases and not as deeds.

A. Yes, sir.

Mr. McGlynn: I want him to show me by the records, not by his search, what the
30 difficulty is.

By Mr. McGlynn:

Q. I ask you to look through those three certified copies which have been marked for identification, and point out to me in the body of those papers what makes them leases and not deeds.

Mr. Weinberg: I object.

The Court: I will allow it.

40 Plaintiff's counsel prays an exception to this ruling of the court.

Exception noted as ground of appeal.

Witness: In the body of the deed itself there is no clause that makes it a lease. That does not appear there. It appears in the acknowledgment of the officers who signed the deeds. 10

Q. Is that true of all three cases? A. All except one.

Q. One of them was all right as to body and acknowledgment? A. Yes, sir.

Q. In the other two the bodies were all right, but not the acknowledgment? A. It says that he signed the "Foregoing lease."

By Mr. Weinberg: 20

Q. You are asked to read it. A. Referring to Exhibit D-5 for identification, dated September 8, 1896: "Be it remembered that on the 11th day of September A. D. One Thousand Eight Hundred and Ninety-Six before me the undersigned a Master in Chancery of said State, personally came George W. Evans, Secretary of the Ocean Grove Camp Meeting Association of the Methodist Episcopal Church, who being duly—did depose and say, that he was present and did see E. H. Stokes 30 President of the said "The Ocean Grove Camp Meeting Association of the Methodist Episcopal Church," sign the above and foregoing Lease, and affix thereto the common and corporate seal of the said Association, which is the same seal now thereto affixed, and then deliver the same as the act and deed of the said association made by order of the said corporation, and that he the said George W. Evans, did thereupon subscribe 40

his name as Secretary of the said Association, to the said Lease, in attestation of the due execution and delivery thereof, and as subscribing witness thereto and his name now subscribed thereto as such Secretary as aforesaid is in the proper
10 handwriting of him the said Geo. W. Evans."

By Mr. McGlynn:

Q. Is the other acknowledgment to which you taken exception in substantially the same language? A. Yes, the same wording.

By the Court:

Q. Which is the next one? A. Exhibit D-6 for identification.

20 By Mr. Weinberg:

Q. What date is that? A. Dated the 3d day of February, 1906.

By Mr. McGlynn:

Q. Were the two acknowledgments to which you took exception both more than six years old? A. Yes, sir.

Q. Had they been on record more than five years? A. They had.

30 Q. Were you familiar with the statute which stated that where deeds had been on record more than five years— A. I was.

Q. You say that when you went to the railroad station you found that you had taken the executed deed that Mr. Blair had on his office table? A. Yes, sir.

Q. So there was an executed deed there ready to be delivered? A. I don't want you to tie me
40 down—I took the deed—

Q. I am only asking you questions. A. I took the deed; whether it was executed or not I don't know.

Q. Don't you remember you asked him to leave the name of the grantee blank and you would fill it in when it was closed? A. I do not. 10

Q. Don't you remember examining this when you were in the office? A. I don't think I got that far.

Q. You say you got to Asbury Park at half-past nine in the morning? A. Yes, sir.

Q. Are you sure of that? A. Yes, sir, the same train Mr Fleischmann came down in.

Q. Don't you know as a matter of fact that you cannot get a train to Asbury Park at that 20 hour in the morning in the winter? A. I know as a matter of fact that I took the train which got me there at that hour.

Q. You have other letters than those in evidence, have you not? A. You told me I did.

Q. I show you a letter dated December 28, 1925, and ask you if you wrote that letter to Mr. Blair? A. I did.

Mr. McGlynn: I ask that it be marked 30 for identification.

(Same is marked Exhibit D-7 for identification.)

Q. Neither Mr. Blair nor Mrs. Fleischmann were at that time holding up the closing, were they? A. Not in the words that you use, no.

Q. The delay from November to January 13th was the fault of your own client's not being willing to close as you agreed upon. A. I wouldn't 40 say that.

Q. On November 1, 1925, your client was not in a position to close this title as agreed, was he? A. He was.

Q. Why all the delay from November 1, 1925, to January 13, 1926? A. You will have to ask him
10 that, Mr. McGlynn. He wanted as much time as he would get.

Q. Whose suggestion was it that this closing be with $7,000 instead of $15,000? Was it your suggestion or your client's? A. The first I heard of it was from Mr. Blair over the telephone.

Q. Didn't you know that your client was the one that instigated that? A. I only know what I heard from Mr. Blair. I know they wanted to
20 get it settled.

Q. Why did you write him on December 28th, "I am having a meeting of the people—

Mr. Weinberg: There is no such letter in evidence.

Q. Why did you write, "I am having a meeting of the people interested at my office tomorrow at 5 P. M.?"

30 Mr. Weinberg: I object. That letter has not been admitted. It may not deal with this matter—

The Court: This witness has seen this letter. I will allow it in evidence.

(The letter previously marked Exhibit D-7 for identification is received in evidence and marked Exhibit D-7.)

(Mr. McGlynn reads Exhibit D-7.)

40 Q. Who were the people interested? A. Mr. Safris and his partner.

Q. What is his name? A. Lesser.

Q. Did you have a meeting? A. No, they were coming into the office and I wanted to ask them about it.

Q. Why? A. I wanted to get the title closed.

Q. What was the delay about? A. I don't know. I suppose they were trying to make better terms.

Q. When did you get the check for $7,000? A. I think it was the 11th of January, and I put it into the bank then, or before that; but I know I had the money there.

Q. You had $7,000, is that right? A. Right.

Q. If this title had closed on January 13th you would have needed more than $7,000, wouldn't you? A. Yes.

Q. Did you have that with you? A. If the title had closed January 13th?

Q. Yes. A. Yes.

Q. What about the adjustment? A. We would be entitled to adjustments.

Q. You would be entitled to insurance premiums— A. There was no insurance on it. They were going to write the insurance then.

Q. They had talked to you about it then? A. I had it in the mortgage.

Q. You knew before you went to Asbury Park that the insurance was in the mortgage? A. Yes, sir.

Q. It was submitted to you with the $38,000 insurance clause? A. Correct.

Q. You knew that your client had to pay $38,000 of insurance? Did you have that with you? A. No, sir, I had my check.

Q. What other figures were there? A. That we would be entitled to tax adjustments.

Q. What did that big difference amount to? A. The interest on $45,000 from November 1, 1925, to January 13, 1926.

10 Q. Why $45,000? A. They wanted interest on the $7,000 that I paid and on the $38,000 mortgage.

Q. Were you to get interest for the $5,000 that you had paid? A. No, sir.

Q. Was there any question about it? A. No, sir.

Q. Did you actually make up any figures? A. Yes, sir.

20 Q. What was the difference in dollars and cents between the figures calculated your way and the figures calculated their way?

Mr. Weinberg: I object to that as wholly immaterial. This witness is an attorney representing the plaintiff and I assume he hasn't any right to give or take. He is entitled to his rights, whatever this court or jury may decide; it doesn't make any

30 difference if the difference was ten cents, if it became a matter of principle he is entitled to it. What is the difference? It is a matter of right—

The Court: I will allow the question.

Plaintiff's counsel prays an exception to this ruling of the court.

Exception noted as ground of appeal.

40 Q. Was there a difference in dollars and cents between the two methods of calculation? A. Not that had to be paid then—

Q. You said that everything else had to be eliminated and there was only one thing standing between these people, and that is the method or the time at which these adjustment figures were to be calculated—one side maintained November 2, 1925, and the other side January 13, 1926. A. Correct. 10

Q. I want to know how much difference there was between these two parties on this transaction. A. In dollars and cents?

Q. Yes. A. If the title was closed as of November 1st, no money would have had to be paid then, but my client would have had to pay interest on $38,000 on January 1, 1926, instead of paying it on July 13, 1926. They wanted interest on $7,000, they claiming that they were entitled to have this money on November 1st and they were not getting it until January 13th. They wanted us to allow them taxes for the year 1925 for the months of November and December and they—I think that was the total amount—now, the agent— 20

Q. I am asking you how much it amounted to in dollars and cents— A. And interest on—

Q. Didn't you figure it before? A. I figured it down there. 30

Q. Haven't you it here? A. I gave it to Mr. Weinberg.

Q. Haven't you the statement? A. That statement will be on my card index on which card appears the date I ordered the tax search—the Supreme Court and the tax search—on the reverse side is a complete statement showing the difference between the parties. 40

By Mr. Weinberg:

Q. Where is that? A. In my office.

By Mr. McGlynn:

Q. Does that card index show both calculations
10 or only yours? A. It doesn't show theirs and it doesn't show mine. It shows the purchase price, the deposit paid, the amount of the mortgage, and that is as far as we got.

Q. You said before you left there during this discussion you and Blair eliminated the insurance discussion. A. Yes.

Q. The next conversation you had was with the broker and he said, "Never mind the argument.
20 I will stand for half and Mrs. Fleischmann will stand for half." A. Yes.

Q. Do you know what the half amounted to? A. I figured it then.

Q. How much was it? A. I will have to figure it now; I don't remember it.

Q. As a matter of fact, weren't you told then and there by Mr. Wright in the presence of Mr. Blair and Mr. Fleischmann, that the only thing left open between the purchaser and seller of this
30 property was the question on the figures of the closing—that this man Wright would stand every cent of the difference right then and there?

Mr. McGlynn: That is not so.

Q. The mortgage which you say you took down there was in the same shape then as it is now, is that right? A. Yes, sir.

Q. The acknowledgments were not filled in? A. Yes, sir.

40 Q. And the check which you had then and there

—you hadn't endorsed that yet, had you? A. No, I didn't want to endorse it.

Q. You didn't make any formal tender of the cash or of the bond and mortgage, did you? A. I made the tender when I left.

Q. You made the tender of what? A. I said, "Here is my check." 10

Q. Unendorsed? A. No, I said, "Here is my check. I am ready to turn it over to you. I am ready to execute the mortgage. Will you close or won't you?"

Q. That is when you picked up the executed deed and took it with you? A. That was the last statement I made. I had made informal statements like that right along and I wanted to make a final stab. 20

Q. What date were you going to put into the acknowledgment of the mortgage? A. The same date that they came in to sign it.

Q. When was that? A. Either the 10th or the 11th; I think it was the 11th of January.

Q. You can't put either in an acknowledgment. A. The date that they came in to sign it; it might have been either the 10th or the 11th. 30

Q. When did you cease to have charge of this transaction? A. I think I was through with the transaction shortly after I left there.

Q. How long would you say it was? A. A week or two, or maybe three; maybe a month. I gave them the folder and I think they went over to Mr. Weinberg's office with the papers. I may have written a letter to Mr. Blair.

Q. As a matter of fact, you didn't write any more letters until April, 1926? A. I got a letter 40

from Mr. Blair and I answered it on April 26th.

Q. They wrote you some time after you were down there on January 13th? A. I think Blair's letter must have been on April 25th, or the 24th. I must have answered his letter soon after I got it. I didn't like the tone of it.

Q. I didn't ask you that. Have you got a copy of his letter to you? A. I think Mr. Weinberg has it.

Mr. Weinberg: I don't see why we should waste time on it. It was a letter written by someone else after I had started.

Mr. McGlynn: I won't press it.

Mr. Weinberg: I didn't know about it, did I?

Mr. McGlynn: No, I don't suppose so.

Q. The only search you had was the one that you got from the Monmouth Title Company? A. Right.

Q. Did you order a guaranteed title or an ordinary search? A. I ordered an ordinary search first.

Mr. Weinberg: If your Honor please, I am going to rest with Mr. Zucker. If the record comes in and we find it will help us out may we let it go in on the defense?

The Court: Very well.

Plaintiff rests.

ROY A. WRIGHT, sworn in behalf of the defendant.

Direct-examination by Mr. McGlynn:

Q. Mr. Wright, in the summer of 1925, were you in the real estate business down at the shore? A. Yes, sir. 10

Q. In what office? A. William H. McBride, Bradley Beach.

Q. Are you the salesman who put the deal through from Safris to Fleischmann? A. Yes, sir.

Q. You were to be paid a commission, I suppose? A. Yes, sir.

Q. Were you familiar with the transaction after it got to the stage of being taken care of by the lawyers for the respective parties? A. I was taking just as much interest in it all the time— 20

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

Mr. McGlynn: I consent that it be stricken out.

Q. Did you write any letters to Mr. Safris for the purpose of bringing this closing to a head? A. I did. 30

Q. I show you a letter of December 11, 1925, from Mr. Zucker to the McBride Agency, your attention. Did you receive that letter? Answer yes or no. A. Yes, sir.

Mr. Weinberg: I am going to object to any correspondence with Mr. McBride. I don't know where he comes in on this mat- 40

ter. He didn't represent either party. He said he took an interest—

Witness: I made the sale.

Mr. Weinberg: But if he was not representing the defendant in this case in this matter of closing, I think that no letter that he could write to Safris or Zucker would have any effect.

The Court: How could his letter be of any effect unless some reply is predicated upon it by the plaintiff which would be evidential against him?

Mr. McGlynn: This is the man who, irrespective of the fact that he negotiated the original sale, commenced negotiations with the plaintiff as to the modification of the amount of cash to be paid. That is what was spoken of by his attorney on the stand. I mean where they accepted $7,000 instead of $15,000.

The Court: If you say that this is to be followed by correspondence from the plaintiff, I will allow it in.

Mr. McGlynn: The next letter is from the plaintiff.

Mr. Weinberg: A letter written by someone and answered by Safris cannot be objected to by me.

The Court: Put your letter in.

Mr. McGlynn: I offer in evidence a letter from Mr. Zucker to Mr. Wright dated December 11, 1925.

The same is received in evidence and marked Exhibit D-8.)

Mr. McGlynn: The next is December 16th, a letter from Wright to Safris. I offer it in evidence.

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

Mr. McGlynn: I offer in evidence a letter of December 17th from Mr. Safris to Mr. Wright. 10

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

(Mr. McGlynn reads to the jury Exhibits D-8, D-9, and D-10.)

Q. Were you present on the day the matter was attempted to be closed in Mr. Blair's office? A. Yes, sir. 20

Q. What time did you get there? A. About half-past nine.

Q. Did Mr. Zucker get there that morning? A. He did.

Q. Was anybody with him? A. No, he was alone.

Q. Did you hear the discussion that went on? A. Yes, sir.

Q. Did you see the papers that were presented by each side? A. Yes, sir. 30

Q. Did Mr. Zucker show a check to anybody? A. I didn't see it—

Mr. Weinberg: I object to that.

Objection sustained.

Q. Did you see Mr. Zucker exhibit a check on that day? A. No, sir.

Q. Did you see him exhibit an executed bond and mortgage? A. I did not. 40

Q. What, if anything did you hear him say with reference to what his instructions were with reference to closing for his client? A. After quite some bickering regarding insurance and little things like that which were finally settled to his
10 satisfaction, he said something about only having a few minutes left and that he had to catch the train and it was absolutely necessary to get right back and it was necessary to close as of January 13th, the day he was in Asbury Park. To that Mr. Fleischmann and Mr. Blair both objected. They insisted that the title be settled as of November 1st, as Mrs. Fleischmann had given up possession of the property on that date and
20 they could have had possession at any time after the 1st of November.

Q. Did you know at whose request she had vacated the property on November 1st?

Mr. Weinberg: I object to that as immaterial.

The Court: I will allow it.

Plaintiff's counsel prays an exception to this ruling of the court.

30 Exception noted as ground of appeal.

Witness. She had left because the contract she had signed called for her to quit possession and for him to take possession as of the 1st of November.

Mr. Weinberg: I object to that and ask that it be stricken out.

The Court: Strike it out.

Witness: When they made the sale they
40 said they expected to take possession on the 1st of October.

Q. That was before the date fixed in the contract? A. Yes, sir.

Q. Had you in any way communicated that to Mrs. Fleischmann? A. I told it to her myself when the contract was signed.

Q. Do you know yourself whether she was out before October 1st? A. I don't know about October 1st. I know she was out on November 1st.

Q. What was said at Mr. Blair's office about the adjustment figures? A. Zucker said he had orders from his client not to settle on any other terms except that day, January 13th. He absolutely refused to budge from that. He grabbed his hat and coat and said he had a check and was ready to settle and he said he had to catch a train. I said, "Just a minute, Mr. Zucker. This is the first time we have had a chance to talk to you. I will call up Mr. McBride—

Q. Don't tell us what you said to Mr. McBride but what you said to Mr. Zucker after the telephone conversation. A. After the telephone conversation I said to Mr. Zucker, "Mr. Zucker, there is $400 or $500 difference as of the amount you want to pay as of the January 13th settlement and the November 1st settlement. We will deduct that from our commission and Mrs. Fleischmann will pay half." Mr. Fleischmann objected. I said I wanted it cleaned up; I had worked hard on it and long. Mr. Zucker said, "I can't see that at all. I am in a hurry and I have to get a train in two minutes." He hurried out with his hat and coat along with some papers of Mr. Blair's and I ran after him and got the papers.

Q. What was the condition of the real estate market in Bradley Beach as of that time?

Mr. Weinberg: I object to that. If you intend to proceed on the counter-claim of loss, I ask that this witness be qualified as to knowledge.

10

The Court: I think the objection is proper.

Q. How long have you been in the real estate business down there? A. Fourteen years.

Q. Were you familiar with the Bradley Beach market at that time? A. Absolutely.

Q. Had you had anything to do with sales and purchases? A. Yes, sir.

20

Q. In the immediate vicinity of this property? A. Yes, sir.

Q. At Ocean and Cliff? A. Yes, sir.

Q. Near the Ocean Grove end, was it? A. Yes, sir.

Q. Was it a corner property? A. Yes, sir.

Q. What was the situation in the market there at that time?

30

Mr. Weinberg: I object unless I have a right to cross-examine him first.

The Court: You may cross-examine.

By Mr. Weinberg:

Q. What properties did you sell around that time on Ocean Avenue in Bradley Beach at the upper end? A. At that end of Bradley Beach there isn't much property outside of the Lake and Sea Hotel.

40

Q. Did you sell any property on that end? A. Yes, sir.

Q. Where? A. Within two blocks.

Q. There is a big difference between land above and below Newark Avenue, isn't there? A. No.

Q. What sort of tract did you sell? Corner property? A. Yes. 10

Q. How much frontage? A. 52 feet.

Q. Did you sell any frontage which fronted on three streets as this did? A. No, sir.

Q. Would that make a difference in value? A. Yes.

By Mr. McGlynn:

Q. Repeating my question: What was the state of the market at Bradley Beach in the summer of 1925 at the time this contract was signed? 20

Mr. Weinberg: I object. What difference does it make?

Mr. McGlynn: Ordinarily I don't suppose in the course of three or four months or six months the value of a piece of real estate would fluctuate materially, but take the case of this city a couple of years ago—

The Court: The question now is that you want to ask this witness whether the real estate market from some particular day on was advancing or stationary or declining. 30

Mr. McGlynn: That is my question.

The Court: I think you ought to be more exact. Give him the starting date and the finishing date and ask him whether it was advancing, declining, or remaining stationary. 40

Q. This contract was executed August 13, 1925. Between that date and November 1, 1925, was the state of the real estate market in Bradley Beach advancing or declining or standing still?

10 Mr. Weinberg: I object. The witness ought to show what the price of that land was, if he knows, on the day that this contract was signed, and then if there was any difference between the value as of that date and the date title was to be taken. We are not interested whether real estate went up or down before or after.

The Court: The question you are asking might be broken into one as to the intention of the defendant to carry out the sale and showing a decline in price; the other is a question on the counter-claim whether you want to show that property was less—

20

Mr. McGlynn: This is a preliminary question. In ordinary circumstances while the fluctuation was not much, here it was, and I want to know the reason. I can't put two questions at once.

30 The Court: I suppose the proper thing to do is to ask him another preliminary question as to what neighborhood in the town it applies to.

Q. In the summer of 1925, was there any difference between the value of real estate in Bradley Beach so far as its location in the town was concerned whether it was on the beach or on Main Street or on a side street?

40

Mr. Weinberg: I object to that. It does not refer to this locality.

The Court: You are trying to prove whether it varied during that period and Mr. Weinberg objects on the ground that you have not applied it to this locality. Property in one section might have gone up or declined and in the other section did not. Find out whether there was any change in the market so far as this location was concerned so as to allot this property to some particular location. You are asking for a market and you are trying to confine your market to Bradley Beach as one area. Mr. Weinberg's objection is that this is too broad, and I think he is right. If you want a ruling, I will sustain the objection.

Q. Was there any difference in the summer of 1925 in property on the beach front? A. Yes, sir.

Q. Was that difference due to its location north or south of a certain street, or what was the difference? A. There was a difference in the value according to the location whether it was nearer south toward Avon, or nearer Ocean Grove. The property to the north was worth less than nearer south.

Q. Did that increase or did it remain the same? A. Proportionately the same.

Q. What happened to the values after November 1, 1925?

Mr. Weinberg: Where?

Mr. McGlynn: In this particular section of Bradley Beach, Ocean Avenue and Cliff Avenue.

Mr. Weinberg: It has not been shown that there was a change.

Q. Was there a change? A. Yes, sir.

Q. In what way? A. Properties deteriorated
10 in value all along Ocean Avenue, on account of the high prices that were paid there during the boom. That applied to all cases north and south.

Q. The decline you mean? A. Yes, sir.

Q. When did that decline start? A. The boom was very short-lived; it started that winter.

Q. The winter preceding? A. Immediately after the 1st of November, 1925.

By the Court:

20 Q. Counsel is asking you as to when the boom started. A. Two days after Mr. Safris bought this property.

By Mr. McGlynn:

Q. That is when it started? A. I think that is the first transaction in the boom.

Q. Was there activity to an extreme in the market at that time? A. Tremendous activity.

Q. When did you say it stopped? A. Well, the
30 big activity stopped within a couple of weeks, although there was a certain amount of activity after that.

Q. When did the decline in prices commence? A. After the first of November and the 15th of November people were supposed to be taking title at that time in a number of instances—

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

40 The Court: Strike out as to what people were doing.

Q. On or about January 13, 1926, what in your opinion was the market value of this property described in this contract?

Mr. Weinberg: I object to that. This witness has shown no knowledge whatsoever of anything approaching this property in similarity, size, location or anything else. He can venture a guess that may or may not be any good. There is no basis for a reliable opinion so far from this witness. 10

The Court: I will allow it.

Plaintiff's counsel prays an exception to this ruling of the court.

Exception noted as ground of appeal. 20

Witness: I should say a fair valuation would have been somewhere between $30,000 and $35,000.

Q. In order to clear up a doubt that seems to have been raised by the last objection, did you have anything to do with any of the transactions regarding beach front also purchased by Mr. Safris? A. Yes, sir, all along the beach front—

Q. No, purchases by Safris? A. Yes, sir. I sold property to him. 30

Q. On the beach front? A. Yes, sir.

Q. In Bradley Beach? A. Yes, sir.

Q. Did he take title to that property? A. He did not—

Mr. Weinberg: I object to that.

The Court: Objection sustained; strike out the answer.

40

Q. Were you paid your commission—

Mr. Weinberg: I object to that as immaterial.

Mr. McGlynn: It is very material. It is set up as one of the elements of damage. These people are seeking the return of this deposit and we want to show we are out $1,500 on this contract.

The Court: What have you to say about their right to recover?

Mr. Weinberg: In the first place, under the law he must have a written agreement before there is any obligation on the part of the plaintiff to pay it. If there is, I want to see it. It may be one of those on which commission is paid when the title passes. It is only in those cases where there isn't any such saving clause in the contract where the owner is obliged to pay any commission—

The Court: Here is a man employed by another to do some work for him, regardless of what the arrangement is; he would do this work for him anyhow. Now, you are asking damages for the loss of your bargain and you are going to be asked to pay the depreciation in this property. This man is employed to do work for them personally, I do not see that it is an element of damage.

Mr. McGlynn: Their suit is for the return of the $5,000.

The Court: That has nothing to do with this question at all. It is only on your counter-claim that it is of any moment be-

cause if they do not prove their right to any deposit it is forfeit. I will sustain the objection.

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

Exception noted as ground of appeal. 10

Adjourned to Friday, February 3, 1928, at ten o'clock A. M.

SECOND DAY.

Friday, February 3, 1928. 20

Continued pursuant to adjournment.

Present, counsel as before stated.

ROY A. WRIGHT resumes the stand.

Direct-examination (continued) by Mr. McGlynn.

Q. Mr. Wright, yesterday you told us that you arrived at Mr. Blair's office about half-past nine. 30
A. That's true.

Q. When you got there was Mr. Zucker there or did he come in later? A. He came in later.

Q. The negotiations with reference to a change of the terms affecting the amount of cash to be paid and the amount of the purchase money mortgage with whom on behalf of Mr. Safris did you, if at all, discuss that change? A. With Mr. Zucker. 40

Mr. Weinberg: I object to that as wholly immaterial.

Mr. McGlynn: Mr. Zucker, the only witness produced by the plaintiff, testifies that he knew nothing about this change.

10 The Court: I will allow it.

Q. Where? A. At his office at the Chamber of Commerce Building, Bradford place, Newark.

Q. Was that the only change discussed? A. At that time, yes.

Q. Did you report to Mr. Zucker? A. I did not.

Mr. Weinberg: I object to that. It is
20 done for the purpose of contradicting Mr. Zucker. He should have been interrogated about it when he was on the stand.

Mr. McGlynn: He was interrogated about it and said he knew nothing about it.

Q. Was there any other clause or part of the contract discussed between you and Zucker so far as any change was concerned? A. None whatever, except the cash payment to take title.

30 CROSS-EXAMINATION by Mr. Weinberg:

Q. Where is this particular land located? A. On the northwest corner of Cliff and Ocean Avenues, Bradley Beach, New Jersey.

Q. It is the north end of the Bradley Beach-Ocean Grove ocean front? A. Yes, sir, it is not directly at the north end.

Q. Not at the point, but it is at the north end. A. That's right.

40 Q. Do you remember when Bradley Beach con-

demned all of the water front just opposite this land? A. Yes, sir.

Q. That was when? A. Why, about five or six years ago.

Q. And there were old hotels and old bathing houses cleared away right opposite this land, is that right? A. That's true. 10

Q. And there were improvements that were in project at that time? A. Yes, sir.

Q. And those improvements were subsequently made? A. That's right.

Q. And this land is located in the neighborhood where the pavilions are and the amusement centers, and so forth? A. Yes, sir.

Q. This land had a frontage of how much? A. 146 feet. 20

Q. On Ocean Avenue? A. Yes, sir.

Q. What depth? A. 120 feet.

Q. On what street? A. Cliff Street.

Q. Did it run into another street? A. Yes, sir, Kent Avenue.

Q. How much on Kent Avenue? A. About 145 feet.

Q. So it was a whole block on the ocean front and part of the block running east and west? A. No, sir, half a block on the ocean front and a whole block on Cliff. 30

Q. What is the other street west of the ocean? A. Kent.

Q. So that you had Cliff Avenue, Kent Avenue and Ocean Avenue frontage? A. That's right.

Q. Do you know what the entire Bradley Beach ocean frontage is? A. Well, no; there is about twelve or fourteen blocks of it. 40

Q. Did you have any parcel around about September, October or November, 1925, of that size or description in the northern part of Bradley Beach for sale? A. Not exactly of the size, no; not the exact size. We had the property in that
10 immediate vicinity for sale.

Q. Then your answer to my question is no. A. No.

Q. Then you sold no property in September, October, or November, of that size with three street frontages in the northern end of Bradley Beach? A. No.

Q. And therefore, of course, you don't know whether any property of that kind or description
20 was resold a few months later at a profit or a loss. A. I don't think there is property in Bradley Beach outside of the Fleischmann property, that is situated as that one is located on three streets.

Q. It has a peculiar location and a value of its own? A. I don't know that it enhances its value to any extent.

Q. I say it has a value of its own. A. Yes, sir.

Q. It is a good site for a hotel up there, isn't it? A. Yes.
30

Q. Then do I understand you are not telling us that any property of this kind and description and size up in that neighborhood was to your knowledge bought around September, or October of 1925 and resold around January, 1926, that you know of? A. Resold? No.

40

ERNEST H. FLEISCHMANN, sworn in behalf of defendant.

Direct-examination by Mr. McGlynn:

Q. Mr. Fleischmann, you are the executor of your mother's estate? A. No, sir. 10

Q. Your brother is? A. My brother.

Q. Are you familiar with the details of this transaction? A. Yes, sir.

Q. Were you at Mr. Blair's office in Asbury Park on January 13, 1926? A. I was.

Q. How did you get there, by train, automobile, or how? A. By train.

Q. From where? A. Liberty Street, New York. 20

Q. Central Railroad or Pennsylvania? A. Central.

Q. Do you recall whether you took the first train you could catch that morning? A. Yes, sir.

Q. What time did that train arrive at Asbury Park? A. 10:27.

Q. You have been going down there for quite a few years? A. Thirty-five or more.

Q. This was during the winter? A. Yes, sir.

Q. In your thirty-five years of experience has there been much change in the trains during the winter? 30

Mr. Weinberg: I object to that. If he has a time table he should produce it.

Q. Have you a timetable? A. This year's; the same train is on.

Q. In your knowledge is there any train that you can get to Asbury Park at 9:30 in the morning? A. No, sir. 40

Mr. Weinberg: I object to that and ask that it be stricken out. If he has testified from a time table it should be produced. There are two railroads that go down there.

10 Q. Are you familiar with the Pennsylvania trains? A. Yes, sir.

Q. Is there any train, in your thirty-five years experience, that gets you there at half-past nine in the morning? A. No, sir.

Q. Who was there when you got there? A. Mr. Blair and Mr. Wright.

Q. When did Mr. Zucker arrive? A. Very shortly after I arrived.

20 Q. Did you hear the conversation between Mr. Zucker and Mr. Blair with reference to this closing? A. Yes, sir.

Q. Did you take part in it? A. Yes, sir.

Q. You said that Mr. Wright was there? A. Mr. Wright, Mr. Bair, Mr. Zucker and myself.

Q. Did you hear anyone there make any statement with regard to an allowance of adjustment figures, taxes—

30 Mr. Weinberg: I object to that as leading. This witness has not been examined before and he should be asked in the usual way what occurred.

(Question withdrawn.)

Q. Start in and give us the conversation between the various parties, giving their names and conversation. A. Mr. Zucker came in and greeted us by saying, "Gentlemen, I have half an 40 hour in which to close this transaction, so make

it snappy." Mr. Blair, said, "I am all ready for you, Mr. Zucker." Mr. Zucker sat down and opened his brief case and brought out a letter that had been passed between Mr. Zucker and Mr. Blair with reference to certain objections Mr. Zucker made to the title, and Mr. Zucker started to read from this letter, and as the various items were reached, Mr. Blair handed over the papers referring to the various items such as the deed received from the Ocean Grove Camp Meeting Association which cleared the objection to the lease—

Mr. Weinberg: I object to his statement as to what it contains. Just tell us what happened.

The Court: Is it necessary for us to go over the part of the conversation which was covered by the straightening out of the title?

Mr. Weinberg: No.

The Court: Pass over the title question. Just on the record title.

Q. I show you what purports to be a deed from the Ocean Grove Camp Meeting Association to Johanna Fleischmann dated November 9, 1925, acknowledged the 14th day of November, 1925, and ask you if that is the deed to which you have just referred. A. Yes, sir.

Mr. McGlynn: I offer it in evidence. The description is the same as of this property.

(The same is received in evidence and marked Exhibit D-11.)

Mr. McGlynn: Then I understand we are

to skip over the question of the mortgages.

The Court: Yes, sir.

Q. Were you here yesterday? A. Yes, sir.

Q. Tell us what you heard of the matters Mr. Zucker discussed about the closing figures. A. We came down to that and Mr. Blair stated to Mr. Zucker that the closing was to be based as of November 1st and that Mr. Zucker understood that—

Mr. Weinberg: I ask that that be stricken out. Just state what Mr. Zucker said—

Mr. McGlynn: He said Mr. Blair said to Mr. Zucker—

Witness: It was always my impression—

The Court: Just what was said?

Witness: Mr. Zucker said that the only basis upon which he would close would be January 13, 1926. Mr. Wright excused himself and went into the other room. When he came back he said, "Gentlemen, we don't have to spend any time—

Mr. Weinberg: I don't think this witness is competent to state what Mr. Wright said. Mr. Zucker is only a witness here. If these matters are intended to be contradictory to what he testified I think the ordinary rule would be—

The Court: This is a situation where the agent is representing the principal in closing. I believe all the conversation is admissible.

Plaintiff's counsel prays an exception to this ruling of the court.

Exception noted as ground of appeal.

Witness: He said, "I will stand whatever difference there is out of my commission."

By Mr. McGlynn:

Q. Had they really started to make any calculations at that time? A. No, sir.

Q. What happened then? A. Mr. Zucker said, "I haven't any time to talk the matter over further." He pushed the papers all together and inadvertently took some of our papers with him and started out of the door.

Q. What did the commission amount to? A. $1500.

Q. I show you a paper dated November 2, 1925, and ask you what that paper is, and whether it has been in your possession. A. That is a deed from my mother—

Q. Why was the grantee left blank? A. At their request.

Q. Was it signed? A. Yes, sir, and acknowledged.

Q. What became of the signature part of it? A. I tore that off because my mother had no place to keep papers and I didn't want a blank signed deed around.

Q. What was the date of her death? A. June 3rd.

Q. June 3, 1926? A. Yes, sir.

Q. What became of the signature part of the deed? A. I destroyed it.

Q. Was it executed on the date there, January 13th? A. Yes, sir.

Mr. McGlynn: I offer the deed.

Mr. Weinberg: I object to this paper. I do not think there is anything about it

that is evidential, a paper with part of the deed itself and acknowledgment torn off. There is no acknowledgment on it and no signature—

The Court: It has been accounted for as having been signed and subsequently the signature was removed. The effect of it, I suppose, is one thing, but this is the deed they are relying on for a tender, as I understand it, and this deed was produced.

Mr. McGlynn: Yes, sir, ready for delivery.

Mr. Weinberg: I object on the ground that a paper cannot be received in evidence which is not in the condition it was in at the time it was used by the party. It has been so destroyed and mutilated that I cannot see how it is evidential.

The Court: If the subsequent mutilation is accounted for, I cannot see why it should not go in. I will allow it.

Plaintiff's counsel prays an exception to this ruling of the court.

Exception noted as ground of appeal.

(The same is received in evidence and marked Exhibit D-12.)

Q. Do you know who witnessed the execution, Mr. Fleischmann? A. Mr. Blair.

Q. At the time of the execution of this contract was this property occupied? A. Yes, sir.

Q. At the time of the date fixed in the contract for closing, November 1, 1925, was it occupied or vacated? A. Vacant.

Q. When, prior to October 1st, did it become

vacant? A. Before October 1st; the contract provided on or before October 1st—

Mr. Weinberg: I object to that and ask that it be stricken out.

The Court: Strike it out. 10

Q. At the date of the execution of the contract was there any personal property about the house which was the subject of this contract?

Mr. Weinberg: I object to that as immaterial and incompetent.

Mr. McGlynn: The only purpose of it is to show what the vendor did in order to place herself in a position to comply with the terms of the contract, leading up to the reason why she was entitled to have the title closed. 20

The Court: You have had him testify it was vacant; that is sufficient.

Q. After January 13, 1926, did anyone to your knowledge on behalf of Mr. Safris make any tender of cash or of executed mortgages or of any attempt to carry out the terms of this contract? A. No, sir. 30

Q. To your knowledge was your mother in a position after January 13, 1926, to carry out the terms of this contract? A. Yes, sir—

Mr. Weinberg: I object to that.

The Court: It calls for a conclusion, I suppose.

Q. Was there any change in the title or ownership of this property from January 13, 1926, up to the time your mother died? A. No, sir. 40

CROSS-EXAMINATION by Mr. Weinberg:

Q. What time did you get to Mr. Blair's office, Mr. Fleischmann? A. About 10:30.

Q. From where did you come? A. From New York.

10 Q. Where were you living? A. 135 West 80th Street, with my brother-in-law.

Q. New York City? A. Yes, sir.

Q. You didn't live at the shore, then, did you? A. No, sir.

Q. You didn't go down to the shore every day, did you? A. Not every day.

Q. About once a week or once every two weeks? A. Not as often as that.

20 Q. How often did you go down? A. What period of time do you refer to?

Q. You talked about going down there and being familiar with it for thirty-five years. A. Yes, sir, over thirty-five years.

Q. And during the fall and winter period you went down as often as once a month? A. No, sir.

Q. Not as often as that? A. No, sir.

Q. Once a winter? A. At least that.

30 Q. And that made you familiar with the running of all the trains and the railroads? A. Yes, sir.

Q. You got to the office 10:30 about? A. Approximately.

Q. Was Mr. Wright there? A. Yes.

Q. Mr. Zucker came in, didn't he? He was there? A. He wasn't there. He came in afterward.

40 Q. But he was there that morning? A. Yes, sir.

Q. Tell us, without going into the substance of the conversation, what they talked about. A. What is that?

Q. They took up in the first place the alleged defects in title. A. Yes, sir.

Q. And discussed the papers that were tendered by your attorney? A. Yes, sir. 10

Q. Your attorney tendered the deeds from the Ocean Grove Camp Meeting Association? A. The deed. This was one deed covering the three other deeds.

Q. One deed covering the three others? A. Yes, sir; covering the defects in the acknowledgments of the other three.

Q. Was that deed examined by Mr. Zucker? A. Yes, sir. 20

Q. And did Mr. Blair then also present these mortgages due in 1911 and some other time I forgot? A. Yes, sir.

Q. Did they talk about those things? A. No, sir, they just showed the cancelled mortgages.

Q. Did they have a discussion about one of the mortgages purported to have been cancelled and which was not cancelled of record? A. Yes, sir.

Q. Was there a telephone conversation from Mr. Blair to Freehold about it? A. I don't recall it. 30

Q. You don't recall whether Mr. Blair spoke about it? A. I don't recall it.

Q. You remember Mr. Zucker's talking about it? A. I remember the conversation about the incident of it not having been cancelled of record and was cancelled on the face of it.

Q. Did they talk about tax matters? A. Yes, sir. 40

Q. Then did they talk about the adjustments? A. There wasn't any further talk except as I stated that the only talk was that Mr. Blair—

Q. I didn't ask you for the details. I am just asking you: There was a talk about the adjust-
10 ment. A. Yes, sir.

Q. And then came Mr. Wright's talk about the commission and his telephone call to his office? A. Yes, sir.

Q. And Mr. Zucker was in Mr. Blair's office all that time? A. All that time.

Q. And apparently things were going along all right until they got to the point of the adjustments, that is so, isn't it? A. Yes, sir.

20 Q. And when they got to that they sort of came to what my friend calls an "impasse" where one wouldn't give and the other wouldn't take; just that he wanted to close as of January 13th and your representative, Blair, said he wanted it as of November 1st. A. Yes, sir.

Q. And then you say Wright volunteered, after getting in touch with his office, to stand that difference. A. Yes, sir.

Q. Do you know what the difference was? A.
30 We had not figured it. Mr. Wright said whatever it was he would take care of it out of his commission.

Q. Mr. Wright didn't know what his commission would be? A. He must have known; there wasn't an opportunity to talk about it.

Q. Without having an opportunity to talk of the difference that there was on the adjustments, Mr. Wright said, "I will stand it." A. Yes, sir.

40 Q. What did you say? A. I said it was perfectly satisfactory to me.

Q. Without asking you to characterize Mr. Wright's testimony, I ask you whether you know what Mr. Wright said about your attitude when he offered to throw off this commission. Did you hear his testimony about that? A. Yes, sir. 10

RE-DIRECT EXAMINATION by Mr. McGlynn:

Q. Are you an attorney? A. Yes, sir.

Q. But not in New Jersey. A. In New York; but I haven't been practising for years.

RE-CROSS EXAMINATION by Mr. Weinberg: 20

Q. Were you representing your mother or was Mr. Blair? A. Both of us.

Q. How old was your mother? A. She was eighty-two.

WILLIAM J. BLAIR, sworn in behalf of defendant.

30

Direct-examination by Mr. McGlynn:

Q. Mr. Blair, you are an attorney of the State of New Jersey? A. Yes, sir.

Q. And you have been practicing how many years? A. Since about 1907, somewhere around there.

Q. Have you during your practice been engaged in any particular line of work? A. For twenty-five years or more I was connected with real estate titles. 40

Q. With what company? A. Twenty years in charge of the title branch of the legal department of the Prudential Insurance Company.

Q. First dealing with the conversation which occurred in your office on January 13, 1926, do you recall now the order in which the various people arrived? A. You mean on the 13th of January?

Q. Yes, the 13th of January. A. I don't recall specifically when they arrived, but I do know it was somewhere around 10:30 when they were there.

Q. You have been traveling back and forth between Asbury Park and Newark for a number of years? A. About sixteen or seventeen years almost every day.

Q. Are you familiar with the time tables of the two railroads that go to Asbury Park during the winter? A. I think so.

Q. Do you know of any train that gets you there at 9:30 in the winter?

Mr. Weinberg: I object to that on the ground that what he does not know is not evidential.

The Court: I will allow it.

Witness: The first train that I know of that would get you there—there is a train that leaves here about six in the morning and there is a train that leaves Broad Street about 8:30 and gets there about 10:20. The next one gets there at about 11, on the Pennsylvania.

Q. Suppose you tell us what happened after Zucker arrived. A. Mr. Zucker came into my office and said, "Well, I am here to close this matter and I have a check in my pocket to close it. Are you all ready", or words to that effect. I said, "Yes, we have been ready for some time." I had the papers spread out on my table: The deeds from Mrs. Fleischmann signed; the cancelled mortgages that he objected to; and the corrected deed from the Ocean Grove Camp Meeting Association which I had stated in the beginning to Mr. Zucker was absolutely unnecessary, but rather than give him any loophole I would get a corrected deed.

Q. You obtained that? A. Oh, yes.

Q. I notice the deed is dated November 9, 1925. Do you recall about when you got it into your physical possession? A. No, I do not.

Q. Was it a long time or a short time after November 14th to your recollection? A. I think about a week. My recollection is that they simply had to take it up with the business committee of the Camp Meeting Association and get the corrected deed signed up.

Q. What happened after that? A. I stated to Mr. Zucker that we were ready to close but the closing would have to be as of November 1st and we were practically ready at that time and his objections to the title were purely technical and which he was assured could be removed without any trouble whatsoever.

Q. What did he say? A. He said we would close as of this date or not at all.

Q. Was it figured out what the adjustments

would be as of that date? Did you get that far? A. No, sir. Mr. Zucker said he was in a hurry and he had to make a train, and I don't remember whether he even sat down or not.

Q. Was there any other conversation after this
10 question as to different dates discussed? A. Only I can remember that I told Mr. Zucker I didn't think he ever wanted to close the title and that that was subterfuge—

Mr. Weinberg: I object to that.

By the Court:

Q. Just what conversation took place. A. I stated to Mr. Zucker that I did not believe he ever
20 intended to close the title and that he was looking for an opportunity to get out of it.

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

The Court: I will let it stand.

Plaintiff's counsel prays an exception to this ruling of the court.

Exception noted as ground of appeal.

By Mr. McGlynn:

30 Q. Had you had any previous conversations with him about this closing? A. I had several conversations on the telephone. I called him up and he said he would have to get in touch with Mr. Safris on it. And then, on one or two occasions, possibly one, I got Mr. Safris on the telephone and he said he would have to get in touch with Mr. Zucker.

Q. Did Mr. Zucker tell you why he couldn't
40 close the title or what instructions he had from Mr. Safris as to that?

Mr. Weinberg: I object to that.

The Court: I will allow it.

Plaintiff's counsel prays an exception to this ruling of the court.

Exception noted as ground of appeal. 10

A. Mr. Zucker told me he was trying to find a loophole in the contract.

Q. When was that? A. In the early stages. He was unable to find it. He said his clients could not go through with it; there were two originally and one of them had dropped out. Mr. Safris was the remaining man and the only one who could handle it, and he couldn't handle it under the conditions of the contract and he was trying 20 to drop the thing.

Q. Did that bring about the change in the amount of cash and the amount of the mortgages? A. Yes, that is what brought it about.

Q. Then there had been an agreement reached between them, namely, $7000 cash instead of $12,000 to $15,000? A. I understood so.

Q. And a mortgage of $38,000 instead of $13,000, or whatever the contract provided? A. Yes.

Q. You had drawn the $38,000 mortgage? A. 30 Yes, sir.

Q. Previous to Zucker's coming down there on January 13th when you had arranged for the closing and arranged the mortgage ready for execution, had you told him then as of what date the contract was to be closed? A. I told him over the telephone it was to be closed as of November 1st.

Q. Did you hear any conversation in your office 40

with reference to these closing adjustments? Did you hear Mr. Wright say anything? A. Oh, yes. There was a discussion that they were not going to stand for the difference from January 1st to January 13th. I don't remember the exact date. We had quite a heated discussion about it and it was about then that I said I didn't believe they really wanted to go through with it and Mr. Wright said that rather than see the thing fall through, after calling up his office he said, "We will stand for that."

Q. What happened then? A. I think Mr. Fleischmann spoke up then. He said, "I don't see the need for Mr. Wright to stand for it."

Q. What did Mr. Wright say? A. He said he was willing to do it.

Q. From your knowledge of this title, what possible figures were open for adjustment on the closing?

Mr. Weinberg: I object to the form of the question at the present time.

The Court: I think it is a matter of mathematical calculation. I think the basis of the transaction is in evidence. I will sustain the objection.

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

Exception noted as ground of appeal.

Q. You say that at no time in that meeting were actual figures calculated as of either date? A. I don't recall that they were. They didn't reach that point.

Q. After January 13th did anybody in behalf

of Safris get in touch with you regarding the matter? A. No, sir.

Q. Is it your recollection that Zucker at any time took this check out of his pocket that he said he had? A. I am not—I don't recall whether Mr. Zucker said, "I have a check here in my pocket" or, "Here is a check." I don't recall that, but I do remember he said he had a check in his pocket to close the transaction.

Q. Did you see the bond and mortgage? A. No, I did not.

CROSS-EXAMINATION by Mr. Weinberg:

Q. You would know the difference, wouldn't you, between Mr. Zucker's saying, "I have a check in my pocket" and waving a check at you? A. It is possible that he may have taken it out. I don't recall. I have just a sort of recollection of his either doing that and saying it was in his pocket—I don't recall that.

Q. So he might have taken the check out? A. He might have taken the check out and held it up and said, "Here is a check."

Q. You are not strong in your denial that he did take a check out? A. No.

Q. You say you have been examining titles for a long time? A. I would consider twenty-five years a fairly long time.

Q. Did you ever pass as being good a paper which purports to be a deed and which is acknowledged as a lease? A. I don't recall that I ever had, but I would.

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

Q. I asked you if you ever did. A. No.

Q. Did you ever have any such instrument before? A. No.

Q. And you were not the only one in the Prudential Insurance Company who passed on the
10 questions in the final analysis. A. I was the one who passed on the final analysis in connection with legal matters on all titles.

Q. And if you were wrong, then what? A. The company might lose.

Q. But it is a fact that you do not deny that what Mrs. Fleischmann's title was arrived at through three papers, two of which in their acknowledgment recited that the papers were ac-
20 knowledged as leases only. That is true, isn't it, and you know it. A. That is true.

Q. Up to the time you were consulted by the Fleischmann's with regard to passing this title, did you have any knowledge as to the nature of the title that he had to these premises? A. I did not.

Q. You didn't have any of the original deeds from the Ocean Grove Camp Meeting Association, did you? A. No, sir.

30 Q. So that the first notice that you had that there was an alleged defect in Mrs. Fleischmann's title was when Mr. Zucker notified you of it. A. Yes.

Q. So that on November 1st, 1925, that part of the record had not been cleared off, had it?

Mr. McGlynn: I object. In the first place I don't know that there is any record to be
40 cleared off.

Mr. Weinberg: The record was cleared off.

Mr. McGlynn: It didn't have to be.

The Court: You mean that which he thereafter did had not been done then?

Mr. Weinberg: Yes, sir. But I will withdraw the question. 10

Q. When was it that you first were made aware of the fact that there was some statement in these alleged deeds that they were simply leases? A. When I got the letter from Mr. Zucker which was offered in evidence.

Q. What date? A. I don't recall the date; the first letter I think that was offered. 20

Q. And after receiving that notification from Mr. Zucker you did obtain from the Ocean Grove Camp Meeting Association a deed which is marked Exhibit D-11. A. Yes, sir, that deed was drawn by me.

Q. You drew the deed? A. Yes, sir.

Q. And it was signed by the Association on November 9th and acknowledged five days later, namely, November 14th? A. Whatever that shows. 30

Q. There was a question as to a mortgage for $2500 that was open. I show Exhibit D-1, which is a mortgage given by Johanna Fleischmann to Samuel H. LaBaw dated November 24, 1906, and ask you if you ever saw that mortgage before. A. Yes.

Q. When was the first time you ever saw that paper? A. When Mrs. Fleischmann had sent me over the papers in the case including the certified copies of the Camp Meeting deeds which she had which were supposed to be defective. 40

Q. That, of course, was after the making of this contract. A. Yes, sir.

Q. You were present when the contract was made? A. I drew the contract.

Q. This particular paper that I hold in my
10 hand, Exhibit D-1, was discussed between you and Mr. Zucker, was it not? A. By that letter.

Q. And afterward in your office was it discussed? Did you talk about it in your office when Mr. Zucker called on January 13th? A. No, I don't recall that we did.

Q. Did you call up the clerk's office? A. Did I?

Q. Yes. A. I think I didn't. I don't recall whether I did or not on the 13th.

20 Q. Well, the 13th or the 12th or the 11th— A. I don't recall whether I called up the clerk's office when he was there or not, but naturally, if I had an uncancelled mortgage which showed a cancellation on the face of it—

Q. Although your paper showed it you are aware of the fact that the record did not? A. Yes.

Q. You did not call up the clerk's office? A. I would have called up.

30 Q. Did you receive a reply from the clerk? A. I said I don't remember if I did call up.

Q. Did you receive a reply? A. How could I receive a reply if I don't remember calling him up?

Q. I am trying to refresh your recollection to see whether you did call him up. Is it not a fact that you did have a call from the clerk's office that there was such a mortgage open of record?
40 A. I probably called him up because that would be natural.

Q. Then you probably received an answer from the clerk's office. A. I probably called him up, but I don't remember when.

Q. What reply did you have? A. That it was not shown cancelled of record.

Q. Did you examine the record after that? A. I did not. 10

Q. Did you have it recancelled at any time? A. I don't remember that.

Q. You don't know whether you went to Freehold, which is not very far from your town? A. I don't believe I did.

Q. So that that mortgage remains open of record now. A. I don't know.

Q. So far as you know. A. So far as I know. 20

Q. You have done nothing to have it cancelled? A. No.

Q. Now, as to the $4500 mortgage. You were told by Mr. Zucker that that mortgage was open of record, were you not? A. In that letter, yes.

Q. And you spoke about it afterward. A. I presume so.

Q. That mortgage was not cancelled of record until more than two weeks after you folks parted. A. That is possible. 30

Q. Look at it and see if it isn't exactly so. A. It was cancelled on February 1, 1926, so that would be more than two weeks afterward.

Q. Did you take it over to be cancelled? A. No, I sent it up.

Q. There was nothing done about the assignment that Mr. Zucker spoke about, was there? A. No.

40

Q. So that to recapitulate: On November 1, there were the original deeds from the Ocean Grove Camp Meeting Association on record which had not been in any wise changed. A. Yes.

Q. There was a $2500 mortgage open of rec-
10 ord. A. So far as I know.

Q. And there was a $4500 mortgage open of record? A. It was open of record.

Q. And the thing that caused the deal to fall apart was the dispute with respect to the time of passing title, that is, the adjustment of the profits or losses on that property? A. Everything else at the time Mr. Zucker called at my office that morning had been disposed of to his satisfaction
20 and he came down, as he said, to close the title, and the only question remaining open was as to whether it should be closed as of November 1st or January 13th.

Q. There was another thing you argued, about the insurance. A. Yes, sir, but that was adjusted.

Q. You were placing insurance at that time yourself? A. Yes, sir, representing several companies.

Q. I mean acting as a fire insurance broker?
30 A. Yes, sir.

Q. And there was a dispute between Mr. Zucker and yourself as to how much insurance should be carried by the mortgagor. A. Yes, sir.

Q. So that all that was discussed when Mr. Zucker was there in your office. A. Yes, sir.

Q. You did compare descriptions, of course, deed and mortgage and all of that. A. Yes, sir.

RE-DIRECT EXAMINATION by Mr. McGlynn:

Q. I show you Mr. Zucker's letter of November 4, 1925, Exhibit P-2. Down in a paragraph before the last he says, "I find of record a mortgage made by Johanna Fleischmann to Samuel H. LaBaw dated November 24, 1926, for $2500, recorded in Book 333" and so forth. "Also mortgage for $4500 from Johanna Fleischmann to Samuel H. LaBaw dated January 14, 1911, recorded in Book 407," and so forth, "page 343." In the next paragraph he says: "It appears that an attempt was made to assign these two mortgages to Louisa M. LaBaw by assignment dated September 10, 1921, and recorded in Book 82 of Assignment of Mortgages for Monmouth County on page 441, but in the assignment, instead of referring to the mortgage of $4500 above mentioned, they recite mortgage recorded in Book 409 of Mortgages for Monmouth County on page 343." I notice in his letter the $4500 mortgage is mentioned as being recorded in Book 407. A. Yes, Book 407, page 343.

Q. This Exhibit D-2 is the $4500 mortgage, is it not? A. That is a $4500 mortgage.

Q. Recorded in Book 409? A. Book 409, page 343.

Q. And the assignment he mentions is Exhibit D-3, the assignment which he says is attempting to assign that mortgage, is it not? A. Yes, it assigns mortgage recorded in Book 409, page 343.

Q. Looking at these two mortgages which have just been shown to you by Mr. Weinberg, isn't it a fact that the mortgage for $2500 bearing the

marking of the clerk for cancellation says, "Cancelled January 16, 1911"? A. Yes, sir.

Q. That mortgage was never sent back by you at any time to the County Clerk's office, was it? A. No, sir.

10 Q. It was the $4500 mortgage that was sent out afterward and cancelled February 1, 1926? A. I sent that up.

Q. But all the time it was in your possession with the endorsement on it by Louisa M. LaBaw? A. Yes, sir, I paid that off personally from the $5000 deposit.

Q. Then if it were open of record the amount of cash which was to be paid by the purchaser,
20 either under the original contract or the contract between the parties, was covered by the mortgage, was it not? A. Yes, sir.

Mr. Weinberg: I object to that as irrelevant.

Objection sustained and answer stricken out.

Mr. McGlynn: I would like to offer in evidence now Exhibits D-1 to D-6 for identification inclusive, they were used by Mr.
30 Weinberg.

(The same are received in evidence and marked Exhibits D-1 to D-6 inclusive.)

RE-CROSS EXAMINATION by Mr. Weinberg:

Q. Will you again look at that assignment from John LaBaw and others, executors, to Louisa M. LaBaw, and tell me where there is therein stated
40

anything with respect to the assignors' intention to assign a mortgage for $2500?

Mr. McGlynn: I object. It does not assign the $2500 mortgage.

Objection sustained.

10

Q. And cancelled the $2500 mortgage?

The Court: I don't see what the mortgages have to do with the case anyway.

Mr. Weinberg: The point is made that it was not open.

The Court: The record of it shows what was what. I will sustain the objection.

Q. At any rate the matter in dispute concerning that assignment was brought to your attention by Mr. Zucker. A. In that letter.

20

Q. Whether it was necessary or not, nothing was done concerning that objection. A. There was nothing to be done.

Mr. Weinberg: I ask that it be stricken out.

The Court: Strike it out.

Witness: Nothing was done.

Defendant rests.

30

MAURICE J. ZUCKER, recalled for the plaintiff in rebuttal.

Direct-examination by Mr. Weinberg:

Q. Mr. Zucker, is it true that you stated to Mr. Blair that your client was trying to find a loophole to get out of this deal? A. No, sir.

40

Q. Did Mr. Blair make any such charge or statement? A. No, sir, Mr. Blair and I were trying to close—

Mr. McGlynn: I object. It has already been answered.

10

The Court: Strike out the last part.

Cross-examination waived.

Plaintiff rests in rebuttal.

Mr. McGlynn: I move, in the first place, that the count in the plaintiff's complaint dealing with the question of the expense to which he was put be stricken from the record on the ground that there is no proof to support it.

20

The Court: There is no evidence as to the certainties.

Mr. Weinberg: May I reopen the case? I had forgotten it.

The Court: Can't you admit that?

Mr. McGlynn: No, sir. I wanted to prove it.

30

Mr. Weinberg: Will your Honor give us permission to reopen?

The Court: Yes. If you have some lesser sum than the amount claimed, you may submit it to Mr. McGlynn and he may admit it.

40

MAURICE J. ZUCKER, recalled in behalf of the plaintiff.

Direct-examination by Mr. Weinberg:

Q. What services did you render, Mr. Zucker, in and about the entering into of this contract, searching of the title, and the attempt to pass the title? A. I went to Asbury Park— 10

Mr. McGlynn: I object. That is not part of the service.

The Court: Just the examination of the title, as I understand it.

Mr. Weinberg: I always understood it included everything in connection with it; the attempting of the passing of the title, and the— 20

The Court: "The reasonable cost of the examination of the title," are the words of the statute.

Mr. Weinberg: I never did feel it was just that narrow because we have been proving otherwise from the date of the contract to the passing of the title—

The Court: I will limit it to that 30

Witness: $275 for tax search from the Collector of Taxes; $1.40 for Supreme Court search; $1.10 for U. S. District Court search, and then I made a bulk charge for the—

Mr. McGlynn: I object to the bulk charge.

By the Court:

Q. Give us what the reasonable value of your services in the examination of this title were 40

worth, not your representing the plaintiff in the negotiations or in the attempt to close. A. The reasonable value as far as I consider I spent in the examination of the title, my trips in going to Freehold, I figured at $300, and based it upon the amount involved in the transaction and the time I spent on it.

CROSS-EXAMINATION by Mr. McGlynn:

Q. You didn't make this search yourself? A. No, sir.

Q. You ordered it from the Monmouth Title Company? A. Correct.

Q. How much did it cost you? A. I believe it cost me $14.50 or $37.50; something like that.

Mr. McGlynn: I ask that the damages on this particular count be limited to the exact amount spent. It seems to me if there is a recovery at all in this case it should be limited—

The Court: You can give me that as a request to charge.

Defendant's counsel moves for the direction of a verdict in favor of the defendant on the plaintiff's case on the ground that there was no legal reason at any time between November 1, 1925, and January 13, 1926, which gave this plaintiff a right to either rescind, which he never did, or a right to refuse to take the title in accordance with the terms of the contract.

Plaintiff's counsel moves for the direction of a verdict in favor of the plaintiff on the plaintiff's case, as well as on the counterclaim.

CHARGE.

SMITH, J.

It seems to me that neither of the parties can recover affirmatively without a tender. We know what a tender is. A tender must be something where you present to the other side what is to be received by that other side so that they can reject it or accept it. I do not see that there is a waiver of tender on either side.

On the plaintiff's case there was a mortgage without acknowledgment; Mr. Zucker had a certified check to his own order for $7,000 unendorsed, and it was not legally tendered. On the defendant's case on the counterclaim, while he had an executed deed there, and, as I understand it, he offered it, he demanded that the closing be as of November 1st or 2d, 1925.

As I have just referred to the pleadings and by the evidence here, it is admitted that the contract was changed; the terms were changed; and by the pleadings it is admitted that the date of delivery was to be the 13th of January 1926. That means that under the terms of the contract the agreement of settlement is the date of the delivery of the deed, and the adjustments have to be as of the date of the delivery of the deed.

The defendant demanded that the mortgage be dated and the adjustments be made as of November 2d, 1925. This I do not think is warranted and therefore the tender was not made, and after that meeting if either side desired affirmative relief they had to prepare their papers and give the other side an opportunity to accept or reject

it. The suggestion of Mr. Wright was not adopted; it was made and Mr. Zucker left; it was not adopted or put in shape.

Therefore I think there ought to be a direction of a verdict in favor of the defendant on the plaintiff's case and in favor of the plaintiff on the defendant's counterclaim.

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

Exception noted as ground of appeal.

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

Exception noted as ground of appeal.

EXHIBIT P-1.

Exhibit P-1

Articles of Agreement, made the Thirteenth day of August, in the year of our Lord One Thousand Nine Hundred and twenty-five, between Johanna Fleischmann (widow), of the Borough of Bradley Beach, in the County of Monmouth and State of New Jersey, party of the first part; and Jacob K. Safris, of the City of Newark, in the County of Monmouth and State of New Jersey, party of the second part;

Witnesseth, That the said party of the first part, for and in consideration of the sum of $50,-

000.00, and also in consideration of the covenants and agreements hereinafter mentioned, made and entered into by the said party of the second part, doth agree to and with the said party of the second part, that she, the said party of the first part, will well and sufficiently convey to the said party of the second part, his heirs and assigns, by Deed of Warranty, free of all encumbrances, on or before the First day of November, next ensuing the date hereof, All those certain lots, tracts or parcels of land and premises, hereinafter particularly described situate, lying and being in the Borough of Bradley Beach, in the County of Monmouth, State of New Jersey, known as lots Nos. 144, 145 and 146 on the official map of said Borough of Bradley Beach, said lots having a total frontage of one hundred forty-four and eighty-one hundredths of a foot (144.80′) on Ocean Avenue being the same premises conveyed by Deeds recorded in Book 770, page 99; book 654, page 98 and book 577, page 102 of deeds in the Monmouth County Clerk's Office, together with the appurtenances thereunto belonging.

And the said party of the second part, for himself, his heirs, executors and administrators, doth covenant, promise and agree to and with the said party of the first part, her heirs, executors, administrators and assigns, that he, the said party of the second part, will pay and satisfy, or cause to be paid and satisfied, unto the said party of the first part, the said sum of

FIFTY THOUSAND ($50,000.00) Dollars, as and for the purchase money of the foregoing described

Exhibit P-1

land and premises, in the following manner, that is to say:

On execution of this agreement for which this is also a receipt	$5,000.00
On Delivery of deed, cash	15,000.00
On Bond and mortgage, same containing usual interest, tax, assessment, insurance and installment default clauses, and an agreement not to claim credit on the interest payable on bond and mortgage, by reason of any tax assessed or to be assessed against the premises with interest at 6% payable semi-annually for five years	30,000.00

It is understood and agreed that the party of the second part is to pay on said mortgage the sum of $5,000 at the end of two years; $5000 at the end of three years and the balance at the end of five years with the privilege of making additional payments at any time together with interest thereon to said day of payment.

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

And it is further agreed by the parties to these presents, that the said party of the second part, his heirs and assigns, may enter into and upon the said land and premises on the day of settlement next ensuing the date hereof, and from

Exhibit P-1

thence take the rents, issues and profits to him and their use.

And it is further agreed by the parties hereto, that the said deed shall be delivered and received at the office of William J. Blair, Professional Building, Asbury Park, N. J., between the hours of ten in the forenoon and four o'clock in the afternoon on the said day of settlement next ensuing the date hereof. 10

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

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

The risk of loss or damage to said premises by fire or otherwise until the delivery of said deed is assumed by the party of the first part. 30

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

It is understood and agreed that the buildings upon said premises are all within the boundary lines of the property as described in the deed 40

Exhibit P-1

therefor, and that there are no encroachments thereon and that the buildings comply with municipal ordinances and regulations.

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

The premises above described are sold subject to restrictions appearing of records, and zoning ordinances, if any.

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

And for the performance of all and singular the covenants and agreements aforesaid, the said parties do bind themselves and their respective heirs, executors and administrators; and they hereby agree to pay, upon failure to perform the same, the sum of which they hereby fix
40 and settle as liquidated damages therefor.

Exhibit P-1

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

JOHANNA FLEISCHMANN (L. S.)
JACOB K. SAFRIS (L. S.) 10

Signed, Sealed and Delivered
in the presence of
William J. Blair

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

Be it Remembered, that on this 13th day of August, in the year of our Lord One Thousand Nine Hundred and twenty-five, before me, the subscriber, a Master in Chancery of New Jersey, personally appeared Johanna Fleischmann (widow) who, I am satisfied is the grantor mentioned in the within instrument, to whom I first made known the contents thereof, and thereupon she acknowledged that she signed, sealed and delivered the same as her voluntary act and deed, for the uses and purposes therein expressed. 20 30

WILLIAM J. BLAIR,
M. C. C. of N. J.

40

EXHIBIT P-2.

Law Offices Of
ZUCKER & GOLDBERG
Chamber of Commerce Building
24 Branford Place
Newark, New Jersey

10

November 4th, 1925.

Re: Safris-Fleischmann.
William J. Blair, Esq.,
Professional Building,
Asbury Park, New Jersey.

20

Dear Sir:

Last night I examined the abstract of the title to the property which my client, Jacob K. Safris has purchased from Johanna Fleischmann, preparing the same for closing on Friday of this week.

My examination of the title discloses the following:

30

Deed from Ocean Grove Camp Meeting Association, etc. to Johanna Fleischmann dated February 3rd, 1906, and recorded in Book 770 of Deeds for Monmouth County on page 990, recites that the said premises are leased and the acknowledgement states specifically that it was signed by the Ocean Camp Meeting Association, etc. president, as a lease.

40

Deed from Ocean Grove Camp Meeting Association, etc. to Johanna Fleischmann dated July

Exhibit P-2

20th, 1900, and recorded in Book 654 of Deeds for Monmouth County on page 98 recites, "leases all that tract, etc."

Deed from Ocean Grove Camp Meeting Association, etc., to Johanna Fleischmann dated September 8th, 1886 and recorded in Book 577 of Deeds for Monmouth County on page 102, contains the same clause as to leases. 10

I find of record a mortgage made by Johanna Fleischmann to Samuel H. La Baw dated November 24th, 1906 for $2500 recorded in Book 333 of Mortgages for Monmouth County on page 72.

Also mortgage from Johanna Fleischmann to Samuel H. La Baw dated January 14th, 1911 in the sum of $4500 recorded in Book 407 of Mortgages for Monmouth County on page 343. 20

It appears that an attempt was made to assign these two mortgages to Louisa M. La Baw by assignment dated September 10th, 1921 and recorded in Book 82 of Assignments of Mortgages for Monmouth County on page 441, but in the assignment instead of referring to the mortgage of $4500 above mentioned they recite mortgage recorded in Book 409 of Mortgages for Monmouth County on page 343. 30

I presume that you will have these mortgages ready for cancellation, but you will have to correct the assignment from the executors of Samuel H. La Baw, because under the assignment to Louisa M. La Baw, she could not very well give a cancellation unless this is corrected. 40

Exhibit P-2

Will you kindly explain to me how you intend to convey title by Warranty Deed in view of the leases which Mrs. Fleischmann holds instead of an absolute title?

10 Will you kindly inform me how you disposed of the fact that the tax searches contain the following clause: "this tax search runs from January 1st, 1925 to date, and records beyond that date uncomplete?"

Awaiting to hear from you, I am

Yours truly,

20 ZUCKER & GOLDBERG,
Per Maurice J. Zucker.

MJZ.EG

EXHIBIT P-3.

LAW OFFICES
WILLIAM J. BLAIR
Professional Building
Asbury Park, N. J.

10

November 14th, 1925.

Mr. Maurice Zucker,
Attorney at Law,
24 Branford Place,
Newark, N. J.

Dear Sir:

20

I am in possession of a bargain and sale deed from the Ocean Grove Camp Meeting Association which cures the objections in the second, third and fourth paragraphs of your letter of November 4th. The mortgage for $2500 was cancelled of record January 16th, 1911 and is in my possession as is also the $4500 mortgage and assignment, which is also correct. The matter of taxes has been taken care of. We will therefore be ready to close this title on Wednesday, November 18th at any time you suggest.

30

Kindly let me know at once the exact time you will be here.

Yours very truly,

WM. J. BLAIR.

40

EXHIBIT P-4.

November 26th, 1925.

Mr. Jacob K. Safris,
c/o Zucker & Goldberg,
20 Branford Place,
Newark, N. J.

10

Dear Sir:

My clients have been ready to close the Fleischman title since October first and you were notified to that effect during the latter part of September.

At the time the agreement was signed you stated that you would close as soon as it was convenient for Mrs. Fleischmann to vacate. The title has been examined by your attorney and all of his objections have been met, yet you have made no effort to carry out your part of the contract. Mrs. Fleischmann has instructed me to inform you that she will not agree to any further delay in the matter, as she is under the impression that you are purposely stalling until you can dispose of the property and I personally am inclined to agree with her. I therefore notify you that unless the matter is disposed of on next Friday, November 27th, I will institute proceedings against you.

20

30

Very truly yours,

40

EXHIBIT P-5.

Law Offices Of
ZUCKER & GOLDBERG
Chamber of Commerce Building
24 Branford Place

10

Newark, New Jersey
November 27th, 1925.

William J. Blair,
Professional Building,
Asbury Park, N. J.

Dear Sir:

20

Receipt is hereby acknowledged of your letter to my partner, Mr. Maurice J. Zucker, dated November 26th, 1925, and also copy of the letter you sent to Mr. Safris.

Mr. Zucker left the office last Wednesday morning and we do not expect him until next Tuesday. He is stopping at the Embassy Hotel, Lakewood, New Jersey, and if you will please get in touch with him by telephone at that address, he will take the matter up with you. 30

Yours truly,

ZUCKER & GOLDBERG,
By Louis D. Goldberg.

LDG/LR

40

EXHIBIT P-6.

Law Offices Of

ZUCKER & GOLDBERG

Chamber of Commerce Building

24 Branford Place

10

Newark, New Jersey
January 5th, 1926.

William J. Blair, Esq.,
Professional Building,
Asbury Park, New Jersey.

Dear Sir:

20 In accordance with my telephone conversation had with you I understand that the above matter may be settled and the title closed on the following basis:

Mr. Safris is to pay at the time of the closing of title the sum of $7,000 in cash.

The balance is to be a first mortgage payable $1,000 each year, the entire principal to be paid in five years (5) with interest at the rate of six
30 per cent.

If this arrangement is satisfactory, will you kindly send me the mortgage at once so that I may have Mr. Safris sign the same, and upon receipt of the said mortgage I will call you on the telephone fixing a definite hour for Saturday for the closing of this matter?

Yours truly,

40

ZUCKER & GOLDBERG,
Per Maurice J. Zucker.

MJZ:EG.

EXHIBIT D-1.

MORTGAGE

JOHANNA FLEISCHMANN, widow, To SAMUEL LA BAW.	Dated Nov. 24, 1906. Ack'd Nov. 27, 1906. Rec'd Dec. 1, 1906. Cons. $2500.00

Covers premises in question.

Cancelled of Record January 16, 1911.

EXHIBIT D-2.

MORTGAGE

JOHANNA FLEISCHMAN, widow, To SAMUEL H. LA BAW.	Dated Jan. 14, 1911. Ack'd Jan. 14, 1911. Rec'd Jan. 16, 1911. Cons. $4500.

Covers premises in question.

Cancelled of record February 1st, 1926.

EXHIBIT D-3.

ASSIGNMENT OF MORTGAGE

JOHN LABAW, WILLIAM LABAW and LOUISA LABAW, Executors of SAMUEL H. LABAW, To LOUISA M. LABAW.	Dated: Sept. 10, 1921. Ack'd Sept. 10, 1921. Rec'd Sept. 12, 1921. $4500.00.

10

Assigns mortgage marked "Exhibit D-2."

EXHIBIT D-4.

20

DEED

OCEAN GROVE CAMP MEETING ASSOCIATION, To JOHANNA FLEISCHMANN.	Dated: July 20, 1900. Ack'd: July 24, 1900. Rec'd: July 30, 1900. $1,000.

30

Covers part of premises in question.

40

EXHIBIT D-5.

DEED

OCEAN GROVE CAMP MEETING ASSOCIATION, To MRS. JOHANNA FLEISCHMANN.	Dated Sept. 8, 1896. Ack'd Sept. 11, 1896. Rec'd Sept. 14, 1896. $1,500.

Covers part of premises in question.

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

Be it remembered that on the 11th day of September A. D. One Thousand Eight Hundred and Ninety-six before me the undersigned A Master in Chancery of said State, personally came George W. Evans Secretary of The Ocean Grove Camp Meeting Association of the Methodist Episcopal Church who being duly—did depose and say, that he was present and did see E. H. Stokes President of the said "The Ocean Grove Camp Meeting Association of the Methodist Episcopal Church," sign the above and foregoing *Lease,* and affix thereto the common and corporate seal of the said Association, which is the same seal now thereto affixed, and then deliver the same as the act and deed of the said association made by order of the said corporation and that he the said George W. Evans, did thereupon subscribe his name as secretary of the said Association, to the said Lease in attestation of the due execution and delivery

thereof, and as subscribing witness thereto and his name now subscribed thereto as such Secretary as aforesaid is in the proper handwriting of him the said

GEO. W. EVANS.

10 Sworn and subscribed to
the 11th day of September,
A. D. 1896 before me
Holmes W. Murphy,
Master in Chancery of New Jersey.

EXHIBIT D-6.

20

DEED.

THE OCEAN GROVE CAMP MEETING ASSOCIATION OF THE METHODIST EPISCOPAL CHURCH to 30 JOHANNA FLEISCHMANN.	Dated Feb. 3, 1906 Ack'd Feb. 3, 1906 Rec'd Mar. 2, 1906 $1,100.

Covers part of premises in question.

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

Be it remembered that on the Third day of February A. D. One Thousand Nine Hundred and Six, before me, the undersigned, A Commissioner
40 of Deeds personally came E. N. Cole, Secretary

Exhibit D-6

of The Ocean Grove Camp Meeting Association of the Methodist Epicopal Church, who being duly sworn did depose and say that he was present and did see A. E. Ballard Vice President of the said "The Ocean Grove Camp Meeting Association of the Methodist Episcopal Church," sign the above 10 and foregoing Lease, and affixed thereto the common and corporate seal of the said association, which is the same seal now thereto affixed, and then deliver the same as the act and deed of the said association made by order of said corporation, and that he the said E. N. Cole did thereupon subscribe his name as Secretary of the said association to the said Lease, in attestation of the due execution and delivery thereof, and as sub- 20 scribing witness thereto, and his name now subscribed thereto as such Secretary as aforesaid is in the proper handwriting of him the said

E. N. COLE,
Sec'y.

Subscribed and sworn to this
3d day of February, A. D.
1906 before me
George F. Rainear,
Commissioner of Deed.

EXHIBIT D-7.

Law Offices of
ZUCKER & GOLDBERG
Chamber of Commerce Building
24 Branford Place

10

Newark, New Jersey.
December 28th, 1925.

William J. Blair, Esq.,
Professional Building,
Asbury Park, New Jersey.

Dear Sir:

20

In the above matter I will write you on Wednesday, December 30th, 1925, and give you definite word in regard to this title.

I am having a meeting of the people interested at my office tomorrow at 5 P. M.

Yours truly,

30

ZUCKER & GOLDBERG,
per Maurice J. Zucker.

MJZ.EG

40

EXHIBIT D-8.

Law Offices of

ZUCKER & GOLDBERG

Chamber of Commerce Building

24 Branford Place

10

Newark, N. J.
December 11, 1925.

McBride Agency,
Main Street,
Bradley Beach, N. J.

Attention—Mr. Wright.

20

In reference to the telephone conversation between you and Mr. Safris, I wish to state that if the Fleischmann people will give us title upon the payment of $7,000.00 and first payment on the second mortgage to begin at the end of the second year, we will take title to the property.

Please get in touch with me as soon as you come to an agreement with them and I will make the proper arrangements to close as soon as possible.

30

Thanking you for your efforts in our behalf, I am

Yours very truly,

MAURICE J. ZUCKER.

C.

40

EXHIBIT D-9.

Dec. 16, 1925.

Mr. Jacob Safris,
c/o Mr. M. Zucker,
20 Branford Place,
Newark, N. J.

10

Dear Mr. Safris:

I have endeavored in every way possible to effect a closing on the Fleischmann property and was successful in obtaining arrangements to close which were tremendously more attractive in their terms than those agreed upon in the contract.

I still feel, although I have had no positive as-
20 surance from Mrs. Fleischmann, that this deal can be settled for $7,000 additional cash with a five year mortgage for the balance payable $3000 at the end of the first year and $5,000 at the end of the second, third and fourth years.

I have repeatedly been in communication with you and Mr. Zucker in an effort to have you close on these terms and you have promised me that you in turn, would acquaint me with any developments that would help toward the closing, how-
30 ever, in all this time I do not remember one occasion wherein you called me and have seemed to disregard this office entirely in face of the fact that we have worked so hard for your interest.

I will thank you to let me know immediately and definitely whether you intend to go through with this deal or not * * *

Very truly yours,

40

Wm. H. McBRIDE,
Agency.

EXHIBIT D-10.

JACOB K. SAFRIS

INSURANCE

24 Branford Place,

Newark, N. J. 10
December 17th, 1925.

Mr. R. Wright,
c/o Wm. H. McBride Agency,
Bradley Beach, N. J.

My dear Mr. Wright:

In answer to yours of the 16th, permit me to 20 state that the reason you did not hear from me is because of the fact that I failed to make connections with Mrs. Fleischman, as I told you I would that day you called me on the telephone.

As things stand now I am to meet Mrs. Fleischmann in New York City this week and make definite arrangements with her.

Just as soon as I come to an agreement with her I will immediately write you and tell you all about 30 it.

Yours very truly,

JACOB K. SAFRIS.

JKS.CGZ

40

EXHIBIT D-11.

THE OCEAN GROVE CAMP MEETING ASSOCIATION OF THE METHODIST EPISCOPAL CHURCH, to JOHANNA FLEISCHMANN.	Dated Nov. 9, 1925 Ack'd Nov. 14, 1925 Rec'd (not recorded) $1.00

10

Covers premises in question.

Deed given to correct errors in the acknowledgements to deeds marked Exhibits D-4 and D-5 and D-6.

20

EXHIBIT D-12.

JOHANNA FLEISCHMANN, widow, to (NO GRANTEE MENTIONED.)	Dated Nov. 2, 1925 Cons. $1.

30

Covers premises in question.

No signature or acknowledgement attached thereto, latter part of said paper being detached.

40

New Jersey Court of Errors and Appeals

JACOB K. SAFRIS, *Plaintiff-Appellant,* *vs.* PAUL W. FLEISCHMANN, executor of the estate of Johanna Fleischmann, deceased, *Defendant-Appellee.*	*Action at Law.* *On Appeal from Supreme Court.*

BRIEF ON BEHALF OF DEFENDANT-APPELLEE.

Facts.

This is an appeal from a judgment in the Supreme Court entered in favor of the defendant and against the plaintiff on the plaintiff's complaint, and in favor of the plaintiff and against the defendant on the defendant's counterclaim. The verdict on which the above judgment was entered was directed by the Honorable William A. Smith after a trial in the Essex Circuit.

The controversy arose over a contract for the purchase of a piece of real estate in Bradley Beach, New Jersey, owned by Johanna Fleischmann and which she sold in her lifetime to the plaintiff by written contract (see Exhibit P. 1, State of Case, pp. 106 to 111).

Plaintiff's claim was for the return of the deposit made under that contract in the sum of five thousand dollars ($5,000) and search fees incurred by the plaintiff in an examination of title.

The defendant who was executor of the vendor, the latter having died after the date of the contract and after the institution of the suit in question, filed a counter-claim seeking damages because of the plaintiff's failure to carry out the terms of the contract (see State of Case, pp. 7 to 10; Amended Counter-claim, pp. 14 to 19).

It appeared that the plaintiff's attorney, who incidently was the only witness called at the trial for the plaintiff, had brought several alleged defects in the title to the attention of the defendant's attorney. Neither the defendant or her attorney ever admitted that these alleged defects were real, although as a practical matter they had agreed and did clear them up to the satisfaction of the plaintiff's attorney.

The alleged defects were divided into three groups, first, there were three deeds from the Ocean Grove Camp Meeting Association, which the plaintiff contended were leases and not deeds, although the only portion of the deed which supported this contention was in the acknowledgments where the documents were referred to as a lease and not a deed. These acknowledgments being more than six years old and the documents having been recorded for more than five years, did not affect the title, but nevertheless, the defendant's attorney procured a corrective deed from the grantor in the three deeds mentioned; Secondly, there were two mortgages apparently open of record and not cancelled, the aggregate amount of which however, did not even equal the amount of cash to be paid by the purchaser, but defendant's attorney had the original mortgages at all times in his possession with either the Register's stamp of cancellation

thereon or the mortgagee's receipt for cancellation thereon.

The other alleged defect was in connection with an assignment of a mortgage which defendant contended was absolutely without merit, and it is respectfully urged that an examination of the evidence fails to disclose any proof which in any way substantiates any contention in that connection made by the attorney of the plaintiff.

The date fixed in the contract for the closing of title and delivery of deed was November 1, 1925.

The purchaser's attorney did not bring any question as to the title to the attention of the vendor until the letter dated November 4, 1925, was written (Exhibit P. 2, State of Case, pp. 112, 113, 114).

On November 14, 1925, the vendee's attorney, by letter (Exhibit P. 3, State of Case, p. 115), informed the vendor's attorney that all questions raised by him in his letter of November 4th, had been satisfactorily taken care of and requested the purchaser's attorney to close title on Wednesday, November 18th. Thereafter, as will be seen from a reading of the correspondence, contained in the State of the Case, the vendor, through her attorney and her real estate broker, kept constantly requesting the plaintiff to close the title. As a result of these urgings the plaintiff finally secured from the defendant, a change in the terms of the contract insofar as it affected the amount of cash to be paid at the time of the delivery of the deed. This was reduced from $15,000 to $7,000 and the purchase money mortgage increased from $30,000 to $38,000. It will be noted that nowhere in the testimony nor in the correspondence is there a single

suggestion that any other term, condition or covenant of the agreement (Exhibit P. 1, State of Case), was to be changed or modified in any respect whatsoever. Nor is there any testimony that the vendor at any time agreed that the date fixed in the contract for the closing of title, to wit: November 1, 1925, was to be extended, nor was there any admission on her part that any of the delay had been occasioned by her, or was brought about by her inability to close title as was provided for in the contract of purchase.

Finally, after all the correspondence and telephone calls between the attorneys, a conference was held in Asbury Park on January 13, 1926, attended by plaintiff's attorney, the real estate broker who had made the sale, defendant's attorney, and defendant's son. Defendant's attorney had in his possession, a deed executed and acknowledged by the defendant in accordance with the terms of a contract, together with all documents necessary to remove the alleged defects complained of by the plaintiff's attorney.

Defendant's attorney had also mailed to plaintiff's attorney, before the date of this conference, the proposed purchase money bond and mortgage for his examination.

It will be noted that neither of the contracting parties were present at this final conference.

Plaintiff's attorney had with him, according to his own testimony, a certified check to his own order in the sum of $7,000, and the bond and mortgage which had been sent to him by the defendant's attorney, which apparently he had had executed by the purchaser, but in which the acknowledgment had not been filled out. Also, the date in the mortgage had not been filled out at the time of its execution.

It will be especially noted that this final conference involving a piece of real estate valued at the contract price of $50,000, lasted only a very short time.

Plaintiff's attorney who was the only witness produced for the plaintiff, testified that after checking up the various alleged defects of title, all of which had been removed to his satisfaction, a discussion ensued with reference to the date as of which the title was to be closed. This was of course for the purpose of dating the purchase money mortgage and calculating the adjustments of taxes, interest if any, insurance premiums, water rents, etc.

Plaintiff's attorney took the position that he would not close as of November 1st or 2nd, which was apparently the date in the purchase money mortgage, but nowhere in his testimony did he state definitely and with certainty as to what date he did insist upon.

There was a suggestion made by the real estate broker that he would pay in cash the difference in the adjustment which would be caused by the calculation as of a different date than November 1st, but apparently his suggestion was not accepted by either party.

Apparently, no attempt was made either by the plaintiff's attorney or the defendant's attorney to actually calculate the adjustments with reference to taxes, insurance premiums, interest, water rents, etc., and so far as the record discloses, the parties separated without any firm statement by either side that a formal tender was made of the cash of the mortgage or of the deed. After this indefinite situation existed for a short time, plaintiff instituted a suit. The defendant produced as witnesses the attor-

ney who handled the real estate transaction for the vendor, the defendant, vendor's son who was present at the final conference, and the real estate broker who had handled the sale and who was also present at the final conference. At the close of the case both litigants moved for a direction of verdict in their favor, and the Court thereupon rendered an opinion which will be found on pages 105 and 106, State of the Case, in which a verdict in favor of the defendant on the plaintiff's case and in favor of the plaintiff on the defendant's counter-claim was entered.

To this ruling plaintiff took an exception and it is from the judgment entered on that verdict that this appeal is taken.

ARGUMENT.

The ruling of the trial judge as will be seen from reading his opinion was based upon the fact that neither of the parties could recover affirmatively without a tender.

The brief of the plaintiff-appellant filed herein seeks a reversal of the judgment on the theory that under the facts as they existed on the day of the final conference, referred to in the statement of facts in this brief, it was unnecessary for the plaintiff to formally tender the cash and mortgage required under the terms of the plaintiff's contract of purchase.

Appellee desires briefly to reply to the argument made in appellant's brief.

The case of *Thorne* v. *Mosher,* 20 N. J. Eq. 257, was a suit for the foreclosure of a mortgage where the defendant had gone to the mortgagee's house for the purpose of paying

the interest, which was refused on the ground that it was after time for payment. The defendant had the amount offered in her purse in her hand which she held out of sight from the plaintiff who saw the purse but not the bills. Defendant had opened the purse and was in the act of taking out the bills but stopped on account of the refusal of the plaintiff to receive the interest.

The Court rightfully held that it would be most inequitable to hold that the principal of the mortgage was due when the offer of payment was deliberately refused, and that refusal prevented the defendant from proceeding further. But as will be seen from a reading of the case in question, the plaintiff in that case *positively* refused to accept the interest.

In the case now before the Court for review, there is no evidence which clearly indicated a positive refusal on the part of the defendant to accept the cash and mortgage if actually offered.

The case of *Crosby* v. *Wells,* 73 N. J. L. 769 to 790, was a suit for the recovery on a promissory note in which the defendant sought to prove a rescission of the contract under which the notes had been given, and as was said by the Court at page 802:

> "The defendant was not required to do more than under the circumstances he was permitted by the plaintiff to do."

This seems to indicate that each case of this kind must be governed by the facts as they exist and that a general ruling cannot be quoted as being dispositive of every case which may arise thereunder.

The case of *Trenton Street Railway Co.* v. *Lawlor,* 74 N. J. Eq. 828, was a case where the defendant notified the plaintiff in advance that

he would not accept the agreed amount of a compromised settlement of a lawsuit. There was no such evidence in the case now before the Court.

In the case of *Chess* v. *Vockroth,* 75 N. J. L. 665, the thing which the party in that case demanded and which was not furnished, and which he contended justified him in refusing to carry out the contract, was the joining of wife with the husband in the execution of a chattel mortgage. Clearly under the terms of the agreement, copy of which appears in the report of the case, such a demand was wholly unwarranted.

In the case of *Bernstein* v. *Kohn,* 96 N. J. L. 223, the vendor was clearly in default because of a failure to remove encroachments, which default continued to exist for several months after the time fixed for the closing of title.

There was no dispute that the vendor in that case was unable to perform at the time agreed upon for the passing of title, and no attempt had been made by the vendor between the original date and the final date when the vendee demanded performance, to place himself in a position to perform. Surely those facts cannot be compared with the situation in the case now before the Court.

Appellee respectfully refers the Court to the case of *Kastens* v. *Ruland,* 94 N. J. Eq. 451, in which case the question of a tender by the plaintiff of the purchase price of certain property described in an option was under consideration. The Court in that case, speaking through Justice Kalisch, page 454:

> "While a tender could only be properly made by the production of the money equivalent to the amount required to be paid, this

formality may be waived by the conduct of the parties. *We think there was evidence of such conduct on part of the defendants as to amount to a waiver of formal tender.*"

Appellee again respectfully suggests that a careful reading of the very brief testimony in the State of the Case will disclose no evidence which would justify a conclusion that the defendant or her representatives who were present at the final conference in Asbury Park had ever indicated by their conduct that they had waived tender. In this connection it must be remembered that practically every bit of delay in the closing of the title in this case was chargeable to the plaintiff, the purchaser. Clearly, one has a right to infer from the testimony that a considerable portion of this delay must have been due to his inability, or perhaps his desire to consummate the purchase of this particular property without the payment of the $15,000 in cash as provided for in the contract. His efforts along that line were successful and the vendor finally agreed to accept $7,000 in cash instead of $15,000, and to increase the purchase money mortgage accordingly.

Surely under these circumstances any vendor would be justified in believing that the vendee could not or would not perform the contract and was entitled to clear and convincing proof of not only his willingness to perform under the changed terms, but both clear and convincing proof of his ability to perform.

Nowhere in the case does it clearly appear what the difference amounted to in dollars and cents, whether the title was closed as of November 1, 1925, or even January 13, 1926, and under those circumstances how can anyone say that the defendant's representatives, present for the pur-

pose of consummating the contract between the parties, would not have receded from the position they had taken if plaintiff's attorney had formally tendered the cash, and a completely executed, purchase money bond and mortgage. Were they not entitled under the circumstances as they existed on January 13, 1926, after practically two and one-half months of delay, to the belief that the purchaser was only raising the question of date for the purpose of creating a situation which would enable him to be relieved of the obligation of the contract?

The following statements taken from 38 Cyc., page 134, *et seq.*, seem to be clear statements of the general rule on the question of tender and when it is excused or waived, and there does not seem to be any material difference between these general statements and the rule laid down in the New Jersey cases, quoted in appellant's brief, but the difference seems to be in the application of the principle to our specific case:

> "A formal tender is unnecessary if the party to whom performance is due be absent from the place of performance, in those cases where his presence is necessary; nor is a formal tender necessary if, at the time for performance, the party to whom performance is due fails or refuses to perform on his part, unless a request which he has no right to make is complied with, or if he is unable to perform, or does or suffers anything to be done with the thing to be delivered by him which renders certain a failure of performance on his part when the day arrives. Similarly, a tender is waived where the tenderee makes any declaration which amounts to a repudiation of the contract, or takes any position which would render a tender, so long as the position taken by him is maintained, a vain and idle ceremony; as where he expressly declares that he will not accept the tender if it is made, or in

any way obstructs or prevents a tender, as by declaring positively that nothing is due him, by admitting that a tender would be fruitless, by declaring the contract to be at an end, or in a threatening tone ordering plaintiff off the premises. But in any case before it can be said that a formal tender is waived, the tenderee must have placed himself in such position as would make a tender an unnecessary act. And a plaintiff, before he can recover damages for the breach, or what he has parted with under the contract, must show, not only the facts constituting the waiver of the formal tender, but that he was able and willing, at the time fixed, to perform on his part, except in those cases where a tender is rendered unnecessary by the previous declaration, act, or omission of the other party. A formal technical tender is not dispensed with by a mere assertion, without more of a lien or claim in excess of the actual amount due, for a tender of the proper sum might be accepted.''

Also on page 142:

''In making a tender, the tenderer must have it in his power, at the time of his offer, to pay the amount due; and must have title to the thing tendered; and the actual ability to deliver the money must not only exist, but it must be made to appear at the time of the tender.''

Also on page 143:

''In order to make a valid tender of either money or chattels, the thing to be tendered must be actually produced and offered to the party entitled thereto, a mere offer to pay being insufficient; and the tenderer must place the money or property in such a position that his control over it is relinquished for a sufficient time to enable the tenderee, if he so desires, to reduce it to possession by merely reaching out and laying hold of the money or thing; and a person is not bound to say whether or not he will accept the money or thing until it is produced.''

It is therefore respectfully contended and strenuously urged that under the particular circumstances of the present case as they existed at the final conference in Asbury Park on January 13, 1926, the defendant's attorney and representative had a perfect right to a clear and convincing demonstration of the willingness and ability of the plaintiff to carry out the terms of his contract of purchase, and that there is nothing in the facts as they appear in the record of this case which definitely established a waiver on the part of the defendant or her authorized attorney and agent which would have rendered a formal tender by plaintiff's attorney an idle ceremony or a nugatory act.

Therefore, in view of the fact that the defendant's decedent admittedly was ready, able and willing to carry out the terms of the contract on her part at the time of the final conference, and as the defendant raises no question at this time as to the propriety of the trial court's ruling with regard to his counter-claim, the judgment of the Supreme Court should be affirmed.

Respectfully submitted,

STEIN, McGLYNN & HANNOCH,
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EDWARD R. McGLYNN,
Of Counsel.

New Jersey
Court of Errors and Appeals

JACOB K. SAFRIS, Plaintiff-Appellant, vs. PAUL W. FLEISCHMANN, Executor of the Estate of Johanna Fleischmann, deceased, Defendant-Appellee.	Action at Law On Appeal from Supreme Court.

BRIEF ON BEHALF OF PLAINTIFF-APPELLANT.

PRELIMINARY STATEMENT.

This action was originally brought by the plaintiff, Jacob K. Safris, against the defendant, Johanna Fleischmann, to recover the sum of $5,000.00, being the amount of a deposit made by the plaintiff to the defendant, under the terms of a written contract for the sale of lands in Bradley Beach, in the County of Monmouth, New Jersey.

After the bringing of the suit in question, the defendant died, and her death being suggested upon the record, her executor, Paul W. Fleischmann, was substituted as defendant, and the case proceeded against him.

A counterclaim was filed by the said defendant against the plaintiff, demanding damages from the plaintiff because of his alleged default in not taking the premises in question, according to the terms of the contract.

Upon the conclusion of the case, which was tried before the Honorable William A. Smith, to whom the same had been duly referred for trial, both parties moved for the direction of verdicts in their favor, and the Court thereupon directed a verdict in favor of the defendant on the plaintiff's claim, and in favor of the plaintiff on the defendant's counterclaim, on the single ground that neither of the parties made to the other, tender, as required by the agreement in question.

The plaintiff being dissatisfied with the ruling of the Trial Court, appeals to this Court from the judgment entered against him, on the verdict aforesaid.

STATEMENT OF FACTS.

The defendant, Johanna Fleischmann, at the time of the making of the contract hereinabove referred to, was the owner of certain lands in the Borough of Bradley Beach, which, on August 13th, 1925, she, by her written agreement, contracted to sell to the said plaintiff for the sum of $50,000.00, on terms stated in the contract (p. 106). Plaintiff, at the time of the execution of the agreement, paid down-money amounting to $5,000.00.

The agreement fixed the first day of November, 1925, as the date for passing title and provided, among other things, that all adjustments of interest and other charges, should be made "as of the day of the delivery of said deed."

The date fixed for the passing of title in the contract came around, but the defendant was unable to give good title at that time.

Maurice J. Zucker, an attorney at law of this state, who represented the plaintiff in the transaction, testified that after the making of the contract in question, he ordered an examination of the title to the premises in question from the Monmouth Title Company, of Freehold, New Jersey. As a result of the title examination, certain objections were discovered, most of which appear in the correspondence between Mr. Zucker and William J. Blair, an attorney at law of this state, who represented the defendant, Mrs. Fleischmann. (See Exhibits P-2 and 3, pp. 112 and 115.)

The objections which were raised, disclose, among other things, that certain deeds to the defendant, Johanna Fleischmann, from the Ocean Grove Camp Meeting Association, a previous grantor, were acknowledged as "leases"; that there was some irregularity in the attempted assignment of certain mortgages given by the defendant, Johanna Fleischmann, to one LaBaw, which mortgages were open of record; and that there was also some objections as to an incomplete tax record.

Attempts were made to straighten out matters, and, somewhere between the 2nd and 5th of January, 1926, Mr. Blair, according to Mr. Zucker's testimony, informed him "that the matter had been ironed out and that Mr. Safris and Mrs. Fleischmann had come to terms and that they were ready to close." (l. 20, etc., p. 32.)

On January 5th, 1926, Zucker wrote to Blair, stating that he understood the matter could be

settled and title closed on certain terms mentioned in his letter, which terms, it seems, were agreed upon between Safris, the plaintiff, and Mrs. Fleischmann, the defendant, by direct negotiations. (Bot. p. 33.) He further stated that he would call Blair on the phone and fix a definite hour on the following Saturday, for the closing of the matter. (See Ex. P-6, p. 108.)

Zucker then goes on to say that in response to his letter, he received a bond and mortgage from Mr. Blair, to be executed by the plaintiff, as part of the purchase price, which papers were dated "November 2nd, 1925." (Bot. p. 34.)

On January 13th, 1926, Zucker, by previous arrangement, called at the office of Blair, at Asbury Park, New Jersey, for the purpose of taking title on behalf of the plaintiff. He had in his possession the bond and mortgage, the title and other searches, and he also had with him a certified check for $7,000.00 (that being the amount agreed upon between the parties). (pp. 34, 36.) At that time, Zucker called Blair's attention to the fact that a $2500.00 mortgage was still open of record. This was verified by Blair himself. (See his testimony, l. 25, p. 96 and top p. 97.) A $4500.00 mortgage also had not been discharged of record (bot. p. 38) and the corrective deeds from the Ocean Grove Camp Meeting Association had not been recorded. (Top p. 39.)

Mr. Zucker was willing, however, to take Mr. Blair's word that the papers mentioned would be properly recorded, and they then proceeded to the substantial matter of passing title. Zucker first called Mr. Blair's attention to the fact that although the bond and mortgage were dated November 2nd, 1925, he was not willing to pass title

as of that date. This brought on an argument with respect to the matter of adjustments, such as apportionment of insurance and other charges, which were said to amount to a considerable sum. (pp. 39, 40 and 41.)

They worked for two hours over the matter; Blair insisted that the apportionment should be made as of November 1st, 1925, while Zucker insisted that the apportionment be made as of January 13th, 1926, the result being that each held his ground, and the deal was declared off.

Before leaving Mr. Blair's office, Mr. Zucker tendered the check for $7,000.00, but Blair was not willing to pass title. (pp. 39 to 43.)

Right here it should be noted that Mr. Zucker and Mr. Blair, the representatives of the respective parties, were dealing with each other in a perfectly friendly manner, each trying to do what he could for his client, and neither one was demanding or expecting formal tender from the other one.

According to the testimony of Mr. Blair, Mr. Zucker arrived at his office in Asbury Park on January 13th, 1926, stating that he had a check in his pocket and was ready to close title. Blair says that he was also prepared to pass title on behalf of his client; that he had spread out on his table, signed deeds from Mrs. Fleischmann, and also the cancelled mortgages in question, as well as the corrected deed from the Ocean Grove Camp Meeting Association. He says that the deed from the Ocean Grove Camp Meeting Association, which was dated November 9th, 1925, came into his possession about a week after November 14th, 1925 (l. 20, p. 89); that he told

Zucker that they were ready to close title "*but the closing date would have to be as of November 1st*" (l. 30, p. 89); that Zucker insisted upon closing as of the date of the meeting—January 13th, 1926. (Bot. p. 89.) He says that the discussion became heated and that one Mr. Wright, who seems to have been the agent in the deal, offered to stand for a part of the difference between the parties, but that Mr. Fleischmann (afterwards the substituted defendant) spoke up and said:

> "I don't see the need for Mr. Wright to stand for it." (Top p. 92.)

Nothing came of the meeting and Mr. Zucker left with his check and papers.

On cross-examination, Blair admitted that on November 1st, 1925, which was the date fixed in the agreement as the time for passing title, the so-called defective deeds from the Ocean Grove Camp Meeting Association had not been corrected; that the $2500.00 mortgage was open of record, and that the $4500.00 mortgage was also open of record. (Top p. 98.)

Summarizing the testimony in the case, it appears that on the date when title was to pass—November 1st, 1925—there were a number of defects in the title which required attention in order to give the plaintiff a warranty deed free and clear of encumbrances, as provided in the agreement. These were sought to be remedied by the defendant, who, however, did nothing in that regard until sometime after November 1st, 1925, in fact, certain important papers were not recorded of record, as hereinabove shown, as late as January 13th, 1926, when the parties met for the purpose of computing the amounts due.

Under the facts as above set forth, the plaintiff insists that the adjustments should have been made as of the time of the "delivery of the deed," to wit, January 13th, 1926. The contract provides, *inter alia,* that the

> "rents of said premises, insurance premiums, water rents, taxes and interest on mortgage, if any, shall be adjusted, apportioned and allowed as of the date of the delivery of said deed." (ll. 15 to 20, p. 109; extract from contract, Exhibit P-1.)

Notwithstanding the facts above stated, the learned Court, although finding that the plaintiff was justified in insisting upon having all adjustments made as of January 13th, 1926, directed verdicts against the plaintiff on his demand for the return of his deposit, and against the defendant on his counterclaim, on the ground that neither side made a tender to the other of that to which he was entitled. (See charge, p. 105.)

This question was not raised by either of the parties at any time during their negotiations, nor at any time during the trial.

DISCUSSION OF THE LAW.

Plaintiff's complaint, filed in the cause, after setting forth the making of the contract, etc., alleged in its fourth paragraph, that:

> "By mutual consent of the plaintiff and the defendant, the time fixed for delivery of the deed was extended to the 13th day of January, 1926." (See complaint, p. 3.)

To this allegation, the defendant filed her answer, admitting the truth of said allegation. (See Par. 1 of defendant's answer, p. 7.)

After Paul W. Fleischmann, executor of the Estate of Johanna Fleischmann, deceased, was substituted as defendant, an amended answer and counterclaim was filed by him in which he also admitted the truth of that allegation. (See Par. 1, amended answer, p. 14.)

If, therefore, the time for the delivery of the deed was extended by mutual consent, until January 13th, 1926, the plaintiff was entirely justified in demanding that all adjustments be made as of that date. This view, as above pointed out, was accepted and adopted by the Trial Court, who said:

> "As I have just referred to the pleadings and by the evidence here, it is admitted that the contract was changed; the terms were changed, and by the pleadings *it is admitted that the date of the delivery was to be the 13th day of January, 1926. That means that under the terms of the contract the agreement of settlement is the date of the delivery of the deed, and the adjustments have to be as of the date of the delivery of the deed.*" (See charge, p. 105.) (Italics mine.)

In view of the fact that the testimony, as herein pointed out, showed that the parties came to a parting of the ways on the question of adjustments, and that the plaintiff was in the right in his insistment in fixing January 13th, 1926, as the date of the making of the adjustments, it is respectfully submitted that the learned Court should have directed a verdict for the plaintiff for the amount of the deposit and interest.

The entire case, therefore, comes down to one question and that is: Was the Court justified in directing a verdict against the plaintiff, be-

cause he had not made a tender (if, in fact, he did not do so) at a time when tender was wholly useless?

Our Courts have frequently said, as the following citations will disclose, that making a tender where a tender will prove futile, is a useless performance, characterizing it as pure "mummery" in such situations.

A maxim applicable to a situation like the present is that

> "No man is bound to do a nugatory act."
> (*Brown's Legal Maxims*, p. 192.)

In the case of *Pittenger* v. *Pittenger*, 2 Gr. Ch. 156-165, it appeared that a purchaser took the deed of conveyance into his hands and read it; that he then handed it back and said he believed he would not take it. On these facts it was held that

> "Where a deed is to be given and the party is present, prepared to give it, and the one who is to receive it positively declines, there is no need of a formal execution and tender."

In the case of *Thorne* v. *Mosher*, 20 N. J. E. 257, it was in evidence that the defendant went to complainant's house to pay the interest upon a debt; that she had the amount in her purse, which was in her hand—the purse, not the money, being in the complainant's sight—and that she was in the act of taking the money out of the purse, but stopped because the complainant refused to receive the interest. On the evidence, the Chancellor held that the offer was neither payment nor tender, but the refusal was a sufficient excuse for not making the actual tender.

In the case of *Crosby* v. *Wells,* 73 N. J. L. 790 (Court of E. & A.), the defendant the vendee, sought to rescind a contract for the sale of shares of stock, which contract the vendee was induced to enter into by alleged fraudulent representations of the plaintiff. The vendee said he rescinded the contract and had the certificate of stock and assignment thereof in his pocket; he said that he had the papers with him, ready for delivery, and he asked that the money paid on the stock be refunded, but did not make an actual tender of them. To this, answer was made by the plaintiff, vendor, rejecting the tender in advance by saying that he would not accept the papers at all.

The Court, in discussing the question of waiver of tender, said at page 802:

> "That the act of rescission may have fallen short of a complete return, would not, under the circumstances of the case, destroy the effect of the notice and offer to return. The defendant was not required to do more than, under the circumstances, he was permitted by the plaintiff to do."

Citing from *Thorne* v. *Mosher, supra,* saying that therein

> "it was held that a defendant was excused from a completed tender when the complainant had announced beforehand a determination not to receive the thing offered."

In the case of *Trenton Street Ry. Co.* v. *Lawlor, et al.,* 74 N. J. E. 828 (E. & A.), the defendant Lawlor was injured by a trolley operated by

the complainant. Prior to the actual trial, Lawlor, through his attorney, agreed to compromise the claim for $1,850.00. Lawlor subsequently repudiated his contract to compromise and refused to execute the release for the present complainant.

The complainant seeks an injunction restraining Lawlor from further prosecution of his lawsuit against the Trenton Street Railway Co., and among the various defenses to the bill is the defense that the complainants have not made a tender of the money, but the Court held that

> "A tender to one who announces in advance that he will not accept it, is unnecessary." (Cites *Thorne* v. *Mosher, supra.*)

In the case of *Chess* v. *Vockroth,* 75 N. J. L. 665 (Ct. E. & A.), one of the questions considered was whether the Trial Court should have allowed the motion for a nonsuit on the ground that no proper tender of a chattel mortgage was made by a vendee who had contracted to purchase a certain business from the plaintiff. The vendor insisted that the vendee's wife, who was not a party to the contract, should sign the chattel mortgage which was to secure the payment of certain purchase money notes. This was refused and the defendant—vendor—refused to fulfill the contract although the vendee held himself ready to sign the chattel mortgage.

The Court, after coming to the conclusion that the vendor was not justified in insisting upon the signature to the chattel mortgage, of the vendee's wife, then considered the question as to whether, assuming that the defendant wrongfully refused to perform his undertaking by demanding the signature of Mrs. Chess, waived a tender

of the balance of the purchase price in cash and said, after citing *Pittenger* v. *Pittenger, Thorne* v. *Mosher* and *Crosby* v. *Wells, supra:*

> "We think that under the principle of these cases, the wrongful insistence of the defendant below was evidential of a waiver on his part of an actual tender by the plaintiff below of that part of the purchase-money which was to be paid in cash, or of the chattel mortgage which was to secure the residue of the purchase-money, and thereby the plaintiff was excused from making such tender." (Bot. p. 675, top p. 676.)

In the case of *Bernstein* v. *Kohn,* 96 N. J. L. 223 (Court of E. & A.), the plaintiff, Bernstein, agreed to purchase certain premises from the defendant, Kohn. The agreement, as in the instant case, provided for a conveyance by warranty deed free from all encumbrances, etc. A survey which plaintiff made, disclosed the fact that there were certain encroachments upon the land to be conveyed and a letter was written by vendee's attorney to the defendant, calling attention to the encroachments, and stating that his client insisted on taking the premises without any encroachments. Exchanges of letters passed between plaintiff's attorney and defendant's attorney, and nothing having been done in the matter, plaintiff demanded the deposit money back from the defendant. Plaintiff was asked to wait a few days and defendant would "see if we can't get these encroachments cleaned up." Nothing further was done.

Plaintiff made no tender of the balance of the consideration which constituted the purchase price to be paid for defendant's property. Later

an action was commenced by the plaintiff in the Essex County Circuit Court, to recover the amount of the deposit, search fees, etc. The Trial Court, in the language of Justice Kalisch who wrote the opinion for this Court,

> "appears to have entertained the notion that under the facts as developed by the testimony, it became obligatory upon the plaintiff before she was entitled to rescind and commence an action against her vendor for a breach of the contract, not merely to show encroachments upon the property, but to go beyond that and show that she has tendered performance and that it has been refused."

The learned Justice, after consideration of the legal rule applicable to the facts of the case, said:

> "In the present case, it appeared that the defendant, vendor, was not at any time in a position to convey a good title, and it would, therefore, have been an idle ceremony for the vendee to go through with the performance on her part. The law does not lend its sanction to such mummery."

In considering the instant case, it will be borne in mind that because of the defects in the title and the encumbrances of record against the premises in question, and for other reasons appearing in the case, the day for passing title was postponed *by consent,* until January 13th, 1926. (See testimony herein quoted and allegations in complaint and admission to that effect in defendant's answer, *supra.*)

On that day, when the parties and their representatives gathered for the purpose of passing title, after certain preliminaries were disposed

of, the question of adjustments was reached. The plaintiff, by his attorney, insisted that the adjustments be made as of January 13th, 1926, which, as herein stated, was fixed as the day of delivery of the deed, while the defendant, by his attorney, insisted upon making the adjustments as of November 1st, 1925, on which day, it appears, the defendant was not ready to give title as provided in the contract.

Each party held to his insistment and the split came when defendant's attorney refused to settle except as of November 1st, 1925. He made it emphatic that there was no use proceeding further unless plaintiff agreed to an adjustment as of that day, while plaintiff's attorney was equally emphatic in insisting that the adjustments be made as of January 13th, 1926. The difference in time was a material matter, as the differential was rather substantial, resulting in an advantage to the defendant—vendor, if the adjustment was made as of November 1st, 1925, and in an advantage to the plaintiff if it was made as of January 13th, 1926.

In this situation, whatever might be said as to the relative merits of the contenders, it is perfectly clear that a formal tender on the part of either party was uncalled for and unnecessary and would have been but an idle gesture, or, as stated by Justice Kalisch, would have been "an idle ceremony."

It appearing, therefore, that tender was excused by the parties, as well as by operation of law, and it further appearing that no question was presented for the consideration of a jury as to the date from which adjustments were to have

been made, it is respectfully insisted that the judgment rendered in the Supreme Court against the said plaintiff, be set aside and for nothing holden.

Respectfully submitted,

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Attorney for Plaintiff-Appellant.

The Otsego Press, Cooperstown, N. Y.