

# THE DAILY APPEAL

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## Supreme Court Decision.

Appeal is taken. To sustain the judgment respondents' counsel make, if we correctly gather them from their brief, many points of objection to the complaint.

1. That the plaintiffs "do not allege that said purchase depended upon the abstract that was to be afterwards furnished to them by said defendants, or that said purchase in any way depended upon what said abstract might disclose."

Without going into an elaborate analysis of the allegation on this point, we deem it sufficient to say the assault of a general demurrer, and whether it was sufficient to repel a special demurrer on the ground stated is not before us for determination.

2. Counsel's second point is that "Said complaint does not allege that said abstract was to be made from the time of the issuing of the patent by the U. S., nor from any particular date, time, or conveyance."

3. As a third point Counsel say "in section five of page three of said amended complaint, the plaintiffs allege that at the time of the purchase of said described land, that the Bank of Nevada was the owner in fee thereof and that the same appeared of record on the public records of Washoe County, but they allege nothing to show that said mortgage was not due and paid prior to the furnishing of the abstract by defendants, and plaintiffs simply assume that said title was in the Bank of Nevada."

4. Under the fourth point counsel say "plaintiffs allege, that they were ousted and dispossessed of said land and premises by due course of law, by the Bank of Nevada, but they fail to show when or how they were ousted and dispossessed of said land and premises by said Bank of Nevada, they don't show when they went into

possession or that they ever had possession of said land and premises, they don't show by what due course of law the Bank of Nevada ousted and dispossessed the plaintiffs of said land and premises, they simply state a conclusion of law and all the authorities held that you must state facts, and from those facts the conclusions are drawn."

5. Fifth: Counsel claim that the complaint does not "show that the plaintiffs on discovering the defect in the abstract, took proper measures to avert the loss and if they fail to do so cannot hold the abstracters liable."

This claim we think untenable. Plaintiffs were not required to show this, if the facts were otherwise it was a matter of affirmative defense to be set up by defendants.

6. The sixth point states that there was a demand made of said Hancock for the return of said \$1100.00 or any part of the same, and without a demand on said Hancock for the return of said \$1100.00 the plaintiffs cannot say that said Hancock would refuse to return the same if a demand was made, in other words the plaintiffs have no cause of action against the defendants until all lawful means for the recovery of said \$1100.00, from said Hancock have failed. It must be shown first that said Hancock is insolvent, and nothing whatever can be collected from him, before the defendants have become liable in damages to said plaintiff."

We think there was, it said "Hancock has refused, and still does, to pay plaintiffs the sum of \$1100.00 or any part thereof."

Refusal to do a thing implies a demand made to do it. Certainly this would be so on general demurrer.

7. The seventh point is that there is no allegation that the plaintiffs have suffered less of \$1100.00 or any sum; but only the statement of a conclusion of law that plaintiffs have so suffered.

8. Counsel say there was no report in the abstract of title furnished by respondents that the land in question

was free from all incumbrances; but only that it was free from some incumbrances. Their contention is expressed as follows: "The Attorneys for the plaintiff in their said brief on the demurrer, compare the Morange vs mix. In case 44 N. Y. 315, with this case, and claim that this case is much stronger than the N. Y. case, and we call the courts attention to line 4 on page 2 of their brief where this language is found. 'While in our case the complaint alleges that it was to be free from any incumbrance. Webster defines the word 'any' as one out of many, indefinite. 'Nor knoweth any' man the Father, save the son, Matt. XI. 27.'"

It is also defined as 'some', as in definite number or quantity, as are there any witnesses present. Now the word any incumbrance does not mean all incumbrances, as the word 'any' in its largest meaning simply means some, and does not mean from all incumbrances."

The language in the allegation (allegation IV) is

"That defendants in the purchase of the land on or about the 25 day of June, 1902, furnish to plaintiffs a pretended abstract of title to the said land and did report and represent to plaintiffs that the same was a full true, accurate and correct abstract of the title to said land; by which pretended abstract of title it appeared and was shown that the said W. H. Hancock was the owner of said land and premises in fee simple without any incumbrances; in reliance on said pretended abstract of title, and depending solely thereon, plaintiffs were induced to and did, on or about the 28th day of June 1902, purchase said land and premises from said Hancock and did pay him therefore the sum of \$1100, in lawful money of the United States."

The allegation is that "Hancock was the owner of said land and premises in fee simple without any incumbrances."

The phrase "without any incumbrances," means just what it says. It means that there were no incumbrances. Indeed, it means there was not a single incumbrance. It could not possibly mean there were some incumbrances, or even there was a single incumbrance. So to hold would be a strange perversion of language.

A few other points are made in the brief of respondents; but we think they are not of such moment as to require mention here, except the following:

9. Ninth point, if we correctly apprehend it is this:

That in case of negligence in the abstracters work and consequent loss therefrom the damaged employer cannot sue the negligent abstractor un-

til he has exhausted all remedy against the grantor of the title involved or shown that such grantor is insolvent. And further that this showing of exhaustion of remedy against grantor or his insolvency is an affirmative showing on the part of the plaintiff and that without such showing his complaint would be bad on general demurrer. Is this the law? We think it is not necessary that such affirmative showing be made in the complaint and it is unnecessary now to determine whether the same would constitute a defense if pleaded by answer. It is urged in the brief that Hancock may have paid the damages of \$1100.00 to plaintiff. It is alleged in the complaint, however, that Hancock has not so paid. It is also urged that Hancock may be able to pay it on being sued. Defendants obligation was a direct contract to furnish plaintiff a full, complete and correct abstract of title to the land in question, such as would protect the plaintiffs from incurring the loss that they have alleged. If plaintiffs had it in their power to protect themselves from such loss by any course of action that they could be reasonably and legally required to take, that is an affirmative defense that respondents should set up and plead to defeat plaintiffs' action.

The case of Morange v. Mix, 43 N. Y. 315, throws considerable light on this question. We think the judgment appealed from in this case is erroneous. Said judgment is reversed and the case remanded to the trial court for further proceedings in accordance with this opinion.

BETZGERAULT C. J.  
 We concur:  
 TALBOT J.  
 NORCROSS J.

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