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BILL OF COMPLAINT

IN CHANCERY OF NEW JERSEY

To His Honor, Edwin Robert Walker, Chancellor of the State of New Jersey:

The complainants, NATHAN JOSEPH and HARRY KOTOK, of Vineland, in the County of Cumberland and State of New Jersey, respectfully show unto your Honor, that:

1. On and prior to the 28th day of August, 1925, JAY S. SKEHAN and BEATRICE L. SKEHAN, his wife, Defendants herein, were the holders of a contract to purchase lands and premises situate in the City of Wildwood, County of Cape May and State of New Jersey, which lands they were purchasing from Dare Bros. Inc., a corporation of the State of New Jersey; said lands are bounded and described as follows:

ALL THAT CERTAIN piece or parcel of land and premises situate, lying and being in the City of Wildwood, County of Cape May and State of New Jersey, known and designated as Lot One (1) Block Forty (40) on the recorded plot of Holly Beach City, filed, and more particularly described as follows:

BEGINNING at the intersection of the southeasterly side of Pacific Avenue and the northeasterly side of Hand Avenue; containing in front or breadth in and along said side of Hand Avenue, southeastwardly, Fifty (50) feet; and of that width extending in length or depth between parallel lines at right angles to said Hand Avenue northeastwardly, one hundred (100) feet.

2. On the 28th day of August, 1925, the defendants herein, Jay S. Skehan and Beatrice L. Skehan, by their duly authorized agents, John A. Ackley & Son, entered into a written contract wherein they sold said premises to one, Harold Finestone of the City of Philadelphia, a copy of which contract is hereto annexed and made a part hereof.

3. In accordance with the terms of the contract entered into as aforesaid, the defendants agreed to convey said premises to the purchasers or their assigns, for the sum of ten thousand dollars ($10,000), subject to a purchase money mortgage of thirty-seven hundred and fifty dollars ($3750), and a deposit was made on account of said purchase price in the sum of one thousand dollars ($1000), on the 28th day of August, 1925.

4. Among other clauses, said contract set forth that "the title to the premises shall be free and clear of all encumbrances including municipal liens and assessments, except municipal improvements in the course of construction and not assessed, obvious easements, usual restrictions running with the land, subject nevertheless to the mortgage above mentioned, and shall be a marketable title and the "SELLER" shall tender a general warranty deed conveying such title at the time of the final settlement, or in the event that such title cannot be as above, then this deposit shall be returned to the "BUYER."

5. On the second day of September, 1925, in consideration of the sum of one thousand dollars and other consideration, all the right, title and interest in the contract aforesaid was assigned unto Nathan Joseph, one of the complainants herein, by the said Harold Finestone.

6. On the second day of September, 1925, the said Nathan Joseph, for and in consideration of the sum of one dollar and other good and valuable consideration, assigned

a one half undivided interest in said contract to purchase said premises unto Harry Kotok, one of the complainants herein.

7. On the 21st day of September, 1925, the said Nathan Joseph, one of the complainants herein, paid unto the said Jay S. Skehan and Beatrice L. Skehan, his wife, the sum of fifteen hundred dollars ($1500) being a second payment due on said contract, and at that time the complainant, Nathan Joseph, informed the said defendant Jay S. Skehan that He and Harry Kotok were the owners of the contract to purchase said premises and that they would receive a deed in accordance with the terms of said contract at the time of said settlement.

8. On the 11th day of March, 1926 the defendants, Jay S. Skehan and Beatrice L. Skehan, received a deed for said premises from Dare Bros. Inc., a corporation of New Jersey, which deed was dated March 11, 1926, and recorded on April 5, 1926, in the Clerk's Office of Cape May County, subject to a purchase money mortgage of thirty-seven hundred and fifty dollars ($3750).

9. Prior to the 20th day of April, 1926, the time set for settlement, the complainants herein, through their attorneys, Kotok & Bardfeld, made a search of the records in the County Clerk's Office of Cape May County for the purpose of examining the title to said premises and discovered filed on record against said premises, a Lis Pendens between Joseph Rabinowitz, complainant, and Robert M. Dare defendant, on a Bill for Specific Performance, filed in Chancery of New Jersey, by Charles A. Bonnell, solicitor for complainant, which Lis Pendens was dated October 4, 1923, and filed in Book 3 of Chancery Notices, page 76, and which Lis Pendens placed a cloud on the title of the premises which the defendants herein agreed to convey to the complainants free and clear of all encumbrances.

10. On April 15, 1926, Kotok & Bardfeld, attorneys for the complainants herein, wrote to the said Charles A. Bonnell Esq., solicitor for the complainant, Joseph Rabinowitz, inquiring about the Lis Pendens on record against the said premises and received a reply from the said Bonnell on April 16, 1926, wherein they were informed that suit for specific performance was pending in the Court of Chancery.

11. On the 17th day of April, 1926, by mutual agreement, the complainants, together with the defendants, herein, met at the law offices of Charles K. Landis, Jr., in the Borough of Vineland, Cumberland County, New Jersey, and there informed the defendants that the records disclosed a title to said premises which were not free and clear of all encumbrances by reason of the Lis Pendens set forth in paragraph nine: it was thereupon mutually agreed that the complainants make an additional payment of eighteen hundred and seventy-five dollars ($1875) on account of said contract price, which additional payment of eighteen hundred and seventy-five dollars complainants herein made on April 17th, 1926, making a total of forty three hundred seventy-five dollars paid by the complainants herein on said contract price, and leaving a balance of eighteen hundred and seventy-five dollars; it was also agreed that the time of settlement be postponed until May 8, 1926, at which time the complainants herein were to pay the balance of eighteen hundred and seventy-five dollars on said contract price and receive a deed for said premises free and clear of all encumbrances.

12. On May 3, 1926, Charles K. Landis, Jr., attorney for the defendants Jay S. Skehan and Beatrice L. Skehan, wrote a letter to Kotok & Bardfeld, attorneys for the complainants, Nathan Joseph and Harry Kotok, a copy of which letter is set forth as follows:—"Kotok & Bardfeld, Counsellors At Law, Vineland, N. J. Gentlemen: This is to confirm phone conversation with Mr. Kotok that settlement for

Lot at Hand and Pacific Avenues, Wildwood, N. J. (Lot One, (1), Block Forty (40) is extended from May 8th to May 15, 1926; in the meantime I expect to make a motion at Trenton to dismiss the bill of complaint which will result in the discharge of the Lis Pendens filed, Yours truly, Charles K. Landis, Jr."

13. On May 15, 1926, Charles K. Landis, Jr., attorney for the defendants herein, visited the law offices of Kotok & Bardfeld, attorneys for the complainants, herein, in Vineland, and informed them that a motion was made by him on behalf of the defendants herein to dismiss the Lis Pendens which motion was set aside and the Chancellor ordered immediate procedure of the chancery suit instituted by Joseph Rabinowitz, complainant, vs. Robert M. Dare, Defendant. The complainants herein through their attorneys, Kotok & Bardfeld, informed the defendants herein through their attorney, Charles K. Landis, Jr., that they would not accept title to said premises while the Lis Pendens was on record and that the complainants herein desired a return of the deposit money or a Warranty Deed free and clear of all encumbrances.

14. On May 20, 1926, Kotok & Bardfeld, attorneys for the complainants herein, wrote the following letter to Charles K. Landis, Jr., attorney for the defendants J. S. Skehan and Beatrice L. Skehan, :— "Charles K. Landis, Jr., Sea Isle City, N. J., Dear Sir: After our conversation the other day, I went over the matter with Mr. N. Joseph and as a result we have decided that in view of the fact that your clients cannot deliver a clear title, that we must request a return of the money paid by our clients together with the expense that he has been put to and interest on the money. Will you kindly therefore get in touch with Mr. and Mrs. Skehan and advise them that we would like to have this matter closed at once? I trust we will hear

from you within the next few days. Very truly yours, Kotok & Bardfeld, By Frank Kotok."

15. In reply to said letter the said Charles K. Landis, Jr., telephoned to the said Kotok & Bardfeld, attorneys for the complainants herein and informed them that he would make an effort to have the defendants herein satisfy the Lis Pendens of record in consideration of a cash settlement with Charles A. Bonnell, solicitor for the complainant Joseph Rabinowitz, who filed the suit for specific performance set forth in paragraph ten.

16. Subsequent thereto, complainants made several requests for the return of the deposit money and expense together with interest, in view of the fact that the Lis Pendens was not removed from record and was informed by the defendants herein through their attorney that they had satisfied said Lis Pendens of record and that it was being removed forthwith.

17. It was thereupon agreed that settlement for said premises should take place on July 3, 1926 at which time the Lis Pendens would be removed of record and the defendants herein would give unto the complainants a good and marketable title in accordance with the terms set forth in the contract.

18. Complainants show that on July 3, 1926, they appeared at the law offices of Charles K. Landis, Jr., together with their attorneys, for the purpose of making settlement and they were ready to deliver the entire balance of the money upon the delivery to them of a deed in accordance with their agreement, free and clear of all encumbrances: complainants herein also produced a Certificate of Search made by Millard F. Campbell, collector of taxes of the City of Wildwood, wherein among other things was set forth a tax assessment as follows:— "Sewers Ordinance No. 169,

twenty dollars ($20), interest to date two dollars and ten cents ($2.10)," such sewers assessment was made on October 10, 1924, and was never paid by the defendants; said certificate of search also revealed that the taxes for 1926 amounting to two hundred and sixteen dollars and forty-five cents ($216.45) and interest of sixty-two cents ($.62) were not paid by the defendants herein.

19. Complainants show further that at the time of settlement on the third day of July 1926, they requested that the defendants herein pay the sum of twenty dollars for the sewers assessment disclosed in the tax search together with two dollars and ten cents interest or that the complainants be allowed that amount in their settlement. This the defendants herein refused to do. The complainants herein also requested that the sum of one hundred and ten dollars and sixty-five cents ($110.65) for taxes against said premises from the first day of January 1926, to the third day of July 1926, be paid to the complainants by the defendants, or that this amount be allowed the complainants in the settlement herein, but the defendants herein refused to pay for said taxes or make said allowance to the complainants. The complainants also requested that the defendants pay sixty-five dollars and sixty-two cents, being interest at the rate of six percent per annum due on the first mortgage of thirty-seven hundred and fifty dollars against said premises held by Dare Bros. Inc., a corporation of New Jersey, from March 19, 1926, to July 3, 1926; the defendants also refused to make this payment or make such an allowance to the complainants herein and would not convey the lands free and clear of all encumbrances as they were bound to do.

20. Complainants show that at all times since the 20th day of April, 1926, the time set for settlement in said agreement they were ready, willing, and able to perform all the conditions on their part for the purchase of said

land from the defendants herein and that settlement was postponed from the 20th day of April, 1926, to the 3rd day of July, 1926, at the request of the defendants herein for the purpose of permitting them to remove of record the Lis Pendens set forth in paragraph nine.

2. Complainants are now ready, willing and able to perform their part of the contract for the purchase of said lands and to accept a deed for the aforesaid premises free and clear of all encumbrances.

Complainants are without adequate remedy in the Courts of Law and therefore pray:

That the said Jay S. Skehan and Beatrice L. Skehan who are the defendants in this suit, may answer this bill of Complaint without oath and each statement therein made.

That the defendants Jay S. Skehan and Beatrice L. Skehan, his wife, may be specifically decreed to perform the said contract for the sale of the said land and to convey the same to these complainants free and clear of all encumbrances and that the sewers assessment and interest due thereon, together with taxes from July 1st, 1926, and interest on the mortgage of thirty-seven hundred and fifty dollars ($3750) held by Dare Bros., Inc., a Corporation of New Jersey, be paid by the defendants to the day that title shall be given for said premises to the complainants herein.

That the defendants also pay unto the complainants herein, interest on the sum of fifty-three hundred seventy-five dollars ($5375) which was the amount the complainants have paid to the defendants on said contract price and to Harold Finestone as set forth in paragraph five, from the 20th day of April, 1926, the day set for settlement in the contract to the day that the complainants shall receive title to said premises.

The complainants hereby offer to specifically perform the said agreement on their part.

Or that the defendants may be decreed to pay unto complainants the sum of fifty-three hundred seventy-five dollars ($5375) being the amount the complainants have expended on said contract price.

That the complainants may have such further or other relief as the nature of the case may require.

That a Writ of Subpoena may issue commanding said defendants to answer this Bill of Complaint and abide by such decree as this Court may make in the premises.

KOTOK & BARDFELD
Sol'rs for and of Counsel with Compl'ts.

THIS AGREEMENT, made the twenty-eighth day of August, A. D., 1925, between John A. Ackley & Son, Agent for Skehan, of Vineland, N. J., hereinafter called the SELLER, and Harold Finestone of Philadelphia, County of Philadelphia, State of Pennsylvania, of the Second part hereinafter called the BUYER.

WITNESSETH, that the SELLER agrees to sell and convey and the BUYER Agrees to buy all that certain lot One, Block Forty, or parcel of land and premises situate in the 3rd Ward, City of Wildwood, County of Cape May and State of New Jersey; more particularly described as follows:—Lot No. One (1), Block Forty, (40), third ward, City of Wildwood, one hundred feet on the easterly side of Pacific Avenue, and fifty feet on the north side of Hand Avenue, for the price or sum of Ten thousand dollars ($10,000) under and subject to the following terms and conditions:

1. A first payment of one thousand dollars ($1,000) receipt of which is hereby acknowledged by the SELLER.
2. The balance of the purchase price shall be paid in the following manner: Fifteen per cent of purchase price on September 20, 1925; Thirty seven hundred and fifty dollars on April 20, 1926; Balance of thirty seven hundred and fifty dollars to remain on mortgage, said mortgage to be payable within three years from its date together with interest at the rate of six percent per annum, interest paid semi-annually, at the time of final settlement, which shall be made at the office of the one mentioned in the original contract of purchase, held by SELLER, on or before April 20, 1925, or the deposit ..... made herewith, at the option of the SELLER, may be applied on account of

the purchase price or be forfeited as liquidated damages to the SELLER, and not as a penalty, provided that the necessary title searches can be obtained from any first-class New Jersey title company by that date. Should there be any delay, not the fault of the BUYER in the procuring of such searches, the time for the final settlement shall extend until such searches can be obtained.

3. The title to the premises shall be free and clear of all encumbrances, including municipal liens, and assessments, except municipal improvements in the course of construction and not assessed, obvious easements, usual restrictions running with the land subject nevertheless to the mortgage above mentioned, and shall be a marketable title, and the SELLER shall tender a general warranty deed conveying such title at the time of the final settlement, or in the event that such title cannot be as above, then this deposit shall be returned to the BUYER.

4. All adjustments shall be made as of April 20, 1926, and possession shall be given the BUYER.

5. The BUYER shall pay for searches and all other expenses, excepting the preparation of the deed and the necessary revenue stamps attached thereto, which shall be paid for by the SELLER.

6. This agreement shall extend to and be binding upon the heirs, executors, administrators, successors and assigns of the parties hereto.

7. Time is the essence of this agreement.

8. This contract includes all fixtures and appurtenances permanently attached to the building or buildings on the land herein described and also specifically the following items:

IN WITNESS WHEREOF, the parties hereto have set their hands and seals the day and year first above written.

Signed, sealed and delivered in the presence of

John A. Ackley & Son (L.S.)
By S. L. Beilin, Agent (L. S.)

Harold Finestone, (L.S.)

Wildwood, N. J.
Sept. 2, 1925.

In consideration of one dollar and other value of consideration, I hereby transfer to Nathan Joseph, all my right, title and interest in the within contract.

Myer Kotok (signed) (signed) Harold Finestone
Vineland, N. J. Sept. 2, 1925.

In consideration of one dollar and other good consideration I hereby transfer to Harry Kotok, a one-half undivided interest in and to the within contract.

(signed) Nathan Joseph

ANSWER

IN CHANCERY OF NEW JERSEY

NATHAN JOSEPH and HARRY KOTOK, *Complainants* vs. JAY S. SKEHAN and BEATRICE L. SKEHAN, his wife, *Defendants.*	ON BILL FOR SPECIFIC PERFORMANCE. ANSWER.

The Answer of the Defendants, Jay S. Skehan and Beatrice L. Skehan, his wife.

These Defendants, Jay S. Skehan and Beatrice L. Skehan, his wife, answering the Bill of Complaint, say that:

1. Paragraph 1 to 7 and 9 to 17 Inclusive, are admitted except these Defendants say that time of settlement was extended on condition that all adjustments should be made as of April 20, 1926 as stated in the Contract annexed as part of said Bill of Complaint; that on April 17, 1926 at the time mentioned in Paragraph 11 of said Bill of Complaint, there was a memorandum in writing endorsed upon said Contract and signed by these Defendants at the request of Complainants extending the time of settlement provided Complainants pay interest on the balance of purchase monies from April 20, 1926. These Defendants deny that the copy of said Contract as annexed to said Bill of Complaint

is complete in that said copy does not contain a copy of said written memorandum endorsed thereon, and therefore ask that Complainants produce and prove said Contract. These Defendants say that said Lis Pendens was satisfied and discharged of record June 21, 1926 and that said lands were thereby discharged from said claim or any lien thereby.

2. Paragraph 8 is admitted except these Defendants say that the Deed therein mentioned was dated March 19, 1926, not March 11, 1926 as stated in said Paragraph.

3. Paragraph 18 is admitted except these Defendants deny that Complainants appeared for the purpose of making settlement and were ready to deliver the entire balance of the money upon the delivery to them of a Deed in accordance with their Agreement.

4. Paragraph 19 is admitted except these Defendants deny that they refused to settle or would not convey the lands according to the contract to which said Bill of Complaint refers. These Defendants say that the item of $20.00 for sewer assessment therein mentioned was payable by Dare Bros. Inc. by the Covenants of their Deed to these Defendants mentioned in Paragraph 8 and deductable from the purchase money mortgage also mentioned in Paragraph 8, which mortgage Complainants had assumed and agreed to pay. These Defendants further say that said item of $20.00 with interest has since been fully paid and satisfied by said Dare Bros. Inc.

5. Paragraphs 20 and 21 are denied, Paragraph 21 being the Last Paragraph erroneously numbered 2.

CHARLES K. LANDIS, JR.
Solictor for and of Counsel with Defendants.

REPLICATION

IN CHANCERY OF NEW JERSEY

NATHAN JOSEPH and HARRY KOTOK,
Complainants,
vs.
JAY S. SKEHAN and BEATRICE L. SKEHAN, his wife,
Defendants

ON BILL FOR SPECIFIC PERFORMANCE, ETC.,

Replication to Answer.

The plaintiffs, Nathan Joseph and Harry Kotok, join issue on the Answer of Jay S. Skehan and Beatrice L. Skehan his wife, defendants in this cause of action.

KOTOK & BARDFELD
Solicitors and of Counsel with Compl'ts.

TESTIMONY

IN CHANCERY OF NEW JERSEY

BETWEEN
Nathan Joseph and
Harry Kotok,
Complainants,
and
Jay S. Skehan and
Beatrice Skehan,
Defendants.

On Bill, &c.

Final Hearing.

Atlantic City, N. J., February 23, 1927

TESTIMONY

Before HON. R. H. INGERSOLL, Vice-Chancellor

APPEARANCES:

For Complainants, Kotok & Bardfeld.

For Defendants, Charles K. Landis, Esq.

(Mr. Kotok opened for the complainants.

Mr. Landis opened for the defendants.)

MR. KOTOK: I desire to offer in evidence an agreement dated August 28, 1925 entered into by John A. Ackley and Sons, Agents for Skehan with Harold Finestein, assigned by Harold Finestein on September 2, 1925, with certain additional memorandums subsequently entered into. I understand Mr. Landis agrees to this offer.

MR. LANDIS: Yes.

(Contract admitted and marked Exhibit C 1.)

LEON M. BARDFELD, Sworn.

Direct Examination

BY MR. KOTOK:

Q. Mr. Bardfeld, you are a practicing attorney in Vineland?
A. I am.
Q. And formerly were associated with me?
A. Yes.
Q. Did you represent Harry Kotok and Nathan Joseph with reference to a settlement that was attempted to be made with J. S. Skehan and Beatrice L. Skehan for lot one, block 40, in Wildwood, formerly Holly Beach City?
A. I did.
Q. What did you do with reference to that settlement?

MR. LANDIS: I object, your Honor, to any proof being made of anything whatever out of the statement already made in the bill of complaint, which is admitted as to what they offered to do at the time of settlement.

MR. KOTOK: I am refering now to the original conversations that he had with Mr. and Mrs. Skehan.

THE COURT: I will permit it.

A. I appeared at the office of Mr. Landis in Vineland.

Q. When was this?

A. Several days before the date set in the agreement for settlement, I suppose three days or so..

Q. The date set in the agreement is April twentieth, 1926.

A. This was the Saturday before that day.

Q. What occurred at that time?

A. At that time I called to the attention of Mr. Landis—

Q. Just a moment; who was there besides you and Mr. Landis?

A. Mr. Landis, Mr. and Mrs. Skehan, and I suppose, Mr. Landis' sister, Miss Landis, was there too, but she had nothing to do with the transaction.

Q. Anybody else, your client?

A. My client was present, with me, Mr. Joseph.

Q. Who was present?

A. Mr. Joseph.

Q. What occurred?

A. I first called the attention of Mr. Landis to the fact that the search which I had prepared disclosed a lis pendens on record against this property. In my opinion that was the first notice that Mr. Landis had of this lis pendens and he told me that it was a matter of seeing the attorney who had placed this lis pendens on record to have it removed; it was merely a formality. With that understanding I told Mr. Landis that it would be advisable to adjourn the settlement and offered to pay part. Now at the time I instructed my client to pay, I think, something like $1875. which was part.

Q. What part, do you recall?

A. About one half of the amount. The actual fact is that the reason for that was that I wanted to make sure about this lis pendens being removed from record. Mr. Landis and I went over the situation pretty well and there

wasn't very much objection to this continuance and I had agreed — —

MR. KOTOK: Just may I interrupt then to ask whether it is admitted that the lis pendens was by Joseph Rabinowitz against R. M. Dare for the specific performance of a contract relating to this same property?

MR. LANDIS: To save time, I have a certified copy of it and you might admit that. Here is a certified copy of it, the description that it has been submitted of record.

MR. KOTOK: I will offer it at this time.

(Certified copy of lis pendens admitted and marked Exhibit C 2.)

Q. Then what other discussion occurred? What else was said?

A. Mrs. Skehan particularly was very much worked up about this lis pendens; she didn't understand it and couldn't see why Mr. Joseph couldn't go through with settlement on that day, when she was compelled to go through with settlement at the time that she had made settlement through Mr. Landis. Mr. Landis and I endeavored to explain to her that this lis pendens was something that could be removed with a little formality and Mr. Landis agreed that he would get in touch with Mr. Bonnell, the attorney who placed it on record, and have it removed. It was my understanding at the time that it was merely a matter of Mr. Landis seeing Mr. Bonnell and having it removed in a proper manner and with that understanding we agreed to have the settlement adjourned for approximately three weeks. Because of this mutual agreement, that is the removal of the lis pendens, which we were not at fault, and because of the fact that we had agreed to continue the settlement for three weeks, we agreed with

Mr. Landis that we would pay interest for the balance of the $1875. at the time of settlement in three weeks.

MR. LANDIS: I object to that because written contract is in evidence and offering parole evidence against it.

Q. As a result of that was this memorandum that appears on the back dated April 17, 1926 agreed upon?

A. It was. It was written by Mr. Landis himself.

Q. And signed by Mr. Joseph and Mr. and Mrs. Skehan?

A. That is right.

Q. What happened after that?

A. After that Mr. Landis communicated with me and informed me that he appeared in Trenton on a motion to have this lis pendens removed from record.

Q. Did that happen prior to the first adjourned day?

A. That happened prior to the first adjourned day.

Q. Was he prepared then to make settlement?

A. From that time on we never met until the actual date on July third because Mr. Landis kept continually either phoning me or writing to me telling me that he was not yet ready, the lis pendens was not yet removed, but that it was being removed eventually.

MR. KOTOK: May I call, Mr. Landis, upon you for the production of a letter — —

MR. LANDIS: That is the letter set forth in the bill of complaint, already admitted.

MR. KOTOK: These things are admitted. I frankly confess to the court I am somewhat at a loss just what we are to prove.

Q. Then did you appear at Mr. Landis office for the purpose of making settlement after the first adjourned day?

A. We had adjourned it on two or three occasions.

Q. Why was it adjourned during these several occasions?

A. Because Mr. Landis had not yet had the lis pendens removed from record.

Q. As a matter of fact when was the lis pendens removed from record, that you know of?

A. Some time in June, I suppose because we actually met on July third, on a Saturday.

THE COURT: As a matter of fact it was June twenty first, 1926, according to the certified copy.

Q. Now after that settlement was set for July third, 1926?

A. That is right.

Q. Had you received a certificate of search from the office of the collector of taxes of Wildwood?

A. I had.

Q. I show you what purports to be the certificate of search referred to and ask whether that is the certificate of search?

A. That it correct.

(Paper offered, received in evidence and marked Exhibit C 3.)

Q. What occurred in Mr. Landis office on July third—who was there?

A. Mrs. Skehan was there and Mr. Skehan, Mr. Landis, Mr. Joseph and myself. Mrs. Skehan was very much wrought up and she said that she was compelled to pay three hundred dollars to Mr. Bonnell to have this lis pendens removed from record and that she wasn't going to make any further allowances.

Q. What was said about this sewer rent?

A. I requested that Mr. Landis make us an allowance for this sewer rent in our settlement. Mr. Landis stated

that in view of the fact that Dare Brother, with whom they had made settlement, was holding a purchase money mortgage, that we could deduct that amount at the time we are paying interest; I told him that we objected to that because we would be taking a chance of having foreclosure proceedings brought against us for not paying the proper amount of interest; the fact that this sewer tax was not paid by them was not our fault and that they personally should take that matter up with Dare Brothers. Mr. Landis and the Skehans refused to allow us that amount.

Q. What was said with reference to interest from May the—either from the twentieth or the first adjourned day to July third, 1926?

A. I had agreed on July third that we would stick by our agreement and pay the interest on $1875. to the first adjourned date but that from that time on — —

MR. LANDIS: I object to anything contrary to the bill, contradicting the bill of complaint. The bill of complaint says with your offer we refused to pay interest for the entire period of time to July third and, if it was your demand that we pay the interest on the sum, pay the interest on the balance of purchase money.

THE COURT: I will permit the examination.

Q. — — but I insisted that we should be allowed interest on the amount of money that we have placed with the Skehans from the time of the first adjourned day until the time that the Skehans could remove this lis pendens of record that it wasn't our fault that the lis pendens was not removed.

Q. Was there very much discussion there?

A. There was considerable discussion, another objection raised which made the matter quite complicated and which shows that we were not quibbling over the twenty dollar sewer assessment, was the allowance for interest due

on the purchase money mortgage. Mr. Landis on behalf of the Skehans refused to allow us interest from the time that settlement was actually to take place until the time of July third and that was an item of over two hundred dollars, and I insisted we should be allowed that because we could not use the property or sell it; we didn't get title to it.

Q. Was there any offer of a deed made at the time?

A. I don't recall seeing a deed prepared.

Q. Was Mr. Joseph, to your knowledge was he ready to make settlement at the time?

A. We came there with the intention of making settlement, Mr. Joseph was ready to make settlement. I had already prepared a settlement sheet and we were right there to close the matter up.

Q. Now I show you a settlement sheet prepared by you and ask whether that is the settlement sheet that you had prepared from your side?

A. Yes, that is in my handwriting.

(Paper offered, received in evidence and marked Exhibit C 4.)

Q. Was there at the time ——

MR. LANDIS: Objected to on the same ground as before.

THE COURT: Permitted.

Q. Was there, at the time, any statement made by you or Mr. Joseph in your presence that he would go out and get the money and did you then leave and not return?

A. There was none.

Q. Why was settlement not made at the time?

A. Because Mr. Landis refused to make us the allowance for the sewer assessment and interest on the purchase

money mortgage and the adjustments shown in the settlement sheet I had prepared.

Q. How about the taxes?

A. The question of taxes was also taken up and Mr. Landis refused to make allowance for the further extension. We insisted that we were entitled to that.

Q. Now, Mr. Bardfeld, just what did Mr. Landis or Mr. and Mrs. Skehan agree to allow at the time of settlement?

A. Mr. Landis agreed to allow interest and all adjustments up to the time settlement was stated in the original contract, April twentieth.

Q. How about the adjustment for the payment of this sewer, was that to be allowed?

A. Mr. Landis refused to allow that.

Q. What happened then?

A. We had quite a discussion and Mrs. Skehan was rather excited and I told Mr. Landis that was our position and Mrs. Skehan said "well, if you are not going through with it, you lose all your money," and I stated to Mr. Landis "it seems as if we can't do anything and we may get into litigation" and we left and that was the end of it.

CROSS EXAMINATION

BY MR. LANDIS:

Q. Did you tender any money, Mr. Bardfeld?

A. We were prepared to tender money but no deed was given us and we had never agreed upon a specific amount to tender; we were prepared at the time to tender money.

MR. LANDIS: May I ask, Mr. Kotok, if you deny that you had possession of the deed at the time. It would be an unsigned deed and if you had it?

MR. KOTOK: I recall now, Mr. Landis calls to my attention, that at one time he gave me an unsigned deed. That is not, of course, the question in litigation at all.

THE COURT: Unsigned?

MR. KOTOK: It was unsigned when given to me.

MR. LANDIS: Wasn't it understood we would sign it when we got the money?

MR. KOTOK. Yes, the sole question, if the Court please, is that they could not agree on the amount of money.

Q. Did you have the money with you?

A. Mr. Joseph was prepared to give a check and, if you refused a check, we could have produced the cash there. In view of the fact that you had accepted checks from us previously we were prepared to give a check at the time, but, of course, the check wasn't made out because we did not arrive at a specific figure, but we were prepared to give the check that afternoon.

Q. Did you have money in bank?

A. We certainly did.

Q. What time in the afternoon was it you came in?

A. This was after banking hours but we were prepared to go out and get the cash, to cash this check if we had to.

Q. Didn't Mrs. Skehan ask you to show the money and you said you would be back in an hour with it?

A. There was a question raised of money at the time but I instructed my client that we were not prepared to make a tender because you people were not prepared to convey title in accordance with the agreement. We hadn't yet gotten to the point of actually making the tender.

Q. Is that the reason you didn't come back when we waited for you?

A. That is absolutely wrong, Mr. Landis. I don't like to differ with you. We met once on July third in your office; we couldn't agree and that was the end of the whole matter.

Q. Who had possession of this property all the time?

A. The Skehans.

Q. Whose sign was it that advertised the property for sale?

A. I know nothing of that, Mr. Landis; I didn't see the property.

Q. Didn't you see the sign on it?

A. I was representing Mr. Joseph as attorney.

Q. And you weren't down about Wildwood where this property is?

A. No; I visited Wildwood twice during the entire summer.

NATHAN JOSEPH, Sworn.

DIRECT EXAMINATION

BY MR. KOTOK:

Q. What is your business?

A. Druggist.

Q. You are one of the complainants in this cause?

A. Yes,sir.

Q. On April seventeenth, 1926, you appeared at the office of Mr. Landis with Mr. Bardfeld?

A. Yes, sir.

Q. What was your purpose in appearing there?

A. To make settlement on the lot in Wildwood.

Q. That was on April seventeenth, 1926?

A. Yes.

Q. Did you pay them any money at that time?

A. Yes, sir.

Q. How much?

A. $1875.

Q. Which made a total of how much that you had paid on account of these lots?

A. Something like $5350. I think.

Q. How much money—figure it up—had you paid on account of the purchase price of these lots, total amount?

A. We paid Two thousand dollars on the original agreement and then we paid $1500 to Mr. Skehan, that is $3500, and we paid $1875.

Q. Making $5375?

A. Making $5375.

Q. But that thousand dollars, of course, we can state was a profit Mr. Finestein made?

A. That is right.

Q. Why wasn't settlement made on April seventeenth, 1926?

A. Mr. Bardfeld received a notice that there was a lis pendens against the property.

Q. Did you also desire an extension or agree to an extension?

A. Yes.

Q. In fact you were just as well satisfied to make settlement three weeks later?

A. Yes.

Q. That is correct, isn't it?

A. Yes.

Q. So that it was mutually agreed that the settlement be made three weeks later, that is correct?

A. Yes.

Q. I suppose that you don't know anything more about it until July third or had you been to Mr. Landis' office before that time?

A. I think we were up there once in that time.

Q. You were with Mr. Bardfeld?

A. I am not so sure.

Q. Once in that time?

A. I think so.

Q. Do you recall if you were there later—refresh your memory—why wasn't settlement made at that time?

A. On account of the lis pendens not being removed yet.

Q. Were you, during all this time from May tenth, or whatever date it was that the settlement was adjourned to, to July third, were you at all times ready to make settlement?

A. Yes, sir.

Q. This was a vacant lot?

A. Yes, sir.

Q. Something has been said about possession of the lot. Were you able to sell it during this time or do anything with it?

A. We had a number of, rather the Wildwood Realty Company had a number of inquiries on this lot but they informed the clients that they couldn't do anything with it on account of it being in litigation.

Q. On July third, when you appeared at the office of Mr. Landis, what was your purpose in appearing there at that time?

A. To make settlement.

Q. Were you prepared to make settlement?

A. Yes, sir.

Q. Why wasn't settlement made?

A. We couldn't come to any agreement on the adjustments of taxes, interest and sewer assessment.

Q. What was said about this sewer assessment?

A. Mrs. Skehan said that they had to pay three hundred dollars and why should they pay any more?

Q. What was this three hundred dollars paid for?

A. To take off the lis pendens.

Q. Was anything further said as to how that sewer assessment could be removed?

A. Why Mr. Landis suggested that being that Dare Brothers, the assessment really belonged to Dare Brothers, and we were to pay interest to them, just take the twenty

dollars or twenty two dollars, whatever it might have been, out of the interest and pay them the difference.

Q. Was there any settlement sheet prepared by Mr. Landis that you know of?

A. I didn't see any.

Q. You are ready to go through with the settlement at any time?

A. Yes, sir.

CROSS EXAMINATION

BY MR. LANDIS:

Q. Mr. Joseph, were you in the real estate business at all?

A. Sir?

Q. I say were you in the real estate business at this time at all?

A. At the time of the transaction?

Q. During the contract?

A. Yes, sir.

Q. Were you trying to sell this lot?

A. I didn't personally but the office had a number of inquiries about the lot but they informed—

Q. What office, Mr. Joseph?

A. The Wildwood Realty Company.

Q. Were they acting as your agents?

A. I happen to be in the firm.

Q. You are one of the firm?

A. I was.

Q. Was your sign on the lot for sale?

A. Yes, sir.

Q. How long was it on the lot, when you got the assignment of your contract, about that time?

A. I don't recall when it was put on.

Q. Was it on there during this time you were making these settlements?

A. It was put on before settlements should have been made.

Q. How long did it continue to be there, ever since?

A. I think so.

Q. Did you have any opportunity to sell the lot?

A. Yes, sir.

Q. Why didn't you sell it?

A. Sir?

Q. Why didn't you sell it?

A. We couldn't sell it, being in litigation.

Q. When was this opportunity before this July third?

A. We had a number of inquiries during the latter part of July and August, the month of August, which is the time that real estate business is done in Wildwood.

Q. That is after this July third?

A. Yes, sir.

BY MR. KOTOK:

Q. You state that real estate business is done during July and August; as a matter of fact sales were made in Wildwood and the biggest real estate sale was Decoration Day, wasn't it?

A. That is right.

Q. You able to put this lot in the sale?

A. No, sir.

Q. Did you make an effort to?

A. I wanted to but Mr. Bardfeld informed me not to do anything with it on account of it being in litigation and possibly cause some trouble later.

Q. As a matter of fact that was the best and biggest sale held in Wildwood last summer, wasn't it?

A. Yes, sir.

Complainants rest.

DEFENDANTS' EVIDENCE

MR. LANDIS: Your Hnoor please, I will offer receipt in evidence for sewerage which was paid by Dare Brothers. These Dare Brothers are the holders of this $3750. mortgage subject to which the property is sold. That was afterwards paid by them on August thirteenth. I will offer the receipt in evidence.

(Receipt admitted and marked Exhibit D 1.)

Mr. Landis; That clears the property of the lis pendens and the sewer rent and leaves nothing but the unpaid taxes and the mortgage subject to which it was expressly purchased and which, I understand, would have been taken out at a settlement if they made a proper offer.

BEATRICE SKEHAN, Sworn.

DIRECT EXAMINATION

BY MR. LANDIS:

Q. Mrs. Skehan, you have heard this testimony of Mr. Bardfeld and Mr. Joseph?

A. Yes, sir.

Q. Were you present on July third at the Landis office in Vineland?

A. Yes, sir.

Q. At the time those things occurred?

A. Yes, sir.

Q. Did they tender any money at that time?

A. No, sir.

Q. Will you please state what was said about it?

A. I said to Mr. Joseph, I says "Mr. Joseph, I don't

believe that you have the money to settle today, after keeping us here all this time, have you?" And he said "No, but I can get it," and Mr. Bardfeld came up and I says "Mr. Bardfeld, Mr. Joseph hasn't the money to settle today," and Mr. Bardfeld says "Of course, Joseph, you have the money. You have it right in your pocket. Show it to Mrs. Skehan," and Mr. Joseph says to Mr. Bardfeld, "No, I haven't got the money, but I can get it."

Q. Well, was there anything said about when they would get it?

A. Yes, we waited there at your office, that they would be back in an hour's time, but they never came back.

Q. Did they say so that they would be back in an hour?

A. That they could get the money within an hour. Now, Mr. Landis, I don't recall if they said they would be back in an hour but I know we waited for them to come back.

Q. Did you tell them you were going to wait?

A. Yes, we were going to wait there at your office.

Q. Did you tell them so?

A. I believe we did.

Q. You are not sure about that?

A. No. I am not sure about it.

Q. They didn't come back and they didn't produce any money; is that true?

A. No, sir, and they were to be at your office at two o'clock and they didn't come until three, and we waited at your office until five expecting them back.

CROSS EXAMINATION

BY MR. KOTOK:

Q. Mrs. Skehan, why did you expect them back?

A. Because it was settlement day and they were supposed to settle.

Q. This was on July third?

A. Yes.

Q. Had you told them the exact amount of money that you would take to settle?

A. I did not.

Q. Had Mr. Landis told them the exact amount of money that you would take to settle?

A. I don't know.

Q. Had you agreed to take any amount, any certain amount of money to settle?

A. No, I don't believe we agreed, we couldn't come to agreement.

Q. So that you didn't come to an agreement?

A. No.

Q. Would you have accepted the sum of money that they offered or any sum less than what would have included all the money, even this sewer assessment?

MR. LANDIS: I object to that question. I think it was their duty to tender the money and then it was our privilege, when the money was tendered, either to accept it or not. If the money had been tendered then the question would have followed.

THE COURT: Not if you had, previous to the money being offered, insisted that a certain sum should be presented which was not due.

MR. LANDIS: It isn't proved that we insisted. There was a disagreement.

THE COURT: Preliminary question on that. I will permit the question.

(Question repeated.)

A. Yes, if it was fair, but they wanted everything and nothing on our part at all.

Q. Now, Mrs. Skehan, you say you would have if it was fair; didn't you refuse to permit this sewer assessment to be taken from the amount?

A. Because Mr. Landis had explained that Mr. Dare would pay that from the second mortgage.

Q. Now on the first time that you people assembled together at Mr. Landis' office Mr. Bardfeld stated that there was a lis pendens for specific performance in a suit in the Court of Chancery or words to that effect that had been filed by one Rabinowitz against Dare?

A. Yes.

Q. Did you know of that lis pendens?

A. I didn't know anything about it until Mr. Joseph spoke to me about it.

Q. Mr. Joseph or Mr. Bardfeld?

A. Mr. Joseph.

Q. Was that at the time of settlement?

A. That was before.

Q. How long before?

A. That was a week before or something, and then I said to Mr. Joseph, I says "I think you are very foolish to pay any money down when this is pending on it and we cannot give you a clear title."

Q. This agreement that has been marked C 1, original agreement, was entered into by John A. Ackley and Son and you subsequently ratified it was all right?

A. Yes, it was all right.

Q. In that agreement it was agreed that a mortgage for $3750. should remain for a period of three years from the time of settlement, which was April twentieth, is that correct?

A. I couldn't say because my husband attends to that business.

Q. As a matter of fact the mortgage against the premises was made on March nineteenth, 1926, to Dare Brothers, wasn't it?

A. You will have to ask my husband; I don't attend to this business at all.

MR. KOTOK: That, while it has no bearing, I just want to show we were making no technical objections and they were minor.

Q. Mrs. Skehan, how much money is due to you and your husband in this settlement or was due to you and your husband on July third, 1926?

A. I believe $1875.

Q. Less anything?

A. I don't know, Mr. Kotok.

Q. Did you agree to have anything at all taken off the $1875?

A. I don't know.

Q. This statement that you say you made to Mr. Joseph "I don't believe you have the money anyway," it was when you made that statement that Mr. Joseph said "well, I may not have the cash; I can get the cash if you insist on it within an hour," is that it?

A. I asked him, I says "Mr. Joseph, I don't believe that you have the money to settle today," and he said "No, I haven't, Mrs. Skehan.' '

Q. On July third or on April seventeenth?

A. On the settlement day and Mr. Bardfeld came up and I said "Mr. Bardfeld," I says "Mr. Joseph hasn't the money to settle." Mr. Bardfeld says to Joseph "you have the money. You have it right in your pocket. Show it to Mrs. Skehan," and Mr. Joseph says "No, I haven't but I can get it."

Q. You didn't sign the deed that day?

A. The deed was all ready.

Q. It was all ready to be signed?

A. Yes.

Q. And in fact you were already to make settlement if you could only agree on what was what?

A. Yes, come to agreement, yes, but there was no tender made on the settlement.

Q. On the seventeenth day of April, when you got together in the office of Mr. Landis, when you found out about this lis pendens, what did Mr. Landis say with reference to how easy it would be to remove it? Did he say anything about that?

A. I don't remember that.

Q. Didn't Mr. Landis say "why I will have that removed in a few days?"

A. I don't recall at all.

Q. Didn't Mr. Joseph or Mr. Bardfeld then say "suppose it is adjourned for two weeks" and you volunteered and said "let it be adjourned for three weeks?"

A. Yes, because Mr. Joseph had come to Shiloh with his wife and asked us to give him three or six months longer to pay, that he didn't have the money to pay us, and then we said "no," as we wanted the money ourselves. Then he asked us if we would take a mortgage or something out on it, we said "no." Mr. Joseph was very anxious for time because he didn't have the money to settle.

Q. Well, you don't know whether he had the money or not, he was anxious at the time?

A. He told me he didn't have any money in the bank at the time. He was very pitiful but he isn't today.

Q. Mrs. Skehan, wasn't an offer made to make settlement or were you informed by your counsel of a further offer to make settlement after the third of July on our part?

A. Was that the final settlement?

Q. After the final settlement?

A. No. I don't believe you tried to make any settlement at all.

BY MR. LANDIS:

Q. When did Mr. Joseph come to see you at Shiloh; what do you mean by Shiloh?

A. To Shiloh, New Jersey, where we live.

Q. He came to your home in Shiloh where you live?

A. Yes, sir; our home in Shiloh.

JAY S. SKEHAN, Sworn.

DIRECT EXAMINATION

BY MR. LANDIS:

Q. Mr. Skehan, are you one of the defendants in this suit?

A. Yes.

Q. Have you heard the testimony of the witnesses given here?

A. Have to speak a little louder, Mr. Landis.

Q. Did you hear the testimony of the witnesses given here today?

A. I heard it, yes.

Q. Were you present on July third at the time and place of this attempted settlement mentioned?

A. Yes, sir.

Q. Was any tender made at that time of money?

A. No, sir.

Q. What did take place? Just state in your own words what did take place?

A. Well, of course there was a discussion as to the adjustment of the taxes and interest and, as I understood it, there was a difference of $110. between you and Mr. Bardfeld on the settlement and you discussed the thing and you couldn't get apparently to any conclusion, finally Mr. Bardfeld gathered up his papers as if he was going to close the case, he was through. Mrs. Skehan turned to Mr. Joseph and said "Mr. Joseph, I don't believe you have got the mnoey to settle" and Mr. Joseph hesitated, he says

"No, I haven't got it but I can get it," and Mr. Bardfeld turned to him, "why" he said "certainly you have the money. You have it right in your pocket." He says "No, I haven't got it but I can get it in an hour." Now that was about four o'clock on Saturday afternoon, although they got up and walked out then and we waited there in your office for an hour after that and they never returned.

Q. Did they say they would be back in an hour with the money?

A. That was my impression, when he said he could get the money in an hour.

Q. But you don't definitely remember?

A. What was that?

Q. But you don't definitely remember whether they said it or not?

A. No, I don't distinctly remember that, but that was our reason for waiting; I know we were anxious to get away as the settlement had been delayed, the appointment was at two o'clock and they showed up three o'clock and we were anxious to get away over the week end, I recall.

CROSS EXAMINATION

BY MR. KOTOK:

Q. As a matter of fact there wasn't any use of them presenting any money or handing you any money, you wouldn't take it because you hadn't agreed on the amount at the time?

A. That was up to Mr. Landis. He was my attorney and whatever he considered ——

Q. But it is so that you hadn't agreed on any amount?

A. What is that?

Q. You hadn't agreed on an amount?

A. No, they hadn't agreed on the amount.

Q. Neither one of you had?

A. No.

Q. How about this sewer, did you offer to pay that?

A. I left that entirely in Mr. Landis' hands, we kept mum as far as discussing those points.

Q. The reason for these continued adjournments from April seventeenth and then again from May and then again to June and again was on account of a lis pendens that was against the property, a bill for specific performance by Rabinowitz against Dare?

A. That apparently was the reason, also accommodation of Mr. Joseph.

Q. The first time from April seventeenth to May tenth, I think it was, was a mutual agreement both for the removal of the lis pendens and for the accommodation of Mr. Joseph?

A. Because he stated to me he wasn't ready to make settlement on that day, he didn't have the money to make it on that day even if the lis pendens had been removed.

Q. And it was because of that that he agreed to pay interest from April seventeenth to May tenth?

A. Yes.

Q. But after that it just was carried along because of the failure to remove the lis pendens?

A. You wouldn't accept the title after that.

Q. Title as it was? That is all.

Defendants rest.

COMPLAINANTS' REBUTTAL.

NATHAN JOSEPH, Recalled.

DIRECT EXAMINATION

BY MR. KOTOK:

Q. You stated, as I recall it, that you were at all times ready to make settlement?

A. Yes, sir.

Q. Were you?

A. Yes, sir.

Q. It has been testified by Mrs. Skehan that you came out to Shiloh, New Jersey and requested an extension; is that so?

A. I didn't ask for an extension of time. I asked them whether they would take back a second mortgage on the place.

Q. You were ready to make settlement, why did you want to make a second mortgage?

A. This was prior to the time of settlement.

Q. I mean prior to that time did you have other use for money, if you could get it?

A. Yes.

Q. With reference to July third, did you understand that you had given anybody any impression that you were going out for some money?

A. Mrs. Skehan said that she said "I don't think you have the money anyhow." I says "I haven't got the money but I have a check with me," and I says "plenty of money in the bank." She says "well, we want the money." I says "well, you took a check before." I says "If you want the money, if we come to any agreement," I says "I can go out and get the money."

Q. That was all that was said about that?

A. That was all.

CROSS EXAMINATION

BY MR. LANDIS:

Q. You said you would go out and get it?

A. Yes, sir.

Q. When did you say you would go back?

A. Didn't set any time. This was before we came to the final agreement, when we knew we couldn't settle.

MR. KOTOK: Did you agree to come back?

A. Not at all.

Q. When do you mean final agreement, when you knew you couldn't settle July third?

A. Before we came down to definite figures, while we were arguing, Mrs. Skehan, says "I don't think you have the money." I says "No, but I have the check and if necessary I can go out and get the money," but there was no use of coming back after we left and we saw that we couldn't come to an agreement, there was no use of us coming back and we never said anything about coming back, we left the office and Mrs. ——

Q. That is all.

Testimony closed.

COPY OF EXHIBIT "C-1."

THIS AGREEMENT, made the Twenty-eighth day of August, A. D., 1925.

Between John A. Ackley & Son, Agents for Skehan, of Vineland, N. J., of the first part, hereinafter called the "Seller," and Harold Finestone, of Phila., County of Phila., State of Pa., of the second part, hereinafter called the "Buyer."

WITNESSETH, That the "Seller" agrees to sell and convey and the "Buyer" agrees to buy all that certain lot, No. 1, Block 40, or parcel of land and premises situate in the Third Ward of the City of Wildwood, County of Cape May and State of New Jersey, more particularly described as follows:—

Lot Number One, Block Forty, Third Ward of the City of Wildwood, 100 feet on the Easterly side of Pacific Avenue, and 50 feet on the North side of Hand Avenue. for the price or sum of Ten Thousand ($10,000.00) Dollars, under and subject to the following terms and conditions:

1. A first payment of One Thousand ($1,000.00) Dollars, receipt of which is hereby acknowledged by the "Seller."

2. The balance of the purchase price shall be paid in the following manner:

Fifteen percent of purchase price on September 20, 1925; Thirty-seven Hundred and Fifty Dollars on April 20, 1926; balance of Thirty-seven Hundred and Fifty Dollars to remain on mortgage, said mortgage to be payable within three years from its date together with interest at the rate of six percent per annum, interest paid semi-annually,

at the time of final settlement, which shall be made at the office of the one mentioned in the original contract of purchase held by the "Seller," on or before April 20, 1926, or the deposit made herewith, at the option of the "Seller," may be applied on the account of the purchase price or be forfeited as liquidated damages to the "Seller," and not as a penalty, provided that the necessary title searches can be obtained from any first-class New Jersey title company by that date. Should there be any delay, not the fault of the "Buyer" in the procuring of such searches, the time for the final settlement shall extend until such searches can be obtained.

3. The title to the premises shall be free and clear of all incumbrances, including municipal liens and assessments, except municipal improvements in the course of construction and not assessed, obvious easements, usual restrictions running with the land, subject nevertheless to the mortgage above mentioned, and shall be a marketable title, and the "Seller" shall tender a general warranty deed conveying such title at the time of the final settlement, or in the event that such title cannot be as above, then this deposit shall be returned to the "Buyer."

4. All adjustments shall be made as of April 20, 1926, and possession shall be given the "Buyer."

5. The "Buyer" shall pay for searches and all other expenses, excepting the preparation of the deed and the necessary revenue stamps attached thereto, which shall be paid for by the "Seller."

6. This agreement shall extend to and be binding upon the heirs, executors, administrators, successors and assigns of the parties hereto.

7. Time is the essence of this agreement.

8. This contract includes all fixtures and appurtenances permanently attached to the building or buildings on the land herein described and also specifically the following items:

IN WITNESS WHEREOF, The parties hereto have set their hands and seals the day and year first above written.

SIGNED, SEALED AND DELIVERED IN THE PRESENCE OF

S. L. Beilin.

John A. Ackley & Son (L. S.)
By S. L. Beilin, Agent (L. S.)
Harold Finestone (L. S.)

Wildwood, N. J.

Sept. 2, 1925

In consideration of one dollar and other value of consideration, I hereby transfer to Nathan Joseph, all my right title, and interest in the within contract.

Myer Kotok (signed) Harold Finestone.

Vineland, N. J.

Sept. 2, 1925

In consideration of one dollar and other good consideration, I hereby transfer to Harry Kotok, a one-half individed interest in and to the within contract.

(signed) Nathan Joseph.

(Notation on Contract)

September 21, 1925.—Received of Nathan Joseph and Harry Kotok $1500.00 (Fifteen Hundred Dollars), being 15% of contract price on within instrument.

(signed) J. S. Skehan (Seal)

Witness: Leon M. Bardfeld.

(Another Notation on Contract)

April 17th, 1926, Rec'd $1875.00 on acct. settlement which is extended to May 8, 1926, at Landis Estate Offices, Vineland National Bank Bldg., Vineland, N. J., 2 P. M., when $1875.00 is to be paid and premises conveyed subject to present mortgage of $3750.00, and terms of this agreement. Purchaser to pay interest from April 20, 1926, on balance of purchase monies.

(signed) Jay S. Skehan
Nathan Joseph
Beatrice Skehan

COPY OF EXHIBIT "C-2."

IN CHANCERY OF NEW JERSEY.

Between: JOSEPH RABINOWITZ, Complainant and R. M. DARE, Defendant.	On Bill Specific Performance Lis Pendens.

Take notice, that a suit entitled as above set forth has been commenced and is pending in the Court of Chancery of the State of New Jersey. That the general object of the said suit is for specific performance under an agreement to convey certain land, as stated therein. That the lands and real estate to be effected by said suit are known as Lot No. 1, Block No. 40, in the City of Wildwood, Cape May County, New Jersey, more particularly described as BEGINNING at the Northeast corner of Hand Avenue a distance of fifty feet, and on Pacific Avenue a distance of one hundred feet.

Dated: October 4th, 1923.

Chas. A. Bonnell, Solicitor Complainant.

(Endorsed)

IN CHANCERY OF NEW JERSEY.

Between JOSEPH RABINOWITZ, Complainant and R. M. DARE, Defendant.	On Bill Specific Performance Lis Pendens

Chas. A. Bonnell, Solr., Cape May Court House, N. J. Received, Recorded and filed this Lis Pendens Oct. 4, A. D. 1923 at 9 A. M.

June 21/26.

The above suit having been discontinued the above lands and real estate are hereby discharged from said claim or any lien thereby.

Chas. A. Bonnell, Solr. Complainant.

STATE OF NEW JERSEY

County of Cape May

I, A. C. HILDRETH, County Clerk, and Clerk of the Courts of Oyer and Terminer, Quarter Sessions, Common Pleas, and Circuit Court, in and for the County of Cape May, DO HEREBY CERTIFY that the foregoing is a true and correct copy of Lis Pendens Between, JOSEPH RABINOWITZ, Complainant and R. M. DARE, Defendant. *as filed and recorded, on the* Fourth *day of* October *A. D.,* 1923,*in the Clerk's Office of the County of Cape May, in Book* No. 3 *of* Notices of Suits in Chancery *at page* 76

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at Cape May Court House, this Seventeenth *day of* December *A. D. nineteen hundred and twenty* six.

A. C. Hildreth

Clerk.

(Seal)

COPY OF EXHIBIT "C-3"

CERTIFICATE OF SEARCH

Office of the Collector of Taxes

City of Wildwood, New Jersey

THIS IS TO CERTIFY that I, MILLARD F. CAMPBELL, am the Collector of Taxes of the City of Wildwood, in the County of Cape May and State of New Jersey, and that the Board of Commissioners of the City of Wildwood in the County of Cape May have in accordance with the Provisions of Chapter 237, P. L. 1918, appointed the Collector of Taxes to make examinations of the records of the municiaplity as to unpaid taxes, assessments and other liens affecting property therein and to certify the result thereof.

In pursuance of the authority vested in me as Collector of Taxes by the said appointment, I DO FURTHER CERTIFY that I have searched the records of the said City of Wildwood for UNPAID TAXES, TAX SALES, UNPAID ASSESSMENTS, ASSESSMENT SALES, UNPAID WATER BILLS, and all other municipal liens and assessments.

ON PREMISES

Lot Number 1 Block Number 40

in the Third Ward of the City of Wildwood, and do not find made up of record and unsatisfied, any taxes, water rents or municipal liens affecting the above stated premises,

EXCEPT THE FOLLOWING:

TAXES	
1926 Taxes	216.45
Interest to date	.62
STREET ASSESSMENTS	
None	
SEWER ASSESSMENTS	
Sewers Ord. No. 169	20.00
Interest to date	2.10
CEMENT SIDEWALK ASSESSMENTS	
None	
CURB AND GUTTER ASSESSMENTS	
None	
WATER RENTS	
None (vacant)	

ASSESSED FOR 1926 TO J. S. & Beatrice L. Skehan.

In witness whereof, I have hereunto set my hand, this Thirtieth day of June A. D. 1926.

Millard F. Campbell
Collector of Taxes

SEARCH No. 4070 SEARCH FEE $2.00

COPY OF EXHIBIT "C-4"

July 3, 1926.

SETTLEMENT between J. S. Skehan, Et Ux, Grantor

and Nathan Joseph and Harry Kotok, Grantee

Premises, Lot 1 — Block 40 — Holly Beach City.

GRANTEE DR.

Purchase Price	$10,000.00	
Fire Insurance paid to		
Tornado Insurance paid to		
Taxes, Current Year, paid to		
Water Rent paid to		
Property Rent paid to		
Sewer Rent paid to		
Interest on $1875.00 from Apr. 20, ½ month	4.69	
		$10,004.69

GRANTEE CR.

Cash paid on account	$	
First Mortgage	3750.00	
Interest from Mar. 19/26	110.65	
Taxes from Jan. 1 To July 3/26	110.65	
Water Rent from To		
Property Rent from To		
Sewer from Assessment, Oct. 1924 & int.	22.10	
Gas		
Electric Lighting		
Original Deposit	1000.00	
On Acct, Sept. 21, 1925	1500.00	
On Acct. Apr. 20, 1926	1875.00	
		$8323.37
Balance due Grantor		$1681.32

COPY OF EXHIBIT "D-1."

Receipt for Sewer Tax.

Bill and Notice dated City of Wildwood, Sept. 10, 1924.
To Mr. R. M. Dare, Wildwood, N. J.
Of assessment for benefits by a system of sanitary sewers under Ordinance No. 169 payable on or before October 10, 1924.

Block 40 Lot 1	$20.—
Interest to date	2.20
	$22.20

(Signed)

Paid August 13, 1926,
Millard F. Campbell
Collector of Taxes.

CONCLUSIONS

IN CHANCERY OF NEW JERSEY

Between: Nathan Joseph and Harry Kotok, *Complainants* and Jay S. Skehan and Beatrice L. Skehan, his wife, *Defendants.*	On Bill for Specific Performance. On Final Hearing. CONCLUSIONS.

THESE CONCLUSIONS ARE NOT TO BE PUBLISHED IN THE OFFICIAL OR UNOFFICIAL REPORTS.

Messrs. Kotok & Bardfeld for the Complainants.

Mr. Charles K. Landis, Jr., for the Defendants.

INGERSOLL, V. C.

I will advise a decree in favor of the complainants.

The original date for settlement was to be April 20th, 1926. The defendants were unable to give title at that time, and the day of settlement was continued from time to time until July 3rd, 1926, at which time the defendant refused to make conveyance unless adjustments were made as of April 20th, 1926.

Possession has remained in the defendant, and he must pay the charges accruing for the time of the delay for which he is responsible.

The amount involved is so negligible, that I will not advise the payment of costs by either party.

Determined: December 5th, 1927.

DECREE

IN CHANCERY OF NEW JERSEY

Between NATHAN JOSEPH AND HARRY KOTOK, *Complainants,* and JAY S. SKEHAN and BEATRICE L. SKEHAN, his wife, *Defendants.*	61-288 On Bill for Specific Performance. DECREE.

This cause coming on to be heard in the presence of Kotok & Bardfeld, Solicitors of the Complainants, and Charles K. Landis, Jr., Solicitor of the Defendants, and the Court having examined the pleadings and having taken proofs orally and in open Court, and heard and considered the arguments of Counsel thereon; and it appearing to the satisfaction of the Court that the Defendants, Jay S. Skehan and Beatrice L. Skehan, his wife, did, on the twenty-eighth day of August, 1925, enter into a contract with one, Harold Finestone, for the sale of the lands and premises hereinafter described, and that the said complainants Nathan Joseph and Harry Kotok, afterwards purchased and became seized of all the rights and interest of the said Harold Finestone in said contract and to said lands and premises; and that on the nineteenth day of March, 1926, the said defendants, Jay S. Skehan and Beatrice L. Skehan, his wife,

became the owners of said lands and premises and became seized thereof in fee simple subject to a certain purchase money mortgage of even date to secure the payment of $3750. within three years thereafter with interest, payable semi-annually, at the rate of six per centum per annum, and which lands and premises are described as follows:

ALL THAT CERTAIN piece or parcel of land and premises situate, lying and being in the City of Wodwood, County of Cape May, and State of New Jersey, known and designated as Lot one (1), Block Forty (40) on the recorded Plot of Holly Beach City filed, and more particularly described as follows:

BEGINNING at the intersection of the Southeasterly side of Pacific Avenue and the Northeasterly side of Hand Avenue; containing in front or breadth in and along said side of Hand Avenue, Southeastwardly, Fifty (50) feet; and of that width extending in length or depth between parallel lines at right angles to said Hand Avenue Northeastwardly One Hundred (100) feet along said side of Pacific avenue.

That by said contract said Defendants agreed to sell said lands and premises for the sum or purchase price of $10,000. on account of which the sum of $4375. has been paid and the said Complainants agreed to pay the balance of $1875. cash at settlement and assume and agree to pay said $3750. mortgage with interest.

And it further appearing that by consent of parties, said time of settlement was extended to July 3, 1926, as of which time all adjustments should be made and that said defendants since July 3, 1926, have paid interest to September 19, 1927 on said $3750. mortgage and that settlement should accordingly be made as follows:

Complainants Dr.

As of July 3, 1926.		
Balance purchase monies		$1875.00
Interest on $3750. mortgage paid by defendants from July 3, 1926 to Sept. 19, 1927, 1 yr. 2 mos. 16 days. .072-2/3		272.50
		$2147.50

Complainants Cr.

1926 taxes at $216.45 apportioned to July 3, 1926,	$109.	
Interest on $109. from July 3, 1926 to Jan. 31, 1928,	10.32	119.32
Balance due Defendants January 31, 1928,		$2028.18

IT IS on this thirty first day of January, 1928, on Motion of Kotok and Bardfeld, Solicitors of the Complainants, to settle the form of the Decree, in the presence of Charles K. Landis, Jr., Solicitor and of Counsel for and with the Defendants, ORDERED, ADJUDGED, and DECREED, that the said Agreement be in all things specifically performed by the parties; that the said Defendants on the 18th day of February, 1928, at the hour of three o'clock in the afternoon at the office of Frank Kotok, 604 Landis Avenue, Vineland, New Jersey, deliver to the said Complainants a warranty deed for said lands and premises subject to said $3750. mortgage with interest thereon from September 19, 1927 and also subject to any unpaid taxes or municipal liens assessed for or during the year 1926 or thereafter which the said Complainants are to assume and

pay, and that at the same time and place, the said complainants pay to defendants or to their solicitor, Charles K. Landis, Jr., the sum of $2028.18, no costs to be allowed either party.

Respectfully advised,

R. H. INGERSOLL
V. C.

E. R. WALKER
C.

A TRUE COPY
Thomas Barber
Clerk

AMENDED NOTICE OF APPEAL

IN CHANCERY OF NEW JERSEY

NATHAN JOSEPH and HARRY KOTOK,
Complainants,
vs.
JAY S. SKEHAN and BEATRICE L. SKEHAN, his wife,
Defendants,

ON BILL FOR SPECIFIC PERFORMANCE.

Amended Notice of Appeal.

The complainants, Nathan Joseph and Harry Kotok hereby amend the Notice of Appeal filed in the above entitled cause on February 28, 1928 so that the same will read as follows:

The complainants, Nathan Joseph and Harry Kotok hereby appeal from so much of the Final Decree made by Honorable Edwin Robert Walker, Chancellor, on the advice of Honorable Robert H. Ingersoll, Vice Chancellor in the above entitled cause, January 31, 1928, as follows:

1. That part of said Decree which sets forth the manner in which settlement should be made.

2. Which adjudges that there is due to the defendants the sum of Two Thousand Twenty-eight Dollars and Eighteen Cents ($2028.18), and decrees that said sum be paid by the

complainants to the defendants upon the delivery of the deed for the premises described in said Decree.

3. Also from that part of said Decree which decrees that the Deed for the premises described in said Decree be delivered subject to interest on a Thirty-seven Hundred and Fifty Dollar mortgage from September 19, 1927, and also subject to any unpaid taxes or municipal liens assessed for or during the year of 1926, or thereeafter, and which orders complainants to assume and pay said interest, taxes or municipal liens.

To The Court Of Errors and Appeals in the Last Resort in all causes.

Dated: March 3, 1928

Kotok & Bardfeld
Solicitors for and of Counsel with Complainants.

I conceive there is good cause for appeal in the above entitled cause.

Frank Kotok
Of Counsel with Complainants.

(ENDORSEMENT)

Service of the within Ammended Notice acknowledged this 3rd day of March, 1928.

Charles K. Landis, Jr.,
Sol'r. for Def'ts.

PETITION OF APPEAL

New Jersey Court of Errors and Appeals

NATHAN JOSEPH and HARRY KOTOK,
Complainants-Appellants,
vs.
JAY S. SKEHAN and BEATRICE L. SKEHAN, his wife,
Defendants-Appellees,

ON APPEAL FROM THE COURT OF CHANCERY,

Petition of Appeal.

To the Honorable, The Court of Errors and Appeals in the last resort in all causes.

The petition of Nathan Joseph and Harry Kotok, the appellants in the above entitled cause, respectfully shows that:

Petitioners find themselves aggrieved by a final decree made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, on the advice of Honorable Robert H. Ingersoll, Vice Chancellor, bearing date January 31, 1928, in a certain cause in said Court of Chancery wherein the said Nathan Joseph and Harry Kotok were complainants and the said Jay S. Skehan and Beatrice L. Skehan, his wife, were defendants in this respect, to wit: That said decree adjudges that settlement shall be made as of July 3, 1926, in the following manner:

Complainants. Dr.

Balance purchase monies	$1875.00
Interest on $3750. mortgage paid by defendants from July 3, 1926 to Sept. 19, 1927 1 yr. 2 mos. 16 dys. .072-2/3	272.50
	$2147.50

Complainants Cr.

1926 taxes at $216.45 apportioned to July 3, 1926,	$109.	
Interest on $109. from July 3, 1926 to Jan. 31, 1928,	10.32	119.32
Balance due Defendants Januray 31, 1928		$2028.18

And that part of said decree which decrees that said premises be conveyed subject to interest on a $3750.00 mortgage, from September 19, 1927, and also subject to any unpaid taxes or municipal liens assessed for or during the year 1926, or thereafter, which the said complainants are to assume and pay, and that at the same time and place the said complainants pay to the defendants or to their solicitor, Charles K. Landis, Jr., the sum of Two Thousand Twenty-eight Dollars and Eighteen Cents ($2028.18).

And petitioners appeal from the decree of the Chancellor which decrees as aforesaid, upon the ground that the same is erroneous in that the sum of Two Thousand Twenty-eight Dollars and Eighteen cents was not due to the defendants on January 31, 1928, but that there was due to the defendants the sum of Eighteen Hundred and Seventy-five Dollars less any interest that was owing at the time of the delivery of the deed, on the mortgage for Thirty-seven Hundred and Fifty Dollars and less any taxes or any other

municipal liens and assessments that were owing at that time against said premises, and less interest at the rate of six per cent per annum, on the sum of Forty-three Hundred and Seventy-five Dollars from April 20, 1926, to the date of the delivery of the Deed; and because settlement and adjustments should not be made from the third day of July, 1926, but all adjustments should be made as of the time of the delivery of the deed by the defendants, and complainants should not assume and pay any interest, taxes or any municipal liens

Petitioners therefore pray:

That the said decree of the said Chancellor may be, in the particulars aforesaid, reversed, set aside and for nothing holden, and that petitioners may have such other relief in the premises as to this Court shall seem proper.

Frank Kotok

Solicitor for and of Counsel with Appellants.

(ENDORSEMENT)

Service of within copy of Notice of Appeal acknowledged this 16th day of March, 1928.

Charles K. Landis, Jr.,

Sol'r. for Def'ts.

Appellees

ANSWER TO PETITION OF APPEAL

NEW JERSEY COURT OF ERRORS AND APPEALS:

NATHAN JOSEPH and HARRY KOTOK,
Complainants-Appellants,

vs.

JAY S. SKEHAN and BEATRICE L. SKEHAN, his wife,
Defendants-Appellees.

ON APPEAL FROM THE COURT OF CHANCERY.

ANSWER TO PETITION OF APPEAL.

The Answer of Jay S. Skehan and Beatrice L. Skehan, his wife, the above named Defendants-Appellees, to the Petition of Appeal of Nathan Joseph and Harry Kotok, Complainants-Appellants, above named.

These Defendants-Appellees, not admitting the truth of all or any of the matters in the said Petition of Appeal contained, for answer thereto nevertheless admit that a Final Decree was, on January 31, 1928, made and entered in the Court of Chancery of the State of New Jersey in the above entitle Cause, which said Petition purports to mention and set forth; but as to the substance and form of said Final Decree, these Defendants, Appellees, beg leave to refer to said Final Decree when the same shall be produced.

These Defendants-Appellees, are advised and believe that the said Final Decree is agreeable to equity; and pray that the same may be affirmed with costs to be taxed in favor of these Defendants-Appellees.

Charles K. Landis, Jr.

Solicitor for and of Counsel with Defendants-Appellees.

NEW JERSEY COURT OF ERRORS AND APPEALS.

NATHAN JOSEPH and HARRY KOTOK,
Complainants-Appellants,
v.
JAY S. SKEHAN and BEATRICE L. SKEHAN,
his wife,
Defendants-Appellees.

ON APPEAL FROM THE COURT OF CHANCERY.

BRIEF FOR DEFENDANTS-APPELLEES.

POINT I.

THE ONLY QUESTION PRESENTED BY THE GROUNDS OF APPEAL IS THE TIME WHEN ADJUSTMENTS SHOULD BE MADE.

The grounds of appeal do not question the title of the sellers, Skehan, nor the truth of the statement of settlement as set forth in the decree.

The only ground of appeal is that settlement and adjustments should be made as of the time of the delivery of the deed by the sellers to the buyers.

POINT II.

ALL ADJUSTMENTS SHOULD HAVE BEEN MADE AS OF APRIL 20, 1926.

The contract in question expressly provided that all adjustments were to be made as of April 20, 1926. (State of Case, page 11, line 21.) It also provided that final settlement should be made on or before April 20, 1926. (State of Case, page 10, line 38.) It did not provide that all adjustments were to be made as of the date of settlement. The contract fixed the same date for each but it fixed it independently and did not make the date of adjustments depend upon the date of settlement because it did not expressly provide that all adjustments should be made as of date of settlement. On April 17, 1926, a part payment was made by the buyers for which a receipt was endorsed upon the contract as follows (State of Case page 45, lines 16-23. Ex. C1); "April 17th, 1926. Rec'd $1875.00 on acct. Settlement which is extended to May 8, 1926, at Landis' Estate Offices Vineland Nat'l Bank Bldg., Vineland, N. J. 2 P. M. when $1875.00 is to be paid and premises conveyed subject to present Mtg. of $3750.00 and terms of this agreement. Purchaser to pay interest from Apr. 20, 1926, on balance of purchase monies." This endorsement extended time of settlement without altering the terms of the original agreement that all adjustments should be made as of April 20th. As stated in Paragraph 12 of the Bill of Complaint (State of Case, page 5, lines 2-3), time of settlement was again extended from May 8th to May 15th. By Paragraphs 14, 15, 16 and 17 (State of Case, page 5, line 26 to page 6, line 28), it appears that complainants for a

time demanded a return of the monies paid on contract but afterwards agreed to settle on July 3, 1926. There is nothing in the allegations of these paragraphs that settlement when made should be otherwise made than as agreed by endorsement of the contract. It appears however by Paragraph 19 (State of Case, page 7, lines 11 to 34) of the Bill of Complaint that complainants insisted upon a settlement in which the adjustments were to be made as of July 3, 1926 and not as of April 20, 1926. Paragraph 17 (State of Case, page 6, lines 23 to 28) of the bill states it was agreed that settlement for said premises should take place on July 3, 1926. An extension of time of settlement but silent as to the terms of settlement, left the terms of settlement unaltered. The burden of proof was upon complainants-appellants, to show any alteration of the written contract and endorsement, because the defendants-respondents are entitled to the protection of the statute of frauds.

The endorsement was signed by Joseph but not by the other appellant, Kotok. The lack of Kotok's signature thereto is waived by appellants. See Paragraph 11 of the Bill of Complaint (State of Case, page 4, lines 11 to 31.) The statement in appellant's brief is likewise that "it was agreed by mutual consent of the complainants and defendants that settlement be postponed to May 8, 1926." The lack of Kotok's signature has not been made a ground of appeal.

The decree ordered that all adjustments should be made as of ~~April~~ July 3, 1926. If error, it was not prejudicial to appellants.

POINT III.

COMPLAINANTS-APPELLANTS AS BUYERS DID NOT TENDER THE PURCHASE MONIES NOR WAS TENDER EXCUSED.

Paragraph 19 (State of Case, page 7, lines 11 to 34) of the Bill of Complaint alleges that at the time of settlement on July 3, 1926, complainants-appellants requested all adjustments to be made as of July 3, 1926, instead of April 20, 1926. If, as stated in Point II, adjustments should bave been made as of April 20, 1926, the offer of settlement as alleged in Paragraph 19 of the Bill of Complaint was not according to the contract and a refusal of such offer did not excuse tender.

Appellants' witness, Bardfeld (see State of Case, page 24, line 34), testified that the sellers "had never agreed upon a specific amount to tender;" likewise appellant, Joseph. (State of Case, page 28, lines 28-29.) In the absence of actual tender, it should at least appear that the buyer was ready and willing to tender a suffibient amount which should be ascertained from the original written contract and could not be excused by the failure of the parties to make some other or new agreement at settlement.

The appellant, Joseph, testified the land in question was "a vacant lot" (see State of Case, page 28, line 12) and that he was a member of a real estate firm known as the Wildwood Realty Company whose sign was on the lot for sale during all the time the appellants had the contract, that is, continuously before and after the time of settlement. (See State of Case, page 29, lines 25 to page 30, line 19.) Notwithstanding this, the conclusions

of his Honor, the Vice Chancellor, were "possession has remained in the defendants, and he must pay the charges accruing for the time of the delay for which he is responsible." (See State of Case, page 53, lines 33-35.) Such error as may be in the conclusions or decree, is harmless to the appellants.

Quoting from *King v. Ruckman,* 24 N. J. Eq. 556, cited in appellants' brief, *see page 562;*

"And indeed, so completely was it the established course to refuse interest to a vendor who failed to convey, from whatever cause, that when the parties desired a different result it was found to be nesessary to introduce in their articles of sale a special agreement with that aspect. These clauses are of frequent occurrence in the reports, and have been construed in several of the decisions, and were to the effect that interest should be paid from a fixed time, whether or not the title was delayed from being passed on any ground whatever. This is a prominent feautre in the cases of *Esdaile v. Stephenson, 1 Sim. & Stu. 123; DeVisme v. DeVisme, 1 Macn. & G. 336; Sherwin v. Shakspeare, 17 Beav. 267.* Now the purpose of these stipulations is obvious; it was to make the vendee pay interest for which he would not have been liable, that is in a case of an involuntary delay of the vendor in making title."

The endorsement on the contract in the instant case, extending time of settlement from April 20 to May 8, 1926, "Purchaser to pay interest from April 20, 1926, on balance of purchase monies," was made in accommodation of such uses as the purchasers then had of the premises and the purposes for which the purchase was made, that is, for sale by the purchasers in speculation. (Joseph testimony, State of Case, page 29, lines 21 to 31—all of page 30.) It is equally apparent that the delay

after May 8th was, as expressed in *King v. Ruckman,* "an involuntary delay of the vendor in making title." After efforts to have the Lis Pendens dismissed, the sellers Skehan made a cash settlement to satisfy the Lis Pendens of record. (Paragraph 15 of Bill of Complaint, State of Case, page 6, lines 8 to 11.) The Lis Pendens was satisfied June 21, 1926 (State of Case, page 47, lines 20 to 30) and, as expressed in Paragraph 17 of the Bill of Complaint, "It was *thereupon* agreed that settlement for said premises should take place on July 3, 1926." (State of Case, page 6, lines 23 to 28.)

Paragraph 11 of the Bill of Complaint (State of Case, page 4, lines 10-31) states that the endorsement on the contract was by mutual agreement between the parties for time to remove the Lis Pendens. It does not state nor does the endorsement, that time was the essence of this agreement. The essence of the agreement was the removal of the Lis Pendens and in peformance of it, the vendors eventually paid a cash consideration to satisfy the Lis Pendens and because of this it was agreed that settlement should take place July 3, 1926 as stated in Para. 17 of the Bill of Complaint. (State of Case, page 6, lines 23 to 28.) Even had time been of the essence of the extension agreement, and whatever the possession of the premises, the subsequent conduct of the parties, as the outlay of cash by the sellers promptly followed by the coming of the buyers to a settlement in which they were to receive the benefit of the sellers outlay, evinces the expectation of the sellers and the acquiescence of the buyers, that the outlay was made in consideration of the extension agreement fixing April 20, 1926, as the adjustment date and time from which interest should be paid by the purchaser. The loss

of the buyers' opportunity to sell the premises after July 3, 1926, of which Joseph testifies (State of Case, page 30, lines 10- 35), was not the fault of the sellers but because on July 3, 1926, the buyers were unwilling to settle on the terms by which they had induced the sellers' outlay of cash. Joseph testified (State of Case, page 30, lines 14-16) that they, the speculating buyers, had a number of inquiries for sale of the premises during the latter part of July and August, 1926, and that the month of August was the time that real estate business was done in Wildwood. It was in the hope and anticipation of this opportunity that the buyers desired the Lis Pendens removed at any time before the latter part of July and were willing to settle July 3, 1926, after having demanded their money back and waived the demand by agreeing to settle when the Lis Pendens had been removed by the sellers' cash outlay.

POINT IV.

THE BUYERS SHOULD ACCEPT TITLE SUBJECT TO THE PRESENT MORTGAGE OF $3750.

Said extension agreement so expressly provides (State of Case, page 45, lines 20-21, Exhibit C1), for settlement "when $1875 is to be paid and premises conveyed subject to present mortgage of $3750."

Most respectfully submitted,
HERBERT C. BARTLETT,
CHARLES K. LANDIS, Jr.,
Of Counsel with Defendants-Appellees.

NEW JERSEY COURT OF ERRORS
AND APPEALS

Between

NATHAN JOSEPH AND HARRY KOTOK,
Complainants-Appellants,

And

JAY S. SKEHAN AND BEATRICE L. SKEHAN,
HIS WIFE,
Defendants-Appellees,

BRIEF OF FRANK KOTOK, OF COUNSEL WITH COMPLAINANTS-APPELLANTS.

FACTS

This was an action brought by complainants against defendants for the specific performance of an agreement for the sale of certain premises located in the City of Wildwood, Cape May County, New Jersey, as described in the agreement (Exhibit "C-1" p. 42). Said premises consisted of a vacant lot of land (testimony of Nathan Joseph, p. 28, lines 12 and 13). Defendants had agreed to sell said premises for the sum of $10,000.00 to one, Finestone; $6250.00 to be paid in payments as set forth in said agreement ("C-1") prior to April 20, 1926, and $3750.00 by the giving of a purchase money mortgage at the time of settlement which was fixed for April 20, 1926. Said Finestone assigned said agreement to complainants, receiving $1000.00

profit for said assignment. Complainants and defendants, by mutual consent, agreed to make settlement on April 17, 1926, instead of April 20, 1926, as set forth in the agreement. Prior to that time complainants discovered that a lis pendens had been filed against said premises by Joseph Rabinowitz against R. M. Dare, a former owner of said premises (Exhibit "C-2", p. 46). When complainants and defendants assembled at the office of the solicitor for the defendants for the purpose of making settlement, it was discovered that said lis pendens had not yet been and could not then be removed from record, and it was agreed by mutual consent of the complainants and defendants that the settlement be postponed to May 8, 1926. On April 17, 1928, complainants paid an additional sum of $1875.00, making a total sum received by defendants at that time, of $4375.00, and making a total sum paid by complainants, including the $1000.00 profit paid to Finestone, of $5375.00. As both parties agreed to this postponement to May 8, 1926, complainants agreed to pay interest on the balance of the purchase money (Exhibit "C-1", p. 45). Defendants' solicitor assured complainants that said lis pendens would be removed before the postponement date, May 8, 1926. On May 8, 1926, defendants had not yet succeeded in having said lis pendens removed. Thereafter defendants requested further time to have said lis pendens removed. The lis pendens was finally removed from record on June 21, 1926, (Exhibit "C-2", p. 47), and complainants having been notified of the removal, arranged to make settlement on July 3, 1926. When the parties assembled for settlement on July 3, 1926, it appeared that a sewer assessment for $20.00 with interest amounting to $2.10, as well as taxes for 1926, being $216.45, with interest amounting to $.62, remained due and unpaid to the City of Wildwood (Exhibit "C-3", p. 50). Complainants contended at the time of settlement that with the exception of the allowance for interest on the balance of the purchase price, as had been mutually agreed, from April 20, 1926, to May 8, 1926, all adjustments for taxes and interest, etc., should be made as

of July 3, 1926, and a deduction for the sewer assessment above referred to, be allowed or that the same be paid by defendants. Complainants had prepared a settlement sheet showing that there was due on July 3, 1926, a balance of $1681.32 (Exhibit "C-4", p. 51). Defendants refused to accept said sum and refused to allow said sewer assessment, but insisted that adjustments be made as of April 20, 1926, and insisted that the sewer assessment be collected by complainants from the previous owner, Dare Brothers, Inc., because said previous owner held the mortgage for $3750.00. (These facts are undisputed and the refusal to pay the sewer assessment is admitted in Para. 4 of defendants' answer, p. 14). Settlement was not made because of the reasons above stated. Shortly thereafter complainants filed the bill in this cause. The material facts are undisputed as they appear in the Bill of Complaint (p. 1 of the State of the Case) and the answer of the defendants (p. 13) admits all of the material allegations alleged in the Complaint. During all this time while defendants were attempting to remove the lis pendens, possession of said premises remained with them. The learned Vice Chancellor found in favor of the complainants that the settlement was continued from time to time to July 3, 1926, because of the inability of the defendants to give title and also that possession remained in the defendants. (See Conclusions of V. C. Ingersoll, p. 53). Complainants had always been ready to make settlement. The decree entered in the Court below, dated January 31, 1928, decrees that defendants deliver to complainants a deed on February 18, 1928, and that settlement be made as of July 3, 1926, and fixes the amount as due the defendants at $2028.18 and decrees that said conveyance be made subject to the mortgage of $3750.00 then against said premises. The mortgage against said premises is for three years and is dated March 19, 1926.

GROUNDS OF APPEAL

On Page 60 of the State of the Case is set forth the grounds of appeal

1. Complainants contend that settlement should not have been made as of July 3, 1926, but that settlement and all adjustments should have been made as of the time of the delivery of the deed, which was fixed by the decree as February 18, 1928.

2. That complainants should not be compelled to pay interest for any unpaid taxes or municipal liens of any kind for or during the year of 1926, or thereafter, except from the time of the delivery of the deed.

3. That complainants should not assume the mortgage for $3750.00 which is dated March 19, 1926, and is payable three years from that date, but should execute and deliver a new mortgage for $3750.00 payable three years from its date, and dated at the time of the delivery of the deed.

4. That there is not due to defendants $2028.18, but that there is due to defendants, $1875.00 less any interest that will be owing at the time of the delivery of the deed, on the mortgage for $3750.00 (provided said mortgage is extended so that it will not become due until three years from the date of the delivery of the deed); and less any taxes or any other municipal liens or assessments that are owing at the time of the delivery of the deed; and less interest at the rate of 6% per annum on the sum of $4375.00 from April 20, 1926 to the date of the delivery of the deed.

5. No appeal is taken from, nor objection made to that part of said decree which decrees specific performance, but the appeal relates entirely to the manner of making settlement.

ARGUMENTS I and II

ADJUSTMENTS SHOULD BE MADE AS OF THE TIME OF THE DELIVERY OF THE DEED.

While the contract (Exhibit "C-1", p. 42) fixed April 20, 1926, as the time of making adjustments, it first casts the burden upon the defendants to be ready at that time to deliver a title free from encumbrances. The defendants were unable to deliver title free from encumbrances at that time but by mutual consent settlement was postponed to May 8, 1926, and after that time all postponements were because of the inability of the defendants to deliver title in accordance with the terms of the agreement.

The Court below has found as a fact that defendants were unable to deliver title clear of encumbrances on April 20, 1926, and has also found as a fact that possession has remained in defendants and that defendants were responsible for the delay in making settlement. (Conclusions of V. C. Ingersoll, p. 53).

Since, therefore, the delay was occasioned because of the fault of the defendants, and defendants refused to make settlement as of July 3, 1926, and refused to pay the sewer assessment (Exhibit "C-1", p. 52), complainants had no other course to pursue than to proceed for an enforcement of the contract, and complainants should not be compelled to pay any of the carrying charges or expenses incurred during the pendency of the litigation, which litigation was made necessary by the acts of defendants. Possession remaining in the defendants, defendants should pay the charges during the time of the delay, not only to July 3, 1926, but to the time of the actual delivery of the deed. If there were any rents obtained, defendants obtained the same and complainants received no benefits from said land.

"In the absence of a special agreement if the delay in performance is caused by the *fault of the vendor* the purchaser is ordinarily not required to pay interest until a tender of performance on the part of the vendor." (39 Cyc. 1573).

There was no default or delay on the part of the complainants. The complainants were unable during the time of the delay and during the time of the litigation, to do anything with the premises; they could not build thereon; they could not take possession for any purpose; they could not sell the premises and were wholly deprived of any use that they might have put said premises to. They could secure no revenue whatever thereform and all because of the lis pendens and because of the arbitrary attitude assumed by the defendants in insisting that settlement be made as of April 20, 1926, although the delay was occasioned by reason of their own fault.

It can readily be seen what a hardship would result to the purchasers of real estate if the sellers were unable to deliver title for several months and the purchaser deprived of the opportunity to either sell or build or secure revenue from such real estate and yet be compelled to pay for the up-keep of the same.

"If the vendor retains the possession and use of the property he must pay the taxes accruing while he is in possession and must continue to do so even after the time for completion of the contract if he is the party responsible for the delay." (39 Cyc. 1635).

After April 20, 1926, all delay was occasioned through the fault of the defendants and the litigation was made necessary by reason of the actions of the defendants and all charges should be paid by the defendants until the actual delivery of the deed, and it is immaterial whether the delay and the litigation was occassioned by an honest belief

on the part of the defendants that they were correct in their contention that adjustments should be made as of April 20, 1926, and that no allowance should be made for the sewer bill.

"Even when the intention of the vendor has been blameless and when he has refused to comply with his engagement from an honest belief of his right so to do, if a loss ensues in consequence of such refusal, such loss should be borne by him." (King vs. Ruckman, 24 N. J. E. at p. 559).

Complainants would have been greatly benefited by having had the opportunity to sell or improve the lands.

"Who can say that in the present case the interest of this vendee would not have been greatly promoted by having had the opportunity to sell or improve these lands?" (King vs. Ruckman, Supra.)

In the case of King vs. Ruckman, Supra, which is in point, the defendants refused to convey certain lands and after protracted litigation extending over a period of five years, vendor contended that he was entitled to interest on the money during that time from the date that setlement should have been made and this Court held that vendor was not entitled to any interest.

It is the rule that when the vendor retains possession he is entitled to the rents and profits provided they are not greater than the interest and expense and vendee is not compelled to pay interest or any other charges.

" This rule, as I conceive this subject, is put in force in every case in which these three qualities enter: first the rents and profits must fall below the interest; second, the delay must be the fault of the vendor; and third, the vendee must be out of possession." (King vs. Ruckman, Supra, p. 561).

ARGUMENT III.

The agreement for the sale of said premises (Exhibit "C-1", p. 42) sets forth that complainants are, at the time of settlement, to deliver a mortgage for $3750.00 as part of the purchase price of said premises.

Complainants contend that said mortgage should be dated from the time of the delivery of the deed by the defendants as they are entitled to a mortgage to run for a period of three years from the time of settlement and settlement having been postponed since April 20, 1926, a new mortgage to run for a period of three years should be given by complainants to defendants at the time of settlement. All of the delay and litigation having been occasioned by the action of the defendants, it would be manifestly wrong for settlement to be made at this late date by assuming a mortgage for $3750.00 dated March 19, 1926, and which would expire on March 19, 1929.

"The next exception made by the defendant to the decree appealed from, relates to its provision directing a portion of the price to be secured by a mortgage. By the terms of the article of agreement, the residue of the purchase money, after the payment of the first three installments, was to be secured by a mortgage on the premises, payable, with interest, in five equal annual sums, from the date of the agreement, which date was the 12th of May, 1868. The Vice-Chancellor has directed that on the execution of the conveyance for these lands, a mortgage should be executed which will give to the purchaser the same time and modes of payment, after he acquires title, which he would have had after such event, if the transaction had been closed in accordance with the compact between these parties." (King vs. Ruckman, Supra, p. 565). The Court

then proceeds to affirm the order of the Vice-Chancellor in directing that a mortgage be given dated from the time of the delivery of the deed.

The situation in King vs. Ruckman, Supra, relating to said mortgage is exactly the same as in the instant case.

ARGUMENT IV.

Complainants contend that there is not due to defendants $2028.18 but that there is due to defendants $1875.00 less any interest that will be owing at the time of the delivery of the deed on the mortgage for $3750.00, if said mortgage is extended for three years from the time of the delivery of the deed, and less any taxes or any other municipal liens or assessments owing at the time of the delivery of the deed and less interest on $4375.00 which had been paid by them, from April 20, 1926, to the date of the delivery of the deed.

Complainants having been ready to make settlement on April 20, 1926, and at all times since and the delay having been occasioned through the fault of the defendants, complainants have been deprived of the use of said sum of $4375.00 since April 20, 1926, and defendants have had the use of said money since that time. Complainants are therefore entitled to interest thereon.

Complainants should make settlement at the time of the delivery of the deed as if the agreement called for settlement to be made at the time of the delivery of the deed, because the time that has elapsed from April 20, 1926 to the time of the delivery of the deed should not in any manner be considered and the loss occasioned by that delay should be entirely borne by the defendants.

The decree entered in the Court below is not in conformity with the conclusions of the learned Vice-Chancellor. (See Conclusions of V. C. Ingersoll, p. 53). (See Decree p. 54).

The conclusions of the Vice-Chancellor specifically set forth that the defendants were unable to give title on April

20, 1926, and the day of settlement was continued from time to time until July 3, 1926, at which time the defendants refused to make conveyance unless adjustments were made as of April 20, 1926. "Possession has remained in the defendant, and he must pay the charges accruing for the time of the delay for which he is responsible." (Conclusions p. 53).

For what delay were the defendants therefore responsible? Were they only responsible for the delay to July 3, 1926, and were they not responsible for the subsequent delay during the time of the litigation? If, as has been held by the learned Vice-Chancellor, they were responsible for the original delay, then it of course became necessary for the complainants to institute the proceedings in this cause and the delay occasioned while these proceedings were pending was certainly part of the delay caused by the action of the defendants.

Complainants have always been ready and willing to perform their part of the agreement and they ought not to be penalized in addition to the additional trouble and expense that they have already had by being compelled to pay for the up-keep of the premises while the defendants were clearing the title or while the cause has been in litigation. Nothing appears in the evidence or in fact is it seriously contended that complainants did not do all that they had agreed to do.

And complainants respectfully submit that the decree of the Court below ought to be reversed in the particulars above set forth.

Respectfully submitted

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