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NEW JERSEY
Court of Errors and Appeals

BETWEEN
HARRY D. GIHON ET UX.,
Complainants-Respondents,
AND
JAMES H. MORRIS ET AL.,
Defendants-Appellants.
} On Appeal.

BILL TO RESCIND DEED.

(*Filed July 12, 1917.*)

IN CHANCERY OF NEW JERSEY.

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

The complainants, Harry D. Gihon and Lou H. Gihon, his wife, of Trenton, New Jersey, respectfully show:

1. That about the month of September, 1908, the complainants were negotiating with one James H. Morris and William J. Morris, of Trenton, aforesaid, for the purchase of a certain house and lot known as No. 263 Bellevue Avenue, Trenton, which was held in the name of James H. Morris, but was a part of the partnership property of William J. and James H. Morris; and that during said negotiations the said William J. Morris acted for the partnership of William J. and James H. Morris, and as the agent and partner of his brother, James H. Morris.

2. That during said negotiations the complainants told the said James H. and William Morris they would

not buy the above-mentioned property unless they were given a clear title in fee simple, and the said James H. and William Morris repeatedly told the complainants that the said James H. Morris had a perfect and clear title to said premises, and one marketable and without any cloud or blemish, and that he would convey this property to these complainants, and warrant and defend them in the use of the same, and give them an absolute and indefeasible estate of inheritance in fee simple.

3. The complainants, relying on the said representations, on September 26th, 1908, paid the said James H. Morris and W. J. Morris the sum of $5,500.00 for the said property, and received from the said James H. Morris a general warranty deed therefor, a copy of which deed is hereto annexed and made a part hereof; and that on or about the complainants entered into the possession of the said premises.

4. The complainants recently attempted to sell said premises to one Charles Y. Barlow for the sum of $5,650.00 when it was discovered that the complainants did not have an absolute and indefeasible estate of inheritance in fee simple in said premises, and thereupon the complainants released the said Barlow from his agreement to purchase.

5. The defect in the title is as follows: Thomas J. Donoghue, the owner of said premises, died in July, 1900, leaving a last will and testament, duly proven before the Surrogate of Mercer county, and recorded in Liber "R" of Wills, pages 559–561, by the third clause of which he gives a life estate to his wife, Mary A. Donoghue, in all his real estate, and by the ninth clause in said will it is provided, "After the decease of my said wife, I give and devise all my said lands and real estate to said five children above mentioned, to wit: Joseph Doran, Mary T. Doran, John J. Doran, Thomas Donoghue and Joseph Donoghue, in equal shares, and if either of them be then deceased and leaving lawful

issue, said issue shall be entitled to take the share of his or her parent, and if either of them be deceased without leaving such issue the survivors shall take the whole of said estate in equal shares." On July 11th, 1906, Joseph P. Donoghue conveyed his interest in said premises to Mary A. Donoghue, which deed is recorded in Book 290 of Deeds, pages 377, &c., of the Mercer County Clerk's Office. On February 10th, 1906, the said Joseph Doran died intestate and unmarried. On July 16th, 1906, Mary A. Donoghue (widow), John J. Doran and Catherine, his wife, Mary T. Doran, Thomas J. Donoghue and Elsie P., his wife, conveyed their interests in said premises to the said James H. Morris, by deed bearing the above dated, and recorded in the Mercer County Clerk's Office, in Book 290 of Deeds, pages 416, &c.

Complainants are advised and charged that by the terms of the said will of Thomas J. Donoghue, should either Mary T. Doran, John J. Doran, Thomas Donoghue or Joseph Donoghue predecease Mary A. Donoghue and leave lawful issue, that issue would be entitled and have an interest and title to a moiety in said property equal to the share of the surviving devisees and the issue of the devisees predeceasing the life tenant, and that the complainants therefore have not a clear, unblemished, marketable title to an absolute and indefeasible estate of inheritance in fee simple.

6. Complainants charge that the said James H. Morris and William Morris knew at the time they bought these premises from the Donoghues and at the time they sold the premises to the complainants that they did not have a clear title to said premises, and one marketable and without any cloud or blemish, and that they did not have an absolute and indefeasible estate of inheritance in fee simple, and knew of the defect above referred to, and that the complainants were induced to purchase said premises because of the fraudulent misrepresentations of the said William and James H. Morris as to the title to said property.

7. Immediately upon the discovery of this fraud complainants demanded of the said William J. and James H. Morris the purchase price of said premises and offered to reconvey the premises and also asked for an accounting, and negotiations have been pending for some time without result.

Complainants are without adequate remedy in the courts of law, and, therefore, pray:

1. That the said James H. and William Morris, who are defendants to this suit, may answer this bill of complaint and each statement therein made.

2. That the defendants may be directed to account for the moneys paid to them on account of the purchase price of said premises, and pay the same to these complainants, together with all taxes paid by complainants on said property, and whatever damages this Court shall think reasonable and proper, after deducting such reasonable sum for the rent of this property as this Court shall think reasonable and proper.

3. That the defendants may be directed to accept a proper deed of conveyance for the said property described in said deed from these complainants.

4. That a writ of subpœna may issue, commanding said defendants to answer this bill of complaint and to abide by such decree as this Court may make in the premises.

CHAS. J. FALCEY,
Solicitor for Complainants.

MARTIN P. DEVLIN,
Of Counsel.

EXHIBIT C 2.

This Indenture, made this twenty-sixth day of September, in the year of Our Lord one thousand nine hundred and eight, BETWEEN James H. Morris of the City of Trenton, in the County of Mercer and State of New Jersey, party of the first part, and Harry D. Gihon, and Lou H. Gihon, his wife, of the same place, party of

the second part, WITNESSETH, That the said party of the first part, in consideration of the sum of One Dollar and other valuable consideration, lawful money of the United States, to him the said party of the first part, in hand well and truly paid by the said party of the second part, before the sealing and delivery of these presents, the receipt whereof the said party of the first part does hereby acknowledge, has granted, bargained and sold, aliened, released, conveyed and confirmed, and by these presents does grant, bargain and sell, alien, release, convey and confirm unto the said party of the second part, their heirs and assigns, all that certain tract or parcel of land and premises, situated, lying and being in the City of Trenton, County of Mercer and State of New Jersey, and bounded and described as follows, to wit:

BEGINNING at a point in the southerly line of Bellevue Avenue, said point being distant five hundred and ninety (590) feet westerly from the southwesterly corner of Bellevue Avenue and Calhoun Street, and runs thence (1) Southerly at right angles to Bellevue Avenue and along the face of the Westerly wall of the house herein described, one hundred and twenty-five (125) feet to a point; thence (2) Easterly at right angles to the first course and through lands of James H. Morris, twenty (20) feet to a point; thence (3) Northerly along line of lands of Jesse N. Barber and Aada A. Barber, one hundred and twenty-five feet to a point in the southerly line of Bellevue Avenue; thence (4) Westerly along the southerly line of said Bellevue Avenue twenty (20) feet to the point and place of Beginning.

The above property is conveyed subject to the right of the owner of the property adjoining on the West to use the Westerly wall of the house herein conveyed, as said wall is used at the date of these presents. And it is also agreed that the said party of the second part can use the westerly wall of the property adjoining on the east, as said wall is used at the date of these presents.

This conveyance is made subject to building and liquor restrictions of the Rutherford Land Company. Together with all and singular the buildings, improvements, ways, woods, waters, water-courses, rights, liberties, privileges, hereditaments and appurtenances, to the same belonging or in anywise appertaining; and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and of every part and parcel thereof; And also, all the estate, right, title, interest, use, possession, property, claim and demand whatsoever, both in law and equity of him the said party of the first part, in and to the said premises, with the appurtenances; To HAVE AND TO HOLD the said lot of land the hereditaments, and premises hereby granted, and every part and parcel thereof, with the appurtenances, unto the said party of the second part, their heirs and assigns, to the only proper use, benefit and behoof of them, the said party of the second part, their heirs and assigns Forever. AND the said James H. Morris, party aforesaid of the first part, for himself, his heirs, executors and administrators, doth hereby covenant, promise and grant to and with the said Harry D. Gihon and Lou H. Gihon, his wife, party of the second part, their heirs and assigns—That at the time of the sealing and delivery hereof, he, the said party of the first part, was seized in his own right of an absolute and indefeasible estate of inheritance, in fee simple, of and in all and singular the premises hereby granted, with the appurtenances and hath good right, full power, and sufficient authority in the law to grant, bargain, sell and convey the same unto the said party of the second part, their heirs and assigns forever, according to the true intent and meaning of these presents; and also, that it shall and may be lawful for the said party of the second part, their heirs and assigns, at all times forever hereafter, peaceably and quietly to have, hold, use, occupy, possess and enjoy the said premises with the appurtenances, and every part and parcel

thereof, without the lawful let, suit, eviction, interruption or disturbance of the said party of the first part, his heirs or assigns, or any other person or persons whomsoever lawfully claiming or to claim the same; and that the said premises are free and clear and freely and clearly acquitted and discharged of and from all former mortgages, judgments, executions, and of and from all other encumbrances whatever. AND LASTLY, that he, the said party of the first part, his heirs, all and singular, the said lot of land, the hereditaments and premises hereby granted, with the appurtenances, unto the said party of the second part, their heirs and assigns, against him, the said party of the first part, and his heirs, and against all and every person or persons whomsoever lawfully claiming or to claim the same, shall and will warrant and forever defend.

IN WITNESS WHEREOF, the said party of the first part, hath hereunto set his hand and seal the day and year first above written.

Signed, sealed and delivered in the presence of

JAMES H. MORRIS. (L. S.)

The word "Westerly" interlined in description twice before acknowledgment.

JOHN E. MULREY.

STATE OF NEW JERSEY, }
MERCER COUNTY, } *ss.*

Be it known, that on the twenty-sixth day of September, in the year of our Lord one thousand nine hundred and eight, before the subscriber, a Commissioner of Deeds of the State of New Jersey, personally appeared James H. Morris, who is, I am satisfied, the grantor mentioned in the foregoing deed of conveyance, and the contents thereof being by me first made known unto him, he did thereupon acknowledge that he signed, sealed and delivered the same as his voluntary act and deed for the uses and purposes therein expressed.

JOHN E. MULREY,
Commissioner of Deeds of New Jersey.

Received in the office of the Clerk of Mercer County on the twenty-eighth day of October, 1908, at 12:45 P. M., and recorded in Book 309 of Deeds, pages 585, &c.

GEORGE R. ROBBINS,
Clerk.

IN CHANCERY OF NEW JERSEY.

BETWEEN
HARRY D. GIHON, JR., ET UX.,
Complainants,
AND
JAMES H. MORRIS ET AL.,
Defendants.
} On Bill, &c.

ANSWER OF WM. J. MORRIS.

(*Filed September 17, 1917.*)

Answer of the defendant, William J. Morris.

This defendant, William J. Morris, answering the bill of complaint, says:

1. Paragraph one is admitted.

This defendant, William J. Morris, answering the the statements made in paragraph two.

3. This defendant admits that on September 26th, 1908, said complainants paid to the said James H. Morris and this defendant, the sum of $5,500 or thereabouts, for the said property, and received from the said James H. Morris a general warranty deed therefor; and that the complainants on or about the 26th day of September, 1908, immediately after the delivery of the deed, entered into the possession of said premises.

4. This defendant has no knowledge or information sufficient to form a belief as to the statements in paragraph four.

5. This defendant admits the statements in paragraph five as to the death of Thomas J. Donoghue, the provisions of his will, and the conveyances therein recited; but as to the other statements contained in said paragraph, this defendant has not sufficient information or knowledge to form a belief.

6. This defendant denies paragraph six.

7. This defendant, while denying any fraud or misrepresentation, admits paragraph seven.

8. This defendant, further answering, says that the said deed from James H. Morris to the complainants, was duly executed and delivered on or about the 26th day of September, 1908; that it conveyed or was intended to convey to the complainants all the right, title, interest, claim and demand of the defendants in and to the lands described therein; that the said conveyance was made by the defendants in good faith, and with the advice of counsel learned in the law, and in the full belief and understanding that it conveyed a title to the lands described therein, which was good, marketable and perfect in every respect.

9. And this defendant further says that the complainants took possession of the said premises immediately after the delivery of the said deed, on September 26th, 1908, and have at all times since then held all of the said lands and premises, without the let, hindrance or interference of anyone, and have received and enjoyed the rents, issues and profits thereof; and that if any defect has existed and does exist in said title, it rests upon a mere contingency which has not yet occurred and may never occur. That the said deed was a general warranty deed, signed by James H. Morris; and that the said James H. Morris and this defendant are today, and have been ever since the making of the said deed, solvent and amply able to respond to any claim that may be made for the breach of any of the covenants contained in said deed. That the making and delivery of said conveyance was entirely without any fraud or

misrepresentation, and without any knowledge of any defect in the title on the part of this defendant; that the will of Thomas J. Donoghue and the various deeds recited in the bill of complaint are and were at the time the complainants received title, matters of public record, open to the inspection of the complainants; and if any defect exists in the title thereby conveyed, such conveyance was executed and accepted because of a mistake in law, mutual with complainants and defendants; and such mistake in law, and the consequences flowing therefrom, is and are not remediable in a court of equity; and that the bill in this cause should be dismissed for lack of equity.

F. W. GNICHTEL,
Sol'r for and of Counsel with the Def't William J. Morris.

I consent to the filing of this answer as in time, Sept. 17, 1917.

CHAS. J. FALCEY,
Sol'r for Complainant.

IN CHANCERY OF NEW JERSEY.

BETWEEN
HARRY D. GIHON ET UX.,
Complainants,
AND
JAMES H. MORRIS ET AL.,
Defendants.
} On Bill.

ANSWER OF JAMES H. MORRIS.

(*Filed September 15, 1917.*)

The answer of the defendant, James H. Morris.

This defendant, James H. Morris, answering the bill of complaint, says that:

1. Paragraph 1 is admitted.

2. This defendant has no recollection, information or belief as to the statements made in paragraph 2 except that it was intended by him that the complainant should receive from this defendant and William J. Morris a marketable and valid title to the premises mentioned in the bill of complaint.

3. Paragraph 3 is admitted, except as to the implication therein that any specific representations were made by defendant and William J. Morris, or either of them, as to their title to said premises as to which defendant has, as aforesaid, no recollection, information or belief.

4. This defendant has no knowledge or information sufficient to form a belief as to the statements in paragraph 4.

5. This defendant admits the statements made in paragraph 5 as to the provisions of the last will and testament of Thomas J. Donoghue and as to the conveyances of the premises in question therein mentioned having been made, but denies that there was or is any defect in the title to said premises by reason of the facts stated in paragraph 5 or otherwise, because he says that upon the death of Thomas J. Donoghue, the testator, and under his will, said Joseph N. Doran, Mary T. Doran, John J. Doran, Thomas Donoghue and Joseph Donoghue received a vested remainder as tenants in common in fee simple absolute and indefeasible in said premises, and were fully entitled to and did convey the same in fee simple, as the provisions of said will followed the lawful course of inheritance which would have prevailed had the said Thomas J. Donoghue and Mary A. Donoghue both predeceased the said Joseph N. Doran, Mary T. Doran, John J. Doran, Thomas Donoghue and Joseph Donoghue, or any or either of them; and this defendant denies that any fraud was practiced or intended by him or said William J. Morris upon complainants in respect of the title to said premises, as implied in paragraph 5, but, on the contrary, says that

this defendant and William J. Morris had, at the time of their conveyance to complainants, a good marketable and indefeasible title in fee simple to said premises and conveyed the same title to complainants.

6. Paragraph 6 is denied.

7. Paragraph 7 is admitted, except as to the implication of fraud contained therein, which is denied.

8. This defendant further says that, even if said title were defective, said deed of conveyance was made by him and William J. Morris to complainants in good faith, without any misrepresentation or fraud, active or passive, in the belief that defendant and William J. Morris had a good valid and marketable title to said lands in fee simple, absolute and indefeasible; that the previous conveyances of said lands as recited in the bill of complaint were then of record in the office of the county clerk of Mercer county, New Jersey, where complainants then resided, and the will of said Thomas J. Donoghue was also of record in the Surrogate's office of said county, where they could have been inspected at any time by the complainants, or their counsel or agents, or by any person interested; that searches or abstracts of title were furnished to complainants by defendant and William J. Morris upon said premises, and it is defendant's recollection and belief that complainants, at the time of said conveyance, were represented by counsel learned in the law, who advised them to accept said title as good and marketable; and that this defendant and William J. Morris did not, at any time prior to the demand mentioned in the bill of complaint, have any knowledge, information or belief that said title was defective, or alleged to be defective, in any respect; and, further, that complainants entered into possession of said premises on or about September 26th, 1908, and have continued in possession thereof ever since, without eviction or any hostile action being taken against them in respect of said title; that, no fraud having been perpetrated, this Court has no jurisdiction in the premises,

there being an adequate remedy in the law, even if the covenant of warranty contained in said deed has been broken; and complainant's bill of complaint should, therefore, be dismissed for want of equity and also for laches in bringing this action.

HUTCHINSON & HUTCHINSON,
Solicitors of Defendant, James H. Morris.

IN CHANCERY OF NEW JERSEY.

BETWEEN
HARRY D. GIHON ET UX., *Complainants,*
AND
JAMES H. MORRIS ET AL., *Defendants.*
} On Bill, &c.

TESTIMONY.

Testimony taken in the above-entitled cause at the State House, Trenton, New Jersey, on Wednesday, the sixth day of February, 1918, at 10:30 A. M.

Before Hon. John H. Backes, Vice Chancellor.

Appearances—John H. Kafes and Charles J. Falcey, Esqs., for the complainants; Frederick W. Gnichtel and Barton B. Hutchinson, for the defendants.

Mary A. Donoghue, a witness produced on behalf of the complainants, being duly sworn, testifies as follows:

Direct examination, by Mr. Kafes.

Q. Mrs. Donoghue, where do you live?

A. 241 North Willow street.

Q. Trenton, N. J.?

A. Yes, sir.

Q. How long have you lived in Trenton?

A. I guess a good while. I'm on the corner thirty-eight years.

Q. Are you a widow lady?

A. Yes, sir.

Q. Your husband is dead?

A. Yes, sir; eighteen years.

Q. You are the widow of whom?

A. James J. Donoghue.

Q. When did he die?

A. The fourteenth of July, 1900.

Q. Did he leave a will?

A. Yes, sir.

Mr. Gnichtel—Here is the deed from Donoghue to Morris, if you are looking for that.

(Handing deed to Mr. Falcey.)

Q. I ask you if you, among others, joined in making the deed to James H. Morris conveying certain ground on Bellevue avenue?

A. Yes, sir.

Mr. Kafes—I offer it in evidence.

Said deed from Mary A. Donoghue and others to James H. Morris, dated July 16th, 1906, and recorded in the Mercer County Clerk's office, in Book 290 of Deeds, pages 116, &c., is marked *Exhibit C-1.*

Q. Before conveying this land to James Morris, did you speak to either James of William Morris about it?

A. I spoke to William, not to James.

Q. And were your negotiations had with William Morris?

A. Well, they were more with William; they weren't with James at all.

Q. How many times do you suppose you saw him before the deed was made?

A. I suppose three or four times; it's a long time ago; it's hard for me to remember all.

Q. Before making the deed to Mr. Morris, did you consult counsel in the matter?

A. No.

Q. Did you see Erwin Marshall, a lawyer?

A. No, I didn't see him, because I thought it wasn't

necessary; I showed him the paper Judge Woodruff had left me, and he said it would be all right.

Q. Mrs. Donoghue, didn't you see Judge Marshall about this matter?

A. I don't think I did; I don't remember seeing him.

Q. Didn't you consult him about this title to this particular piece of property?

A. No, because I thought it was all right, because Judge Woodruff said if I sold it it would be all right, as long as the heirs were willing.

Q. And did you have a conversation with Mr. Morris about the title?

A. I told him in the first place about it, but I didn't tell him afterwards; I showed him the paper.

Q. What did you tell him about it?

A. I don't know exactly; I told him the heirs might make a fuss, and he said it would be all right.

Q. You told him that?

A. Yes, sir, and that paper would cover it all.

Q. And he said, "All right"?

A. Yes, sir.

Q. Where was that had, Mrs. Donoghue?

A. In my sitting room.

Q. How long after that was it that you gave this deed?

A. I can't tell.

Q. Within a few days?

A. Oh, no; it was weeks; it wasn't in a few days.

Q. You knew, then, from the will of your late husband that these heirs might have an interest in this property?

A. They might if they hadn't signed this paper that they would give it up for the benefit of what they would get.

Q. Some of them?

A. The whole of them, and Joe wasn't living at the time.

Q. In other words, you mean by that that you gave him the best title you could?

A. Yes, sir; the very best; I told him nothing but the truth.

Q. And when you told him these heirs might make a fuss for him, who did you refer to?

A. I referred to that paper Judge Woodruff gave me.

Q. To the heirs mentioned in that paper?

Mr. Gnichtel—That is objected to as hearsay; if there was a paper it should be produced.

The Court—Objection overruled.

A. Yes, sir.

Q. Did you mention the names of those heirs?

A. No, sir; they were on that paper.

Q. And he seemed satisfied then to take the property?

Mr. Gnichtel—That is objected to.

The Court—That is leading.

Q. Then the deal was arranged?

A. Yes, sir.

Q. And the deed subsequently given?

A. Yes; I gave him the paper I had, and he had the deeds, I suppose, made from it.

Q. Now, Mr. Donoghue, in his lifetime, took into his home Joseph Doran and Mary Doran, John J. Doran, Thomas Donoghue and Joseph Donoghue?

A. Yes.

Q. What relation were they to you?

A. None.

Q. To Mr. Donoghue?

A. His nephews and nieces.

Q. Is Mary P. Doran living or dead?

A. Yes, sir, living.

Q. Married?

A. She has been married and is a widow.

Q. Are there any children?

A. There was one, but it died.

Q. How old is she?

A. About forty.

Q. John J. Doran, is he living or dead?

A. He is living in Cooper street.

Q. Married or single?

A. Married.
Q. Any children or not?
A. Two boys.
Q. Is Thomas Donoghue living or dead?
A. Living in California.
Q. Is he married or single?
A. Single.
Q. Wasn't he married?
A. Yes, sir, and divorced from his wife.
Q. Were there any children born?
A. No.
Q. Is Joseph Donoghue married or single?
A. Single; he died in Asbury Park.
Q. Joseph Doran?
A. He is dead.
Q. Then two of them, Joseph Doran and Joseph Donoghue, are dead?
A. Both dead.
Q. Did they leave any children?
A. No.
Q. Then the only one of these children who has children born and living is John J. Doran?
A. Yes.
Q. And he has two?
A. Yes; he is the only one.

Cross-examination, by Mr. Gnichtel.
Q. Did I understand you to say that Mr. Morris suggested that you get a paper from the heirs?
A. No.
Q. You have the paper?
A. Yes, sir; from Judge Woodruff.
Q. Who drew it?
A. Judge Woodruff himself.
Q. Is this the paper?
A. Yes, sir; that's their handwriting.

Mr. Gnichtel—I offer the paper in evidence.

Said paper, being an authorization for the sale of property, signed by Mary Donoghue,

Joseph D. Doran, John J. Doran, T. J. Donoghue, Mary T. Doran and Joseph T. Donoghue, dated February, 1901, is marked *Exhibit D-1* for identification.

Q. That paper I show you was made when? It is dated February, 1901.

A. This one from Judge Woodruff?

Q. Yes; when did you first begin negotiations with Mr. Morris for the sale of this property?

A. I can't tell exactly; he often come and said something to me about it, and I paid no attention to it.

Q. It was years after?

A. Yes, sir; I think it was 1906 or '07, I don't know which.

Louise H. Gihon, a witness produced on behalf of the complainants, being duly sworn, testified as follows:

Direct examination, by Mr. Kafes.

Q. Do you remember, together with Harry Gihon, buying a certain property on Bellevue avenue from William and James Morris?

A. I do.

Q. Do you remember when that was?

A. Yes, sir; we moved in the house Labor Day, 1908.

Q. How long did you remain in the house?

A. We moved out in April, the first of April—the last day of March, and it would have been nine years the following September.

Q. When did you move out?

A. The last day of March, 1917.

Q. And had you entered into negotiations to sell the place?

A. We had sold it, thought we had.

Q. To whom?

A. Charles Y. Barlow.

Q. Did he pay you a deposit on it?

A. He did.

Q. Did you proceed to sell it by executing a deed, etc., having searches made?

A. We did.

Q. And state why the property was not sold and deeded to Mr. Barlow?

A. They were to settle on the first day of April; that came on Sunday—

Mr. Gnichtel—That is objected to.

The Court—Objection overruled.

A. We were to receive our money and settle up on the first day of April; that falling on Sunday, it was to have been done on Saturday, but there was some trouble about it, and Dickinson 'phoned that they couldn't settle for a few days; we let it go for several days, and I went to Mr. Kafes' office, and he went to Dickinson's office with me, and he said "Mr. Barlow"—

Mr. Gnichtel—That is objected to as hearsay.

The Court—Objection overruled.

A. We went to Mr. Dickinson's office, and Mr. Bradley told us that Mr. Barlow had withdrawn the money; that he couldn't get a clear title; so I went to Mr. Kafes' office, and he said, "You go and see Mr. James Morris, and probably he will give you a bill of indemnity"; so I went up there and stated the facts to him, and he called Mr. Gaskill in, and it wasn't very long before Mr. Barlow himself came in, and Mr. Morris said, "What's the matter with that property"? Mr. James Morris said that; he said, "Well, I can't get a clear title"; he said, "I may have trouble getting the mortgage; I won't take that property"; and Mr. James Morris said, "There are others that have gotten mortgages"; he said, "That doesn't give me a clear title"; and Mr. Gaskill said, "No, there isn't anything that would give you a clear title"; and Mr. James Morris said, "I don't know why Bill took such a chance."

Q. Now, did Mr. Barlow tell you that he was acting upon the advice of counsel?

A. Yes.

Q. And the attorney—who did he state his attorney was?

A. Solan.

Q. And then the deal didn't go through?

A. The deal didn't go through; we had to return the forfeit he paid us.

Q. In the meantime, you had moved out of the place and taken up your residence elsewhere?

A. Yes, sir.

Q. The place is now rented?

A. For a month or two Mr. Barlow stayed there, and then he moved, and we rented the place as soon as we could.

Cross-examination, by Mr. Hutchinson.

Q. There was only one interview between you and Mr. Morris, was there not?

A. Mr. James Morris?

Q. Yes.

A. That's all.

Q. At his office?

A. Yes, sir.

Q. And Mr. Gaskill, Mr. Barlow, Mr. Morris and yourself were present?

A. And the stenographer.

Q. Miss Titus?

A. Yes, sir.

Q. Did Mr. Gaskill pass on the title at that time?

A. I asked Mr. Barlow if he wasn't willing to take a bond of indemnity, and Mr. Gaskill said that wouldn't give a clear title.

Q. And that is all he did say, isn't it?

A. Yes, sir.

Q. Didn't Mr. Morris say to you then, Mr. James Morris, say to you or say to Mr. Barlow that if he couldn't get anybody to take the $3,000 mortgage he would take it himself?

A. No; he said, "Others have got it." And Mr. Bar-

low said, "Will you take it?" and Mr. Barlow didn't answer that question, to my knowledge.

Q. You are quite sure he didn't say what I have said?

A. I didn't hear it.

Q. Did Mr. Morris express at that time any surprise at the state of the title; did he say anything about his being surprised?

Mr. Kafes—That is objected to.

The Court—Objection overruled.

A. He said, "I don't know why Bill took the chance."

Q. Anything else said there at that interview than what you have stated to us?

A. Anything else?

Q. Yes.

A. Well, there was some conversation, but I think I have stated about all.

Q. You think you have?

A. Yes, sir; I think I have.

Q. Did Mr. Barlow at that time, or at any time, say to you or to anybody in your presence that the house was too large and he didn't care to take it?

A. No, he didn't; he had already signed; we had both signed our contract.

Further cross-examination, by Mr. Gnichtel.

Q. Did Mr. Barlow object to the house after he had agreed to buy it because there was no room for a garage?

A. No.

The Court—I don't think it makes much difference, Mr. Gnichtel, why he refused to live up to his bargain, do you?

Q. Did you make any attempt to compel him to live up to his bargain?

A. What do you mean?

Q. You didn't see a lawyer to bring suit and compel him to take it?

A. I didn't try to when we couldn't live up to it ourselves, when we didn't live up to ours; we couldn't

give him a clear title when we didn't feel we were living up to ours.

Q. Nobody had said to you the title wasn't good, did they? Had any lawyer told you that the title was defective?

A. Only that Mr. Gaskill said, and Lawyer Kafes also—

Q. Oh, did Mr. Kafes tell you?

A. Yes.

Q. But you made no attempt to file a bill in Chancery and compel him to live up to his contract?

A. We didn't, because we didn't think we were living up to ours.

Q. Well, you didn't, did you?

A. No.

Harry D. Gihon, a witness produced in behalf of the complainants, being duly sworn, testified as follows:

Direct examination, by Mr. Kafes.

Q. Do you know James H. Morris?

A. I do.

Q. And William Morris?

A. I do.

Q. Do you remember buying a certain property from William Morris?

A. I do.

Q. Where was that property located?

A. At 263 Bellevue avenue.

Q. And he gave you a deed?

A. He did.

Q. Or had a deed provided for it?

A. He did.

Q. Who gave you the deed?

A. Mr. Morris.

Q. Which one?

A. William J.

Q. No, who gave you the deed, who signed the deed for the place?

A. It was signed by James H.

Q. With whom did you have the negotiations for the purchase of this property?

A. William J.

Q. Did he or not say anything to you of and concerning the title to this property?

A. Why, I asked him whether I should get out the searches, and he said it wasn't necessary, and he said Mr. Mulrey had attended to that.

Q. What else did you say to him about the title?

A. Well, he said the title was all right; that he had searched it up; and I had confidence in him, and I let it go at that.

Q. Did you say anything else in connection with that?

A. That's about all that was said.

Q. Now, just think a moment, and I ask you if you said anything else to him concerning the title or anything you should do concerning the title?

A. I asked him whether I should see a lawyer and get a search, and he said it wasn't necessary; Mr. Mulrey had said it was all right; he searched it up, and it was unnecessary to do it.

Q. You relied upon what he said?

A. Yes, sir; I had confidence in him, and I let it go at that.

Q. Do you remember entering into a certain agreement for the sale of this property?

A. Yes, sir.

Q. Tell us all about it.

A. Well, I did through Mr. Jamieson; Mr. Jamieson wanted to know if I would sell the place, and I told him what I would sell it for, and everything was agreed upon, and Mr. Barlow paid a deposit; and Mr. Jamieson came up there and gave us the deposit, and we thought the sale was good, you know; outside of that, until we found out it wasn't good.

Q. Did the deal go through?

A. Yes, sir, and he went in the place.

Q. Did you sell the place?

A. Yes, sir.

Q. Did you agree to sell it?

A. Yes, sir; we agreed to sell it and signed it.

Q. Why didn't you convey it?

A. We couldn't convey it.

Q. Why not?

A. Because Mr. Solan found out the title wasn't good, and he said you couldn't get a clear title.

Q. He was acting for Mr. Barlow?

A. Yes, sir.

Q. And that is the reason the deal didn't go through?

A. That's the reason the deal didn't go through.

Q. And you returned the deposit money to Mr. Barlow?

A. We had to.

Q. You did, as a matter of fact?

A. Yes, sir.

Q. Did you know the title was bad before that?

A. I did not.

Q. You were not down to the Morris office with your wife?

A. Yes, but I had an appointment and couldn't stay; I had to get back to the office, and I left my wife there, and I didn't hear what went on.

Cross-examination, by Mr. Hutchinson.

Q. Did you ever consult an attorney of your own with regard to the title after it was questioned?

A. No.

By the Court.

Q. Except Mr. Kafes?

A. Yes, sir.

Q. You never brought any suit or took any proceedings against Mr. Barlow with regard to taking the title?

A. No.

By the Court.

Q. What did you sell it for?

A. $5,650.00.

By Mr. Gnichtel

Q. What did you buy it for?

A. $5,500.

Re-direct examination, by Mr. Kafes.

Q. Will you please state how much you paid for the property to Mr. Morris?

A. $5,500.00.

Q. How?

A. Partly with a mortgage of $3,500.00, and the rest in cash and a note.

Q. How much in cash did you pay, do you remember?

A. I don't know that I remember exactly.

By the Court.

Q. Was the note afterwards paid?

A. Oh, yes.

Q. How about the mortgage, did you pay that off?

A. No, the mortgage, that's still on the place.

Q. You assumed that mortgage that was on the place at the time?

A. Yes, sir.

Q. And it was on the place when you bought it?

A. No; Mr. Case got the mortgage for me from John Scudder, of Hopewell.

Q. That is still on the place?

A. Yes, sir.

Q. It wasn't a lawyer or a real estate man?

A. No.

Re-cross examination, by Mr. Hutchinson.

Q. Do you know to whom that mortgage was made when you bought that property?

A. John D. Scudder, of Hopewell.

Q. Where was that transaction made; in whose office, or through what attorney, if any?

A. I forget about that; I couldn't answer that.

Further cross-examination, by Mr. Gnichtel.

Q. Do you remember that you gave a mortgage to John D. Scudder when you bought the property?

A. Yes.

Q. For $3,500?

A. Yes.

Q. And how did you pay the balance?

A. There was a note for $1,000, and I paid that off.

Q. How was the rest paid?

A. By cash.

John Solan, a witness produced on behalf of the complainants, being duly sworn, testified as follows:

Direct examination, by Mr. Kafes.

Q. You are an attorney-at-law?

A. Yes, sir.

Q. Of the State of New Jersey?

A. Yes.

Q. Do you know Mr. Barlow?

A. Yes, sir.

Q. Do you remember him entering into a certain agreement with Harry D. Gihon and his wife for the purchase of a property on Bellevue avenue?

A. I saw the agreement after it had been entered into.

Q. Do you remember searches had been gotten by Dickinson & Company through Mr. Bradley?

A. Yes, sir; they were at my office, the searches that covered the property.

Q. Did you examine those searches?

A. I did.

Q. Did you or not advise Mr. Barlow not to take the place?

A. I advised Mr. Barlow that, in my opinion, the

title was unmarketable, and I advised him not to take the conveyance.

Q. And he did refuse?

A. I believe he did; I advised him to refuse.

No cross-examination.

Mr. Kafes—I offer in evidence the deed made by Morris to Gihon.

Said deed made by James H. Morris to Harry D. Gihon, Jr., and Lou H. Gihon, his wife, dated September 26th, 1908, and recorded in the Mercer County Clerk's office in Book 309 of Deeds, page 585, &c., is marked *Exhibit C-2.*

William J. Morris, one of the defendants, being duly sworn on behalf of the defendants, testified as follows:

Direct examination, by Mr. Gnichtel.

Q. Where do you live?

A. 134 Prospect street.

Q. What is your business?

A. Builder.

Q. Did you, previous to 1906, enter into negotiations with Mrs. Donoghue for the purchase of the property—

A. Yes, sir.

Q. What property?

A. 150 feet of land on Bellevue avenue.

Q. Does that property include the property now in question?

A. That's part of it; yes.

Q. Did you employ a lawyer to look up the title?

A. Yes.

Q. Who?

A. Judge Macpherson.

Q. Did you have any conversation with Mrs. Donoghue as to the title?

A. Well, I used to stop in there when I was going home, and I talked to her a good many times about the lot, and Mrs. Donoghue—

Q. Did she show you a paper during some of those interviews?

A. Not until after we bought the property.

Q. Didn't you see this paper until after you bought the property?

A. No.

Q. When did you see this?

A. I didn't see that until I went to get the deed or something, down—

Q. This paper is *Exhibit D-1* for identification, did she tell you about this paper in the negotiations?

Mr. Kafes—That is objected to.

The Court—Objection overruled.

A. Yes.

Q. Did she tell you who drew the paper?

A. Yes, sir.

Q. Who?

A. Judge Woodruff.

Q. And she showed you afterwards the paper?

A. Yes, sir.

Mr. Gnichtel—I offer the paper in evidence.

Mr. Kafes—The offer is objected to.

Said paper is marked *Exhibit D-1*.

Q. When did you buy the property?

A. Sometime in 1906.

Q. And this deed which has been offered in evidence, *C-1*, you received from whom?

A. From the Donoghue Estate.

Q. Then what did you do with the property, develop it?

A. Yes, sir.

Q. In what way?

A. Built four single houses on it, and the Gihons bought one and Hildebrecht bought one, and Mr. Weeden, the hardware man, bought one, and Fitzcharles, of Fitzcharles and Melrose, bought one.

Q. What did you give for the place?

A. I gave $6,000 for it.

Q. What did you expend in the building of these houses?

Mr. Kafes—That is objected to.

The Court—Objection overruled.

A. Why, I should judge $30,000.

Q. And you have mentioned to whom these houses were sold by you?

A. Yes.

Q. Have some of the houses since been sold?

A. Yes, sir.

Q. And mortgages given?

Mr. Kafes—Objected to.

The Court—Objection overruled.

A. Yes.

Q. When you purchased the property, did you pay cash?

A. No, sir.

Q. Well, you paid Mrs. Donoghue cash, didn't you?

Mr. Kafes—Objected to as incompetent and irrelevant.

The Court—Objection overruled.

A. No.

Q. Didn't you borrow money from the Murphy Estate?

A. Yes, sir.

Q. And didn't you pay that money to Mrs. Donoghue?

A. Yes.

Q. She got her $6,000?

A. She got her $6,000.

Q. How much mortgage did you give the Murphy Estate?

A. $4,000.

Q. That was on the whole property?

A. Yes, sir; on the 150 feet.

Q. Then, did you put mortgages on after you put up the buildings?

A. Well, I couldn't exactly say that, because we generally tried to sell our houses clear, see? Of course, if we got stung for money, then we mortgaged them.

Mr. Kafes—That is objected to. The question is speculative in its terms; and he said when he got stumped for money.

The Court—The objection is overruled.

Q. Did you sell one of the houses to Bayard L. Dunkle?

Mr. Kafes—Objected to.

The Court—Objection overruled.

A. Not of that kind.

Q. One on this tract?

A. Yes.

Q. And one to David S. Lanning?

Mr. Kafes—Objected to.

The Court—Objection overruled.

A. Yes, sir.

Q. Was the title passed—do you remember the date of the Gihon sale?

A. It was 1908.

Q. September 28th, I think. Do you remember the day of the Weeden—do you remember whether you sold to Weeden that property before or after?

A. That was the second house sold; Barber bought the first house—Jesse N. Barber, of Hill's Bakery.

Q. How about the one you sold to Melrose?

Mr. Kafes—That is objected to as incompetent, irrelevant and immaterial.

A. I think that was the last sale.

Q. The date I have here is April, 1908; does that refresh your memory?

A. That Gihon sale was next to the last.

Q. How many were sold before that?

A. Two before Gihon's.

Q. Was any question ever raised as to the title to this property until after you sold the Gihon place?

Mr. Kafes—Objected to.

The Court—Objection overruled.

A. No, sir.

Q. When did you first hear of any objection being raised to the title of this property?

A. On the Weeden house.
Q. On the sale or after the sale?
A. Several years after the sale.
Q. How was it raised?
A. I think there was a party named Umpleby—
Q. Who was her attorney?
A. I don't know that.
Q. Wasn't it Mr. James Buchanan?
A. I think it was.
Q. What objection did they raise; was it ever explained to you?
A. No, sir.
Q. What was the result of that?
A. I never knew any result, only the thing went on just as it did before.
Q. As far as you know, it was straightened out?
A. Yes, sir.

By the Court.
Q. The Weeden sale, when was that, not the date, but in relation to the other sale?
A. That was the third sale.
Q. Who bought the first property?
A. Barber.
Q. Who the next?
A. Weeden.
Q. When you learned of this difficulty with the title, was it before or after you had sold to the Gihons?
A. Two or three years after.

Q. How did that question arise, on a sale or on mortgages?
A. The Umplebys, they wanted their money, and, of course, Weeden had to pay them off, and he didn't have the money, and he again wanted to re-borrow—
Q. There was something about a mortgage that had to be paid off; was a new mortgage obtained?
A. Yes.

Q. Then when did you next hear of any question in relation to the title?

A. Not until Charlie Barlow had bought the Gihon property.

Q. Did you meet either Mr. or Mrs. Gihon when this sale was made?

A. Yes, sir, often; this has been the second house I sold them.

Q. Mrs. Gihon said she had no conversation with you; Mr. Gihon said he had a conversation with you about the title. Do you remember what occurred at that interview?

A. Sure I did. The title was good; I thought the title was good, after Judge Macpherson had passed it for good, and Judge Woodruff had told us it was all right.

Q. Did you give them a warranty deed?

A. Yes, Gihon got a warranty deed, and so did everybody else that bought any of it.

By the Court—

Q. These properties belonged to you and your brother?

A. Yes, sir.

Q. And the title is held in his name?

A. Yes.

Further direct examination, by Mr. Hutchinson.

Q. You say you were both interested; was this partnership property between you and your brother?

A. Yes.

Q. And you conduct all the negotiations?

A. Yes; that was my part of the business.

Cross-examination, by Mr. Kafes.

Q. You started out to say, Mr. Morris, "Yes, I had a conversation with Mr. Gihon"; you were going to say that when you were broken off there; what did you tell him about the title to this property?

A. That that title was all right.

Q. What were the exact words you used?

A. I couldn't tell you.

Q. What did you wish to convey to him, or what did you mean when you used the words "all right"?

Mr. Gnichtel—I object to his stating what he meant; he said he told him it was all right.

The Court—Objection overruled.

A. I couldn't give him a warranty deed if it wasn't all right, or if I didn't think it was all right.

Q. You meant to give him a clear title?

A. I did give him a clear title.

Q. And that's what you meant, wasn't it?

Mr. Gnichtel—That is objected to.

The Court—Objection overruled.

A. Well, if a man like Judge Macpherson told me, I would think it was all right.

Q. You think it was?

A. Yes.

Q. And that's what you meant to convey to the Gihons?

A. Yes.

Q. And that it was clear?

A. Yes, I think it was clear when they bought it.

Q. And that's what you meant to convey to the Gihons that the property was clear?

Mr. Gnichtel—I object to that.

The Court—Objection overruled.

A. Well, it was clear.

Q. And that is what you meant to convey to the Gihons, that the property was clear of any defects in the title?

A. I didn't know that it had any defects.

Q. Is that what you meant to convey to them, that it was clear, the title?

Mr. Gnichtel—Objected to.

The Court—Objection overruled.

A. I did tell you that I said it was all right.

Q. You meant to convey to them the idea that there were no defects in the title to that property?

A. I didn't know of any.

Q. And that's what you meant to convey to the Gihons, that there was no defects in the title?

A. If I went there—

Q. Now, I think you ought to answer that question; didn't you intend to convey to them by your words, the words you used, that it was all right, that there were no defects in the title to that property?

A. Sure; I wouldn't do anything to Harry Gihon or anybody else.

Q. You told them your title was clear?

A. I told them the title was all right.

Q. You didn't tell them it was clear?

A. The house was clear; there was no mortgage on it.

Q. The house and the land it stood on?

A. I told them the property was all right.

Q. You bought this property from Mrs. Donoghue?

A. The Donoghue estate.

Q. You didn't think there was any defect in the title of that ground, did you?

A. I think there is a defect in every piece I buy.

Q. Did you think there was a defect in this?

A. That took the usual course.

By the Court.

Q. You mean you suspect defects?

A. Sure; I didn't pay $6,000 for a property and not know what I am going to do with it.

Q. When you bought it, did you know there was any defect in it?

A. No.

Q. Did Mrs. Donoghue say to you in buying this property, "I will sell it to you, but the heirs might make a fuss for you"?

A. I don't think I ever talked in that sort of line to Mrs. Donoghue.

Q. Didn't she say that to you?

A. I don't think so, no, sir. John Mulrey bought the property and got the deeds and everything for us.

Q. I ask you whether Mrs. Donoghue didn't say that to you?

A. I don't remember her saying that; she might have said, she had told me a number of times that the heirs wanted their money, and she would like to sell it.

Q. What heirs?

A. The heirs from the will that she had to carry this property, and it was a burden to her all the time, and it didn't bring anything in, and she would like to get clear of it; that's the reason we had to pay cash for it.

Q. Did any of your lawyers tell you that if John G. Doran died and then Mrs. Donoghue should die, that their mother's share would go to the two children?

A. No, sir.

Q. And that you couldn't get the signatures of the Doran children to that deed?

A. No, sir.

Q. You never heard of that?

A. No.

Q. And you didn't know that they might have an interest in that property?

A. Well, I knew they all signed the deed.

Q. But you knew the Doran children had not?

A. Well, I had an attorney to attend to those things.

Q. Did he tell you anything about that?

A. No.

Q. Did you know anything about it?

A. No.

Q. What caused Mrs. Donoghue to tell you that some of the heirs might make a fuss?

A. She never told me that.

Q. When you were talking about selling this property to Harry Gihon and wife, did you tell him you would give him a warranty deed and the usual covenants against defects, etc.?

A. I did give him a warranty deed.

Q. And you so told him before he took the property?

A. Sure.

James H. Morris, a witness produced on behalf of the defendants, being duly sworn, testified as follows.

Direct examination, by Mr. Hutchinson.

Q. Mr. Morris, you are one of the defendants in this suit, and the brother of William J. Morris, who was just on the stand?

A. Yes.

Q. In 1906, when the deed was made to Mrs. Gihon, were you and your brother engaged in business together?

A. In 1906?

Q. 1908.

A. Yes, sir.

Q. Did you have anything to do with the transaction between yourselves and the Gihons?

A. No, Mr. W. J. Morris took care of those matters.

Q. Do you remember an occasion when Mrs. Gihon came to your office, and Mr. Gaskill, your stenographer, and Mr. Barlow were present?

A. Yes, sir.

Q. Do you remember saying to Mrs. Gihon that you didn't know why Bill took such a chance?

A. No, I didn't.

Q. Do you mean you don't remember or you didn't say it?

A. I didn't say it in that way.

Q. What did you say? Tell us what occurred.

A. Well, in the first place, Mrs. Gihon came in the office, she was in there when I came in, and that was the first intimation that I knew there was any question about any title in reference to this property; she began to tell me the facts as she thought they pertained to these different heirs that had an interest, and I thought it a most ridiculous thing—

By the Court.

Q. Is that the reason you came to say "I don't know why Bill took such a chance?"

A. Yes, sir; it was ridiculous to think that the title wasn't clear, and he took a chance on buying this property, spending all this money if such was the fact; and I had some work I had to get out—

Q. Just tell what was done and said.

A. So, instead of continuing the conversation with Mrs. Gihon, I called in Mr. Gaskill.

Q. Who is he?

A. Nelson B. Gaskill, a lawyer; and I wanted to get rid of the thing, and if there was anything to decide Mr. Gaskill could take care of my part—

Q. Just tell the Court exactly what was said by Mr. Gaskill or anybody else; what did you say to Mr. Gaskill?

A. Mr. Gaskill came in and I said, "Here is some matter about a defective title," whether I used the exact words I don't know; I thought the whole thing was very insignificant at the time; and Mrs. Gihon explained to Mr. Gaskill what the situation was, as she saw it, in reference to the heirs; and a short time after that Mr. Barlow came in the office, and I said to Mr. Barlow, "What's the matter that you don't go ahead with this deal and close it up?" and the thought ran through my mind that Barlow wanted to flunk on the proposition, and he didn't want it; and that he probably had seen something else, or that it was too expensive, or something of that kind.

Mr. Kafes—That is objected to.

Q. Just what was done and said?

A. Well, that's practically all that was done; and then in reference to that Barlow said that probably he couldn't get a mortgage on this property if the present mortgage was recalled; that might be a serious matter to him, I don't know; but whether I said at the time or since then to Barlow that if nobody else would take

the mortgage I would take it, and that stands good to-day.

Q. What did you say to Mr. Barlow in the office; did Mr. Gaskill examine the title at that time?

A. No, he was only there for a few moments.

Q. What was said about a bond of indemnity or bill of indemnity?

A. There was some mention made of such a thing, but it was no time for me to make a decision of that sort, whether I could give it or whether I shouldn't give it.

Q. What did Mr. Gaskill say in regard to a bond of indemnity?

A. I don't recall that he said anything at all.

By the Court.

Q. The first that you knew of any criticism of this title was when you had this interview with Mr. Barlow and Mrs. Gihon?

A. Yes, sir.

Cross-examination, by Mr. Kafes.

Q. Mr. Morris, Mr. Gaskill represented you at that time, did he not?

A. Well, he was right handy and I called him in at the time; he has done some other work for me.

Q. Did you authorize Mr. Gaskill at that time to get from the Gihons a signed agreement that they would deed the place back?

A. No.

Q. And you would return the consideration?

A. Absolutely not.

Q. Do you know whether he did it or not?

A. I don't think he did.

Q. Do you say he did not?

A. I say he did not, yes, to the best of my knowledge he didn't; he never got any authority from me to do it, and he wouldn't do it unless he had got the authority; so it is probably a positive fact he hasn't done it.

Re-direct examination, by Mr. Hutchinson.

Q. At the time that this conveyance was made by you, which was made by you alone, as I understand it, to the Gihons, did you know or suspect, or have any reason to believe from any source that the title was defective in any respect?

A. I did not.

Q. At the time you delivered the deed and the payment of the consideration money, you didn't know of any such defect?

A. I did not.

Mr. Kafes—If the Court thinks it is relevant, I can produce Mr. Gaskill's letter showing that he did direct Mr. Gaskill—

The Court—No, you need not do that.

Case closed.

Argument, March 5, 1918.

SECOND DAY.

Testimony taken in the above-entitled cause, at the State House, Trenton, New Jersey, on Tuesday, the seventeenth day of April, 1918, at 2 o'clock P. M.

Before Hon. John H. Backes, Vice Chancellor.

Appearances as heretofore noted.

Anna M. Morris, a witness produced on behalf of the defendants, being duly sworn, testified as follows:

Direct examination, by Mr. Gnichtel.

Q. Mrs. Morris, do you remember, in 1908, when your husband, William J. Morris, sold some property to Harry Gihon?

A. I do.

Q. Do you remember hearing a conversation between Mr. Morris, your husband, and Mr. Gihon, in your house?

A. I do.

Q. What was that?

A. The starting of the first part was where Mr. Gihon called up and said he had a chance of selling the property he had to a party by the name of Case.

Q. That is, the property he then lived in?

A. The property he then lived in, and he said if he could make a good deal with Mr. Morris that he could sell his property; and Mr. Morris was not home at the time, but I told him if Mr. Morris came home soon he could call him up; and Mr. Morris called him up, and he and Mrs. Gihon came to our home, and they asked what was the best he could do on the property they bought, and Mr. Morris told him he would do better with him than the rest; it was the only one that was left, and agreed to sell it for $5,000. He had sold the others for $5,500.

Q. Did he say whether that was to be secret?

A. Yes, sir; because the other parties wouldn't feel satisfied if they knew Dr. Gihon had paid $500 less than they did.

Q. Do you know whether that deal went through?

A. Yes; Mr. Morris told me—I don't know their terms, but Mr. Morris said—

Q. When you say you don't know their terms, you mean you don't know the method of payment?

A. Yes.

Q. That was the amount mentioned between them?

A. Between Dr. Gihon and Mr. Morris.

Cross-examination, by Mr. Kafes.

Q. You say these other people paid $5,500 for their property?

A. Well, yes; Mr. Morris said the other people paid fifty-five.

Q. And they were to get it five hundred dollars less than the other people?

A. They paid $5,000 for their property.

Q. (Stenographer repeats the question.)

A. Yes, sir.

Q. Supposing I should tell you that the other people paid $6,000 for their places, what would you say?

A. I don't know anything about that.

Q. But you said the others gave $5,500, didn't you, a moment ago?

Mr. Gnichtel—She is telling what she heard of the conversation between these two people. I object.

The Court—Objection overruled.

Q. (Stenographer repeats the question.)

A. Yes, sir; the Gihons paid $500 less than the others.

William J. Morris, being recalled on behalf of the defendants, testified as follows:

Direct examination, by Mr. Gnichtel.

Q. Mr. Morris, at the hearing of this case Mr. Gihon swore that he paid you $5,500 for this property; is that correct?

A. No, sir.

The Court—You must not reflect upon another witness's testimony.

Q. What have you to say about that?

A. That's what he paid, $5,000, and he had the last house that was sold, and we wanted to clean up that operation, and he said he could make three or four hundred dollars on the house he lived in, and if he could get a bargain on this he would buy it; so I told him as long as he bought another house off me, and it was the last one, and it was empty, and it cost money to keep, he could have it for $5,000.

Q. How was the money paid?

A. $1,000 cash and $500 note—

Q. How much was the mortgage?

A. $3,500.

By the Court.

Q. Was the property sold subject to a mortgage of $3,500?

A. A purchase money mortgage, I think.

Q. They gave you $1,000 in cash and a $500 note, and there was a $3,500 mortgage?

A. Yes. I don't just remember whether it was that or not, but I do remember the house was clear.

Q. You conveyed it clear?

A. Yes.

Q. He may mave given you the purchase money mortgage of $3,500, or got it from someone else?

A. Yes.

Q. Have you looked through your own books to see if you could find any record of the amount of money you received at that time?

A. We have looked, yes.

Q. Is this one of your old books, called "Notes receivable"? (Handing witness a book.)

A. Yes.

Q. I call your attention to an item here under date of September 30—

Mr. Gnichtel—I will withdraw the question.

By the Court.

Q. Is this part of your bookkeeping system of that time?

A. Yes, sir.

Q. What system of bookkeeping had you, a day book and ledger?

A. Yes, sir; and this "Bills receivable" book.

Mr. Gnichtel—I offer the book in evidence.

Said book is marked *Exhibit D-2.*

Q. I call your attention to the copy of the deed attached to the bill in this case, acknowledged the 26th day of September, 1908; did you find any item about that time in that book that refers to this transfer?

A. Yes, the account of the note they gave us.

Q. How much was the note?

A. $500.

Mr. Gnichtel—Under date of September 30th it says: "Harry and Lou H. Gihon." It is under the caption of "Notes and Bills Receivable"; under the sub-caption of "Date," "September 30," but there is no year there. Here in lead pencil there is the year "1908," and then it reads, under the caption of "Drawer," "Harry and Lou H. Gihon." Under the caption of "Favor of" there are ditto marks under "W. J. & J. H." Under the capition of "Account of" it says "House." Under the caption of "Time" it says "3 ditto" meaning 3 months, and then under the caption of "December" it says "30," and under "Amount" "$500.00."

Q. Did you look through your bank books, or any other books, to see what money you deposited about that time?

A. Yes, sir.

Q. Now, tell the court what you did in trying to find out as to the amount of money you received at that time (handing witness bank book)?

Mr. Kafes—That is objected to.

The Court—Objection overruled.

A. I tried to find the old account, but couldn't do it. Our custom after bills are outlawed, or things of that kind, the books are either destroyed or put away where nobody could find them, excepting like the bank books and note books, and there wouldn't be any other way of tracing it; so we tried to find a deposit we made on that day, and I took the book down to the Broad Street Bank, and there is a copy of the deposit that was made nearest the 30th of September.

Q. What deposit appears under those dates; state what they are?

A. These are the deposit slips giving the amount of specie and bills and cash.

Mr. Gnichtel—I offer them in evidence.

Said deposit slips are marked *Exhibit D-3*.

Q. What does the book show?

A. On October 1st, 1908, we deposited $400 in bank notes, a check for $2,500, as shown by this bank slip—and the next one—the next one is September 30, the day the transaction should have taken place, bank notes $66, specie $20, a check for $2,500 and one for $500, and another for five and one for twelve; that's on the same date that it must have been closed up on that day.

Mr. Gnichtel—I offer it in evidence.

Said bank slip is marked *Exhibit D-4.*

Q. How were the payments made by Mr. Gihon for the consideration of this deed?

A. How were the payments made? I have no recollection outside of the note.

Q. You don't remember whether it was cash or a check?

A. No, sir; it might have been a check; it might have been cash, because I think he made about $400 on 233 Bellevue avenue.

Q. Did you sell this property to Mr. Gihon any cheaper than the other houses?

A. Yes, sir.

Q. How much?

A. $500 less.

Q. What did he pay you for this house?

A. $5,000; and the reason I am doubly impressed, he sold his own house, and he got out of that about fifteen or sixteen hundred dollars, and he told me he didn't want to put all that money in, because he might want to buy some new furniture for this other house, and the other house he got a mortgage on.

Q. Were you on friendly terms?

A. Yes.

Q. Were you neighbors?

A. No, sir.

Q. Well, you had been neighbors?

A. Yes, several years.

Q. Do you know whether this house in question has been changed?

A. Yes.

Q. In what respect?

A. They have taken an open fireplace out of it.

Q. The mantelpiece and the fireplace?

A. It would only be a shelf, possibly; I don't know whether there was a mantel there; I don't think there was.

Q. What did they put in the place of it?

A. I don't think anything.

Q. Would this increase or decrease the value of the house?

A. It would decrease the value.

Q. You have built a great many houses?

A. Yes.

Q. And bought and sold a great many?

A. Yes.

Q. Do you know what would be the difference in price or marketability of a house with an open fireplace, or what difference there would be in a house that has an open fireplace and one that has not?

A. Ninety-five per cent. of the people want an open fireplace—they do now.

Q. What would be the value in this case; to what extent did it change its value; did it raise it or lower it or what?

A. It lowered it.

Q. How much?

A. $250, I would say.

By the Court.

Q. What would it cost to replace it?

A. In the neighborhood of $200.

Q. Did it enlarge the room when the fireplace was taken out?

A. Yes, and added a window to it; it was a corner fireplace in the reception hall.

By Mr. Hutchinson.

Q. Mr. Morris, are you able to state whether Mr.

Gihon gave you two or one check at the time the transaction was closed?

Mr. Kafes—That is objected to.

The Court—He says he has no recollection outside of the note.

A. I don't remember whether there was two $500 checks or $1,000, or whether it was in a check or cash.

Cross-examination, by Mr. Kafes.

Q. Speaking of this fireplace, you remember when the Gihons bought the property off you they spoke to you about this dining room; was it the dining room; what room was this fireplace in?

A. In the reception hall.

Q. They spoke to you about that being pretty dark, didn't they?

A. I don't know anything about that.

Q. No, but didn't they talk to you about that being so very, very dark?

A. That's ten years ago.

Q. Didn't they?

A. I don't remember.

Q. Didn't they say to you, "What would you suggest, Mr. Morris, that we do for more light"?

A. I can't remember that.

Q. And didn't you say, "If you want to spend the money we will knock it out, and I'll put you in a nice big window there that will give you more light than any other house in this row"?

A. That would have been likely.

Q. And didn't they then say, "All right, Mr. Morris, you take out this fireplace and put us in this window," and wasn't the bill for $37?

A. I guess around $40.

Q. You did the work?

A. They didn't pay for it—

Q. You did the work, did you not?

A. I personally, no.

Q. Your man?

A. Yes, sure.

Q. And I show you a bill and ask you to look at it, and I ask you if that is not the bill you rendered for doing this particular work?

A. It might have been, yes.

Q. I ask you whether it is or not?

A. I don't know.

Q. Do you say that you ever submitted that bill to the Gihons, or that you didn't; have you any knowledge?

A. No, I have no knowledge.

Q. Have you any knowledge that they ever paid you anything for putting in a window in that house?

A. No.

Q. You have no knowledge?

A. No.

Q. Then I ask you to produce your books and find the record of it.

Q. You know I can't do that; we can't produce the books.

Q. You saw that receipt?

A. Yes.

Q. You said before I showed you the bill it cost about $40, didn't you?

A. Yes.

Q. And now you say you have no recollection?

A. I have no recollection of it.

Q. You said $40, about, it cost?

A. Yes.

Q. You did have recollection of it?

A. I have recollection of tearing the fireplace out.

Q. You said they paid you about $40 for it before I showed you the bill?

The Court—He said it would cost about $40.

Q. Didn't you advise them to take it out?

A. Well, I might have advised them the same as anybody else that wanted work done to suit them.

Q. Didn't you advise them that it would be an improvement to take that out and put this window in, put this large window for the light it would give?

A. I might have done that, if they were looking for light and not for a fireplace.

Q. You say these houses, these other houses you sold, you received $5,500 apiece for them?

A. No, not all of them.

Q. You said so, didn't you?

A. That was the price of the houses, $5,500.

Q. Whom did you sell these to?

A. To Jesse Barber.

Q. How much did he pay?

A. I think he paid $5,500.

Q. Who else?

A. Frank Weeden.

Q. How much?

A. $5,500.

Q. Are you sure?

The Court—He says so.

Q. Who else?

A. Mr. Melrose.

Q. How much?

A. I don't know; he paid all cash; there was no mortgage or notes, or anything else, but he didn't pay $5,500.

Q. Less or more?

A. Less, because he had the money and put it right down cash.

Q. Who else?

A. That's all of them, four.

Q. I am asking you if, because of the fact that you sold the Gihons their property for $500 less than the others, and you having in mind and believing that the others paid $5,500, if you in that way fixed the price at $5,000 which they gave?

A. Oh, no; I fixed the price of $5,000 because the house had been idle a long time.

Q. No, do you say now that they paid you $5,000 because they paid you $500 less than the other people; is that your reason?

A. No.

Q. What is your reason for fixing it at $5,000 now?

A. That is ten years ago; I have sold two or three hundred—

Q. Do you mean to say that day after day, day after day, down to the present time, you carry in your mind what they gave you for it?

A. Yes.

Q. And you know it was $5,000—each day?

A. I don't know anything— 10

Q. (Stenographer repeats the question.) From the day you sold the property, and from day to day thereafter and down to the present time, you carried that in your mind that it was $5,000?

Mr. Gnichtel—That is objected to.

The Court—Objection overruled.

A. Not every day I didn't.

Q. But you never forgot what they paid you?

A. No.

Q. And then the sale price of the other houses is no 20 basis for your testimony here to-day?

A. No.

Q. You don't say, because these others gave $5,500, and they paid $500 less than them, necessarily it must have been $5,000 which they paid?

A. Well, when it's the last lot of any houses I reduce the price to clean up.

Q. Because of the fact, if it be a fact that you have testified to, that these other parties paid you $5,500 for these other houses, and that the Gihons paid you $500 30 less, is it because of that that you fix the price that they paid you at $5,000?

A. No, not altogether.

Q. Well, is it partially at least?

A. No, from a conversation I had with Harry Gihon.

Q. A conversation?

A. Yes.

Q. You remember that, do you?

A. Yes.

Q. You remember when he paid you for this house?

A. Yes.

Q. When was it?

A. As near as we have the record of it, the 30th of September.

Q. But do you remember personally now; do you recall the actual meeting between you when he paid you the money on account?

A. No.

Q. It was one day of the Inter-State Fair, was it not?

A. I couldn't tell you.

Q. Do you remember where he paid you the money?

A. No.

Q. Do you remember who were present?

A. No.

Q. Or the money that he paid you?

A. No.

Q. You don't remember that?

A. No.

Q. How do you remember, then, that he paid you $1,000 and a note for $500?

A. Because he told me that he give a $1,000 note; he testified here that he give a thousand-dollar note; that's how I know.

Q. A $1,000 note for the first property?

A. For the second property.

Q. He gave you a $1,000 note for the first property?

A. I don't know.

Q. You said, as I understood you, that you had no recollection as to what was given you in payment, save the note for $500?

A. That's the only thing we have the record of.

Q. I am talking of your recollection; the only thing you have the recollection of?

A. Yes.

Q. Do you know whether he gave you a check or cash for the money he paid you?

A. No.

Q. Do you know what he sold his other property for?

A. I think he sold it for around $3,600.

Q. If I should tell you $3,700, would you agree with me?

A. Yes; I know he made four or five hundred dollars.

Q. And the mortgage was $2,000?

A. Yes, sir.

Q. And he got $1,700 cash, about, that day, didn't he?

A. I don't know what terms he sold his house on.

Q. And don't you know he turned over $1,500 of that money to you, without ever putting it in the bank or anything else?

A. I don't know.

Q. And that it was because he didn't have the $2,000 that he gave you the note for $500, and that he kept $200 out of that transaction?

A. I don't know anything about that.

Q. Will you please say, to the best of your recollection, whether or not he didn't give you a $500 promissory note and $1,500 in cash?

A. I don't know; no, I don't remember whether it's cash, or a check, or what it was.

Q. You don't remember, really, Mr. Morris, whether it was $1,000 or $1,500, do you?

A. Oh, yes, I remember it was $1,000.

By the Court.

Q. Cash or check?

A. I don't know.

Q. How do you remember it was $1,000?

A. Because I remember the amount of the house.

Q. And the difference between the $500 note—

A. Yes, and if he said a $1,000 note, then I would say he give—

Q. Is this it: the only thing that is in your mind is the price you agreed to sell the house to him for?

A. That's it.

Q. In your system of bookkeeping at that time, in 1908, did you keep a cash book?

A. I don't think we did.

Q. Did you keep any books that would show amounts; the books kept by your firm—did you keep a cash book?

A. No, I don't think so.

Q. What did you enter in your cash book?

A. In the check book?

Q. Didn't you have the names of the parties and the amount so you could transfer it to your ledger?

A. In the check book.

Q. Did you keep a cash book of any kind?

A. These contracts.

Q. Did you keep any ledger account?

A. Yes.

Q. A debit and credit?

A. Yes.

Q. Where would you get the credit from to transfer to the ledger, if you didn't keep a cash book?

A. When the checks were deposited.

By the Court.

Q. You kept an individual ledger account?

A. Yes, and when a check come in and it was deposited in the bank it showed the deduction.

Q. You made the entry in the ledger from the checks?

A. Yes.

Q. How about if cash were paid you?

A. The same thing.

Q. How would you make the entry?

A. "By cash."

Q. And put that down with the name of the party?

A. Yes.

Q. In your ledger?

A. Yes.

Q. Have you that ledger of 1908 containing any account of the Gihons?

A. No, we haven't got it.
Q. When did you destroy it?
A. I couldn't tell you.
Q. Do you know whether you did or did not?
A. Personally, I didn't see it destroyed.
Q. Do you think there is any way you can produce that ledger?
A. No, sir.
Q. When did you last see it?
A. I don't know, a good while.
Q. Have you seen it at any time during the progress of this suit?
A. No.
Q. When did James H. and William Morris dissolve their partnership?
A. In July.
Q. What year?
A. 1915.
Q. Three years ago?
A. Yes.
Q. Did you have the books at that time?
A. I?
Q. You, or anyone for you, or acting for you?
A. I didn't have them.
Q. Or anyone acting for you?
A. I didn't have them, no; no one acting for me.
Q. Or for James H. Morris?
A. Miss Titus was acting for him.
Q. Did she have them?
A. I guess so.
Q. Did you make any effort to find them?
A. Yes, sir.
Q. Did you ask Miss Titus about that?
A. Yes, she went in the vault and looked.
Q. And you can't find them?
A. No.

By the Court.
Q. Upon what basis did you make your settlement with your brother; didn't you have the books then?

A. It was more than eighteen months ago.

Q. Who did it for you?

A. Miss Titus was secretary, and she done it.

Q. And she had the books?

A. Yes; we just kept the thing going; she can explain all that.

Q. When you received cash from any person for your firm, did you always deposit that money in bank, or would you sometimes use it for paying off men?

A. No, it always went into the bank.

Q. All the cash you received?

A. Yes, I don't believe—outside of the men, nobody gets any cash.

Q. All the cash went into the bank?

A. Yes.

Q. This deposit slip of September 30th, there is $66, that was the amount of cash you deposited at that time?

A. Yes.

Q. And a $2,500 check, and two $500 checks and $12; you are satisfied that that $66 deposit—

The Court—We have that, haven't we?

Q. They gave you $1,000 cash; what did you do with it?

A. Put it in the bank.

Q. Where is your record of it, or your entry of it? (Showing witness bank book.)

By the Court.

Q. Did you deposit all in the Broad Street Bank?

A. Yes.

Q. Can you point out any entry in there, at or about September 30th, of the cash deposit that you received from Mr. Gihon?

A. No; there's only the stubs I got from the bank.

Q. They don't show any cash deposit in the neighborhood of $1,000?

A. No, there were two $500 checks deposited on the 30th of September.

Q. Do you know whose checks they were?

A. No, we couldn't find out; they didn't keep any record of them in the bank.

Re-direct examination, by Mr. Gnichtel.

Q. Did you keep any other account, or did the firm of William and James Morris, keep any other account with the Gihons, or did you keep any other account at the bank?

A. That is the only account we had at that time.

Re-cross examination, by Mr. Kafes.

Q. In the bill in this suit, Mr. Morris, did you read it over?

A. No.

Q. But you were informed of it?

A. I read it in the "Trenton Times."

Q. You were informed of the contents of this bill, were you not?

A. I was informed?

By the Court.

Q. Did you read the bill?

A. No.

Q. Did you know its contents?

A. In the "Trenton Times."

Q. Did you know it from reading the bill?

A. Oh, the Judge read it.

Q. Did you?

A. No, I knew I was in trouble, and I handed it to him.

Q. Did you know that the third paragraph of the bill filed against you said that on September 26, 1908, the complainants paid you $5,500 for the property, to which you answered "the defendant admits that on September 26, 1908, said complainants paid to the said

James H. Morris and this defendant the sum of $5,500 or thereabouts for the said property"; do you remember so answering?

Mr. Gnichtel—That is objected to; he didn't say he saw that bill at all.

The Court—Objection overruled.

A. I don't know what the amount was.

Q. Do you remember so answering?

A. No, sir.

Re-direct examination, by Mr. Gnichtel.

Q. After the trial of this case did you in a conversation with Mrs. Morris have your memory refreshed as to the consideration of this deed?

A. Yes, sir.

Q. And that led to this investigation?

A. Yes.

Re-cross examination, by Mr. Kafes.

Q. And then you said a moment ago, in answer to my question, that you remembered yourself, from time to time—

The Court—He has contradicted that, in substance; he has no recollection as to any circumstances.

Mr. Kafes—That is all.

Helen E. Titus, a witness produced on behalf of the defendants, being duly sworn, testified as follows:

Direct examination, by Mr. Gnichtel.

Q. Were you at one time the bookkeeper of the firm of William J. and J. H. Morris?

A. I was.

Q. When did you become such bookkeeper?

A. It was August, either I think it was 1912—either 1911 or 1912.

Q. And do you have any personal knowledge of the entries in any of these books in 1908?

A. No.

Q. Did you, at the request of Mr. Morris, make a search through the vault in the cellar of the Broad Street Bank?

A. Yes.

Q. For the books of the firm?

A. Yes.

Q. Did you find any books?

A. No, I couldn't find any record of it whatever.

Q. Did you find the books that the firm used in 1908?

A. I couldn't seem to; I don't know how far about it was, 1910, I think it was.

Q. Did you find the book—did you find this book that I now show you, that is marked "D 2"?

A. Yes, sir.

Q. Do you know whether Morris & Company at that time, or did you find any books to show whether they kept more than the account in the Broad Street Bank?

A. No, sir; not at that time.

Q. You found no other bank book but the book of the Broad Street National Bank?

A. No, sir; not at that time.

Q. Is this the one you found?

A. Yes, sir.

Mr. Gnichtel—I offer it in evidence.

Said bank book is marked *Exhibit D-5.*

Q. Here is a bank book of the Mechanics National Bank, and also a check book of 1911; did you find any books of the Mechanics Bank previous to that time?

A. No, sir.

Mr. Kafes—No questions.

Charles Y. Barlow, a witness produced on behalf of the defendants, being duly sworn, testified as follows:

Direct examination, by Mr. Gnichtel.

Q. What is your business?

A. General contractor.

Q. And builder?

A. Yes, sir.

Q. You know the property in question here in this suit?

A. I do.

Q. It is in evidence here that when that property was sold in 1908 there was a fireplace in the reception hall; that it was afterwards removed by the Gihons; does that increase or decrease the value of the property, in your judgment?

A. In my judgment, it would be according to who would want the property.

Q. Well, in the general market?

The Court—It's a matter of taste.

Q. You buy and sell property?

A. No, I build property.

Q. You don't buy and sell property?

A. I have bought some.

Q. In building properties, could you say as a matter of your judgment, whether properties that have open fireplaces are more in demand than those that have not?

Mr. Kafes—That is objected to.

The Court—Objection overruled.

A. In my judgment, it would be according to the location of the fireplace.

Q. Do you think in this particular house it increased or decreased the value of the property by its removal?

A. In this particular house?

Q. Yes.

A. In my judgment, it increased the value of the house.

Q. To take out the fireplace?

A. Yes, sir.

Lou H. Gihon, a witness produced on behalf of the complainant, being duly sworn, testified as follows:

Direct examination, by Mr. Kafes.

Q. Will you please state what you know about the purchase of this property from William J. and James H. Morris?

A. Just about the time we were considering selling

our house at 233, Dr. Gihon called up the Morrises, and Mr. Morris asked us if we wouldn't like to take one of these houses; he wanted to show others through the house, and he said, "I am going to sell this house for $6,000, but I will let you have it for $5,500 right off." Mr. Morris wasn't at home when Dr. Gihon called up; that night Mr. and Mrs. Morris came down to our house—we had about given up the idea; that night Mr. and Mrs. Morris came down to our house, and my husband made him the offer of $5,500, because we understood the others had paid $6,000, and I can see now where we weren't very businesslike, because we made the offer—

Q. Did he accept it?

A. Immediately.

Q. Did you pay him for that place?

A. We did.

Q. How much?

A. $5,500.

Q. How did you pay him?

A. We paid him $1,500 cash, not by check, but cash; we gave him a note for $500, and we got our own mortgage of $3,500.

Q. Who from?

A. Mr. Scudder.

Q. Are you absolutely sure?

A. I am, absolutely.

Q. What have you to say as to this fireplace?

A. The reception hall was a very dark hall; we never got a direct ray of sunlight, and after we purchased the house that was such a dull room that we talked to Mr. Morris about it, and he suggested then to have the fireplace removed and that he would do it for us; and we had it removed; it increased the dining room, and we have a large window in the room, and we considered—

Q. You put a window in?

A. Yes, sir.

By the Court.

Q. Where the fireplace was?

A. Yes, and it gave us the square corner and a large window in the back.

Q. Is this the bill which was rendered?

A. Yes.

Q. And was it paid?

A. Yes, sir.

Mr. Kafes—I offer it in evidence.

Said bill is marked *Exhibit C-3.*

Q. Now, after Harry Gihon testified in a former hearing in this matter, did he and you have a conversation with Mr. Morris?

A. Well, after he came down from the stand, the day we were giving our first testimony, Mr. Morris said to me, "Why didn't you come to me instead of to Jim; I would have settled this matter up with you." He said, "Harry, you made a mistake on this note; you paid me $1,500 in cash and gave me a note for $500, instead of a $1,000 note." My husband said, "Yes, I remembered afterwards that I gave you the $1,000 note on the first house"; that was right here before we left.

Cross-examination, by Mr. Gnichtel.

Q. Where did this conversation take place?

A. Just before we left this room on the day we gave our first testimony, when we were talking to Mr. Morris?

Q. And he said what?

A. "Why didn't you come to me that day instead of to Jim; I could have settled it for you."

Q. What day?

A. He was referring to the day I went to Mr. Jim Morris' office, I imagine.

Q. When did you learn there was a $500 note given?

A. I didn't learn it, I knew it.

Q. Did you sign the note?

here in my purse.

Q. Your husband said he gave a $1,000 note?

A. He was confused; he was thinking of the $1,000 note he gave on the first house.

A. No, I have the receipt for that $500 note right

Q. How do you know what he was thinking about? He swore positively that he gave a $1,000 note, didn't he?

A. I don't know whether he did or not, Judge Gnichtel.

Q. About the money; when did you sell your house?

A. We sold our house and we didn't even put the money in the bank.

Q. I didn't ask you that.

A. I don't remember the exact date.

Q. How long before this transaction?

A. I don't remember; but we received the money the same day we turned it over to Mr. Morris that night.

Q. Whom did you receive that money from?

A. Mr. Case.

Q. What Case, Lew Case?

A. No, Mr. Case that is at the Hamilton Rubber.

Q. How much in cash did you get from him?

A. We got $1,700 cash from Mr. Case.

Q. And did you have to pay any commission to an agent?

A. No, we didn't have to pay any commission.

Q. Then, didn't you say to Mr. Morris, that you wanted to keep $500 of that to furnish the house?

A. No; we didn't buy any furniture when we went there.

Q. When you went where?

A. To 263.

By Mr. Hutchinson.

Q. Who is Lou Gihon?

A. I'm the person.

Q. Didn't you sign that note with Mr. Gihon?

A. I don't think I did; I think Dr. Gihon, Senior, went on that note.

By the Court.

Q. Were you present when the $1,500 was paid to Mr. Morris?

A. Yes.

Q. Who paid it?

A. My husband.

Q. Where?

A. In our reception hall.

Q. Who else was there?

A. Mr. Mulrey, the man who did the work when he gave us the deed. We gave him $1,500 in cash and the $500 note; there was the four of us.

Q. What had he to do with this matter?

A. He drew up the deed.

Q. He was the conveyancer?

A. Yes.

Q. Where is he?

A. I don't know whether he is in town or not; I think he is in the service.

Q. Where did Mr. Case pay over the $1,700?

A. He gave that to Dr. Gihon some time during the day.

Q. Were you present?

A. No, I don't remember that.

Q. When did you learn that he gave it to Dr. Gihon?

A. In the evening when Dr. Gihon came home and we were ready to settle with Mr. Morris.

Q. And did Mr. Morris and Mr. Mulrey come together?

A. Yes.

Q. And who had the money at the time they came?

A. Dr. Gihon; we had just received the money; and that's the reason we didn't deposit it; we turned it right over to Mr. Morris.

Harry D. Gihon, the above-mentioned complainant, being recalled in his own behalf, testified as follows:

Direct examination, by Mr. Kafes.

Q. Do you remember seeing Mr. William J. Morris about this property, 263 Bellevue avenue?

A. I do.

Q. Where did you see him concerning the purchase of this property?

A. I first called him up and then afterwards went down to his house.

Q. Then what?

A. And I asked him if I could buy that house; I told him I would give him $5,500 for it, and he didn't decide just at that time, and afterwards he came down to our house and told me I could have it for my price.

Q. What?

A. $5,500; I set the price myself.

Q. Was there anything said, either by Mr. Morris or yourself, about that being less than the other house?

A. Not to my knowledge.

Q. Did you know what the other houses had sold for?

A. Why, I had been told that all the other houses were sold for $6,000, and with that impression in mind, I thought by offering him $5,500 I was making a good deal; that was my object.

Q. What did he say about accepting it?

A. Well, when he came down to the house he said he would take my offer, and it was settled there.

Q. Did you own any other house at any time?

A. 263 Bellevue avenue.

Q. At that time?

A. 233 at that time.

Q. And you sold that?

A. I hadn't sold it yet, but I negotiated for the sale of it, and I knew I could sell it, and I wanted to make sure I could get this other place first.

Q. Did you sell it?

A. Yes.

Q. To whom?

A. Mr. Case.

Q. For how much?

A. $3,700.

Q. And how much of a mortgage was on it?

A. $2,000.

Q. And he paid you the difference?

A. Yes, $1,700 in cash.

Q. What did you do with that $1,700?

A. Well, I had some back taxes to pay, and I took part of the money and paid the back taxes with it.

Q. How much was that?

A. Inside of $200, and I didn't turn the balance of the money in the bank; I was going to put it in the bank and pay with a check, but I just held the money and turned it over to Mr. Morris just as I received it.

Q. That same night?

A. That same night.

Q. Where at?

A. 263 Bellevue avenue.

By the Court.

Q. Were you living in this house then?

A. Yes, we were in the house before the money was paid over.

Q. What else did you give him besides $1,500 in cash?

A. A note for $500.

Q. How about a mortgage?

A. I got a mortgage from John W. Scudder for $3,500.

Q. $1,500 cash, $500 note; are you absolutely sure of that?

A. I am sure of it.

Q. Do you remember stating at a former hearing in this matter, where you answered there was a note for $1,000; what have you to say as to that answer?

A. Well, I got confused with the former house I owned; I gave him a note for $1,000 on that house, and I afterwards found out my mistake.

Q. How about the conversation with Mr. Morris after the former hearing in this case?

A. Well, after the hearing in this case we met Mr.

Morris about where the chair is there, and he stated to us that I made a mistake on the stand, that I didn't give him a note for $1,000; that I gave him a note for $500, and the balance of $1,500 in cash, and my wife was present at the time.

Q. He stated that to you?

A. He stated it right there.

Cross-examination, by Mr. Gnichtel.

Q. When you had this conversation with Mr. Morris, was that the first time you were told you made a mistake about the amount of the note?

A. No, I realized it shortly after I stepped off the stand.

Q. How many years' taxes were due on the other property?

A. I don't just remember that; I know it was inside of a couple of hundred dollars that I had to pay.

Q. How did you refresh your memory since the last meeting we had here in regard to these amounts that makes you so sure?

A. Which amounts?

Q. The last time you swore you gave a note for $1,000 and $500 in cash?

Mr. Kafes—That is objected to.

The Court—Objection overruled.

Q. You stated here that you gave a $1,000 note and $500 in cash?

Mr. Kafes—Objected to.

The Court—Objection overruled.

Q. What has happened since then that leads you to change your mind?

A. Well, I told you that I knew it right away.

Q. Then why didn't you correct it?

A. Because I was off the stand.

Q. Why didn't you tell your counsel?

A. I did tell my counsel and my wife, and they refreshed my mind, and it came back to me as clear as a whistle after that.

Q. You are fixing the amount because you realize you got this house $500 cheaper than the other houses were sold for?

A. I know it as a fact; I know what I sold my house for.

Q. You understood the other houses were sold for $6,000?

A. That is what I was told by Mr. Barber.

Q. And you got this $500 less?

A. Yes.

Q. If I should say the other houses were sold for $5,000, what would you say you gave for yours; in other words, you gave $500 less than the others?

A. Yes; but Mr. Barber gave $6,000 for his.

Q. And if you are mistaken in that, you are mistaken in all your testimony. Who told you what Mrs. Weeden gave?

A. Mrs. Weeden herself; she can prove it.

Q. What did this other man, Barber, give, as you understood it?

A. I understood that he gave $6,000 for it.

Q. And if it turns out that they only gave $5,500, then you only gave $5,000?

A. No, I had the information that they gave $6,000, and that is the reason I gave $5,500.

Q. And suppose they only gave $5,500, then you got yours $500 less, didn't you?

A. I don't think so.

Q. Did you have to pay any commission for the sale of your own house?

A. I did not; I met a man on the street, and—

Q. How many years' taxes were due on the house?

A. I couldn't swear to that.

Mary R. Weeden, a witness produced on behalf of the complainants, being duly sworn, testified as follows:

Direct examination, by Mr. Kafes.

Q. You are the wife of Frank Weeden?

A. Yes, sir.

Q. And you reside where?

A. 265 Bellevue avenue.

Q. Next door to the property formerly occupied by the Gihons?

A. Yes.

Q. Are they both the same kind of properties?

A. The same kind.

Q. Built at the same time and by whom?

Q. How much did you pay for that place?

A. $6,000.

Q. Who from?

A. James Morris.

Q. How did you pay for it?

A. I had a first mortgage on a property for $1,500; I gave that and there was $200 given in cash, and there was a second mortgage for $1,800 given to Mr. Morris, and there was a $2,500 mortgage on the property.

Q. Did you know what the Barbers gave for their place?

A. She told me $6,000.

Q. As you understood it.

Mr. Gnichtel—That is objected to.

The Court—Objection overruled.

A. $6,000.

Cross-examination, by Mr. Gnichtel.

Q. Wasn't part of this consideration taken out in trade with your husband?

A. The $2,000 was.

Q. $2,000 was taken out in trade?

A. Yes, sir.

By the Court.

Q. These items that you have given us amount to $6,000?

A. Yes.

Q. Where did the $2,000 come in?

A. Well, the $200, that was owing from the store, and then the $1,800 mortgage we gave, it was $200 cash.

Q. You gave an $1,800 mortgage and a $2,500 mortgage?

A. The $2,500 mortgage Mr. Ivins had.

Q. You gave a second mortgage of $1,800?

A. A mortgage of $1,800 for material.

Q. Material was bought at the store, and in that way the mortgage was paid off?

A. Yes, and $200 also.

Q. Mr. Morris owed you $200 at that time at the store?

A. Yes.

Q. And the $1,800 second mortgage you gave, which was also liquidated at the store?

A. Yes.

Q. What kind of a store?

A. Hardware.

Q. That is, material they use in these building operations?

A. Yes.

Q. Did you attend to the matter personally?

A. I was there.

Q. Did you give him a check?

A. I have the receipt for this $1,800.

Q. You gave Mr. Morris a check and signed it in the wrong name, and it wasn't any good?

A. No, sir.

Q. Who bought the property, you or your husband?

A. I bought the property.

Frank T. Malloy, a witness produced on behalf of the complainants, being duly sworn, testified as follows:

Direct examination, by Mr. Kafes.

Q. What business are you engaged in?

A. Real estate and insurance.

Q. Where is your office?

A. The Forst-Richey Building.

Q. How long have you been engaged in that business?

A. I have been engaged in the business for about six years.

Q. How long before that with anyone else?

A. About three years, I guess; three or four years.

Q. You have been about nine years in the business?

A. Yes, sir.

Q. How long have you been in Trenton?

A. I was born in Trenton and have lived here always.

Q. Are you connected with any firm at the present time?

A. With a building firm, yes.

Q. What is that?

A. Building houses and selling them.

Q. You are engaged in the general real estate business in the city of Trenton and have been for the past nine years?

A. Yes.

Q. Are you familiar with the value of real estate on Bellevue avenue?

A. I think so, yes.

Q. Do you know whether the property has increased or decreased on Bellevue avenue in the neighborhood of this property?

Mr. Gnichtel—Objected to.

The Court—Objection overruled.

A. The property has increased in value, in my estimation.

Q. You are familiar with the property 263 Bellevue avenue?

A. Yes.

Q. Has that increased or decreased in value during the past ten years, in your judgment?

A. I think that it has increased in value.

Q. Have you had anything to do with the buying or selling of any of these properties?

A. Yes, I bought No. 267 for my father; that is, I negotiated the sale.

Q. 267?

A. Yes, just exactly the same as 263.

Q. When did you buy that?

A. Two or three years ago.

Q. What did you for it?

A. $5,750.

Q. What, in your judgment, is the property 263 Bellevue Avenue worth at the present time?

A. I think it is worth $6,500.

Mr. Gnichtel—I have no questions.

Both sides rest.

The Court (orally.)

The clear weight of the evidence favors the contention of the complainants in this case. All parties concerned agree that the Gihons were favored, or were supposed to have been favored, by a price of $500 less than what other purchaser of similar houses paid, and it is upon that fact, upon which they all agree, that much of this testimony is predicated. Mrs. Morris, a very estimable lady, is of the impression, and so states, that the price asserted by her husband as having been received from others was $5,500, and that there was a reduction made of $500. That is Mr. Morris' view too. And Mr. Morris affirms that the price paid by the others was $5,500. I can readily understand and see why people who are absolutely honest, when they come on the witness stand come with fixed impressions as to what the actual truth is, when, in fact, they are mistaken. They come here intending to tell the absolute truth and not waiver from it. And one can see how, in this case, the parties are mistaken. Mr. Gihon understood and says that Mrs. Weeden, an adjoining purchaser, paid $6,000, and that understanding is verified by the actual fact in one instance. Mrs. Weeden testified that she, who was a purchaser of one of the properties, paid $6,000, so that the favor that the Gihons thought they were getting is a reduction from $6,000 to $5,500, and not, as Mr. and Mrs. Morris now think, a reduction from $5,500 to $5,000. People can easily be mistaken. We observe it here. Apparently Mrs. Morris says the arrangement

was made at her house, and Mrs. Gihon says not, but that it was made at her house, but Mr. Gihon said it was made at both. That explains that matter.

Now, the real question is, what was paid in this case? And the testimony in the case strongly, in my judgment, favors that of the complainants. I will tell you why. Mrs. Morris, herself, don't know how much money was paid. It was paid in the Gihons' house, in the presence of Mr. and Mrs. Gihon and Mr. Morris by Mr. Gihon to Mr. Morris. The Gihons have some occurrences, some instances, some incidents in their minds that refreshes their memory to almost a point of perfection, I think. That is that they sold their own house in which they then lived for $1,700—that much cash—and $1,500 they paid in payment of part of the purchase money of the new purchase. It is not remarkable that Mr. Morris should not remember it, and he is not at all certain of the tenacity of his memory in that regard. He reasons from a set of circumstances fixed in his mind, honestly and honorably, that the properties were sold by him for $5,500, but that to the Gihons, because it was the last property and because of friendship, he made a reduction. If he is in error about that he is in error about the whole subject matter; and it is not remarkable that he should err and that his memory should be defective. He has sold a good many properties since that time, but the Gihons only bought one—their home. Mr. Morris was not selling his home; he was selling a commodity, the business of which he was engaged in. He sold houses as a grocer sells sugar. They were commodities with him, and with the Gihons it was a home and a single purchase; and it is perfectly good reasoning, it strikes me, that their memory would be much firmer as to details than that of Mr. Morris. Memories are always elusive, and when people of this character testify against the impressions of one another, it is hard for the Court to say where the actual truth is. We must gather it from the usual circumstances, and it is the circumstances that must strongly appeal to us. Mr. Morris,

when he left at the former hearing, frankly told Mr. and Mrs. Gihon that Mr. Gihon had made a mistake in the amount of the note; that the note which Mr. Gihon gave him in part payment of this property was not for $1,000 but was for $500, and that the balance was $1,500 in cash. That stands in the case. It is not contradicted, and I must give that due weight.

There will be a decree in this case directing the defendants to pay to the complainants on Tuesday, the thirtieth of April, $2,000 at the office of Mr. Gnichtel, at two o'clock, and on that day they will deliver to Messrs. Morris, by their individual name, a deed of conveyance granting this property to them, but without covenants, unless some other arrangement can be made. And possession must be given at the same time.

I think this property has not been hurt by the change of the fireplace, and if it has been changed in value I think there is an increase.

Make it the fourth of June that they must deliver to you not only the conveyance of the property but also the possession of the property.

EXHIBIT C 1.

THIS INDENTURE, Made the Sixteenth day of July, in the year of Our Lord One Thousand Nine Hundred and six Between Mary A. Donoghue (Widow) John J. Doran and Catherine his wife, Mary T. Doran, Thomas J. Donoghue and Elsie P. his wife, of the City of Trenton, County of Mercer and State of New Jersey of the First Part: And James H. Morris of the City of Trenton in the County of Mercer and State of New Jersey of the Second Part;

Witnesseth, That the said party of the first part, for and in consideration of Six Thousand Dollars, lawful money of the United States of America, to them in hand well and truly paid by the said party of the second part, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged,

and the said party of the first part, therewith fully satisfied, contented and paid, have given, granted, bargained, sold, aliened, released, enfeoffed, conveyed and confirmed, and by these presents do give, grant, bargain, sell, alien, release, enfeoff, convey and confirm to the said party of the second part, and to his heirs and assigns forever, All those certain lots, tracts or parcels of land and premises, hereinafter particularly described, situate, lying and being in the City of Trenton, in the County of Mercer and State of New Jersey, bounded and described as follows, to wit:

Tract No. 1, embracing lots numbered Thirteen and Fourteen as laid down and designated upon a certain Map or Plan of Lots of The Rutherfurd Land Company, made by Robert I. Sloan, City Surveyor, February A. D. 1872, and filed in the Mercer County Clerk's Office. Beginning in the Southerly line of Bellevue Avenue at a point distant Westerly Six Hundred feet from the Southwesterly corner of Bellevue Avenue and Calhoun Street and running thence (1) Southerly at right angles to Bellevue Avenue and along the Westerly line of Lot Number Twelve (12) One hundred and seventy-five feet more or less to lands of the Belvidere Delaware Railroad Company; thence (2) Westerly along line of lands of said Railroad Company one hundred feet more or less to the Southeasterly corner of Lot number Fifteen (15) on said Plan; thence (3) Northerly, parallel with the first course, and along the Easterly line of Lot Number Fifteen (15) One Hundred and seventy-five feet more or less to the Southerly side of Bellevue Avenue aforesaid, and thence (4) Easterly along the Southerly side of said Avenue One Hundred feet to the Place of Beginning.

Being the same premises conveyed to Thomas J. Donoghue by Francis Pashley, Jr., by deed dated May 13th, 1880, and recorded in the Mercer County Clerk's Office, in Vol. 175 of Deeds, page 107, &c.

Said property is conveyed subject to the same restrictions concerning sale of intoxicating liquors; and

also subject to the same building restrictions as are contained in the deed from The Rutherfurd Land Company to Francis Pashley, Jr., which deed is recorded in the Clerk's Office of Mercer County in Vol. 120 of Deeds, page 501, &c.

Tract No. 2, Being Lot Number Twenty-six (No. 26) as laid down and marked on a certain Map or Plan of Lots of the said The Rutherfurd Land Company dated June 28th, 1883, and drawn by C. C. Haven, C. E., and bounded and described as follows, to wit:

Beginning in the Southerly line of Bellevue Avenue at a point distant Six Hundred feet (600 ft.) from the Southwesterly corner of Bellevue Avenue and Calhoun Street and corner to lot hereinbefore described and running thence (1) Southerly at right angles to Bellevue Avenue and along the Easterly line of the lot hereinbefore described One hundred and seventy-five feet (175) more or less to lands of the Belvidere Delaware Railroad Company; thence (2) Easterly along line of lands of said Railroad Company Fifty feet (50 ft,) to a point; thence (3) Northerly parallel with the first course One Hundred Seventy-five feet (175 ft.) more or less to the Southerly side of Bellevue Avenue aforesaid, and thence (4) Westerly along the Southerly side of Bellevue Avenue Fifty feet (50 ft.) to the place of Beginning.

Being the same premises conveyed to Thomas J. Donoghue by The Rutherfurd Land Company by deed dated July 17th, 1883 and recorded in the Clerk's Office of Mercer County in Vol. 137 of Deeds, page 308, &c.

Said property is conveyed subject to the same restrictions concerning sale of intoxicating liquors; and also subject to the same building restrictions as are contained in deed from The Rutherfurd Land Company to Thomas J. Donoghue.

Together with all and singular the houses, buildings, trees, ways, waters, profits, privileges, and advantages, with the appurtenances to the same belonging or in anywise appertaining:

Also, all the estate, right, title, interest, property, claim and demand whatsoever, of the said party of the first part, of, in and to the same, and of, in and to every part and parcel thereof,

To have and to hold, all and singular the above described land and premises, with the appurtenances, unto the said party of the second part, his heirs and assigns, to the only proper use, benefit and behoof of the said party of the second part, his heirs and assigns forever:

And the said Mary A. Donoghue, John J. Doran, Mary T. Doran and Thomas J. Donoghue do for themselves, their heirs, executors and administrators covenant and grant to and with the said party of the second part, his heirs and assigns, that the said Mary A. Donoghue, John J. Doran, Mary T. Doran, and Thomas J. Donoghue the true, lawful and right owners of all and singular the above described land and premises, and of every part and parcel thereof, with the appurtenances thereunto belonging; and that the said land and premises, or any part thereof, at the time of the sealing and delivery of these presents, are not encumbered by any mortgage, judgment, or limitation, or by any encumbrance whatsoever, by which the title of the said party of the second part, hereby made or intended to be made, for the above described land and premises, can or may be changed, charged, altered, or defeated in any way whatsoever.

And also, that the said party of the first part now has good right, full power and lawful authority, to grant, bargain, sell and convey the said land and premises in manner aforesaid:

And also, that Mary A. Donoghue, John J. Doran, Mary T. Doran and Thomas J. Donoghue will Warrant, secure, and forever defend the said land and premises unto the said James H. Morris, his heirs and assigns, forever, against the lawful claims and demands of all and every person or persons, freely and clearly freed and discharged of and from all manner of encumbrance whatsoever.

In Witness Whereof, the said party of the first part have hereunto set their hands and seals the day and year first above written.

MARY A. DONOGHUE [L. S.]
JOHN J. DORAN [L. S.]
KATHERINE DORAN [L. S.]
MARY T. DORAN [L. S.]
THOMAS J. DONOGHUE [L. S.]
ELSIE P. DONOGHUE [L. S.]

Signed, Sealed and Delivered
in the presence of
ERWIN E. MARSHALL

STATE OF NEW JERSEY, } *ss.*
COUNTY OF MERCER, }

Be it Remembered, That on this Seventeenth day of July in the year of Our Lord One Thousand Nine Hundred and six before me, the subscriber, a Master in Chancery of the State of New Jersey personally appeared Mary A. Donoghue (Widow), John J. Doran and Catherine, his wife, Mary T. Doran, Thomas J. Donoghue and Elsie P., his wife, who, I am satisfied, are the grantors mentioned in the within Indenture, and to whom I first made known the contents thereof, and thereupon they acknowledged that they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed: And the said Catherine Doran and Elsie P. Donoghue being by me privately examined, separate and apart from their husbands, acknowledged that they signed, sealed and delivered the same as their voluntary act and deed, freely, without any fear, threats or compulsion of their said husbands.

ERWIN E. MARSHALL,
M. C. C. of N. J.

ENDORSED.

Deed. Mary A. Donoghue (Widow) and others to James H. Morris. Dated, July 16th, 1906. Received in the Clerks Office of the County of Mercer on the 18th day of July A. D. 1906, at 3:15 o'clock in the afternoon and recorded in Book 290 of Deeds for said County, on pages 416, &c.

CHAS. H. BAKER, *Clerk.*

I, THOMAS J. DONOGHUE, of the City of Trenton, and State of New Jersey, do hereby make, publish and declare this my last will and testament, as follows, that is to say—

First. I will and direct that all my just debts and funeral expenses be duly paid as soon as conveniently may be after my decease.

Second. I give and bequeath unto my wife Mary A. Donoghue, all of my personal property absolutely, after the payment of the legacies hereafter mentioned.

Third. I give and devise unto my said wife *Mary A. Donoghue* all the real estate of which I shall die seized or possessed for and during the term of her natural life, to have, hold, use and enjoy the same and the rents, issues and profits thereof; my said wife to keep the buildings in first class repair and to pay the expenses thereof with the taxes, insurance and interest out of the said rents and profits.

Fourth. I give and bequeath unto the Hospital of the Sisters of St. Francis of Trenton, the sum of Two Thousand Dollars,—and I direct the payment of the said sum to said Sisters for the use of said Hospital within five years from the date of my decease.

Fifth. I give and bequeath unto my sisters Margaret Doran and Catharine Smith the sum of Five hundred dollars each and direct my Executrix to pay the said sums to them respectively within five years from the date of my decease.

Sixth. I give to my Sister Mary Shandley a Bond and Mortgage I hold against her property on Lamberton Street, Trenton, and release all claims that I have against her on said property.

Seventh. It is my wish that after my decease my wife shall continue to treat the five children now living with us, to wit, Joseph Doran, Mary T. Doran, John J. Doran, Thomas Donoghue and Joseph Donoghue, as members of her family with the same rights and privileges of natural children.

Eighth. If my personal estate should not be sufficient to pay the legacies above mentioned, then I authorize and empower my Executrix to sell and convey such part of my real estate that she shall in her judgment deem proper and to use the proceeds of sale for such payment.

Ninth. After the decease of my said wife I give and devise all my said lands and real estate to said five children above mentioned, to wit, Joseph Doran, *Mary T. Doran, John J. Doran, Thomas Donoghue* and Joseph Donoghue, in equal shares; and if either of them be then deceased and leaving lawful issue, said issue shall be entitled to take the share of his or her parent and if either of them be deceased without leaving such issue, the survivors shall take the whole of said estate in equal shares.

Lastly. I nominate and appoint my said wife Mary A. Donoghue, the Executrix of this my last will and testament, hereby revoking any former will by me heretofore executed.

In Witness Whereof I have hereunto set my hand and seal this Twenty-third day of July, eighteen hundred and ninety-two.

Thomas J. Donoghue (L. S.)

Signed, sealed, published and declared by the said Thomas J. Donoghue, to be his last Will and Testament in the presence of us, who were present at the same time, and at the request of the said testator and in his presence

and in the presence of each other, have hereto set our hands as witnesses.

James S. Aitken.

Daniel J. Bechtel.

Proven July 25, 1900.

Probated July 25, 1900, Mercer County Surrogate's Office.

EXHIBIT D-1

Whereas, by the last will and testament of Thomas J. Donoghue, deceased, all of the real estate owned by the said Thomas J. Donoghue was devised unto his widow Mary A. Donoghue for life, with the remainder to the subscribers hereto;

And whereas some of the real estate is unproductive and brings no revenue to said estate but on the contrary, is a constant source of loss thereto, we, therefore, the undersigned, the tenant for life and the remainder men—deeming it for the best interests of all concerned, do hereby agree to a sale of such part of said real estate as is hereinafter named and at a price not less than the one herein named, and we hereby authorize the Executrix named in said will to make such sale of such parcels of said Real Estate and we do further agree to join with her in the execution of good and lawful conveyances of said property to any purchaser of the same.

We do authorize this sale by her of the following described properties: for the minimum price as hereinafter set forth:

ALL that certain tract or parcel of land embracing lots numbered thirteen and fourten (13 and 14) as laid down and designated upon a certain map or plan of building lots of The Rutherford Land Company made by Robert I Sloan City Surveyor February 1, 1872 and filed in the Mercer County Clerk's Office said land hereinafter described being situated in the City of

Trenton aforesaid and particularly bounded and described together as follows: Beginning in the southerly line of Bellevue Avenue at a point distant westerly six hundred feet from the southwesterly corner of Bellevue Avenue and Calhoun Street and running thence (1) southerly at right angles to Bellevue Avenue and along the westerly line of lot number twelve (12) one hundred and seventy-five feet more or less to lands of the Belvidere Delaware Railroad Company; thence (2) westerly along the line of lands of said Railroad Company one hundred feet more or less to the southerly corner of lot number fifteen (15) on said plan; thence (3) northerly parallel with the first course and along the easterly line of lot number 15 one hundred and seventy-five feet more or less to the southerly side of Bellevue Avenue aforesaid; and thence (4) easterly along the southerly side of said Avenue one hundred feet to the place of beginning.

Being a portion of the same premises conveyed to the said party of the first part by the said The Rutherford Land Company by deed dated Oct. 14th A. D. 1878 and recorded in the said Mercer County Clerk's Office in Book of Deeds Vol. 120 p. 501.

Subject nevertheless to a certain mortgage of four hundred dollars given by the said party of the first part to the said The Rutherford Land Company bearing date the fourteenth day of October A. D. 1878 which said mortgage the said Thomas J. Donoghue hereby assumes and agrees to pay as part of the purchase money hereinbefore mentioned. Also

All that certain lot or parcel of land, situate, lying and being in the City of Trenton, in the County of Mercer and State of New Jersey, and bounded and described as follows, to wit: fronting or in width, fifty feet on the southerly side of Bellevue Avenue, and extending back therefrom, at right angles thereto, in a southerly direction, the same width, fifty feet, by and between land about to be conveyed to Frances Henry, by said party of the first part, on the easterly side thereof

and land heretofore conveyed to said party of the second part, by said Land Company, on the westerly side thereof, one hundred and seventy-three feet more or less, in depth, to line of lands The Belvidere Delaware Railroad Company, in the rear.

Being laid down and marked on a certain map or plan of lots of said Rutherford Land Company, dated June, 28, 1883, as drawn by C. C. Haven, C. E. and thereon numbered as Lot TWENTY-SIX. Also

All that certain tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the City of Trenton in the County of Mercer and State of New Jersey bounded and described as follows, to wit:

Beginning at a point on the northerly side of Bellevue Avenue at the southeast corner of lands of Mary P. Moors, and running thence (1) northerly, at right angles to Bellevue Avenue and along said Moore's line two hundred (200) feet to a point; thence (2) easterly, parallel with Bellevue Avenue, eighty-five (85) feet more or less to Marion Street; thence (3) southerly, parallel with first course, and along the westerly side of Marion Street, two hundred (200) to Bellevue Avenue; and thence (4) westerly along Bellevue Avenue eighty-five (85) feet more or less to the said Moore's land and the place of beginning. Also

All that certain lot or piece of ground situate in the City of Trenton, County of Mercer and State of New Jersey, composed of lots numbered fifty, forty-nine and the eastern most part of lot numbered forty-eight on a plan of lots belonging to the Estate of Virginia E. Southard made by Charles Potts and described as follows: Beginning at a point being the northwest corner of lot numbered sixty-five on the said plan conveyed to Owen McCaffrey by Edward Shippen, Trustee, thence extending northward on a line at right angles with Higbee Street (now Bellevue Avenue) one hundred feet to the south side of said Higbee Street or Bellevue Avenue, thence eastward along the south side of the said

street or avenue sixty feet more or less to the line of the land of the said estate of Virginia E. Southard and land now or formerly of Titus Sherman & Co., thence extending southward along the said line one hundred feet more or less to the northeast corner of lot numbered sixty-six granted to Owen McCaffrey, thence extending westward along said line of Owen McCaffrey parallel with the said Higbee Street or Bellevue Avenue fifty feet more or less to the first mentioned point and place of beginning. Being lot #42 on page 26 of the City Atlas of Trenton, and the same lot conveyed to said James McCaffrey by Edward Shippen Trustee by deed dated April 26, 1862 and recorded in the Clerk's Office of Mercer County, in Vol. 52 of Deeds, page 39, &c.

It is agreed between the parties that the property in the first and second description may be sold for a sum not less than Five Thousand two hundred and fifty Dollars ($5250) and that the property in the third description may be sold for a sum not less than Twenty two hundred dollars ($2200) and the property in the fourth description may be sold for a sum not less than Six thousand five hundred dollars ($6500).

In witness whereof, the parties hereto have affixed their hands and seals this day of February A. D. Nineteen hundred and one.

MARY A. DONOGHUE (L. S.)
JOSEPH D. DORAN (L. S.)
JOHN J. DORAN (L. S.)
C. J. DONOGHUE (L. S.)
MARY T. DORAN (L. S.)
JOSEPH P. DONOGHUE (L. S.)

Signed, sealed and delivered
in the presence of
JOHN BOYD Notary Public N. J.

IN THE CHANCERY OF NEW JERSEY.

BETWEEN
HARRY D. GIHON ET UX.,
Complainants,
AND
JAMES H. MORRIS ET ALS.,
Defendants.
} Conclusions.

CONCLUSIONS.

For the complainants, Mr. Charles J. Falcey and Mr. John H. Kafes.

For the defendants, Mr. Frederick W. Gnichtel and Mr. Barton B. Hutchinson.

BACKES, *V. C.*

This bill is to rescind a contract for the sale of land on the ground of misrepresentation, and to recover the purchase price.

The defendants sold to the complainants a dwelling house on Bellevue avenue, Trenton, in 1908, for $5,500. The complainants occupied it as their home, and recently, just before the bill was filed, sold it to one Barlow for an increased sum, and upon the title being examined by the purchaser it was found to be defective, and he refused to carry out his bargain. The defect in the title was this: The vacant lot upon which the complainants' house and three others were erected by the defendants was owned by Thomas J. Donoghue, now deceased, who by his will gave his real estate to his widow for life and by the ninth section devised as follows:

> "After the decease of my said wife I give and devise all my said lands and real estate to said five children above mentioned, to wit, Joseph Doran, Mary T. Doran, John J. Doran, Thomas Donoghue and Joseph Donoghue, in equal shares; and if either of them be *then* deceased

and leaving lawful issue, said issue shall be entitled to take the share of his or her parents, and if either of them be deceased without leaving such issue, the survivors shall take the whole of said estate in equal shares."

Joseph Donoghue conveyed to the widow. John died without issue. The widow and the remaining three devisees, Mary T. Doran, John J. Doran and Thomas J. Donoghue, who are still living, conveyed the premises in 1906 to James H. Morris, who held it for the defendants, as co-partnership property. It is quite apparent that the defendants did not acquire and had not a clear title to the property conveyed to the complainants. Mrs. Donoghue had but a life estate, and the remaindermen's vested fee is liable to be divested upon their dying before the life tenant, leaving children. One, John J. Doran, has two children.

When the complainants bought the property they placed a mortgage on it for $3,500, and paid the difference in cash. They sue to recover the $2,000 on the ground that the title was misrepresented to them. William J. Morris negotiated the sale with Mr. Gihon, and upon the latter suggesting that he would secure a lawyer to search the title was told that it was unnecessary; that the title was all right, meaning, as Mr. Morris admits, he intended to convey that the title was free from defect; that it was clear and marketable. There can be no doubt from the testimony of the two who made the bargain, that the representation was that the title was perfect in the defendants in all respects, nor that it was untrue in fact. The complainants' counsel argues that the representation was a mere expression of opinion, but I cannot accept that view. It was, as well, a representation of a fact, and was so regarded, and was intended to persuade Mr. Gihon of the needlessness of having the title examined. For such a misrepresentation, upon which the complainants relied and parted with their money, equity will grant relief. *Eibel* v. *Von Fell*, 55 *N. J.* 670. An effort was made to show that the

representation was knowingly false and intentionally made to deceive, in which, however, the complainants have failed. The Morrisses paid the fair market value for the vacant lot and expended a large sum of money in building houses on it. It is barely possible that they suspected that complete ownership was not in their grantors, and that all was not right, and took a "gambler's chance," but the heavy expenditures they made is a powerful argument in favor of their belief in the integrity of the title. It was not necessary, though, for the complainants to go to that length to entitle them to recover. Proof of willful falsehood was not essential. It is sufficient that the representation was one of fact; that it was false and that the party relying upon it suffered in consequence. *Eibel* v. *Von Fell, supra; DuBois* v. *Nugent,* 69 *N. J. Eq.* 149; *Straus* v. *Norris,* 77 *N. J. Eq.* 33. As stated by Sir George Jessel, in *Redgrave* v. *Hurd,* 20 *Ch., Div.* 1, cited by V. C. Emery in *DuBois* v. *Nugent,* "According to the decisions of Courts of Equity, it was not necessary, in order to set aside a contract obtained by material false representation, to prove that the party who obtained it knew at the time when the representation was made that it was false. It was put in two ways, either of which was sufficient. One way of putting the case was, 'A man is not to be allowed to get a benefit from a statement which he now admits to be false. He is not to be allowed to say, for the purpose of civil jurisdiction, that when he made it he did not know it to be false; he ought to have found that out before he made it.' The other way of putting it was this: 'Even assuming that moral fraud must be shown in order to set aside a contract, you have it where a man, having obtained a beneficial contract by a statement which he now knows to be false, insists upon keeping that contract. To do so is a moral delinquency; no man ought to seek to take advantage of his own false statements.' The rule in equity was settled, and it does not matter on which of the two grounds it was rested."

There will be a decree for the complainants. The

complainants must account for the use of the property, the defendants for the interest on the purchase price.

After deciding the main issue the defendants asked for a further hearing, setting up that the consideration price for the property was $5,000, and not $5,500, and that they were liable only for $1,500. Although William J. Morris and his wife testify that the price was $5,000, they have no definite recollection, and speak only from impressions, while, on the other hand, Mr. and Mrs. Gihon are positive of the amount they paid, and fortify their recollection by circumstances regarding which it is doubtful that they can be mistaken. The clear weight of the evidence favors the complainants. Mrs. Morris, a very estimable lady, who was not present when the transaction was consummated, and who knows little of the matter other than what was told her by her husband, affirms that the price was $5,000, mainly upon her understanding that the purchasers of the remaining three houses paid $5,500, and that there was a reduction made to the Gihons of $500 because of their friendly and intimate relations. Mr. Morris is of the same opinion, and for the same reason. Both witnesses are absolutely honest in their belief in this circumstance, and mean to tell the truth, but are mistaken, and this is established by a Mrs. Weeden, who purchased the adjoining house and who testified that she paid $6,000 for it. If the defendants favored the complainants to the extent of $500, it was by reducing the asking price from $6,000 to $5,500. Now, the Gihons rely on a circumstance to corroborate their statements, which furnishes a firm and convincing basis for their recollection. They sold their home, the only property they owned, for $1,700, to buy the new one from the Morrises. Out of the proceeds they paid $1,500 and gave a note for $500, which, together with the $3,500 raised by mortgage, made up the $5,500. The cash and note were paid to Mr. William J. Morris in the Gihon old home, in the presence of Mr. and Mrs. Gihon, and they so testify. It is not at all strange that Mr. Morris

should not remember this, for it appears that his memory is not especially tenacious in regard to the details. He neither admits nor denies nor speaks specifically of facts calculated to induce belief, but rather he reasons from the standpoint, no doubt honestly enough assumed, that the selling price of the group of houses was $5,500 each, and that because of the supposed reduction made to the Gihons he received but $5,000 from them. He is in error, as I have shown, in his hypothesis and necessarily in his conclusions. It is not remarkable that his memory fails to serve him and that he should have fallen into this mistake, nor is it unbecoming that I should place reliance in the circumstances supporting the testimony of Mr. and Mrs. Gihon. The Morris brothers are, and have been for years, extensively engaged in the building and selling of dwelling houses. In carrying on their business dwelling houses were a commodity, while with the Gihons the transaction was epochal; it was for them the purchase and acquisition of a home, and it is but reasonable to deduce that their recollection of what they paid is keener and that their memory is more reliable than that of the merchant who, out of hundreds of like sales, attempts to recall the price of this one. There are also these two things in the case that strongly persuade me that the truth is with the Gihons. It is alleged in the bill and virtually admitted by the answer, that the purchase price was $5,500. On the first day's hearing there was not the slightest challenge of this allegation. After the hearing was over Mr. Morris said to Mr. Gihon that he, Gihon, was mistaken in his testimony of the manner in which the $2,000 had been paid; that the note given in part payment was not for a thousand dollars, as Mr. Gihon had testified, but that it was for $500, and that $1,500 was paid in cash. That testimony stands in the case uncontradicted, and I must give it due weight.

As I understand, the parties regard the use of the house and the interest on the purchase price as a stand-off, and a further accounting will not be necessary.

Some testimony was given to the effect that a fireplace was torn out and a window installed by the Gihons. This has increased rather than diminished the value of the property.

There will be a decree directing the defendants to pay to the complainants $2,000 on the fourth day of June next, at two o'clock, at the office of Mr. Gnichtel, at which time the complainants will deliver a deed of conveyance without covenant, unless other arrangements convenient to the parties are made. Possession must also be given at that time.

The complainants are entitled to costs.

IN CHANCERY OF NEW JERSEY.

BETWEEN

HARRY D. GIHON ET UX.,
Complainants,
AND
JAMES H. MORRIS ET AL.,
Defendants.

On Bill, &c.

DECREE.

Filed April 19, 1918.

This cause coming on to be heard in the presence of Charles J. Falcey, solicitor for the complainants, and Frederick W. Gnichtel and Barton B. Hutchinson, solicitors for the defendants, on bill, answer, and oral proofs taken in open court; whereupon and upon duly considering the said pleadings and proofs, and hearing and considering the arguments of counsel, and it appearing to the Court that the complainants are entitled to the relief sought and prayed for by them in their bill of complaint:

IT IS, on this sixteenth day of April, nineteen hundred and eighteen, by His Honor, Edwin Robert Walker,

Chancellor of the State of New Jersey, ORDERED, ADJUDGED AND DECREED, and the said Chancellor, by virtue of the power and authority of this Court, doth hereby ORDER, ADJUDGE AND DECREE that on Tuesday, June fourth next, at the hour of two o'clock in the afternoon, in the office of Frederick W. Gnichtel, Broad Street Bank Building, Trenton, New Jersey, the complainants deliver, and the defendants accept, a deed of conveyance without covenants for the property described in the deed annexed to the bill of complaint in this cause, together with the possession of the aforesaid premises; and that at the same time and place the defendants pay to the complainants the sum of two thousand (2,000) dollars, lawful money of the United States of America.

AND IT IS FURTHER ORDERED, that the defendants pay to the complainants or their solicitor, the costs of this suit to be taxed.

E. R. WALKER, *C.*

Respectfully advised.

JOHN H. BACKES, *V. C.*

A true copy.

ROBERT H. MCADAMS,
Clerk.

IN CHANCERY OF NEW JERSEY.

BETWEEN

HARRY D. GIHON ET UX.,
Complainants,

AND

JAMES H. MORRIS ET AL.,
Defendants.

On Bill.

NOTICE OF APPEAL.

The defendants appeal from the final decree made in this court in the above stated cause, and the whole

and every part thereof, to the Court of Errors and Appeals, to the last resort in all causes.

HUTCHINSON & HUTCHINSON,
Solicitors of Defendant James H. Morris.
F. W. GNICHTEL,
Solicitor of Defendant William J. Morris.
B. B. HUTCHINSON, *of Counsel.*

Dated May 9, A. D. 1918.

We conceive there is good cause for appeal in the above stated cause.

B. B. HUTCHINSON,
F. W. GNICHTEL,
Of Counsel with Defendants.

Service of the within notice of appeal is hereby acknowledged this 28th day of May, A. D. 1918.

CHARLES J. FALCEY,
Solicitor for Complainants.

PETITION OF APPEAL.

NEW JERSEY COURT OF ERRORS AND APPEALS.

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

The petition of James H. Morris and William J. Morris, the appellants in the above stated cause, respectfully shows, that your petitioners find themselves aggrieved by a final decree made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of New Jersey, bearing date the sixteenth day of April, in the year one thousand nine hundred and eighteen, in a cause wherein Harry D. Gihon and wife, were complainants, and the said James H. Morris and William J. Morris were defendants, in this respect to wit: that the said decree adjudged that "the complainants deliver, and the defendants accept, a deed of conveyance, without covenants, for the property described in the deed annexed to the bill of complaint in this cause, together

with the possession of the aforesaid premises; and that at the same time and place, the defendants pay to the complainants, the sum of two thousand dollars ($2,000) lawful money of the United States of America" and "that the defendants pay to the complainants, or their solicitor, the costs of this suit to be taxed."

And your petitioners humbly appeal from that part of the decree of the Chancellor, which decrees as aforesaid, upon the ground that the same is erroneous, for that the complainants were not entitled to the relief granted in said decree, but that on the contrary, their bill of complaint should have been dismissed with costs to be paid to the defendants.

Your petitioners, therefore, pray that the said decree of the Chancellor may be in the particulars aforesaid, reversed, set aside and for nothing holden; and that your petitioners may have such relief in the premises, as to this Honorable Court shall seem meet.

HUTCHINSON & HUTCHINSON,
Solicitors of Appellants.
HUTCHINSON & HUTCHINSON,
Of Counsel with Appellants.

NEW JERSEY COURT OF ERRORS AND APPEALS.
IN CHANCERY OF NEW JERSEY.

BETWEEN
HARRY D. GIHON ET UX.,
Complainants-Respondents,
AND
JAMES H. MORRIS ET AL.,
Defendants-Appellants.
} On Bill, &c.

ANSWER.

The answer of the above-named respondents to the petition of appeal of the above-named appellant, James H. Morris.

These respondents, not acknowledging all or any of the matters in the said petition of appeal contained to be true, for answer thereto, nevertheless, say and admit that the decree was on the sixteenth day of April last past made and entered in the Court of Chancery, in the cause for that purpose mentioned in the said petition, as is therein stated; but as to the substance and form thereof these respondents pray to refer thereto when the same shall be produced. And these respondents are advised and believe that the said decree is agreeable to equity, and they pray that the same may be affirmed, with costs to be adjudged to these respondents.

JOHN H. KAFES,
MARTIN P. DEVLIN,
Sol'rs and Counsel for Respondents.

Due and legal service of the within answer on the defendant, James H. Morris, is hereby acknowledged this 16th day of September, 1918.

F. W. GNICHTEL,
Sol'r of Def't and Appellant.

MacCrellish & Quigley Co., Printers, Trenton, N. J.

NEW JERSEY
Court of Errors and Appeals

IN CHANCERY OF NEW JERSEY.

BETWEEN
HARRY D. GIHON ET UX.,
Complainants,
AND
JAMES H. MORRIS ET AL.,
Defendants.
} On Bill, &c.

Brief of Complainants.

THE FACTS.

Defendant, James Morris, by a general warranty deed dated September 26th, 1908, conveyed to Harry D. Gihon, Jr., and wife, Lou H. Gihon, the house and property on Bellevue Avenue, Trenton, New Jersey, which is now the subject matter of this suit.

By reference to said deed it will be perceived:

First. That it conveys and warrants "The reversion and reversions remainder and remainders."

You can immediately see that the title of the estate of reversion and reversions, remainder and remainders was not in the grantor at the time he made the deed,

therefore he conveyed and warranted something he did not have any title to.

Second. Defendant warrants that at the time of the sealing and delivering of said deed he "was seized in his own right of an absolute and indefeasible estate of inheritance in fee simple."

It will be readily seen by reference to the will of the late Thomas Donoghue that the two living heirs of John J. Doran may defeat a certain interest, at least, of the grantees in this land. It would be brought about by John J. Doran predeceasing Mary A. Donoghue. It will also be seen by reference to the will and possible circumstances that these two children of John J. Doran may inherit even the entire estate in this property. You will observe that the property is to pass from Mary A. Donoghue, life tenant to Mary P. Doran (and it appears by the testimony that she is a widow about forty years of age with no children), John J. Doran (who is married and has two children living), Thomas Donoghue (living and single), Joseph Donoghue (dead without issue), Joseph Doran (dead without issue), cousins and nephews of Thomas Donoghue, deceased. Should any of the above die without issue his or her share, according to said will, is to go to the remaining surviving heirs. It will thus be seen that two of the above are already dead, that two other heirs have no children, and that John J. Doran is the only heir who has children. Thus, if the three remaining heirs should predecease Mary A. Donoghue, and Mary A. Donoghue should predecease the two children of John J. Doran (this is assuming that the other two heirs have no lawful issue), then the entire estate would descend and vest in the heir or heirs of John J. Doran who would have complete ownership of these premises, and they could at any time eject the present occupants from the same. The following cases sustain this position:

A, by his will, divides certain of his lands to his son B and certain other of his lands to his son C, and

charged his sons respectively with the payment of moneys to his wife and daughters. The will contained this provision: "If they (referring to the sons) should die, or either of them, without child or children, the real estate given to them or either of them shall go to my other children, share and share alike." *Held*, (one) that the sons each took a conditional fee in his holding with a limitation over to the testator's "other children" by way of executory advice; (two) that among the "other children" of the testator entended was included one of the sons who died leaving a child; (three) that the children of the testator who survived him took contingent interest in severalty which were transmissible by descent and divisible by will. *Brooks* v. *Kip*, 54 *N. J. Eq.* 462.

A title made by a conveyance executed during the life of the devisee for life, from a child having a vested estate under the provisions of that section, being subject to be devested in the event of a death of such child leaving issue during the life of the devisee for life, is not a marketable title which a purchaser ought to be compelled to take by a decree for specific performance.

Lamprey v. *Whitehead*, 64 *N. J. Eq.* 408.

Thus it will be seen that when a grantor warranted against any person or persons now or hereafter interfering in the peaceful use and occupation in these premises, he did so without any legal right or title so to do.

It appears that the complainants in this suit bought the premises in question from the defendants, James and William Morris, who were then partners, sometime in September, 1908. The legal title of the property was in James Morris and he made the conveyance to the Gihons. The Gihons held this property for about nine years when they found a purchaser, Charles Y. Barlow, who was to give $5,650, which was $150 more than they had paid the defendants for the property. When upon

examination of the title to the properties it was discovered by John J. Solan, an attorney-at-law of this city and others, there was a defect in the title of this property, one which might seriously interfere with the raising of a mortgage on the premises, or which might jeopardize a part or the entire title of the property as above set forth, the said purchaser, acting upon the advice of his attorney, refused to take the place.

The complainants then for the first time discovered there was some defect in the title. They immediately took the matter up with James Morris and his counsel, Mr. Nelson Gaskill, with a view of having Mr. Morris take this property back, and upon his refusal so to do they immediately instituted suit in this Court asking for that relief.

The question which now presents itself is as follows:

(1) Did the defendants make false representations as to the title to this property which involved questions of fact and law?

(2) Were these representations of such a character as to be a ground for a rescission of this deed?

(3) Is this such a case as to come within the principle that where there has been a plain mistake or misapprehension of right, though not the effect of fraud or contrivance, persons are entitled to the interposition of a Court of Equity?

Under the first point complainants contend that the defendant, William J. Morris, knew all the time that he did not have a clear title to this property and did as his brother James said, "he took a chance." It will be observed in the testimony that he saw Mary A. Donoghue a number of times about this property (Case, page 21). He also says that Mary Donoghue told him about a paper which she had gotten from Judge Woodruff concerning the title to this property, but that she did not show it to him until after he bought the premises. It will be observed thus far that he knew it was necessary to get some kind of a paper from some

persons who had an interest in this land, but that he did not deem it to be enough importance to even look at the paper Mary Donoghue had and which she said she had gotten from Judge Woodruff, before he bought this ground (Case, pages 21 and 22). He further says that he had Judge Macpherson search these premises for him. It does not appear that Judge Macpherson appeared either as counsel or as a witness in his behalf (Case, page 22). Why not?

Under these circumstances William J. Morris sells this property to complainant. He testifies (page 28) that he told them that the title was "all right," what did he mean by that "the title was all right"? That the title was either right or wrong? He says it was "all right;" he further said "I could not give him a warranty deed if it was not all right or if I didn't think it was all right." Now what did he mean when he said "it was all right." It certainly seems to me that if it means anything that he was selling the complainants that title absolutely clear for the consideration price agreed upon, $5,500, paid by cash note and mortgage. What else could he have meant when he said the title was "all right" and "I will give you a guaranty deed to guarantee it"? If that does not mean that a man as a matter of fact is representing his property to be free from defects in title, then plain words have no meaning. They can be construed to mean something which their ordinary acceptance and usage warrant, especially after a defect in title had been called to his attention as Mrs. Donoghue did. He further says in his testimony (Case, page 28) "I thought it was clear when they bought it." On page 29, he says, "Well, it was clear" (meaning when they bought it the title did not have any defects). He further said in answer to this question (Case, page 28): "Q. Now I think you ought to answer that question; didn't you intend to convey to them by your words the words you used, that it was 'all right,' that there were no defects to the

title in that property? A. Sure, I wouldn't do anything to Harry Gihon or anybody else."

It will be seen that the defendant, William J. Morris, says that he intended to convey the meaning to the Gihons at the time he sold them this property that the same was free and clear and there were no defects in the title. Now he had seen Mrs. Donoghue and she had told him about the interest of the heirs and that it would have to be cleared up in some way, yet he accepts her version of this important matter without her paper. If he did not see the paper until after he bought these premises, then Judge Macpherson, we have the right to assume, did not see this paper at the time he passed title, if he passed title at all, which must have been before or at the time the deed passed to those parties, therefore, William J. Morris was guilty of gross negligence in this most important matter in not demanding this paper from Mrs. Donoghue before this conveyance was made, and showing it to his counsel, Judge Macpherson. By his using only ordinary care he would not find himself in the predicament he is to-day.

Mary J. Donoghue testifies (Case, p. 4) as follows: "Q. What did you tell him about it (referring to title)"? "A. I do not know exactly. I told him the heirs might make a fuss, and he said it would be all right." If Mrs. Donoghue told him the heirs might make a fuss, and he said, "It will be all right," he was put on his guard and warned of the danger; therefore, he knew of the possible defect of this title. Secondly, when he said, "It will be all right," he took a gambler's chance and proceeded on at his peril, and only he is to blame for his present predicament, because he was once warned by Mary Donoghue, and it behooved him, it seems to us, to have this matter cleared up at that time or to leave it alone. Is Mary Donoghue to be believed? The defendant, William J. Morris, denies this, but the facts and circumstances are against him. He admits they were talking about heirs and the title, and that Judge

Woodruff would have to fix things up the best he could. Therefore, is it not more natural and more believable that Mary Donoghue said to him that he might make a fuss, and he said it will be "all right," meaning taking a chance. This man knew all about this transaction, but thought it would go through.

However, in this case it does not matter whether the defendants knew that the representations they made were false. The mere fact that they made a representation, and that representation is untrue, no matter how innocently made, is fraud in the courts of equity of this State.

> "Equity will relieve from false representations made in the sale of realty, whether they were intentional or made through mistake." *Strauss* v. *Norris*, 77 *N. J. Eq.* 33.
>
> "Proof of fraudulent intent is not essential. If a representation, false in fact, though ignorantly or innocently or mistakenly made, be shown, the plaintiff is entitled to relief by way of injunction." The action of the court depends upon the right of the plaintiff and the injury to that right, not upon the motive of the defendant." *Silver Co.* v. *Rogers*, 66 *N. J. Eq.* 120.
>
> "In a suit in equity for the rescission of a contract for the exchange of real estate induced by false representations, proof of defendant's knowledge of the falsity of such representations when made is not required." *DuBois* v. *Nugent*, 69 *N. J. Eq.* 145.
>
> "A court of equity will rescind a transaction entered into upon the faith of a material representation false in fact, if the person to whom it was made relied upon it, and, in consequence, suffered injury. The fact that it was made innocently will not prevent such rescission." *Eibel* v. *Von Fell*, 55 *N. J. Eq.* 670. House as good as new, opinion.
>
> See, also, *Mailander* v. *Pluckthun*, 84 *N. J. Eq.* 382.

Morris said the title was "all right and he would give a warranty deed to guarantee it." Morris knew that Gihon would not give $5,500 for a property unless he were given a clear and marketable title, and when Morris said the title was "all right," etc., that was the meaning intended to be conveyed and that was conveyed. Morris, when he agreed to sell the property by that very act told the complainants he had power to give a clear title, and the question of whether he had the power to sell a clear title is a fact vital to the case.

However, where one represents that he has sufficient knowledge of facts upon which to form an opinion, and sufficient knowledge of any special nature to pass upon those facts, that opinion is not true; to the knowledge of the vendee there is fraud, and in order to establish fraud in equity it would not have to be shown that such opinion was knowingly false. Cases cited.

> "If such a representation be with respect to specific facts susceptible of exact knowledge, and the subject matter be such that the affirmation of knowledge is to be taken in its strict sense, and not merely as a strong expression of belief, the falsehood of the defendant's representation is in the defendant's affirmation that he had sufficient knowledge to vouch for the truth of his assertions." *Cowley* v. *Smith*, 46 *N. J. L.* 380.
>
> "Representations made by the vendor of a horse that the animal could travel a certain distance in a certain time, when such representations were coupled with an assertion of personal knowledge of their truth, but with a true statement that the horse had been used in a certain employment, can only be regarded as an expression of a strong belief in the truth of the representation." *Cummings* v. *Cass*, 52 *N. J. L.* 77.

In the case of *Cummings* v. *Cass* it will be noticed that

such expression of opinion was not coupled with an assertion of personal knowledge. In the case at bar the defendant said the title was "all right," and that he had it "searched up" and was going to give a "warranty deed to guarantee it." Those expressions are not expressions of opinion merely, because the very words show an assertion of personal knowledge linked with them.

Defendant, in his brief, says that he had been given an opinion on the title by Judges Woodruff and Macpherson, and had furnished the Gihons with a search. It is true he furnished the Gihons with a search, but not until after the sale was consummated. My adversary seems to argue that title is a matter of opinion, but this does not affect this case, as Morris said he had sufficient knowledge upon which to base that opinion, and the facts now show that he did not. The fact that he was misinformed, if at all, by Judges Woodruff and Macpherson about his title makes no difference in this case, because when he made representations to the Gihons about his title he coupled those representations with an assertion of personal knowledge, "that he had it searched up," and "would give a warranty deed to guarantee it."

The case of *Hampton* v. *Nicholson*, 23 *N. J. Eq.* 427, quoted by my adversary, by implication upholds our position:

> "Purchasers frequently accept deeds by which no title is conveyed, under a misapprehension of the law. When there is no mistake or misrepresentation as to the facts, and no fraud and no warranty of title, they have no redress at law or in equity."

The Court says further—

> "The deed to the complainant is not in evidence, but it must be presumed to be the usual executor deed, WITHOUT WARRANTY, reciting truly his power of sale."

Mutual Mistake of Law.

The case at bar comes directly within the case of *Swedesboro* v. *Gans*, 65 *N. J. Eq.* 132.

In that case a man died leaving a widow and children, and seized of a property upon which there was a mortgage of $1,100, held by a loan association. The widow and the father of the deceased made a deed to the loan company, and the loan company, believing that it had the legal title to the property, canceled the mortgage. In that case the defense was set up that it was a mistake of law, for which there could be no redress. The Vice Chancellor held, however, that the mistake was one of fact, resulting from a mistaken notion of the law, and could be redressed. In that case the title to property was the subject of the controversy, the same as in this case. Both parties in the case at bar, the same as in that case, believed the grantor had a right to convey. In both cases the grantor had no right to convey. The principle of the case is set forth in the second syllabus:

> "Cases of plain mistake or misapprehension of right, though not the effect of fraud or contrivance, are entitled to the interposition of a court of equity where there has been no negligence on the part of the applicant."

In this case numerous authorities are cited.

In the case of *Vliet* v. *Cowenhoven*, 83 *N. J. Eq.* 234, wrote an opinion following the Gans case. In that case there was a mistaken notion as to the ownership of an equity of redemption; in other words, legal title, and the Court granted relief, and decreed the cancellation of a mortgage, canceled because of the mistake as to legal title, as void.

Negligence and Laches.

The defendants contend that the complainants were negligent in not consulting a lawyer and having the title examined. Let us see if negligence can be attributed to

Gihon for any act that he did or omitted to do. He testifies (Case, p. 15) as follows:

"A. I asked him whether I should see a lawyer and get a search. He said it was not necessary, Mr. Mulrey had said it was all right. He searched it up, and it was unnecessary to do it.

"Q. You relied upon what he said?

"A. Yes, sir; I had confidence in him, and I let it go at that."

Two things will be observed in connection with this testimony: First, William J. Morris, speaking as of that time, did not mention the names of Judge Woodruff and Judge Macpherson. He mentioned the name of Michael J. Mulrey, a real estate dealer. Gihon spoke of having a lawyer search the title for him. Did not Morris tell him it was not necessary; that he had had it searched, and it was all right, and he could rely on him? Why did not Morris tell him there was some question about the interest of these heirs and that he better have a lawyer, and what difference did it make to Morris if Gihon had a lawyer? Did he not persuade Gihon not to have a lawyer because of fear that a lawyer would discover this defect? It seems to us that it comes with ill grace from the defendant to charge the complainants with negligence in not having a lawyer when his very acts, conduct and words were the direct and controlling cause in the complainant not having a lawyer to examine the title for him.

Defendant, in his brief, says, "Since that time (referring to the time of purchase of this property by the Gihons) there has been a number of transfers of this property and others coming under the same." Speaking of this property, and it seems this is the only one that concerns us, there has never been a single transfer of this property. The Gihons have held it since they acquired it from Morris, and the testimony shows that at the time they purchased it Mulrey succeeded in placing a mortgage upon it and that that mortgage has

never changed hands, so it will be seen that since the Gihons acquired the property that but a single mortgage has been placed upon it, and it would appear that Mulrey, perhaps, ignorant of this defect in title, persuaded the mortgagee that the title was all right. Furthermore, we contend that it is no defence to an allegation of fraud in the sale of land by representing the title complete, where the owner owned but a moiety, to show the conveyances were recorded whereby vendee might with proper diligence have discovered the defect, and cite the case *Young* v. *Hopkins, 22 Ky.* 19. Furthermore, we contend that no parties could successfully prosecute a suit for the rescission of a sale on the ground of fraud if they were called upon to exercise that degree of care which the defendants seem to require of them in this case. The fact that suits of a like character have been successfully prosecuted in our courts disapproves the contention of the defendants.

The defendants say the complainants have been guilty of laches. Defendants say that "complainants for nearly ten years has placed himself in a position where they have gained an unfair advantage over defendants to their great detriment. As to the first contention there may be some force in defendants' contention if complainants had knowingly slept on their rights for a number of years. How can this be contended in this case when the testimony clearly shows that the complainants had no such knowledge until their title was refused by Barlow? What do they then do? They immediately take the matter up with the grantor, James Morris, and upon his failure to restore to them the consideration of this property they promptly started suit for the enforcement of their rights. Can it be said under these circumstances that they were guilty of any laches? If so, when did the laches begin? Did it begin one hour after they bought the premises, one day or years, or did it begin when they discovered they had a defective title? We contend that laches does not begin until the discovery of the fraud.

Point 2. As to the unfair advantage and great detriment to defendants, we ask how can this contention be successfully sustained. Are not the interests and rights of defendant the same to-day, if not better? It will be remembered that the defendants sold complainants this property for $5,500 and that complainant was forced to abandon a sale for the same for the sum of $5,650 or $150 more than they paid for it. As a matter of fact the premises are more valuable to-day than at the time the defendants gave their deed for the same.

Dfendants contend, "A plaintiff who sleeps on his rights until the progress of events and change of circumstances have rendered it impossible to grant relief with equal justice to the defendant, he is guilty of laches," and cites 16 *Cyc.* 16. It becomes pertinent to inquire, have the circumstances so changed that justice cannot be done defendants? We contend they have not. For that which they gave can be reconveyed to them intact and is more valuable to-day than it was nine years ago.

In the case of *Tynan* v. *Warren*, 8 *Dick.* 321, quoted by defendants, Vice Chancellor Green said, "I do not understand that mere delay in bringing a suit will deprive a party of his remedy unless such negligence has so prejudiced the other party, by loss of testimony or by means of proof or changed relations, that it would be unjust to now permit him to exercise his rights."

(a) Loss of testimony.
(b) Means of proof.
(c) Changed relations.

Has defendants suffered from any of these? As to these, did the defendants suffer by loss of testimony of proof? Did he produce Judge Macpherson on whom he relied for the genuineness of his title, when his testimony might have helped his cause. No. Where is the difference in the relations of these parties to-day that amounts to an injury to defendants. There are none, save that the property has increased in value in favor of the defendants. Furthermore, we contend, that de-

fendant cannot take advantage of this defence, whether real or imaginary, as he admits in paragraph seven of his answer "While denying any fraud or misrepresentation, admits paragraph seven." Nowhere does defendant set up in his answer any such defence of laches, but on the contrary admits there was none on complainants' part.

Did Defendant's Statement Influence?

The complainant, Gihon, testified as follows: "Did he say anything to you of and concerning the title of this property?" *A.* "Why I asked him whether I should get out the searches, and he said it was not necessary, and he said Mr. Mulrey had attended to that." *Q.* "What else did you say to him about the title?" *A.* "Well, he said the title was all right, that he had searched it up and I had confidence in him and I let it go at that." *Q.* "Now think a moment. I ask you if you said anything to him concerning the title or anything you should do concerning the title?" *A.* "I asked him whether I should see a lawyer and get a search, and he said it was not necessary. Mr. Mulrey had said it was all right. He searched it up and it was unnecessary to do it." *Q.* "You relied upon what he said?" *A.* "Yes, sir. I had confidence in him and I let it go at that." Does it not appear that the conduct and representations of Morris were not the superinducing cause of the purchase and did not he influence the Gihons in making a purchase. To say that he did not, would be pure nonsense.

Equities with Defendant.

Defendants say—What is the situation here? After waiting nearly ten years, a period which would have more than outlawed any action except on an instrument under seal, complainants come into this court and ask relief from a situation caused by their negligence; they

come at a time when values and conditions have changed, when new relations have arisen, and when the entire financial and business world is under great and intense stress.

If the Court will grant their prayer, what will be the result? It will affect not only this transaction, but everything that has been done in relation to the property of which this is a portion, during the past twelve years. The mortgage not only on the Gihon property but all the mortgages on the entire tract will be called in at once.

The owners will make the same demands these complainants are making, and it will be necessary for these defendants to raise immediately the sum of $35,000.00. The Court will take judicial notice of the times, war conditions and the scarcity of money; the utter impossibility of furnishing that amount of money at once. It will mean ruin and bankruptcy to these defendants.

In answer to defendants' contention, complainants say:

First—This situation was not caused by their negligence and through no fault of theirs, but that the direct cause of this suit is due to the carelessness and neglect of William J. Morris, especially in withholding the truth from Gihon at the time of the purchase, as he knew it from Mrs. Donoghue, in influencing him by his words and conduct not to have a lawyer at the time the sale was made.

Second—If values and conditions have changed they have changed in favor of the defendants, as the properties are more valuable to-day than they were nine years ago.

Third—No new relations have arisen that have been disclosed by the evidence that affect the defendants.

Fourth—That the financial and business world is under great and intense stress is of no concern in this suit, as it was not brought about by any of the parties hereto.

Fifth—That if relief be granted to complainants, other suits will follow is irrelevant to this cause. Something that can only be surmised, and not controlled by the complainants, and cannot affect their rights in this suit.

Sixth—The fact that it will be necessary, if a fact at all, for these defendants to raise immediately $35,000.00, is something that cannot affect the merits of this suit if the defendants through their own act have brought about this situation. I understand the defendant, William Morris, to say that he erected four houses on this tract. That he sold one to the Gihons, one to Hildebrechts, one to Weedens, and the other to Mr. Fitzcharles. You will remember the Gihons said they paid $5,500.00 for this place, and, assuming that the other paid a like amount, which is a reasonable assumption inasmuch as the fact is that the houses are similar, Morris must have received $22,000.00 for the four, and, assuming that he made a profit of only $17,000.00 in these houses, and not $35,000.00, this would also include the price of the land. The defendants further say that the Court will take judicial notice of the times, war conditions and the scarcity of money; the utter impossibility of furnishing that amount of money at once; it will mean ruin and bankruptcy to these defendants. Can it be said if a person deals on a large scale and with a number of persons, derives great profits from these persons, and it subsequently turns out, through his fault, that he did not give these persons what he represented to them, that they should suffer, and not him, because he dealt on a larger scale than he. The individual hardship to these persons, at least to one of them, will be as great as it would to these defendants. It would seem to us that sizing this latter appeal against granting relief sought for in complainants' bill of complaint is a magnificent plea for mercy, and has no standing either in a court of law or equity.

MARTIN P. DEVLIN,
JOHN H. KAFES.

MacCrellish & Quigley Co., Printers, Trenton, N. J.

NEW JERSEY

Court of Errors and Appeals.

IN CHANCERY OF NEW JERSEY.

BETWEEN
HARRY D. GIHON AND HIS WIFE,
LOU H. GIHON,
Complainants-Respondents,
AND
JAMES H. MORRIS AND WILLIAM J. MORRIS,
Defendants-Appellants

On Bill, &c.

Brief of F. W. Gnichtel, Solicitor and Counsel with Defendants-Appellants.

FACTS.

Thomas J. Donoghue died on July 14, 1900, leaving a last will (p. 77), by which he devised to his wife, Mary A. Donoghue, all the real estate of which he died seized for and during the term of her natural life.

By the 9th section of the will he provided:

> "After the decease of my said wife, I give and devise all my said lands and real estate to the said five children above mentioned, to wit,

> Joseph Doran, Mary T. Doran, John J. Doran, Thomas Donoghue and Joseph Donoghue, in equal shares; and if either of them be then deceased and leaving lawful issue, said issue shall be entitled to take the share of his or her parent, and if either of them be deceased without leaving such issue, the survivors shall take the whole of said estate in equal shares."

In February, 1901, the widow and the remaindermen executed an agreement (p. 79) drawn by Judge Woodruff, in which the remaindermen agreed to join with the life tenant in a conveyance when a purchaser was found to sell and convey certain pieces of land, the property of the estate, among them the property in question, located on Bellevue Avenue, in the City of Trenton, which had a frontage on Bellevue Avenue of 150 feet.

Joseph Donoghue conveyed his interest to the widow, and afterward he and Joseph Doran died without issue.

On July 16, 1906, the widow, Mary A. Donoghue, and the remaindermen, John J. Doran and wife, Mary T. Doran and Thomas J. Donoghue and wife, conveyed the premises in question to James H. Morris, who held it for the defendants as partnership property; the consideration was $6,000. *Ex. C 1* (p. 72).

The defendants are contractors and builders, and erected on the premises six dwelling houses, at a cost of about $30,000 (p. 29). These houses were sold to various parties, and mortgages placed on the property to secure loans.

On the 26th day of September, 1908, the defendants sold, by warranty deed, one of the houses to Harry D. Gihon and Lou H. Gihon, his wife, and part of the consideration was secured by a loan from John Scudder, of Hopewell, to whom a mortgage was given by the Gihons. *Ex. C2* (p. 5).

On or about April 1, 1917, complainants attempted to sell the premises to one Barlow for $5,650, and were informed that the title was not marketable. Thereupon

complainants filed this bill, charging fraud, and asking that the contract be rescinded on the ground of fraudulent misrepresentations.

The answers deny the fraudulent misrepresentations, and state that the conveyance was made in good faith and in the full belief that it conveyed a good title; that complainants have been in possession since 1908, and are still in possession; that if any defect exists in the title, it rests upon a contingency which has not yet occurred and may never occur. That the deed was a general warranty, and defendants are amply able to respond to any claim that may be made for breach of any of the covenants; that the will of Thomas J. Donoghue, and the various deeds recited, were at the time matters of public record, open to the inspection of the complainants, and ask to have the bill dismissed for want of equity.

The defect in the title is stated as follows:

Joseph Donoghue, one of the remaindermen, conveyed to the widow, and afterwards died without issue. Joseph Doran, another remainderman, died without issue. The widow and the remaining three devisees, Mary T. Doran, John J. Doran and Thomas J. Donoghue, who are still living, conveyed the premises in 1906 to James H. Morris, who held it for the defendants, as co-partnership property.

"It is quite apparent," says the Vice Chancellor, "that the defendants did not acquire and had not a clear title to the property conveyed to the complainants. Mrs. Donoghue had but a life estate, and the remaindermen's vested fee is liable to be divested upon their dying before the life tenant, leaving children. One, John J. Doran, has two children."

WAS THERE FRAUD IN THIS CASE?

The bill in this case is based on fraudulent misrepresentation of fact. A careful examination of the testimony will show that the only evidence in the case that

can possibly be construed into anything that might be called misrepresentation, is a statement which William J. Morris made to Mr. Gihon that the "title is all right." He believed the title to be all right because Judge Macpherson and Judge Woodruff had both said it was all right. The testimony also shows that the complainants received a search from the defendants.

Is this misrepresentation? Misrepresentation that amounts to fraud in equity? At law the misrepresentation must be shown to be not only false, but false to the knowledge of the person making it; in other words, fraudulent. Equity, however, will relieve if the representation be false *in fact*, though no conscious fraud be perpetrated.

Strauss v. *Norris*, 77 *Eq.* 33.
Eibel v. *Von Fell*, 55 *Eq.* 670.
DuBois v. *Nugent*, 69 *Eq.* 145.

In this case it is not claimed that any conscious fraud was perpetrated.

At the hearing below it was not contended that defendant's statement was false; it was practically admitted that he acted in good faith, and the Vice Chancellor in his opinion says in regard to this:

> "An effort was made to show that the representation was knowingly false and intentionally made to deceive, in which, however, the complainants have failed. The Morrisses paid the fair market value for the vacant lot and expended a large sum of money in building houses on it. It is barely possible that they suspected that complete ownership was not in their grantors, and that all was not right, and took a "gambler's chance," but the heavy expenditures they made is a powerful argument in favor of their belief in the integrity of the title."

So that the case as it stands shows that Mr. Morris stated the title was good and he was honest in his belief. If that is a statement of opinion, I think, under the law of all cases cited, it cannot be made the basis of fraud

and rescission. To sustain the bill there must be misrepresentation of fact. Every reported case on rescission which I have examined is based on fact.

In *Strauss* v. *Norris* (77 *Eq.* 33), there was a misrepresentation as to the number of acres purchased, there being a shortage of 23 acres; in *Eibel* v. *Von Fell* (55 *Eq.* 670), it was represented that the house was a perfectly new house in absolutely good condition, when in fact it was an old house out of repair; in *DuBois* v. *Nugent* (65 *Eq.* 145), the misrepresentation was concerning some trees which were represented to be "fine, healthy and mostly bearing," whereas for a long time they had been infested with the San Jose scale, and were practically worthless.

In *Mailander* v. *Pluckthum*, 84 *Eq.* 382, there were misrepresentations of material facts; in *Turner* v. *Houpt*, 53 *Eq.* 526, the character, condition and value of the property was misrepresented.

In *Perkins* v. *Partridge*, 30 *Eq.* 82, the mortgage for $7,000 was set aside on the ground of fraud. The false representations were that the property was a good and safe security for the money; that he had sold it for $50,000; that the land was good and the timber valuable, all of which was false and fraudulent.

In *Crosslan* v. *Hall*, 33 *Eq.* 111, there was wilful misrepresentation as to the income derived from the royalty on a certain patent, which induced a landowner to exchange his land for a one-half interest in such royalty.

Opinion is a judgment formed or conclusion reached, especially the judgment formed on evidence that does not produce knowledge or certainty. One's view of the matter. What one thinks, distinguished from what one knows to be true. (Century Dictionary.)

Fact—the actual physical or mental event or existence, as distinguished from a legal effect or consequence. Whether certain words were spoken is a question of fact; their legal significance is a question of law or opinion.

In *Hedden* v. *Minneapolis Medical & Surgical Institute* (62 *Minn.* 146), which is reported in *L. R. A., Vol.* 35, 417, the reporter has collected numerous cases on the subject of fraud, claimed to be based on expressions of opinion, and the principle drawn from the cases is stated as follows:

The general rule is that the mere honest expression of opinion will not, although the opinion may prove to be erroneous, be regarded as fraud either as the basis of an action for deceit or as a ground for setting aside, or refusing performance of a contract.

Citing *Wise* v. *Fuller*, 29 *N. J. Eq.* 257, and a score of other cases from various states.

THE REPRESENTATION HERE WAS ONE OF OPINION—NOT OF FACT.

In the case before us the representation was the expression of an opinion, in the nature of an opinion of law. The statement concerns the title to this property. Title is not a fact, but is a right, estate or interest arising from the facts proper under the rules of law applicable to them. The defendant said the title was all right; that was his opinion, and he based his opinion on the opinions he received from his lawyers. The matter with which he was dealing is not one which will permit a man to speak with knowledge. Experts who pass on titles, merely give opinions, and no one can speak with positive knowledge of a title. In this case the defendant expressed his opinion that the title was good; he is not a lawyer; he has no expert knowledge on this subject, and he based his opinion upon the opinions he had received from Judge Macpherson and Judge Woodruff, and he furnished the complainants with a search, showing the basis of the title.

The learned Vice Chancellor did not accept this view. He held that "it was, as well, a representation of a fact, and was intended to persuade Mr. Gihon of the need-

lessness of having the title examined." But I respectfully submit that a careful reading of the testimony does not support this view; the matter of an examination of the title was not mentioned.

In the first place, the defendant did not broach this subject; it was first mentioned by Gihon. Gihon testifies on page 23:

> "Q. Did he or not say anything to you of and concerning the title to this property?
>
> A. Why, I asked him whether I should get out the searches, and he said it wasn't necessary, and he said Mr. Mulrey had attended to that.
>
> Q. What else did you say to him about the title?
>
> A. Well, he said the title was all right; that he had searched it up; and I had confidence in him, and I let it go at that.
>
> Q. Did you say anything else in connection with that?
>
> A. That's about all that was said.
>
> Q. Now, just think a moment, and I ask you if you said anything else to him concerning the title or anything you should do concerning the title?
>
> A. I asked him whether I should see a lawyer and get a search, and he said it wasn't necessary; Mr. Mulrey had said it was all right; he searched it up, and it was unnecessary to do it."

Mr. Mulrey was the man who drew the deeds for Morris (p. 35).

The defendant, William J. Morris, when asked if he remembered what occurred at this interview, said (p. 32):

> "Sure I did. The title was good; I thought the title was good, after Judge Macpherson and Judge Woodruff told us it was all right."

He said he had employed Judge Macpherson to look up the title (p. 27).

In the long cross-examination to which he was subjected, the gist of his answers is, that he said "the title was all right" and that he believed it was because the lawyers had said so.

He was asked on cross-examination (p. 35):

> Q. Did any of your lawyers tell you that if John G. Doran died and then Mrs. Donoghue should die, that their mother's share would go to the two children?
>
> A. No, sir.
>
> Q. And that you couldn't get the signatures of the Doran children to that deed?
>
> A. No, sir.

Says the learned Vice Chancellor in his opinion:

> "The complainant's counsel argues that the representation was a mere expression of opinion, but I cannot accept that view. It was, as well, a representation of a fact, and was so regarded, and was intended to persuade Mr. Gihon of the needlessness of having the title examined."

The testimony does not show that the question of having the title examined was mentioned between the parties. Gihon asked him whether he should get out searches, and he said it was not necessary; that Mr. Mulrey had attended to that. The only two points mentioned were as to whether Gihon should get the searches or get a lawyer to get the searches, and whether the title was good.

Mr. Morris told him that Mr. Mulrey had attended to getting the searches, and that the title was good.

As far as the matter of searches is concerned, that was only a question of ordering or perhaps paying for them. There was no question of representation or misrepresentation there.

The only representation there that might tend to mislead this man was the opinion that the title was good, and the Vice Chancellor holds that that statement was "as well a representation of fact."

But I insist that the statement made by Morris "that the title was all right" is an expression not of fact but of an opinion, and, furthermore, an expression of a legal opinion, and, that being the case, the complainants had no right to rely on Morris' statement as to the title.

But the Vice Chancellor holds although the complainants failed to establish that the representations were knowingly false and intentionally made to deceive, "It was not necessary, though, for the complainants to go to that length to entitle them to recover. Proof of willful falsehood was not essential. It is sufficient that the representation was one of fact; that it was false and that the party relying upon it suffered in consequence."

These people dealt with each other at arm's length. The complainant with whom William J. Morris dealt is a professional man; he is a highly intelligent man, and has shown himself to be so on the stand; and he had every opportunity to ascertain the truth concerning this property.

Furthermore, there were no relations of trust and confidence in this case. We stated our opinion as to the title, and that even if untrue does not constitute fraud, in the absence of relations of trust and confidence.

Statements of mere matters of opinion or judgment, although found to be false, do not constitute fraud in the absence of relations of trust and confidence.

Wise v. *Fuller*, 29 *Equity* 257.

We contend, therefore, that the representation in this case was not a representation of fact; it was a matter of opinion, honestly entertained, and there being no relations of trust and confidence, the complainants had no right to act upon the statement, and they must rely on their covenants in the deed.

Pomeroy says, in regard to misrepresentations of matters of opinion (*Pomeroy's Eq., Sec.* 878) that

"The true rule is that a fraudulent misrepresentation cannot itself be mere expression of opinion held by the party making it. The reason is very simple; while the person addressed has a right to rely on any assertion of a fact, he has no right to rely on the mere expression of an opinion held by the party addressing him, in *whatever language such expression be made;* he is assumed to be equally able to form his own opinion, and to come to a correct judgment in respect to the matter, as the party with whom he is dealing; and cannot justly claim, therefore, to have been misled by the opinion, however erroneous it may have been."

"As a general rule, opinions, judgments and expectations are not regarded in law as fraudulent, and no action for rescissions can be based thereon. They are not statements of fact in any sense, and at most are mere expressions of mind or deductions from facts, upon which one person's judgment is as good as another, at least where they have or may have equal knowledge or means of forming an opinion." *Smith on Fraud, Section* 65.

"Generally mere expressions of opinion, estimate or judgment, even though false, do not constitute fraud. It may be said, generally, an actionable misrepresentation consists in a false statement respecting a fact material to the contract, and which is influential in producing it." *Wise* v. *Fuller*, 29 *Eq.* 257-262.

In *French* v. *Griffin*, 18 *Eq.* 280, the representation was that the lot was valuable and eligible. It was held to be merely the expression of an opinion. Says the Chancellor:

"Take it in its strongest view that can be taken of it for the defendant, it amounts to nothing more than *simplex commendatio*, a representation that the lot was a good and valuable one, which is the accompaniment of almost every

sale, and has been from the time of Solomon until now."

"Fraud can never be imputed where mere opinion, calculation and deduction shall constitute the essential ground for imputing it." *Fisher* v. *May*, 5 *Ky.* 450; 5 *Am. Dec.* 626.

"Mere expressions of opinion employed in urging or importuning another to engage or invest in any matter, are mere inducements, and form no ground upon which to base fraud." *Rockford Ins. Co.* v. *Warne*, 22 *Ill. App.* 19.

"A misrepresentation of a matter of mere judgment, or the expression of an opinion in reference to a matter equally open to the inquiry of both parties, is not a fraud." *Davis* v. *Betz*, 66 *Ala.* 206; *Crown* v. *Carriger*, 66 *Ala.* 590.

"A misrepresentation in a matter of mere judgment equally open to the inquiry of both parties is not a fraud." *Townsend* v. *Cowles*, 31 *Ala.* 428.

"The rule that in order to establish a charge of fraud the representation must have been in regard to a material fact, excludes such statements as consist merely in an expression of opinion or judgment honestly entertained." *Southern Development Co.* v. *Silva*, 125 *U. S.* 247, 31 *L. Ed.* 678.

"A misrepresentation of matter of opinion cannot be the foundation of a bill in equity." *Payne* v. *Smith*, 20 *Ga.* 654.

In *Hubbell* v. *Maig*, 50 *N. Y.* 480, it was held that fraud is not proved by proving the falsity of statements which were merely the expressions of opinion and belief founded upon information derived from others.

TITLE IS NOT A FACT.

"Title has been defined as the evidence of the right of a person as to the possession of prop-

erty, or the evidence of ownership." 32 *Cyc.* 678.

"Title is not a fact in the sense of the rule of pleading that here applies, but is a right, estate, or interest arising from the facts proper under the rules of law applicable to them." *Ward* v. *Luneen,* 25 *Ill.* 160, 163.

"An honest expression of an opinion by a vendor of his title is not fraud, even though it is erroneous, and affords no ground for the rescission of a sale. Such an opinion is more in the nature of an expression in regard to the law than of facts." *Smith on Fraud, Section* 68 *i. Kerr on Fraud and Mistakes, Section* 49.

In *Glasscock* v. *Minor,* 11 *Mo.* 655, the fraud charged was that Minor stated that he had examined the records, that he could find no conveyance from Dickerson, and was therefore of opinion that none existed, it was held that this was a mere matter of opinion and could not be imputed to fraud, and held further that a mistake of opinion as to title, the means of information being clearly accessible to both vendor and purchaser, is no fraud.

"An honest expression of opinion by a vendor of his title, though erroneous, is not fraud." *Fitzhugh* v. *Davis,* 46 *Ark.* 337.

"An expression of opinion by an executor that the title to land which he is selling is good, if honestly entertained, will not amount to fraud." *Bond* v. *Ramsey,* 89 *Ill.* 29.

In *Campbell* v. *Hillman,* 54 *Kentucky,* 508, the title depended upon the construction of a will, and the court held that if the agent honestly believed the representation he made in regard to the title to be true, he could not have made it for the purpose of deceiving or defrauding the purchaser.

The mere matter of an opinion expressed by a vendor of land in good faith in respect to the title to land sold by him, and the probable decision of the court thereon,

should it be contested, is not ground for the rescission of the contract because it turned out not to be correct, there being no confidential relations subsisting between the parties. *Maney* v. *Porter,* 3 *Humph.* (Tenn. 347.)

> "A general assertion of title to property is not such a representation of fact as will be a basis for a charge of fraud." *Ward* v. *Luneen,* 25 *Ill.* 160.

In *Conwell* v. *Clifford,* 45 *Ind.* 392, the title was bad because it was based on a defective foreclosure sale. The seller represented that the heirs of one Conwell had a good title. The matter came up on a question of pleading, and the Court held as to the representation "The allegation that the plaintiff fraudulently represented the heirs of Conwell had a good title to the land, does not show the representation of a fact, but simply a legal opinion."

The Vice-Chancellor bases his decision largely upon the case of *Redgrave* v. *Hurd,* 20 *Ch. Div.* 1, and reproduces the quotation from that case which Vice-Chancellor Emery uses in *DuBois* v. *Nugent.* That was a case of specific performance. A solicitor without any practice offered in an advertisement a partnership to anyone who would buy his home, for which he asked apparently a high price. He represented that his practice was worth £300 a year. Immediately after the deal was put through, the buyer learned that the business was utterly worthless, and that he had been cheated. It was a case of fraudulent misrepresentation of a fact, and rescission was ordered. It establishes the law that equity will rescind on misrepresentations of fact, even though innocently made. I can find no case of rescission based on a statement of opinion which afterwards turned out to be erroneous.

In this case the misrepresentation charged is the mere expression of an opinion. Furthermore the complainants are amply protected by the covenants in the deed, and there is no question of the solvency of the defendants. The defendants do not deny their liability on

the covenants if the title is defective, but they protest, and earnestly contend that they ought not to be branded as frauds for making a statement which practically amounts to an opinion of law, and which was based on the advice obtained from men learned in the law.

NEGLIGENCE AND LACHES.

The complainants were negligent in not having the title examined. It is work for an expert, yet they stood by and did nothing. They chose to rest upon the representation of this defendant on a matter of law, and now they must rely on their covenants. They have waited nearly ten years before asking the aid of the court.

In *Haven* v. *Bliss, 26 Eq.* 363, it was held: That every man purchases at his peril, and is bound to use some reasonable diligence in looking to the title and competency of the seller. It will not answer to rest upon mere representation and belief, unless the party intends to rely upon his covenants alone.

The defendants had done everything that reasonable and prudent men could do. They had the records searched, and they had the opinions of Judge Woodruff and Judge Macpherson to the effect that the title to the property was good. Since that time there have been a number of transfers of this property and others coming under the same title; the title has frequently been passed upon, mortgages have been placed upon the property, and defendants had a right to the opinion that it was a good title.

Where the position of the complainant has been the same for nearly ten years, and it is established that by his delay he has placed himself in a position where he gains an unfair advantage, or the defendants are placed at great detriment, he is in laches, and must resort to his legal remedy.

> "A plaintiff who sleeps on his rights until the progress of events and change of circumstances have rendered it impossible to grant relief with

equal justice to the defendant, is guilty of laches. 16 *Cyc.* 162; *Strauss* v. *Norris*, 77 *Eq.* 33; *Eibel* v. *Von Fell*, 55 *Eq.* 670; *DuBois* v. *Nugent*, 65 *Eq.* 145; *Brissell* v. *Knapp*, 155 *Fed. Rep.* 800; *Daggers* v. *Van Dyck*, 37 *Eq.* 130-137; *Hendrickson* v. *Hendrickson*, 42 *Eq.* 657; *Miller* v. *Harrison*, 34 *Eq.* 374; *Tynan* v. *Warren*, 8 *Dick.* 321.

The defendants have been seriously prejudiced by the fact that the complainants waited nearly ten years, a period which would more than have outlawed any action except on an instrument under seal. They come into court and ask relief from a situation which is wholly due to their negligence in not having the title examined at the time. They come at a time when values and conditions have changed; when new relations have arisen, and when the entire financial world is under great and intense stress.

Furthermore, if they had had the title examined at that time and had discovered the defect which they claim exists, the defendants at that time might have been able to recoup their own loss. Now the grantors from whom we received our conveyance are scattered over the country, and it is doubtful if they can recover the loss they will sustain. The complainants have not yet sustained any injury. They received possession of this property ten years ago, and they have been in possession ever since, enjoying the rents, issues and profits. They have not been evicted, and no one in this world today can successfully dispute their title to or their possession of these premises. The most that can be said is that they have lost a sale. Their title and their possession, for all practical purposes, is good to-day, and even under their own construction there is merely a possibility—a remote contingency—that in the distant future, if the remaindermen die before the life tenant, that some claim may be made for a portion of this property. It is a remote possibility—not even a probability.

DID DEFENDANT'S STATEMENT INFLUENCE?

Was the statement "that the title was all right" a material statement that influenced the complainants? In general, an actionable misrepresentation consists in a false statement respecting a material fact to the contract, and which is influential in producing it. *Wise* v. *Fuller*, 29 *Eq.* 257. The complainants did not testify that it influenced them. The testimony of Mr. Gihon on pages 14 and 15, shows that this statement was made after the bargain had been made. Gihon had evidently agreed to take the property, and then he testifies "I asked him (William J. Morris) whether I should get out the searches, and he said it was not necessary, and he said Mulrey had attended to that," and then he asked about the title.

The testimony shows that this took place after the bargain had been completed. What influenced the complainants in buying this property was that they were going to get it at a reduction of $500. They were eager to take it. What took place there in regard to the search and the title was merely incidental. He had already determined to purchase.

CONSIDERATION PAID.

There is a question in the case as to the consideration paid for this property. The deed is for one dollar and other considerations. At the first hearing Harry D. Gihon testified that he paid $5,500; $3,500 was covered by a mortgage, and the rest by cash and a note. On page 25 he swears that he does not remember how much cash he paid. On page 26 he states that the note was $1,000 and the rest was paid in cash.

After the main question was decided the defendants asked for a further hearing, claiming that the consideration for the property was $5,000 and not $5,500.

Mr. Morris produced the Bills Receivable book of the defendants (*Exhibit D-2*), which showed, under date of September 30, 1908 (the deed is dated September 26, 1908), an entry of a three-months note from Harry D. and Lou H. Gihon to W. J. and J. H. Morris for $500, showing that Gihon was mistaken when he said the note was $1,000.

Anna M. Morris, the wife of William J. Morris, testified that in her presence Mr. Morris told Mr. Gihon that he would let him have the property for $5,000; that he had sold the others for $5,500, but would let him have it for $500 less, and that the price was to be kept a secret.

William J. Morris also testified that the price was $5,000; that in addition to the mortgage of $3,500, $1,000 was paid in cash, and that Mr. Gihon gave him a note for $500, which was afterwards paid. The amount of the note is corroborated by the production of the Bills Receivable book. The defendants also produced several bank deposit slips. The one on September 30th showed a deposit of bank notes, $66; specie, $20; a check for $2,500; one for $500, another for $500 and another for $1,200 (pages 45 and 54).

There is no positive testimony as to whether the $1,000 which Mr. Morris claims was paid to him, was in cash or by checks. Mr. Gihon, on being recalled, testified that he paid $5,500, $1,500 in cash, a note for $500, and the balance was covered by a mortgage of $3,500. He testifies that he understood the other houses sold for $6,000, and that Mr. Morris sold this one to him for $500 less. To support this statement, a Mrs. Weeden was called, who testified that she paid $6,000 for her house; but on cross-examination, Mrs. Weeden stated that $2,000 of the consideration for the house she bought was taken out by Mr. Morris in trade with her husband (p. 67). The payments were made as follows: She gave a mortgage for $2,500, and assigned to Mr. Morris a mortgage for $1,500, which she

held on another property; gave a second mortgage to Mr. Morris for $1,800, and a receipted bill for $200, which Mr. Morris owed her husband. The $1,800 mortgage was liquidated by material which Mr. Morris bought at her husband's store.

It will therefore be seen that this sale was partially a trade, and does not meet the testimony given by Mr. Morris that the other properties were sold for $5,500, and that he gave Mr. Gihon a special rate of $5,000.

We contend that complainants have not proved by a preponderance of evidence that the consideration was $6,000. Their testimony depends largely upon the recollection of Mr. and Mrs. Gihon of a happening ten years previous, while, on the other hand, the defendants have produced documentary evidence to show that the note was only $500, and that at the time of the transaction two $500 checks were deposited in bank. They are contractors and builders, and it is unlikely that if they had received $1,500 in cash they would not have made an entry of it.

In view of the vagueness of the testimony of the complainant, and in view of the fact that written documents were produced to contradict the testimony as it was first given, I think the only fair conclusion in this case is that the Gihons paid $5,000 and not $5,500 for the property.

Respectfully submitted,

F. W. GNICHTEL,

Solicitor and Counsel for

Defendants-Appellants.

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