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**BILL OF COMPLAINT.**

**In Chancery of New Jersey**

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

10

The complainant, David Turkington, of the  
Town of Westfield, County of Union and State  
of New Jersey, respectfully shows unto your  
Honor:

1. On or about the 1st day of June, 1924, one  
Henry Smith agreed to convey to complainant,  
for the sum of \$4,000 certain improved lands  
and premises known as 205 Central avenue, West-  
field, New Jersey, which premises consist of a  
frame house and garage in rear described as fol-  
lows:

20

BEGINNING at a stake planted for the south  
corner of the lot herein described on the north-  
east side of the main road leading from West-  
field to Rahway distant one hundred and forty-  
two feet on a course leading north forty-seven  
degrees and eight minutes west along the line  
of said road from the west corner of Edwin  
Donners lot, from said beginning running along  
the northeast side of said road north forty-seven  
degrees and eight minutes west forty feet to a  
stake by the side of said road; thence binding  
on lands of Walter Sparkman formerly Joseph  
Crane north forty two degrees and fifty-two  
minutes east one hundred and eighty-two feet  
two inches to a stake in the line of land owned by  
Oren Pierson, formerly the lot of C. A. Lever-  
adge; thence binding on his land south forty-  
seven degrees and eight minutes east forty feet

30

40

*Bill of Complaint.*

to a stake; thence binding on Frederick Hinzer land south forty-two degrees and fifty-two minutes west one hundred and eighty-two feet two inches to the place of BEGINNING. Containing seven thousand two hundred and eighty-six and two-thirds square feet of land be the same more or less.

10

2. That the aforesaid Henry Smith was married to one Lillie Smith, who by a final decree dated the first day of October, 1915, in the Court of Chancery of the State of New Jersey, obtained a decree of divorce against the defendant, Henry Smith, dissolving the marriage between the aforesaid Henry Smith and the aforesaid Lillie Smith.

20

3. That the aforesaid Henry Smith was suffering from an incurable disease, to wit, pulmonary tuberculosis and that he came to live with the complainant, David Turkington, at 205 Central avenue, in the Town of Westfield, N. J. That he had bed and board with the aforesaid David Turkington and operated a small grocery store in the premises; that the complainant herein provided the aforesaid Henry Smith with comfortable living quarters and money from time to time upon which he could live, and paid rent to the aforesaid Henry Smith as a tenant up and until the time of the making of this contract.

30

40

4. That the aforesaid Henry Smith by reason of the kindness and affection shown to him and by reason of the fact that all of the improvements on the premises made before the making of the contract, were financed by the complainant, and by reason of the fact that the complainant was continually advancing monies to him, the said

*Bill of Complaint.*

Henry Smith desired that the complainant purchase premises 205 Central avenue, Westfield, New Jersey.

5. On the 1st day of June, 1924, complainant entered into possession of said premises under said contract, having been in possession of the same as a tenant prior to the making thereof, and made repairs and improvements upon the lands and buildings, installing heating apparatus, repairing the interior and exterior of said building, installing new sewerage system, paying the water and tax bills assessed against said premises and completing the erection of a garage on the premises. 10

6. That by and under the terms of said agreement, it was agreed that the said Henry Smith should receive for the balance of the purchase money, a mortgage which would insure the payment to him of the sum of \$40.00 per month, with interest on the unpaid principal at the rate of six per cent. 20

7. That in addition thereto, it was agreed that the aforesaid complainant would during the natural life of the aforesaid Henry Smith, provide him with board and lodging exclusive of breakfast and dinner, milk, cream and eggs, for the rest of his natural life and that in the event said mortgage would be paid off before the aforesaid Henry Smith should die, then the provision with respect to the board and lodging would still be enforced until his death. 30

8. That subsequently, to wit, on December 1, 1924, by an agreement between complainant and defendant, the amount of payments on the mortgage was reduced from \$40.00 to \$30.00 a month. 40

*Bill of Complaint.*

10 It was agreed however that in the event that the aforesaid Henry Smith desired to live in another home, other than the one of this complainant at 205 Central avenue, Westfield, N. J., then and in that event, the complainant in addition to the \$30.00 per month annuity, would also contribute the sum of \$30.00 toward the bed and board and lodging per month.

9. On the 4th day of June, 1924, the aforesaid Henry Smith died, leaving him surviving Theodore Smith, a minor under the age of twenty-one years.

20 10. Thereupon on the 3rd day of July, 1924, Lillie Zuber was appointed administratrix of the estate of Henry Smith, by the Surrogate of the County of Union and on the 26th day of June, 1924, the aforesaid Lillie Zuber was appointed guardian of the aforesaid Theodore Smith, a minor over the age of fourteen years and under the age of twenty-one years.

11. Complainant has been always ready, willing and able to carry out the terms of his contract and has offered to do so many times, but the aforesaid defendants herein have refused and still refuse to do so.

30 12. Complainant from time to time requested the said Lillie Zuber and Theodore Smith to deliver him a deed for said premises, but the said Lillie Zuber and Theodore Smith have neglected and refused to do so and still neglect and refuse to do so.

40 13. That on or about the 11th day of May, 1925, the defendant, Lillie Zuber, as administratrix, commenced an action in the District Court of the City of Elizabeth to secure possession of

*Bill of Complaint.*

the aforesaid premises, which action is now pending.

Complainant is without adequate remedy in the Court of Law and therefore prays:

1. That Lillie Zuber and Theodore Smith, defendants to this suit answer this bill of complaint and each statement therein made. 10

2. That the agreement so made and entered into by and between the complainant and the said Henry Smith, for the purchase of the said lands and premises, may be specifically performed by the defendants, Lillie Zuber and Theodore Smith complainant having partly performed the said agreement on his part and being ready and able to perform his part of the agreement at any time. 20

3. That a writ of subpoena 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.

4. That an order issue restraining the defendants from in anywise proceeding in the prosecution of any action in any court at law for the possession of said premises during the pendency of this suit. 30

HAROLD SIMANDL,  
Solicitor for Complainant.



*Answer.*

10. They admit Paragraph Ten.

11. They deny Paragraph Eleven, except that they admit that they have refused to carry out the alleged contract.

12. They deny Paragraph Twelve, except that they admit that they have refused to deliver a deed for said premises. 10

13. They admit Paragraph Thirteen.

#### FIRST SEPARATE DEFENSE.

1. The alleged contract is not in writing and this suit is therefore barred by the Statute of Frauds.

#### SECOND SEPARATE DEFENSE.

2. No contract for the sale of said premises was ever made and executed by Henry Smith and complainant is not entitled to a conveyance of said premises. 20

#### THIRD SEPARATE DEFENSE.

1. The alleged contract is inequitable and unfair and the alleged consideration for the said premises is inadequate and below the true and fair value of the property. 30

#### FOURTH SEPARATE DEFENSE

1. The alleged contract was procured by undue influence of the complainant over Henry Smith, while he was hopelessly and incurably ill and in the home and under the control and domination of the complainant.

*Answer.*

FIFTH SEPARATE DEFENSE.

1. The defendant, Theodore Smith, the owner of the fee of said premises, is an infant, and the alleged contract should not be enforced against him for the reason that it is unfair, the consideration is inadequate and the alleged agreement was procured by undue control over Henry Smith.

E. A. & W. A. SCHILLING,  
Solicitors of Defendants.

20

30

40

*David Turkington, direct.*

IN CHANCERY OF NEW JERSEY.

*Between*

DAVID TURKINGTON,  
*Complainant,*

*and*

LILLIE ZUBER, Administratrix,  
*et als.,*

*Defendants.*

10

Transcript of testimony taken in the above-entitled cause before Hon. Maja Leon Berry, Vice-Chancellor, at the Chancery Chambers, Newark, New Jersey, on Wednesday, January 6, 1926, at 10 A. M.

20

Appearances:

Mr. Milton M. Unger for complainant.

Mr. Edward A. Schilling for defendants.

Mr. Unger: Mr. Simandl asks that I be substituted as solicitor for the complainant, and I present an order for that purpose.

DAVID TURKINGTON, complainant, sworn.

30

*Direct examination* by Mr. Unger.

Q You are the complainant in this case?

A Yes.

Q Did you know Henry Smith, who is dead?

A Yes.

Q Where did he live? A 205 Central avenue, Westfield.

Q How long did you know him before he died? A Since 1922.

40

*David Turkington, direct.*

Q Is that when you first got acquainted with him? A I knew him a long time before that, but not personally.

Q Was he in any business? A A small grocery store.

Q Where was that located? A 205 Central avenue.

10 Q Did you live in the same house with him?

A Yes.

Q You were his tenant? A Yes.

Q When did you start to be a tenant there?

A In April, 1922.

Q Did he ever make any proposal to you about that property?

20 Mr. Schilling: I object; this suit is brought against Lillie Smith Zuber, administratrix of the estate of Henry Smith, deceased, and against Theodore Smith. Under the fourth section of the Evidence Act, the testimony of Turkington, he being the complainant, is inadmissible for this reason: Smith is dead; his administratrix is a party to this suit; she is not only proper but a necessary party for this reason, if their contention were correct, it would have been

30 an equitable conversion of this property at the time the agreement was made, and the property would then, from the time of this alleged agreement, have been in the name of Smith as trustee practically for Turkington. That being so, they now want a conveyance of it, and it may be the heir-at-law, the party to make the conveyance, and the administratrix, the party to receive the money, she standing in Smith's shoes, and I object to

40 any testimony whatsoever relative to any transaction between Turkington and Smith.

*David Turkington, direct.*

The Court: So long as the administratrix is the party, I don't think I have any alternative but to sustain the objection. Why you made her a party I don't know, but she is a party.

Mr. Unger: I think she is a proper but not necessary party, but I think this evidence will be admissible so far as the heir is concerned, and not so far as she is concerned. 10

The Court: How can I admit it at all, if it is objectionable against one of the defendants? It wouldn't be binding on her, anyway; I don't know how the decree in this case can in any way affect her estate. I am going to exclude it now. If you can convince me later that I am wrong, I will admit it. I will sustain the objection now. 20

Mr. Unger: I thought you might admit it upon the authority of Smith against Smith, 52 Law, 207—an action by a wife for dower.

The Court: I know what the distinction is as between an administrator and an heir; it is admissible against an heir, but it is not admissible against an administrator. 30

Mr. Unger: I would like to discontinue as to her as administrator; I don't think she is necessary for the determination of this case at all. There is a decree of divorce between the parties.

The Court: Before I permit you to discontinue as to her I would like to know why she is made a party.

Mr. Unger: I presume upon the theory that having been appointed administratrix, 40

*David Turkington, direct.*

10 she might have been entitled to collect the rents which accrued from this property between the time when the decedent died and the time when the Court found that we were entitled to relief. The boy is under twenty-one. My idea of it is that she is not a necessary party at all, and that the Court can pronounce a decree in this case without bringing her in in any way, the decree of divorce preventing her rights so far as relationship is concerned.

20 The Court: That is probably so if they were divorced. The parties were divorced; then, of course, she had no dower right. There isn't any question about that. As to whether she is a necessary or proper party, I must confess that I am not just clear. I don't know on what theory you made her a party.

Mr. Unger: I did not draw the bill; I can give another reason; she commenced action in the Elizabeth District Court to dispossess Turkington for possession of the premises; that action has been stayed.

30 The Court: Then she is a necessary party. The moment the suit is discontinued as against her, then the stay is vacated.

Mr. Unger: We will take that chance. The reason is, it is going to shut out of this case very important testimony, not that we cannot meet some of it, but it will take away from your Honor's consideration something very important, and I am willing to stand the consequences of dismissing as to her absolutely.

40 Mr. Schilling: I object to dismissal at this time. The theory is, and my belief is,

*David Turkington, direct.*

I haven't the case before me, but I do remember very distinctly that it has been held that in a suit for specific performance, not on an oral contract but on a written contract, it is necessary that not only the heir-at-law be a party, but also the personal representative of the decedent, for the reason that who is going to take this mortgage? The Court must consider, if this alleged agreement is a good one, that there was a conversion at that moment that it was made; that the real estate from then on was personal property—the money, the mortgage—that descended or should be distributed to the personal representative of Smith and not his heir-at-law. And if this contract were enforced, and Smith had left a wife and not a divorced wife, so that there would be a question of distribution, that that money, that that mortgage would descend as personal property and not as real estate. If it descends as personal property, then it descends only through the personal representative, and she is a necessary party.

The Court: I will sustain the objection for the present; you may renew your motion again after you have put in the rest of the case; in the meantime, if you can find the case which you referred to, I will be glad to have it. I will sustain the objection and will hold the motion in abeyance at present.

Q Mr. Turkington, did Mr. Smith board with you while you were his tenant in the property?

A Yes, sir.

Q And did he pay board?

Mr. Schilling: I object.

*David Turkington, direct.*

A No, sir.

The Court: Strike it out. Any transactions will be excluded.

10 Q Did you and he after he was boarding with you go to Mr. Simandl's office, in Newark?

A Yes.

Q And had you been there previous to that time? A Yes, sir.

Q At whose request? A At Smith's request.

Mr. Schilling: I object.

The Court: Strike it out.

20 Q Did Mr. Smith accompany you to Mr. Simandl's office? A Yes.

Q And while you were there did you see Mr. Simandl? A Yes.

Q Was Mr. Smith present? A Yes.

Q Did the three of you together have any conversation with respect to this property on Main street in Westfield, New Jersey?

Mr. Schilling: I object.

30 The Court: I will sustain the objection, unless you separate it. You have asked if the three of them together had any conversation. Now, in reply to that question the witness might very well state conversation which passed between him and the decedent.

Mr. Unger: All I have asked is, did they—

The Court: I will permit him to say "Yes" or "No."

40 A Yes, sir.

*David Turkington, direct.*

Q Who was present when the conversation took place? A In Mr. Simandl's office?

Q Yes. A Mr. Simandl, Mr. Smith and the stenographer and myself.

Q Were you all there at the same time? A Yes.

Q And the three of you, outside of the stenographer, talked together about this property? A Yes, sir. 10

Q Will you say what arrangement, if any, was arrived at; what the conversation was between the three of you while you were all present?

Mr. Schilling: I object.

The Court: Objection sustained. You are not barred from putting that testimony in by someone else. 20

Q While you were there, while Mr. Smith, the decedent, was there, will you tell us what Mr. Simandl said to the three of you—to the two of you?

Mr. Schilling: I object to the conversation with the two of them.

Mr. Unger: I withdraw the question. 30

Q Tell us what Mr. Simandl said to you in the presence of Mr. Smith, while he was there.

Mr. Schilling: I object now on the ground that it is absolutely immaterial.

The Court: I will admit the question.

A Mr. Simandl asked me if I realized what I was doing; I told him yes; he said, "All right, 40

*David Turkington, cross.*

Turkington, you are the doctor." Do you want me to say what he said to Smith?

The Court: No.

10 Q Tell what he said to you about this property. A He suggested it being drawn up in a mortgage form.

Q Draw up what in a mortgage form? A The agreement that we had already come to.

Q Did Mr. Simandl tell you how he thought it ought to be done? A Yes.

20 Q What did he say? A He turned around and explained it in this way to me, that I wouldn't want the property, if anything happened to Smith over night; Mr. Smith wouldn't want the property if anything happened to me over night. He suggested that we go back home, talk matters over, reach an agreement and come back and see him later.

Q Did Mr. Simandl say anything about whether or not you should fix the price? A Yes.

Q What did he suggest? A He suggested a mortgage of \$4,000, which Mr. Smith agreed was a reasonable purchase price.

30 The Court: Strike out what Mr. Smith agreed.

Mr. Unger: I think I will withdraw Mr. Turkington and I will put Mr. Simandl on.

*Cross examination by Mr. Schilling.*

Q When was this call to Mr. Simandl's office, the date? A I cannot exactly give you the date.

40 Q Approximately. A In the fall of 1923.

*Harold Simandl, direct.*

HAROLD SIMANDL, sworn.

*Direct examination by Mr. Unger.*

Q You are a member of the Bar? A I am.

Q When did you first see Mr. Turkington in connection with this property? A I believe it was about three weeks before he came in with Mr. Smith. 10

Q What year? A 1923.

Q Do you know what part of the year? A It was in the fall.

Q Did you make a suggestion to Mr. Turkington when he called on you? A Yes.

Q Did he relate his story? A He did; he related a transaction that he wanted me to take care of.

Q As a result of what he related to you, what did you tell him to do? A I directed him to bring Mr. Smith there. 20

Q Had you met Mr. Smith before that time? A Never.

Q Did they come back? A Yes, sir.

Q Can you fix the time? A It was the latter part of November, to the best of my recollection.

Q Had you met Mr. Smith at any time before then? A I had never met Mr. Smith before that date. 30

Q Who introduced you? A Mr. Turkington.

Q How old a man was he? A I should judge he was about a middle-aged man; he was thin and spare.

Q Did he appear to be in good or bad health? A He appeared to be in bad health.

Q Will you tell us what transpired between you and Smith and Turkington; what was said 40

*Harold Simandl, direct.*

by the three of you with respect to this property?

A The first thing when he came in he brought me three papers, which I think you have.

10 Q Who? A Mr. Smith, and he gave me these at the outset, because there was doubt in his mind as to whether or not he could sell the property, in view of a certain agreement which he showed me.

Q Can you recognize the papers? A I can pick them out. This paper, that paper, and there is another paper—three or four papers; there are two deeds and a decree and the agreement that he had with Mr. Schilling.

Q These are the papers that he brought in to you? A Yes.

20 Mr. Unger: I will offer these four papers and ask to have them marked for identification.

Mr. Schilling: I have no objection to their going in evidence.

(Marked Exhibits C. 1 to C. 4, inclusive, for identification.)

30 Q Go ahead. A He showed me Exhibit C. 4, which was an agreement between himself and his former wife, wherein he agreed, among other things, that he wouldn't sell the property unless he took care of his son in some way in his will. I read that agreement, everything; I asked him whether or not he had any other property; he told me that he had a piece of property at Astor street, in Newark, and that he intended to give that to his son. I told him I saw no reason why then he couldn't sell his Westfield property. He then told me that he had been ill and that Dave, 40 as he called Turkington, had been very good to

*Harold Simandl, direct.*

him; he said that he had had early some difficulty with his wife and that she had divorced him, and from what I understood, and he told me, she was trying to bring contempt proceedings against him for failure to pay alimony. He expressed himself as not having seen very much of his son, but that he felt that it was his duty to leave something to his son. He said that Turkington had advanced some moneys to meet these alimony payments that he had agreed to— I think it was twenty-five dollars a month—I am not sure of the amount; he said that Turkington had kept him and treated him almost like a brother, and that he wanted Turkington to have this property, and he told me that they had agreed between them that Turkington was to get this property from him; he wanted me to draw a deed in this fashion, that Turkington was to pay \$40 a month for the balance of his life, and keep him for the balance of his life, and he wanted me to have that drawn up in a regular deed. After he had expressed himself in that light I turned around to Turkington and I said, “Turkington, if you die tomorrow and Smith lives, do you want to saddle your wife with this thing? Do you know what you are doing?” Turkington said, “I do.” I said, “Now, look here, Smith, suppose that you leave this office, is it your intention that if you get hit by a trolley car and you die tomorrow, that this property goes over to Turkington?” Well, he kind of thought for a moment, and he said, “Well, is there any other way that you can do it?” In other words, he apparently—

Mr. Schilling: I object.

The Court: Just tell what he said.

*Harold Simandl, direct.*

10 A I then asked him how much the property was worth; he told me it was assessed for around \$3,000. I said, "Why don't you men agree on a price and then have a mortgage given back for the balance, and in that way it will be a lien on the property, and if Turkington dies, his heirs will have to pay off the lien or else the property will go back to your estate, and Mrs. Turkington, if she dies, will know what she has to have as a lien on that property." There was some discussion between them then as to the value—the exact words I cannot remember, but anyway they arrived at the amount of \$6,000 as being a fair value of the property. Then Turkington had stated that Smith owed him some money, and I think Turkington said it was about \$500, and Smith said, "No, I think it is more than that."

20 There was some question as to the amount of money that Smith owed to Turkington. I said this, "Why don't you men get together and find out how much Smith owes Turkington, and when you agree upon that amount, credit Turkington on account of the purchase price, and I will draw a mortgage for the balance, and draw an agreement to keep him for life, bed and board." They agreed to that, and they left leaving behind these deeds, this certified copy of final decree between him and his wife, and that agreement. He asked me one other question, whether he had to leave a will; I asked him whether he had any other heirs than his son, and he said no, and I said that property would pass to his son at his death, without a will. That is all the conversation that we had.

30

Q Then before these people went away did they make any appointment with you to return at any time? A Yes, that was left as an appointment, that they were to come back.

40

*Harold Simandl, direct.*

Q Did they come back? A No, I never saw Smith after that.

Q Did you receive any word from either of them? A Yes, I did.

Q A letter? A I did.

Q I show you a letter dated January 8, 1924, addressed to you and ask you if this is the letter you refer to? A Yes, sir. 10

Q Did you receive that? A I did.

Q And read it? A I did.

Mr. Unger: I will offer this in evidence. I will prove the execution of it later.

Mr. Schilling: I have no objection, except as to the signature.

Mr. Unger: Upon my assurance that I will prove the execution and the writing of the agreement and the mailing. I ask your Honor to admit it, and I will prove it now, if you say I must. 20

Mr. Schilling: I think it should be marked for identification.

Mr. Unger: I want to read it.

Mr. Schilling: I haven't any objection to reading it.

The Court: It will be admitted subject to being properly proved. 30

(Marked Exhibit C. 5.)

"205 Central Ave.,  
Westfield, N. J.

Jan. 8, 24.

Mr. H. Simandl

Dear Sir:

In regards to the contract which is being drawn up by you for the buying of the property at 205 Central Av. might say that the 40

*Harold Simandl, direct.*

10 purchasing price has been agreed on by Mr. Smith & myself but he (Mr. Smith) desirous that same be kept a personal affair between ourselves & that contract prices which is to be stipulated in same will only be enough to constitute a legal buy, also that the life annuity of 40\$ (Forty Dollars) per month payable at least Quarterly will be binding not only on myself but on my predessors as long as he lives trusting this will enable you to have this attended to at once as Mr. Smith intends to leave for the winter vacations the 15 inst. & he is anxious to have this settled before leaving. I am submitting this letter to Mr. Smith before mailing same to you & having him sign same as he does not want to take the trip to Newark if same can be avoided.

20 thanking you in advance for any early settlement in this matter

Sincerely yours,

Henry Smith      David I. Turkington,  
205 Central Av.,  
Westfield, N. J.

P. S.

30 Mr. Smith desirous that stipulations be made in contract to the effect that he be permitted to have his board & room the same as usual but same to be at his own discesion & must not exceed at any time over 30\$ per month which agrement is satisfactory to me.

D. Turkington  
Henry Smith''

Q After you received this memorandum did you prepare any agreement? A No, sir.

40 Q Did you prepare any deed? A No, sir.

*Harold Simandl, direct.*

Q Any mortgage? A No, sir.

Q Can you give us any reason for your failure to do so? A One of the reasons was that when I first got this letter it didn't contain the information that I wanted.

Q What was that? A That was the amount of money of the mortgage, and subsequently, I think it was in the middle of January, 1924, just before Mr. Smith was going away, he called me on the telephone. 10

Q Who did? A Mr. Smith; told me who he was, told me that he was Mr. Smith of Westfield.

Q Did you recognize his voice? A I did, and he started to—wanted to know why he hadn't had his papers drawn up, and I told him that his agreement had not stated what I wanted to know, and that was the amount of the mortgage. He said that is \$3,200. He told me that he was going away in a few days, and he wanted to have the thing attended to, and then I was notified that he had gone away. 20

Q Who told you that? A I learned that from Turkington, and of course, he was in Florida, and we couldn't do anything during that period of time, and about when he came back or somewhere around that time, I was unfortunately called away on a pretty important matter. 30

Q Where did you go? A I went to Canada.

Q A capital case? A A capital case.

Q A case where you tried to save someone from execution up there? A Yes.

Q And succeeded? A I did, thank God, and one night, it was quite late at night, I was in bed, I got a telephone call telling—I won't testify to something that is not evidence, but the next morning I was informed that Mr. Smith was dead. 40

*Harold Simandl, cross*

Q You never prepared any papers of any kind? A No, sir, I have not.

10 Q When Smith and Turkington were in your office on the occasion on which they were there together, did you hear anything said about whether or not Smith was to be furnished with board and support, and if so, what that was to be worth? A He was furnishing that board and support; under the agreement that had existed, that they told me existed at that time, Turkington was furnishing him board and lodging, and he was telling me how good he found it, and that arrangement was to continue.

20 Q Was anything said about Smith continuing to use the store in the Central avenue property? A No, there wasn't anything said exactly about that; I knew that he was in the store, but there wasn't anything said one way or the other as to whether he was or wasn't to continue there, from my recollection.

Q When Mr. Smith called you on the phone, as you say, before he went South, did he tell you why the mortgage was to be \$3,200? A He said they had figured up and that he owed Turkington \$3,200.

30 *Cross examination by Mr. Schilling.*

Q Did he tell you what it was for? A In the office he told me what most of the money was for.

40 Q What did he say it was for? A Back money that had been advanced to him first of all to pay Mrs. Zuber, the former wife, some of it; some of it was to pay some trip that he had taken South; some of it was to pay for taxes on the Astor street property, because he said it was Dave who was able—"it will be through Dave

*Harold Simandl, cross*

that I will be able to leave that property to the boy," because it seemed that Dave had paid the taxes on the Astor street property for one or two years; there were some other items, money advanced between them; that is all I knew about, apparently. The old man was reluctant at first to talk about personal agreements between them, but subsequently I made it emphatic that he should, and he did tell us all about it. 10

Q In the office he was under the impression that the amount was \$500 he had advanced? A No, Turkington was under the impression it was between five and six hundred, and he said it was \$600.

Q When you say they agreed on the price for the property in your office, you are mistaken, aren't you? A No, I am not; they agreed on that, and I am absolutely certain of it. 20

Q Calling your attention to the letter which he wrote shortly after he had been in your office—that is so, it was shortly after? A Yes.

Q He says, "In regard to the contract which is being drawn up by you for the conveying of property 205 Central avenue, I might say that the purchase price has been agreed on between Mr. Smith and myself"— A That is right.

Q —"but he (Mr. Smith) desires that same be kept a personal affair between ourselves." If you already knew that the price was to be \$4,000, can you account for that writing? A Yes, I can, in this way, that this letter—the writer of this letter is apparently using terms that he didn't understand about; the fact is, that the sale purchase price had been agreed upon, but the amount of the mortgage, \$3,200, had not been agreed upon in the office, because they didn't know how much was due from Smith to Turkington, and that was the amount that they were to 30 40

*Harold Simandl, cross*

fix and let me know, so that I could draw a mortgage. The question of the legal buy was that he wanted a dollar and other valuable consideration placed in the deed.

10 Q Doesn't that letter call to your attention that the agreement in the office was the life annuity proposition \$40 per month, and that you didn't want to draw such an agreement, and that you suggested that they go back and name a purchase price between them and terms in substitution of that life annuity proposition? A  
 20 The word "life annuity" is rather an inappropriate word in view of the conversation that was had in my office; when I received that letter I had received no further information than I had had in my office, and it wasn't until the telephone call that I got sufficient information to start drawing papers. The only additional feature was this postscript in the letter; that I didn't understand exactly until the thing was explained to me about the \$30 a month at his discretion. I didn't understand even what that meant.

The Court: As I recall it, you said that Smith explained that to you over the phone?

The Witness: Yes.

30 Q That he was to occupy a room there as long as he wanted to be there, and \$10 was to be deducted? A This \$30 discretion business they had agreed, Smith and Turkington, that he was to continue to board there; in my office they had agreed upon this.

40 Q I said occupy a room, I meant the store. A The store proposition they didn't speak to me about; that was something that came afterward; I didn't have any definite knowledge from Mr.

*David Turkington, further direct.*

Smith about that. The \$30 per month he explained to me; the word "discretion" meant this, that if he ever became dissatisfied with the type of board he was getting at Turkington's, he could use his discretion and go elsewhere and get board not to exceed \$30 per month; that is what that meant.

Q That is what Smith told you? A Yes, but I didn't understand it when I got it.

10

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DAVID TURKINGTON, recalled for further

*Direct examination by Mr. Unger:*

Q Before you came to Simandl's office with Smith, had you advanced any money for him? A Yes, sir.

20

Mr. Schilling: I object.

The Court: Strike that out; the test is that where one party to a transaction is dead, the other party cannot testify to anything which took place between them which the other party, if here present, would deny.

Mr. Unger: In case the witness testified falsely.

30

I will prove the document itself, coupled with his testimony that he could not be testifying falsely.

The Court: I will not permit it.

Q Before you went to Mr. Simandl's office with Mr. Smith did he owe you any money?

Mr. Schilling: I object.

The Court: I will sustain the objection.

40

*David Turkington, further direct.*

Q After you left Mr. Simandl's office with Mr. Smith on the occasion that you were there with him, did you with Mr. Smith dictate or write the letter which has been marked in evidence as Exhibit C. 5?

10 Mr. Schilling: Objected to.

The Court: Objection sustained.

Q I show you Exhibit C. 5 and ask you if you signed that? A Yes, sir.

Q Did Henry Smith sign?

Mr. Schilling: I object.

The Court: Objection sustained.

20 Mr. Unger: I am only trying now to prove the genuineness of an instrument executed.

The Court: You may prove the signature by someone else, but cannot prove it by this witness.

Mr. Unger: Under the Evidence Act I can prove the signature by anybody who is familiar with it, or who saw him sign it. I am not trying to prove any transaction.

30 It is a transaction which the testator has himself reduced to writing?

The Court: That isn't the testimony. The testimony is that it is in Mr. Turkington's handwriting.

Mr. Unger: But signed by the testator.

The Court: You cannot prove his signature by this witness.

Q You testified that you signed this? A Yes.

40 Q Did anybody else sign it while you were there?

*David Turkington, further direct.*

Mr. Schilling: I object.

The Court: He may answer that yes or no.

A Yes.

Q Who was present at that time?

Mr. Schilling: I object. 10

The Court: Objection sustained.

Q Did you see Henry Smith sign it?

Mr. Schilling: I object.

The Court: Objection sustained.

Q Do you know Henry Smith's signature?

A Yes, sir.

Q Were you familiar with it? A Yes. 20

Q Before this time? A Yes, sir.

Q I show you what purports to be his signature, on Exhibit C. 5, and ask you whether in your opinion that is his signature?

Mr. Schilling: I object.

The Court: Objection sustained.

Mr. Unger: Aren't you depriving me of the opportunity to prove the execution of a written instrument? 30

The Court: By this witness, yes.

Mr. Unger: Do you think he is deprived of the right merely because he is a party to this action of saying whether or not a certain paper bears the genuine signature?

The Court: Yes, if the introduction of that paper in evidence would prove a transaction, and it would. You must qualify the rule which permits you to identify the signa- 40

*David Turkington, further direct.*

ture with the other rule which prohibits him from testifying to transactions with the decedent.

10 Mr. Unger: I am simply asking him now to testify as to whether or not a certain signature is his or is in his opinion the signature of someone else, the same as he would on a promissory note or a deed.

The Court: I am sustaining the objection to that offer.

Mr. Unger: The paper is in evidence as having been signed by him. Your Honor admitted it before.

The Court: It wasn't admitted before.

Q Did you mail this paper? A Yes.

20 Q To Mr. Simandl? A Yes.

Q You wrote it? A Yes.

Q In the presence of the testator? A Yes.

Q Whom did you address it to? A Lawyer Harold Simandl.

Mr. Unger: I offer it in evidence.

Mr. Schilling: I object to it.

30 The Court: I will admit it this far: I will not admit it as a memorandum signed by the testator, because his signature has not yet been proved.

Mr. Unger: Your Honor is depriving me of the only way in which it can be proved on earth.

The Court: I cannot help it. There are many instances of that kind which arrive because of section four of the Evidence Act, for which the Court is not responsible.

40 Q Mr. Turkington, after that letter was written, did you add anything with respect to the

*David Turkington, further direct.*

property at 205 and 207 Central avenue, Westfield? A Yes, sir.

Q What did you do? A Started making general repairs.

Q Can you detail to us what repairs were made and when you made them? A A leaky roof; I had to put a stoop on the back, fix up the back stoop. 10

Q Who did that for you? A The stoop in the back I believe was fixed by Mr. Hoppel.

Q How much did you pay him? A I don't recall the amount, one hundred and some dollars his work was, altogether.

Q Do you know when that work was done? A That was done, I believe, in around the spring; the stoop was done before 1924. The repairs that were being done to the property at that time was done by Mr. Jenser, repairs to the dining-room; I was confused. 20

Q I asked you to tell what you laid out for repairs. A Mr. Jenser is the carpenter who was working on the building at the time the letter was written.

Q When did he work? A December and January.

Q How much did you pay him? A Two hundred and something his work was, altogether, I believe. 30

Q Who else did you have? A Mr. Ziegler, mason work.

Q How much did you pay him? A I believe around \$35.

Q When did you pay it to him? A In January.

Q Did you have anybody else? A Mr. Tice did some electric work. 40

*David Turkington, further direct.*

Q How much did you pay him? A I believe his bill amounted to around the same; I didn't keep track of it.

Q When was that done? A Mr. Tice done a lot in the cellar at that time and a lot in the yard.

10 Q When? A I believe the best I remember, it was in and around January or February, 1924.

Q Did anybody else, other than you, make or pay for any repairs to the house during 1924?

A No, sir.

Q Prior to that time had you made any repairs to that house? A Yes, sir, since May, 1923.

Q Can you tell us what you had paid in the way of repairs from May, 1923? A Repairs to the stack.

20 Q How much? A I cannot say offhand.

Q About? A About possibly \$40 or so, possibly more.

Q What else? A Fixed the run in the back, chicken coop run.

Q How much? A And raised the coop and fixed it up.

Q How much did that cost? A I cannot tell you.

30 Q Haven't you any idea? Who did the work? A Mr. Hoppel did that work. As far as I remember, Mr. Hoppel got close to \$150 off me, and Mr. Russo, another carpenter, his bill was over \$200.

Q You paid those? A Yes.

Q Out of your own moneys? A Yes.

Q Did Smith, the owner, pay any of those bills? A He wasn't the owner at that time.

Q The owner of record; did he order any of this work himself? A No, sir.

40

*David Turkington, further direct.*

Q Who ordered it? A I did.

Q Why did you order it and why did you pay for it?

Mr. Schilling: I object.

The Court: I don't know what the answer is going to be. 10

Mr. Unger: His motive in advancing money should be known to the Court.

The Court: There can be no objection to the answer, unless the answer represents some transaction between the parties. I will admit it for the present. If the answer is objectionable, I will strike it out.

Q The question is why did you order these repairs and why did you pay these bills? A Because I believed I owned it. 20

The Court: That is admissible, I think.

Q Did you pay any taxes on this property?  
A Yes.

Q For what year? A I believe 1923 and 1924.

Q I show you a paid tax bill and your check accompanying the same, and ask you if this is what you referred to when you said you paid the 1924 taxes? A Yes, sir. 30

Q This is your check receipt? A Yes.

Mr. Unger: I offer it in evidence.  
(Marked Exhibit C. 6.)

Q Your check appears to cover half of the taxes for 1924; did you pay the other half? A No, sir, not yet. 40

*David Turkington, further direct.*

Q I show you check dated May 12, 1924, for \$48.15, and ask you what that is for? A The last half of the 1923 taxes.

Q That is the 1923 you referred to? A Yes.

10 Mr. Unger: I offer that check in evidence.

(Marked Exhibit C. 7.)

(It is admitted that Smith died June 4, 1924.)

Q Did you pay any taxes on 85 Astor street?

A Yes.

Q When? A I believe the same month; the early part of the same month.

Q Is this the receipt for the same? A I believe it is.

20 Q Did you pay this in cash or by check? A Once by cash and once by check.

Q Did you get any person to pay the bill? A No, Mr. Smith paid the first by cash.

Q How did you pay it? A The second time, I sent the boy down with a check.

Q With your check? A Yes.

Q For the second half? A Yes.

30 Q To whom did you give the cash for the first half? A Mr. Smith.

Q At whose request? A At his own.

Mr. Unger: I offer this receipt in evidence.

(Marked Exhibit C. 8.)

The Court: Of what value is that in this transaction?

40 Mr. Unger: This: Mr. Smith owed him \$800 in January, 1924, and I am going to show how he owed him \$800, and these were

*David Turkington, further direct.*

all made prior to January 8, 1924, these advances of taxes for 85 Astor street, Newark.

Q Did you pay the 1924 taxes on 85 Astor street, Newark? A No, sir.

Q Sure about that? Did you pay this bill? 10  
A Yes.

Q You did? A Yes.

Q And this payment was made May 31, 1924?  
A Yes.

Q At whose request? A Mr. Smith's request.

Q You sent your check for it? A Yes.

Mr. Unger: I offer it in evidence.  
(Marked Exhibit C. 9.) 20

Q I think you told us that Mr. Smith had a grocery store in the property? A Yes.

Q Did he continue to rent that grocery store?  
A No, sir.

Q When did he give it up? A In December, 1923.

Q And where did he go to then? A He was preparing, when he gave it up, to go South. 30

Q Did he go South? A Yes.

Q When did he come back? A I believe in the latter part of March, 1924.

Q And who ran the grocery store then? A I did.

Q For him or for you? A For myself while he was away, and I turned the store over to him when he came back.

Q When did he come back? A I believe in the latter part of March or early in April, 1924. 40

*David Turkington, further direct.*

Q You had not yet, then, been to Mr. Simandl's office? A Yes, we had been down to Simandl's office prior to that.

Q While he was away and before he returned in March, 1924, did you pay the bills for the grocery store? A Yes.

10 Q By cash or check? A By check some, and some by cash.

Q I show you a bundle of checks here, commencing with January 5, 1924, and ending with July, 1924, and ask you what they represent, and tell us clearly what they were for? A Groceries, eggs, cigars, soda water.

Q Paid by you? A Paid by me.

Q Who took the profits of this store, if there were any, at that time? A Until Mr. Smith came back, I did, and when he came back, he got  
20 it, and continued running the store in my name.

Mr. Unger: I offer this bundle of checks in evidence.

Mr. Schilling: No objection.

(Marked Exhibit C. 10.)

Q After you left Mr. Simandl's office with Mr. Smith, did he continue to live in your house?

30 A Yes.

Q Did he have a room there of his own? A Yes.

Q Tell us the condition of his health at that time. A His health was not as good at that time, because at night sometimes he would wake the wife up, and sometimes the wife would have to wake the girl up to wait on him and open or shut windows, or give him a glass of water. I had a window put on the rear so he could close it. I went away every morning at one o'clock in  
40

*David Turkington, further direct.*

the morning, and I stepped in his room to see if there was anything he wanted before I went out, so he wouldn't have to annoy the girl or my wife during the night.

Q Who furnished him the food? A I did.

Q Who cooked for him? A The wife cooked for him.

Q Did he require any special kind of food?

10

The Court: Why isn't it objectionable? Isn't furnishing food and lodging a transaction? It has been repeatedly held that any transactions which are testified to by the survivor, and which the other party, if he were here, could deny, are not admissible. Suppose Mr. Smith were here; Mr. Turkington said, "I furnished him with board and lodging for a period of so many weeks." Mr. Smith could go on the stand and say, "No, he didn't furnish me with board and lodging; I boarded with Mr. Unger at that time."

20

Mr. Unger: Do you think the rule goes so far as to exclude testimony as to things which were actually performed, in dealing with conversations, in dealing with business transactions?

30

The Court: Anything which purports a transaction between the two parties, which imports an act done by one with the other is excluded.

Mr. Unger: My offer is to show what he did for the testator while he was living with him.

The Court: Your offer now is to show that this man furnished food and lodging for the decedent?

40

*David Turkington, further direct.*

Mr. Unger: Yes.

The Court: The offer is overruled.

Mr. Unger: And the extent of the food and lodging, the period of time it covered?

The Court: Yes, the same ruling.

10 Q Was Mr. Smith doing business in the store in 1924 prior to his death? A Yes, sir.

Q Down to what time? A Right up until the time he died.

Q Did he take his meals outside of that building? A No, sir.

Q Did he board with anyone else?

Mr. Schilling: I object.

20 The Court: I don't know of any rule which is any broader than the rule which is enunciated under the fourth section of the Evidence Act.

Mr. Unger: If that is your Honor's view, I won't press it.

The Court: I won't rescind it; strike out the answers.

30 Q Mr. Turkington, who has been in charge of this property on Central avenue, Westfield, since the death of Mr. Smith? A I have.

Q And have you paid all the bills in connection with it? A Yes.

Q Everything? A Excepting taxes; I haven't paid any more taxes.

Q And those you admit you owe? A Positively.

Q What do you claim you owe on this building?

40 Mr. Schilling: I object.

*David Turkington, further direct.*

The Court: I don't see how that can be material now. If we found that there was a contract, then what he owes would be what Mr. Simandl has testified to as what occurred, or what Mr. Smith said that he would pay, less what he has paid.

I overrule the question.

10

Q Did you pay Mr. Smith any moneys by the month or at any stated interval—

Mr. Schilling: Objected to.

The Court: Objection sustained.

Mr. Unger: I hadn't quite finished the question.

Q —from the time you and he were in Mr. Simandl's office down to the time of his death?

20

Mr. Schilling: I object.

The Court: Objection sustained.

Q From March, 1924—was the time when Mr. Smith returned? A Yes.

Q —down to the time of his death, did you pay him at any stated intervals any sums of money?

30

Mr. Schilling: Objected to.

The Court: Objection sustained.

Q From January, 1923, down to the time when Mr. Smith was in Mr. Simandl's office with you did you pay Mr. Smith any moneys at any intervals?

Mr. Schilling: I object.

The Court: Same ruling.

40

*David Turkington, cross.*

Q During the time which elapsed from June, 1923, down to the time of Mr. Smith's death, in 1924, did he sleep or lodge or take his meals in any place other than in your house?

Mr. Schilling: I object.

10 The Court: Same ruling.

Q Where did he eat and sleep or lodge from June, 1923, down to the time of his death, in 1924?

Mr. Schilling: I object.

The Court: There is nothing objectionable in the question, as far as I can see.

A With me.

20 Mr. Schilling: I move that the answer be stricken out.

The Court: That does not mean that he paid him anything, or owed him anything for it. It is a question as to where he was physically.

Q Why; why did he?

Mr. Schilling: I object.

30 The Court: Objection sustained.

You want to show he was there pursuant to this arrangement?

Mr. Unger: Yes.

The Court: I won't permit it.

*Cross examination by Mr. Schilling.*

40 Q The \$500 which Mr. Simandl testified to and which you testified to that was coming to

*David Turkington, cross.*

you at the time of this talk in Mr. Simandl's office was for money which you had advanced to Turkington and bills which you had paid for him?

Mr. Unger: I object on the ground that the witness has not given any testimony at all as to any advances. It is not predicated upon fact. 10

Q You testified that you paid \$81.27 for the Astor street taxes; is that correct? A Yes.

Q You also paid \$48.15 for Central avenue taxes for 1923? A Yes.

Q You also paid \$49.44 for Central avenue taxes for 1924? A Yes.

Q You paid \$136, did you, for the Astor street taxes for 1922? A Yes. 20

Q Where is the check? A I haven't got it; Mr. Smith attempted to—

Q You haven't the check? A No.

Q When did Mr. Smith die? A June, 1924.

Q Do you remember the day of the month?

A I believe the fourth.

Q And he was very sick? A No, he was not.

Q How long had he been sick prior to his death? A About six hours. I had him riding three hours the day before, in my own machine. 30

Q You say you repaired this property and repaired the leaky roof; can you show me the bill which you said you paid for it? A No, sir.

Q You have no bill? A No, sir.

Q You say you repaired the stoop in the back? A Yes.

Q Have you any bill for that? A No, sir.

Q This property down in Westfield was what is known as an old shack, isn't that so? A Yes. 40

*David Turkington, cross.*

Q And in very bad condition? A Yes.

Q It was in very bad condition? A Yes.

Q How old would you suppose that that house was, Mr. Turkington? A I should judge forty or fifty years old.

10 Q It had a chicken coop in the rear—he never kept any chickens? A Yes, he had chickens after I went there.

Q After you went there did you keep any chickens? A Yes.

Q Have you any bills at all for any work that you have done on this house? A No, sir, I never asked for them; I didn't think it was necessary.

20 Q When Mr. Smith's wife—Mrs. Zuber—came to see you after the death of Mr. Smith, she had a talk with you concerning the property—is that right? A No, sir.

Q Did you notify Mrs. Zuber of the death of Mr. Smith? A I did.

Q She came down there? A The following day.

Q And then she came down a day or two later, when Mr. Smith was buried? A Yes.

30 Q At that time did you have any conversation with her concerning your occupancy of the property? A All I told Mrs. Smith was that my lawyer, Simandl, was handling my affairs.

Q That was two days after Mr. Smith's death? A I don't remember the date.

Q I am talking about the occasion two days after Mr. Smith's death. What talk did you have with Mrs. Zuber concerning your right to occupy the property? A Two days after Mr. Smith's death.

40 Q The day of Mr. Smith's burial, I think it was. A I told Mrs. Smith that I had an agreement on the property.

*David Turkington, cross.*

Q Didn't you tell her you were the tenant there, paying \$30 a month and supporting Smith?

A No, sir; she misunderstood it.

Q Did you say anything similar to that? A Mrs. Smith at that time asked me how I came to rent the property; I told her how I rented the property in 1922 when I came down.

10

Q You mentioned that it was in 1922, did you? A Positively.

Q You remember her subsequently coming around, on July first, and asking you for the \$30 rent? A Yes.

Q Although you told her in June that you had bought the property, is that right? A Yes.

Q What did you tell her then, when she came around on July first? A I told her that she had no rent coming.

Q You told her she wasn't the right party to collect it? A No, I told her that she had no rent coming.

20

The Court: You say you entered into possession of this property under whatever arrangement you had with Mr. Smith, on June 1, 1924?

The Witness: Yes, May.

Mr. Unger: When we were here before we asked that it be amended to June 1, 1923.

30

The Court: There is no order of amendment here.

Mr. Schilling: I recall it; it was a typographical error.

The Court: There should be an order directing the amendment.

40

*Charles E. Houston, direct.*

CHARLES E. HOUSTON, sworn for complainant.

*Direct examination by Mr. Unger.*

Q What is your business? A Wholesale grocery salesman.

10 Q With what firm? A L. F. Herr & Brother.

Q Did you know Henry Smith, who had a store in Westfield, New Jersey? A Yes, sir.

Q Had you done business with him? A Yes.

Q What was it? A He conducted a small grocery store.

Q Did you sell him groceries? A I did.

Q Did you at any time stop selling him groceries? A Yes.

20 Q Can you tell me when that was? A According to our ledger sheet, we started to sell David Turkington on December 28, 1923.

Q Before that time did you have any conversation with Mr. Smith, the decedent, about this store? A Yes, I had lots of conversations with him.

Q Will you tell us of any conversations you had with him about that time in which Mr. Turkington was discussed?

30 Mr. Schilling: I object as not material.

The Court: I will admit it.

A I don't recall any direct conversation at that time with reference to Turkington; it was a general conversation about the store.

Q Did Mr. Smith ever ask you to find someone to take over the store? A Yes, Mr. Smith asked me to get a customer for the store, that he wanted to sell the store and rent it.

40

*Charles E. Houston, direct.*

- Q And did you try to find one? A Yes.  
 Q Did you speak to Mr. Turkington about it?  
 A No.

The Court: When was this he talked with you?

The Witness: That was probably in the summer, before Turkington appeared on the scene. 10

The Court: 1923?

The Witness: I should say so, from our record.

Q Do you know whether or not Smith left his store in 1923 and went away? A I don't have any exact date, but Mr. Smith went to Florida. 20

Q Do you know how long he was gone? A As I recall it, he was away one or two months.

Q Was it at that time that you opened your account with Turkington? A Yes.

Q And after that did you notice Smith in the store? A Yes, when he came back.

Q Whom did you charge your bills to? A Turkington.

Q Was that by any arrangement with anyone? A When Smith went away I thought he was going to close the store, and I was much surprised to find it open when I went there, and Turkington continued to conduct the store. 30

Q Had you had any talk with Smith as to who was or was not the owner of that store at that time?

The Court: When he came back from Florida?

Mr. Unger: Yes. 40

*Charles E. Houston, direct.*

A No.

Q Do you know whether or not Mr. Smith told you that he had ceased to have anything to do with the store and someone else was the owner of it? A In the general course of the conversation I criticised Mr. Smith's buying—

10

The Court: To whom, to Mr. Smith?

The Witness: Yes.

The Court: Was that after he came back from Florida?

The Witness: Yes.

Q What did he say? A I understood he was manager of the store, from Turkington, but I criticised Smith's buying in such small quantities, and he felt hurt about it, and he turned to me and said, "Well, he is boss; talk to him."

20

Q Whom did he turn to? A To Turkington; he pointed to Turkington and told me that Turkington was the boss.

Q After that who acted as boss in the store?

A It wasn't long after that that Smith died.

Q Who was in charge of the store? A Turkington paid the bills and Henry Smith sometimes ordered stock.

30

Q You had dealt with Turkington as the owner? A Yes.

Q Have you got your original sheet? A Yes.

Q And that is a transcript of the account, is it? A Yes.

Q And that shows Turkington is the person to whom the goods were charged? A Yes.

Q Commencing what date? A December 28, 1923.

40

Mr. Unger: I offer that sheet in evidence.

*Charles E. Houston, direct.*

The Court: How is that admissible?

Mr. Unger: It goes in with the rest of the evidence, to indicate that at a certain time someone ceased to be the proprietor of that store.

The Court: Not up to the present time it doesn't. This man's testimony is to this effect, that in December he found that Mr. Smith had gone away, and found Turkington in charge. For some reason or other—it doesn't appear, and it doesn't make any difference so long as Smith isn't responsible—they began charging the goods to Turkington. He never had any conversation with Smith in which he said that Turkington was the owner. The most that was ever said was, that on one occasion, when he was criticising Smith for his small purchases, he turned and said—he turned to Turkington and said, "He is the boss." 10 20

Mr. Unger: Coupled with the fact that that is the time that the account was opened.

The Court: No, that wasn't; that was after he came back from Florida that he had that conversation.

Q Was it? A I had a conversation after he came back, but the account was opened while he was in Florida. 30

Q When was it that Smith said, "It is up to him; he is the boss," indicating Turkington?

A That was a short time before he died; late in this transaction.

Mr. Unger: I think the account is admissible.

The Court: I will not admit it. 40

*Charles E. Houston, cross.*

Q Did Smith pay his bills in cash or by check? A He generally paid them in cash.

Q Did you ever get checks from him? A I think he has paid by check.

Q Are you familiar with his signature? A I have seen it, but I wouldn't want to say that I was familiar with it. This was long ago.

10 Q Would you recognize it if you saw it again? A I could tell you better if I saw it. I might refresh my memory.

Q Look at Exhibit C. 5, at the place where the name of Henry Smith appears, and look at the signature in two places on there, and after looking at it, will you tell us whether in your opinion that is his genuine signature?

20 The Court: He hasn't qualified to testify to that yet. He is not sure that he could recognize the signature if he saw it.

Mr. Unger: He said he could by looking at this. This will furnish him a basis for comparison.

The Court: You may cross examine as to his qualifications.

*Cross examination by Mr. Schilling.*

30 Q Have you any recollection whatsoever of how Henry Smith signed his name? A It is hazy; I haven't any word picture, or any real picture.

Q You have no mental picture whatsoever of it; you don't know whether he writes large or small? A As I recall it, he wrote in a large plain hand, not any too regular.

40 Q Straight up and down or slant or back-hand? A A slight hand, an ordinary writing, the same as men of his affliction would write.

*Charles E. Houston, further direct.*

Q How many times have you seen his signature or have you seen him sign his name? A I think I have seen him sign checks.

Q How many times? A I don't remember that; it was something that didn't make any great impression on me.

Q To the best of your recollection, how many times would you say you saw him sign? A Not over four or five times. 10

Q How long ago was that? A That must have been in 1922, or 1923. My impression was that at times he gave me a check and other times he gave me cash.

Mr. Unger: I think his testimony goes to the weight and not the competency.

The Court: I think that his testimony as to whether or not it is his signature, whether or not this is Mr. Smith's signature, is of very little use; I will take it for what it is worth, but it is not worth very much to me, because he, himself, confesses that he is very hazy about the signature, and not sure whether he would recognize it if he saw it. With that qualification, I will receive it. 20

*Further direct examination by Mr. Unger.* 30

Q Will you tell us, based upon the experience you had with seeing his signature, whether you can recognize this as his? A No, I cannot.

Q You wouldn't want to say whether it is or not? A No.

Q Do you recall that Smith went to Atlantic City in December, 1923? A I recall him going to Atlantic City at one time.

Q Or went South? A I don't know as to dates. 40

*Charles Squire, direct.*

Q Isn't that the time that you complained about the smallness of the bill, and it was then that Smith told you that someone else was the boss?

10 Mr. Schilling: He has been asked twice and he said differently.

The Court: I think he has sufficiently identified the time as shortly before the man's death, but I will permit you to ask him this question.

A I cannot hook it up with that time.

Q You don't identify that conversation as having taken place at the same time that you opened this account with Turkington? A No.

20

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CHARLES SQUIRE, sworn for complainant.

*Direct examination by Mr. Unger.*

Q What is your business? A Wholesale milk dealer.

Q In Westfield? A Plainfield, New Jersey.

30 Q Did you know Henry Smith? A I knew Mr. Smith.

Q Who owned property on Central avenue, Westfield? A Yes.

Q Did you have any business dealings with him? A Not with Mr. Smith.

Q Whom did you have them with? A Mr. Turkington.

40 Q Did you ever have any talk with Mr. Smith about this property on Central avenue, Westfield? A I was down there calling on Mr. Turkington one Friday.

*Charles Squire, cross.*

Q Will you tell us the time? A It was in the afternoon, I should judge around two or three o'clock.

Q In what year? A It must have been in 1923, because what happened, it has been about that time, from the evidence that I have heard.

Q What part of the year? A In the fall, and at that time they were laying a cement— 10

Q Who was? A Some men were laying cement in the floor in the garage, and the conversation came up about the money and about the property, and during our conversation he told me that he had turned the property over to Dave, and it was in the course of being settled.

Q Who told you that? A Mr. Smith.

Q Can you remember his words; do you remember what he said? A We were talking about the expense, and he said that, well, why shouldn't he, it is his property, or words to that effect. 20

Q Smith said that? A Yes.

*Cross examination by Mr. Schilling.*

Q They were doing what kind of work? A They were laying cement floor in the garage. 30

Q Do you recall approximately what month that was in? A It might have been September or October; I cannot say just which month.

Q And it was September or October prior to Smith's death? A Yes.

Q That is why you say it was 1923? A Yes.

Q Did you pay any attention at that time to the conversation that Smith had with you; was there any reason particularly for keeping that in your mind? A I was waiting for Turkington 40

*Charles Squire, re-direct.*

to come; I collected every Friday and I had a habit of sitting on the stoop, and we struck up a conversation, because there was nothing else to do.

Q You talked about the cement? A Yes.

10 Q How did you come to talk about the cost of it? What was said, do you recall? Asked him where he was getting the money to pay for it? A No.

Q How did you come to talk about it? A I think something was said about—I said, “You are spending quite some money on the property.” He said, “No, it is not me; it is Dave,” and he said, “Why shouldn’t he spend it? It is his property; I have turned it over to him.”

20 Q He said he had turned it over? A He said it was in the course of being settled; he said that Dave had taken it over.

Q Did he tell you that Dave had loaned him a lot of money to make repairs around there? A No.

Q Dave used that garage himself, didn’t he? A Yes.

Q Anybody else? A Not that I know of.

30 Q Turkington used it in his milk business, didn’t he? A Yes. There was room for two cars; he had one car at that time; whether he rented the other one or not I don’t know.

*Re-direct examination by Mr. Unger.*

Q From your conversation with Mr. Smith, did you get the impression that this was a completed transaction or one which was in the course of being completed—turning over the property?

40 A In the course of being completed.

*Louis Gattiato, direct.*

Q Did he say whether or not it has been turned over? A He said that Dave had taken it over; he didn't say that it had been completed.

Q By taking it over, you mean the property?  
A Yes.

Q Did he say anything about the papers having been drawn? A Mr. Smith didn't talk a whole lot; that was all he did say. 10

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LOUIS GATTIATO, sworn for complainant.

*Direct examination by Mr. Unger.*

Q You live in Westfield? A Yes.

Q What is your business? A Notary and real estate. 20

Q You are a justice of the peace? A Yes.

Q Did you know Henry Smith of Westfield?  
A Yes.

Q Did you know David Turkington? A Yes.

Q Did these people ever come to you about any transaction with respect to the Central avenue property of Smith's? A Yes.

Q Who sent for you? A Mr. Turkington.

Q Can you tell us the time? A It was, I believe, in the fall of 1923. 30

Q Did Turkington come alone or with Smith?

A Turkington sent for me, but Smith wanted to see me.

Q Did you go? A Yes, sir.

Q Where to? A To the Central avenue house.

Q Whom did you meet there? A I met Mr. Smith and Mr. Turkington.

Q Tell us what Mr. Smith said to you. A I went there; I never spoke to Mr. Smith before. 40

*Louis Gattiato, cross.*

I never knew him; I was introduced by Mr. Turkington, and Mr. Smith began to tell me about some transaction with Mr. Turkington, and when I was called I was told that I should take the execution to some contracts; so I went there and they explained to me about this trans-  
 10 action.

Q What did Smith say to you? A He told me that Mr. Smith was very anxious to have a deed drawn.

Q To whom? A To Turkington.

Q Did he say that? A Yes, he did.

Q For what property? A For this property in Central avenue, and they was talking about some terms—\$40—but I don't recall now, because I wasn't interested, as in the conversa-  
 20 tion I was told that a certain lawyer was in the case and was supposed to draw these papers, and Mr. Smith was very anxious—

Mr. Schilling: I object.

Q Tell us what he said. A Mr. Smith said, "this lawyer that Dave Turkington got must be very busy, and I want to get through this; I want you to draw these papers." I said, "Being  
 30 there is a lawyer in the case, and I am not a lawyer, if the deed was already drawn, or a contract drawn, I would execute it as a notary, but being that the lawyer is in the case you had better consult your lawyer," and I refused to execute any papers or draw any papers.

*Cross examination by Mr. Schilling.*

Q You say you think this was in the fall of  
 40 1923? A Yes.

*Andrew Carney, direct.*

Q How do you fix the time? A Because it was kind of cold weather.

Q What month would you say it was? A I would say between October and November.

RECESS.

10

ANDREW CARNEY, sworn for complainant.

*Direct examination by Mr. Unger.*

Q You are an official of the Town of Westfield? A Yes.

Q Your profession is what? A Health officer.

Q Were you health officer in 1923? A Yes. 20

Q Did you know Henry Smith, who owned the property on Central avenue? A Yes.

Q You know that he died? A Yes.

Q Did you know also Turkington? A Yes.

Q Did you have an occasion to go to that property on Central avenue in 1923? A Yes.

Q Can you fix the month? A It was very late in the fall; I think it was in the latter part of November or first part of December.

Q Why did you go there? A Some of the neighbors complained about the smoke nuisance; the chimney was down rather low and the smoke was getting into the other houses. 30

Q You received that complaint? A Yes.

Q Did you go to the property? A Yes, I went there and Mr. Smith was there, and I spoke to him about it, and he said, "You cannot bother me any more, because I haven't anything to do with that any more." He said, "I am not the owner; Turkington has got all to do with that; 40

*Andrew Carney, cross.*

you will have to see him." So, as he was going in the door I asked him if he would send him out, and he sent Mr. Turkington out. I asked Mr. Turkington if he was the owner—

Mr. Schilling: I object.

10 Q Was Smith there when you asked him that?  
A No; Mr. Smith went in the house and sent Turkington out.

Mr. Unger: Don't tell us what happened while Smith was not there.

Q What else did Smith say? A That is all.

Q When he said he was not the owner, was Turkington in the room or where was he? A  
20 No.

Q Did he say who was the owner? A Yes, he said Turkington; you will have to see Turkington.

*Cross examination by Mr. Schilling.*

Q Have you any record of your visit? A No.

Q Did you keep a record of complaints? A Yes.

30 Q Did Turkington keep a milk bottling establishment there? A No, he wasn't bottling there at that time; he was storing milk there, but he wasn't bottling at that time.

Q Have you looked up your records as to this complaint? A No.

Q You are sure it wasn't a complaint about the condition of his milk business? A No.

Q What were the exact words which Smith used? A I told him that while it wasn't an  
40 official complaint we had received, it was only

*Andrew Carney, cross.*

sort of a neighborly complaint, and that we didn't keep any record for that reason, the people had not made a written complaint; in fact, most of them didn't make written complaints.

The Court: You were just asked what he said to you, the exact words. 10

The Witness: He said, "I haven't anything to do with that any more; you will have to see Turkington; he is the owner." That was his exact words. "I haven't anything to do with that any more."

Q Did he say that Turkington is the owner, or "I am selling it to Turkington"? A No, he said, "Turkington is the owner."

Q And that, to the best of your recollection, was in the latter part of November or beginning of December? A Yes. 20

*Examination by the Court.*

Q What impressed you with the fact that he said Turkington was the owner; why do you recall those two words any more distinctly than you do any other part of the conversation? A Because the conversation was very short. 30

Q Did he say that, "You will have to see Turkington about that; it is up to him; he is the owner"? A He said, "You cannot bother me with that any more; you will have to see Turkington."

Q Is that when he stopped, when he got there? A No, he said, "You will have to see Turkington, he is the owner."

Q Sure he said, "He is the owner"? A Yes. What impressed me with it was—if I can go on— 40

*Charles Edward Tice, direct.*

that Mr. Turkington came out, and I said to him, "Are you the owner of the property?"

The Court: Never mind what he said.

The Witness: I wanted to show what fixed it in my mind.

10 Mr. Schilling: Smith wasn't there when you said to Turkington, "Are you the owner?"

The Witness: No.

Mr. Schilling: He didn't hear his answer?

The Witness: No.

Mr. Schilling: Whatever his answer was, did you go back to say anything to Smith?

The Witness: No.

20

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CHARLES EDWARD TICE, sworn for complainant.

*Direct examination by Mr. Unger.*

Q Where do you live? A Westfield, New Jersey.

30 Q Your business? A Electrical contractor.

Q Were you in that business in 1923? A Yes.

Q Do you know the Smith property, on Central avenue? A Yes.

Q Did you know Henry Smith? A By sight; just to say "How do you do?" to him.

Q When in 1923 did you do any work on that building? A Along in the latter part of the year, October or November; I know it was cold weather.

Q What kind? A Electrical work.

40 Q Who ordered it? A Mr. Turkington.

*Charles Jenson, direct.*

Q Who paid for it? A Mr. Turkington.

Q What did it amount to? A All told, it amounted to thirty-five dollars.

Q Did Smith give you any orders or direction to do anything? A No.

Q Nor did he pay you? A No, sir.

10

*Cross examination by Mr. Schilling.*

Q Have you any record with you of when you did the work? A Not actually, no, sir; I have it home in books.

Q You didn't bring them with you? A No, sir.

Q How many trips did you make there altogether? A Four.

Q What did you do? A The first time I went there I repaired a light in the store; the second time there was a short circuit upstairs in the rear part; I told him I couldn't work there on account of the cellar was full of water; then I went back again, and I put a light in the dining-room; I fixed the light and also fixed the light over the milk which he had there, and also wired the garage.

20

Q This property at that time was occupied by Turkington; he was using it for his business and living quarters? A Yes.

30

Q And the electric light had already been installed in it? A Yes; I added to it.

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CHARLES JENSON, sworn for complainant.

*Direct examination by Mr. Unger.*

Q What is your business? A Carpenter.

Q Where? A Westfield.

40

*Charles Jenson, direct.*

Q Do you know Henry Smith? A Yes.

Q In his lifetime, of course? A Way back from 1922.

Q Do you know Turkington? A Yes, I know him by business like.

10 Q Did you ever do any work on Smith's house on Central avenue, Westfield? A I worked on that property, yes.

Q What kind of work did you do? A Carpenter work.

Q How big a job was it? A I put in new beams, put whole new ceilings in.

Q Who ordered the work? A Mr. Turkington.

Q When did he order it? A About the early part of January, 1924.

20 Q Did you do the work for him? A Yes.

Q Did he pay you? A He paid me when it was all done.

Q How much was it? A I guess about \$250.

Q Did Smith, the owner, order any of the work of you? A No.

Q Did he give you any directions about doing it? A No.

Q Did he pay you any part of it? A No.

Q How did you get this, in cash or check?

30 A I got paid by cash.

Q Did you have any talk about that time with Mr. Smith about why Turkington was doing these repairs? A Different times.

Q With Mr. Smith? A Yes.

Q What did he say to you? A I used to say why he didn't build up the front; I wanted to build out the front.

40 Q Whom did you say that to? A Mr. Smith, and he said, "I have nothing to do with the property; you speak to Mr. Turkington, be-

*Charles Jenson, direct.*

cause that is the man that have to do all the repairing what will be done.”

Q Did you talk with him more than once about repairs? A Not about repairs, only different things about real estate, in other words.

Q Were you in the house there at any time when a letter was written by Mr. Turkington? 10

A Yes, sir.

Q And who was there when that letter was written? A Mr. Turkington, Mr. Smith, and the fellow that used to drive a truck there.

Q What is his name? A I think his name is Hazel.

Q Is he in court? A Yes, I think he is.

Q Who else was there? A And a young boy that used to help him on the wagon.

Q A colored boy? A No, a young fellow. 20

Q Is he in court? A Yes.

Q What were you doing there? A At the time being I was just finishing up the dining-room, putting molding around the windows and various things.

Q You were working there? A No, I was just finishing up, and it was around eight o'clock, and I was just going to go home; I was sitting down and talking, and he was saying this.

Q What did you hear Mr. Smith and Mr. Turkington talk about while you were there? A Mr. Smith, he was dictating to Mr. Turkington what to write down on a letter, and he told him to write down that that property should be bought for \$4,000, on a mortgage of \$3,200. 30

Q Did you hear that? A Yes.

Q Was Turkington doing anything while you were there? A Yes, he wrote all that down.

Q What property were they talking about? A Westfield property. 40

*Charles Jenson, direct.*

Q How do you know that? A I know that he was talking about it.

Q Tell us anything else that you heard them say about the terms of that property, the terms of sale. A He is supposed to pay \$30 a month, and board and lodging.

10 Q Who was supposed to pay? A Mr. Turkington to Mr. Smith.

Q And did they talk about the price of the property, how much it was to cost? A The price was to cost \$4,000.

Q Do you know what the \$800 was said to be for? A That is supposed to be money Mr. Smith owed to Turkington, and it was supposed to be taken off.

20 Q How long did this talk take? How long a time? A It must be an hour's time.

Q And after this letter was written or this paper was written, did you see anybody sign it; whom did you see sign it? A Mr. Smith.

Q Were you there when he signed it? A I was there.

Q I show you a paper which has been marked Exhibit C. 5, and ask you if you ever saw that paper before? A That is the paper that was drawn up that night.

30 Q You saw that paper that night? A Yes.

Q Is that the paper which you saw Henry Smith sign? A Yes.

Q And he signed that while you were there? A Yes, I was there.

Q And after he signed the paper, what was done with it? A It was going to be sent to Newark, I don't know to whom.

40 Q Who said that? A Mr. Smith told Turkington to send it right away to Newark; that is all I know; who was going to get it, I don't know.

*Charles Jenson, cross.*

Q You didn't see it mailed? A No; I saw him put it in an envelope.

Mr. Unger: Now I offer it in evidence.

The Court: You may cross examine on the paper.

*Cross examination by Mr. Schilling.*

10

Q You heard Turkington and Smith talking about the terms for which this property was to be sold, is that right? A Yes.

Q And Turkington was sitting there writing, was he? A He was talking that over before he wrote anything.

Q Didn't you say that Smith was talking to Turkington what to put in the letter? A He told him what to put in after the price.

20

Q And was Turkington writing at that time? A Yes.

Q You heard Smith telling him what to put in it? A The price, yes.

Q He told him to put in that the price is to be \$4,000? A Yes.

Q And \$3,200 is to be mortgage? A After \$800 was taken off.

Q And \$3,200 was to be the mortgage? A After, yes.

30

Q You saw Turkington write that in, did you? A Yes.

Mr. Unger: This is not cross examination on the execution at all.

The Court: I will permit it.

Mr. Schilling: I object to it, because there is no such proposition in this letter; it is not identifying this letter.

40

*Charles Jenson, by the Court.*

10 The Court: I will admit it, but the admission does not conclusively prove—does not necessarily conclusively prove the execution. I will take it for what it is worth. This is the paper which this man said he saw executed there, but obviously it does not contain the terms which he said Mr. Smith directed Mr. Turkington to incorporate, but he has been shown a paper, and he says that is the one that was signed.

Q How can you tell this letter from any other letter that might have been written that night?  
A By the signature.

Q If there was another letter—do you know Henry Smith's signature? A Yes.

20 Q Tell us what it looks like; is it big or small?  
A Half and half like.

Q Is there anything about it that you can tell us that is unusual? A I can tell most by the "H's" he makes.

Q What kind of "H's" does he make? A Some kind of German like, foreign "H's."

*Examination by the Court.*

30 Q Have you seen him sign his name? A Yes.

Q Before this? A Yes.

Q How many times did you see him sign his name? A Three or four times, different times.

Q What was the occasion when he signed his name? A Oftentimes he come in the store.

40 Q For what purpose? A That I cannot say exactly, what purpose, but I saw him sign the name different times.

*Charles Jenson, by the Court.*

Q Did you ever see him sign any paper you received from him? A I never received any paper from him.

Q Who did receive the papers which you saw him sign? A Different people come in with different things they want to have signed.

Q What were you doing, looking at him signing papers? A Often I go in the store and buy small things and I used to stand and talk with Smith when people come in. 10

Q You just happened to be there when he signed these papers? A Yes, different times, a couple of times I have been there.

Q Can you mention any particular paper which you ever saw him sign besides this? A No, only when I saw him sign a check.

Q Did he ever sign a check for you? A No. 20

Q Did he ever sign any check which was given to you? A No.

Q Where were you when he was signing the checks? A I might have been in there working.

Q If I signed my name here now on this piece of paper, you could see me sign it? A Yes, I could see you sign it.

Q But you couldn't recognize the signature? A The check was lying there and I saw it. 30

Q You mean Mr. Smith put that check down there in front of you and signed it? A He was signing there when I was working there in the dining-room; the thing was lying there the whole time with his name on it.

Q It was there a whole day? A The check was lying there.

Q Did you take up the check and inspect the signature? A I didn't look at the check, only the name; different times I looked at the name. 40

*Charles Jenson, re-direct.*

Q Why were you interested in his signature?

A One time I have some lumber sent there, he signed the bill when the driver came.

Q Why didn't you sign it? A I wasn't there.

Q How do you know he signed it? A I saw his name there.

10 Q You didn't see him sign? A I saw his name.

Q Someone else might have signed? A Smith told me he signed; I saw his name when I paid the bill.

Q You didn't see him sign his name there? A He told me he signed it.

The Court: I will admit it for what it is worth.

20 (Letter referred to marked Exhibit C. 5.)

*Re-direct examination by Mr. Unger.*

Q Mr. Jenson, you said Mr. Smith told him to put in the contract price. A No, I said he talked that all over before he sat down and wrote.

30 Q Was Mr. Turkington writing all the time that you were there? A He was writing, not when he was talking about the price.

Q Do you mean that before Mr. Turkington started to write this paper, they had some talk between them? A Oh, yes.

Q Was it in that talk that the price of \$4,000 was discussed? A Yes.

Q And was it then that you heard about the \$800? A Yes.

40 Q You said one more thing, and that was about the repairs to this property. I understood you to say that when you spoke to Mr.

*Charles Jenson, re-cross.*

Smith about extending the building and making a new front, he said that the repairs were up to Turkington? A Yes.

Q Did he tell you why they were up to Turkington; did he give any reason? A He said he was the owner.

*Re-cross examination by Mr. Schilling.*

10

Q How long have you known Turkington? A A couple of years.

Q Have you ever done any work on that property for Mr. Smith? A No.

Q The property is and has been for many years what is known as a little shack, isn't that so? A Yes.

Q It is ready to tumble down, isn't it? A It is half down now.

20

Q And it has been for many years, isn't that so? A The rats run away with it.

Q You know that little odd jobs have to be done around the property all the time, so you can live in it; isn't that right? A What was necessary.

Q When they talked about the \$800, what was that made up of, did they say? You heard them talking, that Smith owed Turkington \$800; did they say what that \$800 was for? A That

30

was money Turkington has been giving him.

Q And paying out for him? A Yes.

Q And bills that he has been paying for him? A I don't know.

Q Your money was included in the \$800, wasn't it? A No. It was before that time.

Q What item did they talk about that made up the \$800? A I don't know what the \$800 is for, whether it was for that money that Turkington has furnished Mr. Smith.

40

*Charles Jenson, re-cross.*

Q What did they say about it? A It was to be taken off the price, \$800.

Q What? A \$800.

Q Did they say why? A No, they figured up and left a mortgage of \$3,200.

Q You were right there? A Yes.

10 Q How did you hear them figure; what did they say? A That I didn't take much interest in.

Q Did you hear \$4,000? A I heard the mention about the price.

Q But you didn't hear any mention of what money Mr. Turkington had paid out for Mr. Smith? A \$800 he owed him.

Q I want the things that made it up. A I don't know what it was for.

20 Q Turkington was running that store, wasn't he? A I believe so.

Q You know it, don't you? A Smith was in the store, too.

Q You knew it was Turkington's store, didn't you? A Yes, and Smith did run it.

Q When did you talk to Smith about extending the store out? A Before that time.

30 Q And Smith told you he didn't want a bigger store; see Turkington, isn't that right? A He said he had nothing to do with it any more.

Q With the store, he told you he had nothing to do with the store? A With the property.

Q What work did you do there? A Put in new beams in the dining-room.

Q What do you mean by "new beams?" A Beams that carried the floor up above.

Q Was the ceiling plastered? A Yes, it all fell down.

40 Q And the beams inside you repaired, is that right? A I took them out.

*Charles Jenson, by the Court.*

Q What else did you do? A Put in new ones.

Q What else did you do? A Put the ceiling back again.

Q What else did you do? A Panelled it all off, fixed windows, put in new doors.

Q What about the windows; you fixed windows? A They couldn't be opened; they wouldn't move. 10

Q Do you remember exactly how much Turkington paid you? A I got it in the books home; it is around \$250.

*Examination by the Court.*

Q You say that when this conversation took place, you were sitting in the store with two other people? A In the dining-room. 20

Q And these two other men beside Mr. Turkington and Mr. Smith were there also? A Yes, we were sitting there, and Mr. Smith and Mr. Turkington were sitting around the table.

Q What were you doing around the table? A Mr. Smith and Turkington were sitting around the table and talking.

Q What were you doing in the dining-room at eight o'clock at night? A I was usually fixing up and cleaning up the place, putting my tools together and things; I was just finishing up the job. 30

Q This was in the fall of the year, you say? A Early part of January.

Q Why were you working there so late that night? A Finishing up.

Q Hadn't you quit for dinner or supper? A We quit dinner; there was a little left; we never want to go back and stir up the house again. 40

*Charles Jenson, by the Court.*

Q Did you quit for dinner that night? A No.

Q You kept on working up until eight o'clock?

A Yes, it must have been around seven o'clock when we got finished.

10 Q Then you sat down and stayed there an hour or so and talked? A I sat down and talked with the other two fellows.

Q Had Mr. Smith or Mr. Turkington ever said anything to you about this transaction which you heard them talking about? A Never mentioned it.

20 Q Didn't you think it strange that they should sit down and talk over private affairs in your presence and in the presence of these other two fellows, without saying anything? A They were talking; we wasn't at the table, we were on the other side of the room.

Q What were you doing? A Sitting there talking.

Q What were you talking about? A About different things, about how the job looked.

Q How far were you away from Mr. Turkington and Mr. Smith? A It must have been around six or seven feet anyhow.

30 Q What was the subject of your conversation? A I don't remember.

Q How is it you don't remember what you were talking about, but do remember what the other people were talking about? A We were talking about the job, how the job looked, and the trouble we had to get the beams in.

Q At the same time Smith and Turkington were talking about this property? A Yes, I couldn't help hear it.

40 Q And you were sitting there on one side of the room and they were on the other? A They

*Charles Jenson, by the Court.*

were sitting very near the kitchen door; everything was in the place.

Q You were sitting on the other side of the room? A Near the store, like.

Q Six or seven feet away? A Yes.

Q Were you sitting around the table? A No, sir. 10

Q Standing up? A Sitting on a chair.

Q And did Mr. Smith and Mr. Turkington sign this paper on the table where they sat? A I heard Smith say to write a letter and "I sign it, and we have to mail it to Newark." That is all I know.

Q Didn't you hear him dictate what went in the letter? A Not the price—they had talked about price before.

Q Didn't you hear Mr. Smith tell Turkington the very words to put in the letter? A No, I never took notice. 20

Q You never knew what went into the letter, did you? A I know the price, I heard that.

Q You heard something about the price, but you didn't know actually what he wrote? A I didn't take no notice of it.

Q When Smith signed this paper you were still over on the other side of the room? A Yes, we were still sitting there talking. 30

Q And Turkington and Smith signed the paper at the table where they were sitting, is that right? A Doing the writing.

Q You didn't get up and go over there and watch them sign it? A No.

Q Did they say anything to you to ask you—to tell you at the time that they were signing the paper? A No, sir.

Q What called your attention to the fact that they were signing the paper? A I seen it. 40

*Charles Jenson, by the Court.*

Q Why did you take such particular notice of their signing this particular paper? A Because; I took the notice because Turkington had told me that he is going to have that property transferred over soon; that is how I took notice.

10 Q Well, you didn't get up, walk over and see them sign? A No, sir.

Q Did you actually see them sign? A I saw him sign.

Q Did you actually see them sign, or did you hear Mr. Smith say, "I will sign"? A I saw him sign; I saw him taking the letter and sign.

Q Do you know that what he signed then was this letter which is here? Do you know what he signed then is this letter here, which is Exhibit C. 5? A Only his name; I can see his name.

20 Q The only way you identify this particular paper which has been offered in evidence is that you recognize his signature? A That is the way it looked, because there are two sheets of paper. I can also remember that; I remember that it was two sheets of paper that he had on the table.

Q You said something a while ago about thirty dollars a month and forty dollars a month. A Thirty dollars a month board.

30 Q How is it that you remember all the details of every conversation while you were engaged in conversation with two other persons in the same room? A You cannot stop hearing the other party talking.

*Leslie Hurley, direct.*

LESLIE HURLEY, sworn for complainant.

*Direct examination by Mr. Unger.*

Q Where do you live? A 625 Central avenue, Westfield.

Q Do you know Henry Smith? A I do, yes, by sight; not personally. 10

Q Did you ever come in contact with him in Westfield before he died? A I did.

Q In what way? A No more than when I was working around there for Mr. Turkington.

Q And what kind of work were you doing? A I did driving for Mr. Turkington; that was for the benefit of Mr. Smith.

Q In what way do you mean? A I took Mr. Smith riding; he was sickly.

Q Pleasure riding? A Yes. 20

Q Do you remember the time he died? A I do.

Q Before he died how long had you been driving him around? A I don't know; about six months or so.

Q For his health? A I cannot say whether it was for his health or pleasure; he used to get Dave to get me to take him riding.

Q How long had you been working for Turkington? A I don't know; I wasn't working for him steady at that time. 30

Q When did you first start to work for him? A The first that I ever worked for him steady was just last year before; at that time he got me whenever Smith wanted to go riding.

Q How long before Smith died was it that you took employment there? A About six months or seven.

Q And during that time where did Smith live? A In Mr. Turkington's house. 40

*Leslie Hurley, direct.*

Q Do you remember whether or not he had a room there? A I cannot say; I know he did when he died, otherwise I never was in the house.

Q Did he live anywhere else? A Not that I know of.

10 Q Do you know whether he took his meals there? A I know he did.

Q How do you know that? A Because I was there myself, and he was always there meal times.

Q You saw him eating there? A Yes.

Q Continuously from time to time? A Continuously, as often as I was there.

Q Did Mr. Smith ever say anything to you about anything that he had done with this property? A No, not at all.

20 Q Coming down to 1924, were you present any time when Smith and Turkington and anybody else was around, and this property was talked about? A No more than the night the letter was written I happened to be there—I don't know, I guess I had been doing work around there that day, just fooling around with the children.

03 Q Whose children? A Mr. Turkington's children, and I know they wrote that letter; that looks like the letter that I saw written.

Q I have shown you this letter which is before you; you have seen this letter before? A That looks like the same one.

Q I showed it to you a few moments ago, did I not, out in the room here (referring to C. 5)? A Yes.

Q You looked it over? A Yes.

04 Q Do you remember seeing it before? A I do, but I never read it closely.

*Leslie Hurley, direct.*

Q Where did you see this letter before? A Lying on his dining-room table.

Q On whose dining-room table? A Mr. Turkington's.

Q When was this? A This was in January.

Q What year? A 1924.

Q Did you hear any conversation about this property at that time when you saw the letter lying there? A I heard the conversation, but fooling with the children I didn't pay no attention. 10

Q Will you tell us just what you heard? A About all I heard of it, that I really remember, was that, the fact that Mr. Turkington was to pay him thirty dollars a month and room and board for life, but to say any more I cannot.

Q Did you hear any talk about the price of the property? A No. 20

Q Did you hear any talk as to what was being done with the property? A No, I didn't hear that.

Q Was this paper signed by anybody while you were there? A Mr. Smith; and how I come to notice it was the peculiar "H" that I never saw made before.

Q Had you seen him sign his name before this? A No. 30

Q You never saw him sign? A No.

Q Did you see him sign this paper, Exhibit C. 5? A I did.

Q Where were you when he signed it? A I was standing back so that I could look right over his shoulder.

Q Did he have this paper in his hands? A Yes.

Q You saw him sign it? A Yes. 40

*Leslie Hurley, cross.*

Q Did you hear anybody there say what was to become of the paper, or what was to be done with it? A I don't know that I did.

Q Outside of Mr. Smith and Mr. Turkington, who else was in the room? A The man that was just up here.

10 Q Mr. Jenson? A Yes.

Q Anybody else? A Joseph Woodruff; he was around there somewhere.

Q What were you all doing there? A I had been doing some work around there that day and happened to be fooling around there a little late that night and was fooling around there with the children.

Q That was not unusual for you to be there? A No.

20 Q Was it a usual thing for you to be around? A Yes, when I was working, to be fooling around like that.

*Cross examination by Mr. Schilling.*

Q Whom are you working for now? A Mr. Turkington.

Q At that time, 1923, were you working for him then? A Off and on, but not steady like  
30 I am now.

Q How often? A Whenever Mr. Smith wanted to go out, sometimes two or three times a week; sometimes twice a week.

Q How long would you go out with him? A Two or three hours at a time.

Q You didn't do any other work for Mr. Turkington? A Sometimes I would go for milk, something like that. If Mr. Turkington took him out in the afternoon, then I would run the route  
40 at night.

*Leslie Hurley, cross.*

Q How long were Turkington and Smith talking together that night when you were all there? A They were there quite a while; I cannot say how long; I didn't pay any attention to the time.

Q How long would you say it was? A Perhaps an hour and a half or so. 10

Q You were there all that time? A In and out, yes.

Q What do you mean, in and out; did you leave at any time? A I wasn't in the same room all the time.

Q Where did you go? A Out in the kitchen and other parts of the house.

Q How much of that hour and a half did you spend in the same room? A I cannot tell you. 20

Q Were you talking to Jenson? A No, not particular; I was fooling with the children.

Q You were with them for an hour and a half? A Yes, I was.

Q Except the time that you walked over and looked over Smith's shoulder? A Yes, the "H" drew my attention.

Q Where were you when you saw him trying to make the "H"? A I happened to be standing there; I noticed the peculiar "H," and I stopped and looked at it. 30

Q Where were you with respect to the table? A Standing by the sideboard, some distance away, not very far.

Q You saw a peculiar "H"? A Yes.

Q You saw him signing it, and watched the rest of the signature? A I did.

Q Did you notice him write anything else in this letter? A No, I didn't see him write anything else. 40

*Leslie Hurley, cross.*

Q Did he make any comment after he signed it? A No.

Q Say anything? A No more than he told Dave he signed it.

Q You saw him take the pen and sign this? A Yes.

10 Q Then, you saw Turkington sign it; did Turkington sign it before him? A Turkington signed it before him; Turkington didn't do anything to it afterward that I saw.

Q What happened to the paper? A I don't know; I didn't pay any more attention.

Q You just saw the peculiar "H"? A Yes, that drew my attention to it.

20 Q Did you see Turkington write anything else on it after Smith had signed it? A No, I didn't pay any attention to it.

Q How many times did Smith sign it? A Once is all I know of.

Q In other words, you saw him sign the paper once? A Yes, I did.

Q Is there any way you can tell us what paper it was, or any recollection in your mind; did you look at it? A I have.

30 Q Any more than any other paper, any more than it was two papers together, and noticed that "H," and that is the reason you say it is this paper? A Yes, it looks like the same paper; I have no reason to say it is not.

Q You notice there are two Henry Smiths on there; which one did he sign while you were looking at it? A This is the last one I saw.

Q You saw him take the pen in hand and sign that one? A I did.

40 Q Where did the pen come from? A Mr. Turkington was using it.

*Dennis Ziegler, direct.*

Q Had you seen him using it? A Surely; I saw him writing it.

Q Did you hear any talk between them while Turkington was writing? A No more than I told the other lawyer.

Q What was it? A That he was to—Mr. Turkington was to pay him \$30 a month and room and board for life. 10

Q That is all you know about the transaction? A Yes.

Q You heard nothing about price? A No.

Q Did you hear the name of the lawyer mentioned that he was to go to? A No.

The Court: Do you read and write?

The Witness? Yes.

20

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DENNIS ZIEGLER, sworn for complainant.

*Direct examination by Mr. Unger.*

Q Where do you live? A Garwood.

Q That is near Westfield? A Next town.

Q Did you know Henry Smith, of Central avenue, Westfield, in his lifetime? A Not personally, no. 30

Q Did you ever meet him? A Only once.

Q When was that? A When I was at Mr. Turkington's house, or when I was called there.

Q When was that? A That is the early part of January, 1924.

Q What were you called there for? A To repair a chimney.

Q Who called you there? A Mr. Turkington. 40

*David Turkington, further direct.*

Q While there did you meet Mr. Smith? A Yes.

Q Did you have any talk with him about the chimney? A None whatever.

Q Have any talk with Mr. Turkington about it? A Yes.

10 Q Was Smith there? A Yes.

Q What did you say in Smith's presence? A I told him he ought to rebuild the chimney.

Q Whom did you say that to? A Mr. Turkington.

Q What did he say? A He said, "I don't want to get into too much expense until I get a settlement."

20 Q What did Mr. Smith say? A Mr. Smith said, "A settlement? What do you mean? Haven't you got my agreement?" That is all I heard.

Q That is all you heard? A Yes, sir.

*Cross examination by Mr. Schilling.*

Q Had the carpenter been working there before that? A That I don't know.

30 Q How do you fix the time as being early in January, 1924? A Because I had a record of the occasion in my books of 1924.

Q You didn't rebuild the chimney? A No.

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DAVID TURKINGTON, recalled for

*Further direct examination by Mr. Unger.*

40 Q Do you know a man named Perrine? A Yes.

*David Turkington, further direct.*

Q Did he do any work on this house? A Yes, sir.

Q When? A In the latter part of 1923.

Q What kind of work did he do? A When the Board of Health came down with a complaint in regard to the smoke stack, he had to put a new piece on and extend the smoke stack up.

10

Q Did you see Mr. Carney on the property? A Yes.

Q And did he make any complaint to you? A He did, after he spoke to Mr. Smith.

Q And as a result of what he said to you, did you have the work done? A Yes.

Q How much did it cost you? A The smoke stack, I believe, was in the neighborhood of \$35.

Q Up to January 8, 1924, how much money did Henry Smith owe you?

20

Mr. Schilling: I object.

The Court: I will not admit it.

Mr. Unger: I want to renew my motion for leave to discontinue the action, if necessary, with costs as to the administratrix. I think that she is not a necessary party to this suit, and that your Honor can proceed to a decree in the case and determine the rights of the parties without her presence as the defendant, and I think that under at least one case I have the right to proceed with only the heir-at-law as the defendant. The case I refer to is *Greenwood v. Henry*, 52 Eq. 447.

30

Mr. Schilling: I object.

The Court: There isn't much doubt in my mind about it; I will sustain the objection and deny the motion.

40

*Louise F. Turkington, direct.*

LOUISE F. TURKINGTON, sworn for complainant.

*Direct examination by Mr. Unger.*

10 Q You are the wife of David Turkington? A Yes.

Q You live with him? A Yes.

Q In Westfield? A Yes.

Q How long have you been living in this house on Central avenue, Westfield? A It will be four years in August.

Q When did you move in? A In April.

Q And when you first moved in there did you rent the place? A We did, at first.

Q Whom did you rent it of? A Mr. Smith.

20 Q How much rent did you pay? A I believe it was around \$30 or \$40; I cannot exactly tell you.

Q Did you have the whole house? A Yes.

Q Did Mr. Smith live there? A Yes.

Q What part of the house did he live in? A We let him pick the best room in the house.

Q What room did he pick? A The biggest room.

30 Q Did he ever pay any board? A At first he did, but after awhile there was a change.

Q How much board did he pay in the beginning? A I cannot say.

Q Did he pay you the money? A No, sir.

Q Whom did he pay it to? A To my husband.

Q You don't know how much it was? A No.

Q What did he get there for his money? A He got whatever he asked for; I cooked every meal he asked for.

40 Q Did he get board? A Yes.

*Louise F. Turkington, direct.*

Q Did he get a room beside? A Yes.

Q Did he buy any meals outside of your place? A No, sir.

Q For four years he kept on boarding there?  
A Yes.

Q How long was it that he was paying board, at what time? A Until he made arrangement with Mr. Turkington; I don't know what arrangement that was. 10

Q What year was that in? A I cannot exactly tell you.

Q How long before he died? A Almost about two years, I believe, or a year, or something like that.

Q Do you remember when he died? A Yes, June 4, 1924.

Q How long before he died did he stop paying board and make a new arrangement? A A long time. 20

Q How long? A I don't know, before he went South.

Q When did he go South? A The first time, in January, 1922, or something like that, the first year.

Q You didn't go there until 1922, did you?  
A We moved in April, and then the next year, 1923, that is right. 30

Q Did you hear your husband and Mr. Smith talk over or discuss any arrangement about how he was to continue to live there? A He was to live there all his life.

Q What was he to give for living there all his life? A Payment on the property, something like that.

Q Tell us what was said between your husband and Mr. Smith. A Mr. Smith and Mr. Turkington kept it to themselves. 40

*Louise F. Turkington, direct.*

Q You didn't hear that? A No.

Q Tell us what you did hear about it. A I heard that he was buying the house.

Q Whom did you hear that from? A From Mr. Smith and Mr. Turkington.

10 Q What did Mr. Smith say? A He wanted Mr. Turkington to buy the house. He didn't want anybody else to have it but him; of course, he wanted to live there for a lifetime.

Q Did you hear him say that? A Yes.

Q Did you and your husband talk it over after that? A Yes.

Q And did you make up your mind? A Yes, I made up my mind because the poor man had no place else to go.

20 Q After you had made up your mind did you tell Mr. Smith whether or not you would accept his proposition? A I said I was perfectly satisfied.

Q What did he say? A He said everything was all right.

Q What did you then do? A We done what we could for him.

30 Q What did you do after that? A I cleaned his room, gave him his meals and everything he asked for.

Q How many meals a day did you give him? A Three square meals a day.

Q Did he require any particular food? A Every morning, cereal, cream, fresh eggs.

Q What was the matter with him? A He had asthma, heart trouble, tuberculosis.

Q Do you know whether or not he was satisfied living with you? A Perfectly satisfied.

40 Q How do you know that? A Because he said he was satisfied; he got along with me fine.

*Louise F. Turkington, direct.*

Q Did he say that? A Yes; there was no argument.

Q Did he pay you any board after this talk about taking over the house? A No, sir.

Q He paid no board? A No.

Q Of any kind? A No.

Q Did you ever see him give any money to your husband? A Yes, a couple of time, and Mr. Turkington gave Mr. Smith money. 10

Q I asked you whether you ever saw Mr. Smith give your husband any money after that for board? A No.

Q Did your husband give him any money? A Yes, lots of it.

Q What for? A He needed money; he was short of money and didn't have enough money. 20

Q After this talk between your husband and Mr. Smith about taking over the house, did your husband make any improvements in the house? A Yes.

Q What did he do? A He had the ceiling fixed; it fell down, and had the electrician man in and mason, and pipeless furnace in the cellar was fixed; there was lots of things.

Q Do you know Mr. Jenson? A Yes.

Q Did he do any work on the house? A Yes, he did. 30

Q How long was he working there? A He has been working there for quite a while.

Q Whom was he working for? A He did it for Mr. Turkington.

Q Did Mr. Smith make any of those repairs or pay for them, so far as you know? A No.

Q When Mr. Smith died, was he still living in the house? A Yes.

Q And still had a room there? A Yes. 40

*Louise F. Turkington, direct.*

Q Had you been giving him his meals, and attend to him right up to the time of his death?

A Yes.

Q Do you know whether or not he required any attention at night? A Yes, when he woke up a couple of times I gave him a glass of water; he would get out of bed and holler.

10 Q How many rooms were there in this house? A Three downstairs, three upstairs, about seven rooms.

Q Did Mr. Smith have his room upstairs, or downstairs? A He had a room upstairs.

Q And was there a store in the building? A Yes.

Q Where was the store? A In the front of the house.

20 Q Who occupied that store? A He attended to it for a while, because he wasn't able to do anything.

Q He attended his store? A Yes, for a while.

Q Was he buried from your house? A Yes.

Q In Westfield? A Yes.

Q Did you know his wife, the former Mrs. Smith; did you ever see her around there? A No, I never did.

30 Q What did he ever tell you about his wife? A He told me—

Mr. Schilling: I object.

The Court: He was divorced from his wife; what difference does it make what he thought about it?

*Louise F. Turkington, cross—re-direct.*

*Cross examination by Mr. Schilling.*

Q Mrs. Turkington, you didn't know anything about the arrangement which your husband made with Mr. Smith, did you? A No, not at all.

Q And when they talked together you couldn't hear it, could you? A No, they kept that to themselves. 10

Q Whatever you know about this transaction is what you have learned from your husband, what he told you? A That is true.

*Re-direct examination by Mr. Unger.*

Q The attorney on the other side asked you—the last question he asked you was, if it wasn't so that all you knew about this transaction was what you heard from your husband; is that so? A Yes. 20

Q Did you ever hear anything from Mr. Smith? A Just my husband, don't you know, on account of my not hearing very good.

Q What I want to know is whether Mr. Smith ever talked to you about any of these things? A He talked about buying the house and things like that and borrowed money off my husband.

Q It is true you talked to Mr. Smith as well as your husband? A Yes. 30

Q No reason why you couldn't understand Mr. Smith? A I don't understand things much like that.

Mr. Unger: I am through, if your Honor please, with one exception that I would like, if your Honor would give me the opportunity to prove by outside sources, the genuineness of the signature of Mr. Smith 40

*Lillie Zuber, direct.*

10 to Exhibit C. 5. I don't know whether it is seriously in dispute here, but if it is, there are ways of proving it. He had a bank account, I observe here, and there is a signature card there, and probably a dozen other people have seen him sign his name many times, and if this signature is open to attack and your Honor considers it material, I think it would be well to give me the opportunity of proving that some other day.

The Court: In the view I take of the case, it is immaterial. I will not announce my decision until the proper time comes.

Mr. Unger: I would like the opportunity.

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20 LILLIE ZUBER, sworn for defendants.

*Direct examination by Mr. Schilling.*

Q You are the former wife of Henry Smith?

A I am.

Q And the mother of Theodore Smith, who is the son of Henry Smith? A I am.

30 Q At the time of the death of Henry Smith or the burial of Henry Smith did you go to the house in Westfield, 205 Central avenue? A I did.

Q And meet Mr. Turkington there? A I did.

40 Q Did you have any conversation with him concerning his occupancy of that house; if so, what did you say to him and what did he say to you? A He said first about Mr. Smith and then I spoke to him and asked him about the

*Lillie Zuber, cross.*

place and he said he pays \$30 to Mr. Smith and his board.

Q What day was this burial, do you recall?

A On Friday he died, late Tuesday night, on the sixth.

Q This was on the sixth? A Yes.

Q Did you talk to him concerning whether he had paid for June? A I did. 10

Q What did he say? A He said he paid Mr. Smith.

Q Did you go down subsequently to see him? A I did.

Q When was that? A In July.

Q What did you say to him? A I asked him for the rent.

Q What did he say? A He said he doesn't know whom he pays the rent to now. 20

*Cross examination by Mr. Unger.*

Q When you went down to see him after the death of your former husband, in June, 1924, did you have a talk with him about the arrangement under which he was in possession of the property? A I did not.

Q Had no talk with him at all? A No.

Q You simply went down to see if you could get the rent? A Yes. 30

Q At that time had you been appointed administratrix? A I don't remember if I had or not.

Mr. Schilling: The record will show she hadn't been.

Q If you hadn't been appointed administratrix at that time, by what authority were you down there demanding the rent? A It was Mr. 40

*Lillie Zuber, cross.*

Smith's place, I thought it was no more than right to look after my son.

Q You were not related to him? A No.

Q Were you there in the interest of your son?

A Yes.

10 Q And you said you wanted the rent for the place? A Yes.

Q He refused to give it to you? A Yes.

Q He told you he had been paying \$30 a month? A Yes, that is what he said at the time.

Q Did he say under what arrangement he had been paying \$30 a month? A No, he did not.

Q Did you ask him to tell you under what arrangement? A No.

20 Q You were not interested in hearing under what arrangement he was there, were you?

The Court: Does it make any difference whether she was or not?

Q Did you report back to Mr. Schilling—I suppose he was your attorney then—what Mr. Turkington had said to you? A I did.

30 Q Did you report to him that Turkington had refused to pay rent? A I did.

Q Did you tell him that Turkington claimed to you that he had a contract to buy the property? A No, I did not.

Q Nothing of the kind? A No.

Q Did you authorize Mr. Schilling to write a letter to Mr. Turkington after you had seen him? A What was that?

40 Q After you had seen Mr. Turkington in July, 1924, and after he refused to pay the rent, did you the authorize Mr. Schilling, or direct him

*Lillie Zuber, cross.*

to communicate with Mr. Turkington and make the demand? A I did.

Q And before you told him to do that did you acquaint Mr. Schilling—did you tell him what Mr. Turkington had told you? A I did.

Q Did you know that he wrote this letter to Mr. Turkington? (Showing witness letter.) 10  
Read it. A No, I did not; I left it in his hands.

Q Does the contents of that letter surprise you? A I said I left it to the lawyer; I didn't leave it to Mr. Schilling.

Q I ask you now whether or not the contents of this letter surprise you; do they? A In what way?

Q In this way, is it a surprise to you that Mr. Schilling stated in this letter— 20

Mr. Schilling: I object. Wait until they introduce it.

The Court: I think it is quite apparent what the purpose is. I don't think it is so very material. The situation was that Mr. Schilling represented this woman; obviously she didn't know any more than the ordinary client knows what the ordinary lawyer does in her behalf. They do whatever they think 30  
is right, as a rule, for the benefit of their client. Acting on that idea, Mr. Schilling wrote to Turkington. I assume from what you said, that he said something about a contract to purchase. Suppose he did?

Mr. Unger: How could a lawyer be mistaken?

The Court: He might have gotten it from some other source. You may go just as far as you wish, but I say you are wasting time. 40

*David Turkington, further direct.*

Mr. Unger: If you do not think it is material, I won't press it.

Q Did you tell Mr. Schilling that Turkington had informed you that he a contract to purchase this property? A No, sir.

10 Q Do you know any way how it could have happened that Mr. Schilling wrote that? A I do not.

Mr. Schilling: You knew that I was in touch with Mr. Simandl who was Mr. Turkington's attorney, did you not?

The Witness: I did.

---

20 DAVID TURKINGTON, recalled for further

*Direct examination by Mr. Unger.*

Q When Mrs. Zuber, the lady who has just been on the witness stand, called to see you in June, 1924, what did she ask you for? A For rent.

30 Q What did you tell her? A I told her she would have to take that matter up with Mr. Simandl, that I considered I owned the property and I was afraid she had no rent coming.

Q Did you tell her that you were paying \$30 a month rent to Mr. Smith for that property? A Positively no.

Q When she called again, in July, 1924, what did she ask you for on that occasion? A For the rent.

40 Q What did you say to her then? A I turned around and told her that she would have

*Conclusions of Vice-Chancellor.*

to take that up with Mr. Simandl, that he was handling my affairs.

Q On that occasion or any other occasion did you tell her that you did not know to whom you ought to pay rent? A No, sir.

Q You have always refused to pay rent? A I have positively refused to do it, believing I owned it. 10

*Cross examination by Mr. Schilling.*

Q Did Mrs. Zuber come down after that at any time? A Yes, she came down with her mother, I believe, one day.

Q Did she ask for rent again? A No, they come down to abuse me, not for anything else.

The Court (orally): The bill in this case is filed for the specific performance of an alleged agreement for the sale of lands to the complainant by one Henry Smith, who is now deceased. 20

The bill is brought against the administrator of the decedent, and against the heir.

The complainant sets up a verbal contract to buy the premises, and alleges that the terms of the contract were to the effect that he was to buy the property for \$4,000; that he was to be credited on account of that purchase price the sum of \$800, and was to give a purchase money mortgage for \$3,200 to the decedent, and that he was to be credited on account of that mortgage from time to time for whatever sums he paid to the decedent on account of the purchase price after the fall of 1923, at which time, I believe, the arrangement was made. 30

He alleges that he was to pay to the defendant or the decedent thirty dollars a month on 40

*Conclusions of Vice-Chancellor.*

10 account of this mortgage, and was to also give him board and lodging, or rather, provide a home for him for the remainder of his life, as a part of the consideration of the purchase of the property. Previous to the time this arrangement was alleged to have been made, the complainant was a tenant of the decedent in the property which is involved, and paid rent for the property, and the decedent boarded with the complainant and paid him board. Mr. Smith died in June, 1924, about six or eight months after the contract is alleged to have been agreed upon.

20 The defense to this suit is, first, a denial of the contract; second, a defense of the statute of frauds, and contention that the contract is inequitable and unfair, and that it was procured by undue influence; also that it is unfair as to the heir, who is an infant, and should not be enforced against him.

30 I may say that I see no evidence whatever of any unfairness in the contract, nor is there any evidence of any undue influence. The defense of the statute of frauds does not, in my judgment, avail the defendant, because there is a writing which has been offered in evidence, and which, in my judgment, is sufficient to charge the decedent and to satisfy the requirements of the statute of frauds. That writing is a letter which was written by Mr. Turkington, the complainant, under date of January 8, 1924, and is signed by both Mr. Turkington and Mr. Smith. I think that it cannot be denied that this writing was signed by Mr. Smith. Two witnesses are produced who testify to having witnessed the signature. In spite of vigorous cross examination by counsel for the defense and my  
40

*Conclusions of Vice-Chancellor.*

own examination of at least one of these witnesses, their testimony as to the actual witnessing of this signature is not shaken. I conclude, therefore, that the letter referred to and which was offered in evidence and marked Exhibit C. 5, was signed by Mr. Smith, and also by Mr. Turkington, and that that letter is sufficient evidence of the contract which was alleged in the bill of complaint to satisfy the statute of frauds. 10

In addition to this writing, which, while it does not contain all of the terms of the alleged contract, does contain sufficient to indicate that there was at least in contemplation at that time a definite contract of sale of the property, but if any further evidence were required of that fact, it is afforded by the testimony of Mr. Simandl, who interviewed both the complainant and the decedent in his office some time in the fall of 1923, and after receipt of this letter of January 8, which is addressed to him by these parties, he talked with Mr. Smith over the telephone, and there the statements in the letter were confirmed. Some additional information was given to Mr. Simandl, which in my judgment was sufficient to have supplied the incompleteness of the terms of the contract as they were contained in this letter. In other words, there is no doubt in my mind but that after the conversation with Mr. Smith over the telephone, Mr. Simandl was then in possession of sufficient facts to have prepared an agreement which would have been binding on the parties, if such an agreement had been contemplated. 20 30

It does not appear, however, that any written agreement of sale was contemplated between the parties. If that had appeared I would perhaps be obliged to deny relief, because then it would 40

*Conclusions of Vice-Chancellor.*

have appeared that the minds of the parties had not met, but all that Mr. Simandl was to do, as I gathered from the evidence, was to prepare a deed and a mortgage which were to carry out the contract which had been previously agreed upon.

- 10 Under these circumstances, it seems to me that I have no alternative but to advise a decree in favor of the complainant. The fact that the deed and mortgage were not prepared and executed was due, apparently, to the fault of neither the complainant nor the decedent; it was due to delays in the office of the attorney, who may have had matters which were more pressing. There was some excuse, at least, for the failure to prepare the papers, in the fact that
- 20 Mr. Smith himself went to Florida shortly after the first of the year 1924, and did not return until in the spring, when Mr. Simandl was out of the country.

- It appears that the complainant did enter into possession of the property, which was the subject of the agreement. On the strength of that agreement he spent considerable sums in repairs and improvements on the property. The arrangement for board of the decedent which had
- 30 existed prior to the time this agreement was made was changed, and thereafter, instead of the decedent paying the complainant board, the complainant apparently paid the decedent some moneys, how much does not appear, and he has been prevented from testifying as to what was paid by the Evidence Act—by the section which excludes such testimony, or at least which this Court has excluded.

- It appears, however, that on the purchase
- 40 price the complainant is entitled to a credit of

*Exhibit C. 1.*

\$800, and he is also entitled to certain payments for taxes made on the Astor street property after the date of this agreement. I do not recall what other payments were proved. In fact, I do not recall that any other payments were proved, but if there were any other payments proved, then the complainant should be given credit for those payments in addition to what I have already indicated. 10

I will advise a decree in accordance with these conclusions.

**EXHIBIT C. 1.**

THIS INDENTURE, made the Fourteenth day of November in the year of Our Lord One Thousand Eight Hundred and Seventy Three BETWEEN Andrew Smith of the Township of Cranford in the County of Union and State of New Jersey of the First Part: AND John A. Smith of the Township of Cranford in the County of Union and State of New Jersey of the Second Part: 20

WITNESSETH, That the said party of the first part, for and in consideration of Three Thousand Dollars lawful money of the United States of America, to him 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, has 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 30 40

*Exhibit C. 1.*

second part, and to his heirs and assigns forever,  
 ALL That tract or parcel of land and premises,  
 hereinafter particularly described, situate, lying  
 and being in the Township of Westfield in the  
 County of Union and State of New Jersey  
 Beginning at a stake planted for the South cor-  
 10 ner of the lot herein described on the North  
 East Side of the main road leading from West-  
 field to Rahway, distant one hundred and forty  
 two feet on a course leading North forty seven  
 degrees and eight minutes West along the line  
 of said road from the West corner of Edwin  
 Downes lot, from said beginning running along  
 the North East side of said road North forty  
 seven degrees and eight minutes West forty feet  
 to a stake by side of the said road, Thence bind-  
 20 ing on lands of Walter Sparkman formerly  
 Joseph Cranes North forty two degrees and  
 fifty two minutes East one hundred and eighty  
 two feet two inches to a stake in the line of land  
 owned by Oren Pierson formerly the lot of C. A.  
 Leveridge thence binding on his land South  
 forty seven degrees and eight minutes East  
 forty feet to a stake thence binding on Freder-  
 30 ick Hinzes land South forty two degrees and  
 fifty two minutes West one hundred and eighty  
 two feet two inches to the place of beginning,  
 containing seven thousand two hundred and  
 eighty six and two thirds square feet of land  
 be the same more or less it being the same land  
 and premises conveyed to Andrew Smith by  
 Deed dated first day of April 1868 from Edward  
 Sanford and Matha E Sanford his wife and re-  
 corded in the Union County Clerks office Book  
 28 page 499, 500, 501.

40 TOGETHER with all and singular the houses,  
 buildings, trees, ways, waters, profits, privileges,

*Exhibit C. 1.*

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 Andrew Smith doth for himself heirs, executors and administrators covenant and grant to and with the said party of the second part, his heirs and assigns, that he the said Andrew Smith is the true, lawful and right owner 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: except a mortgage held by Jacob Miller for one thousand dollars which the said John A. Smith is to assume; AND ALSO, that the said party of the first part now have good right, full power, and lawful authority, to grant, bargain, sell and convey the said land and premises in manner aforesaid. AND ALSO, that the said Andrew Smith will WARRANT, secure and forever defend the said

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30

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*Exhibit C. 1.*

land and premises unto the said John A. Smith 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 encumbrances whatsoever. Except said mortgage.

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

ANDREW SMITH (SEAL)

Signed, Sealed and Delivered  
in the presence of

John W. B. Hegeman

20

STATE OF NEW JERSEY, }  
COUNTY OF UNION. } ss.

30 BE IT REMEMBERED, That on this Seventeenth day of November in the year of Our Lord One Thousand Eight Hundred and Seventy Three before me, a Commissioner of Deeds in and for said County personally appeared Andrew Smith who, I am satisfied, is the grantor in the within Deed of Conveyance named, and I having first made known to him the contents thereof, he did acknowledge that he signed, sealed and delivered the same as his voluntary act and deed, for the uses and purposes therein expressed:

T. V. WALTER,  
Commissioner of Deeds.

40

*Exhibit C. 2.*

## WARRANTY DEED.

From

ANDREW SMITH

—To—

JOHN A. SMITH

10

Dated, 14 Nov 1873

Received in the Clerk's Office of the County of Union N. J. on the 17th day of November A. D. 1873 at o'clock in the noon, and Recorded in Book 86 of DEEDS, for said County, on pages 25, 26 & 27.

HENRY R. CANNON, Clk.

20

**EXHIBIT C. 2.**

THIS INDENTURE, made the First day of April in the year of our Lord, One thousand Eight Hundred and Sixty Eight BETWEEN Edward C. Sanford and Martha E Sanford of the Township of Westfield in the County of Union and State of New Jersey OF THE FIRST PART, And Andrew Smith of the Township of Westfield in the County of Union and State of New Jersey OF THE SECOND PART,

30

WITNESSETH, That the said party of the First Part, for and in consideration of the sum of Three Thousand Dollars lawful money of the United States of America, to him in hand well and truly paid by the said part of the Second Part, at and before the sealing and delivery of these presents: the receipt whereof is hereby

40

*Exhibit C. 2.*

acknowledged, and the said party of the First Part, therewith fully satisfied, contented and paid: has 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 That Tract or Parcel of land and premises, hereinafter particularly described, situate, lying and being in the Township of Westfield in the County of Union and State of New Jersey

Beginning at a stake planted for the South corner of the lot herein described on the North East side of the main road leading from Westfield to Rahway, distant one hundred and forty two feet on a corse leading North forty seven degrees and eight minnits West along the line of said road from the West corner of Edwin Downes lot, from said beginning running along the North East side of said road North forty seven degrees and eight minnits West forty feet to a stake by the side of said road, thence linding on lands of Walter Sparkman formely Joseph Crane North Forty two degrees and fifty two minnits East one hundred and eighty two feet two inchs, to a stake in the line of land owned by Oren Pierson formely the Lot of C A. Leveradge, thence linding on his land South forty seven degrees and eight minnits East forty feet to a stake, thence linding on Frederick Hinzer land South forty two degrees and fifty two minnits West one hundred and eighty two feet two inches to the place of beginning Containing seven thousand two hundred and eighty six and two thirds Square feet of land be the same more or lefs, it being the same

*Exhibit C. 2.*

land and primsis conveyed to E C. Sanford by Deed dated First day of August 1867 from Joel Moffett and Wife and recorded in Union County Clerks Office Book 25, pages 289 & 290

TOGETHER with all and singular the houses, buildings, trees, ways, waters, profits, privileges and advantages, with the appurtenances to the same belonging, or in any wise appertaining: 10  
 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 tract or parcel of land and premises with the appurtenances, unto the said part of the Second Part; to 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 Edward C Sanford doth for himself his heirs, executors, and administrators, covenant and grant to and with the party of the Second Part and to his heirs and assigns, that he the said Edward C. Sanford is the true, lawful and rightful owner 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, except a mortgage held by Jacob Miller for one thousand Dollas which the said Smith is to assume 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 40

*Exhibit C. 2.*

may be changed, charged, altered or defeated  
 in any way whatsoever. AND ALSO, that that  
 the said party of the First Part, now have good  
 right, full power, and lawful authority, to grant,  
 bargain, sell, and convey the said Land and  
 Premises, in manner aforesaid. AND ALSO, that  
 10 the said Edward C Sanford will WARRANT,  
 SECURE, AND FOREVER DEFEND the said Land and  
 Premises unto the said Andrew Smith his heirs  
 and assigns, forever, against the lawful claims  
 and demand of all and every person and persons  
 freely and clearly freed and discharged of and  
 from all manner of encumbrances whatsoever:

IN WITNESS WHEREOF, the said Edward C  
 Sanford and Martha E his wife hath hereunto  
 set there hand and seal the day and year first  
 20 above written.

Edward C Sanford (SEAL)  
 Martha E Sanford (SEAL)

Signed, Sealed, and Delivered  
 in the presence of

Wm. W. Connoly  
 (Revenue stamps attached.)

30 STATE OF NEW JERSEY }  
 UNION COUNTY, } ss.

BE IT REMEMBERED, That on this Twenty fifth  
 day of May, in the year One Thousand Eight  
 Hundred and Sixty Eight before me Wm W  
 Connoly a commissioner for taking the acknowl-  
 edgements and proof of Deeds in and for said  
 county personally appeared Edward C Sanford  
 and Martha E his wife who, I am satisfied, are  
 40 the grantors in the within Deed of conveyance

*Exhibit C. 2.*

named; and I having first made known to them the contents thereof, they did acknowledge that they Signed, Sealed, and Delivered the same as their voluntary act and deed, for the uses and purposes therein expressed.

And the said Martha E Sanford being by me privately examined, separate and apart from her said husband, further acknowledged that she signed, sealed, and delivered the same as her voluntary act and deed, freely without any fear, threats or compulsion of or from her said husband. 10

Wm. W. Connoly

2209

WARRANTY DEED. 20

From

Edward C Sanford

To

Andrew Smith

Received in the office of the Clerk of the County of Union the Sixth day of June A. D. 1868 and Recorded in Book 28 of Deeds for said County, page 499, 500, 501 30

Henry R Cannon  
Clerk



*Exhibit C. 3.*

said defendant, Henry Smith, are divorced from the bonds of matrimony for the cause aforesaid and the marriage between the said petitioner and the said defendant is hereby dissolved accordingly, and the said parties and each of them are and is hereby freed and discharged from the obligations thereof.

And it is further ordered, adjudged and decreed that the petitioner be and she is hereby permitted to resume her maiden name.

E. R. WALKER  
C.

38-328

IN CHANCERY OF NEW JERSEY

Between

Lillie Smith,

and

Henry Smith,

Pet'r.

Def't

FINAL DECREE (DIVORCE)

John P. Manning, Sol.

Filed Oct. 1, 1915.

10

20

30

40

*Exhibit C. 3.*

I, ROBERT H. McADAMS, Clerk of  
 the Court of Chancery of the State of  
 (L. s.) New Jersey, the same being a Court  
 of Record, do hereby certify that the  
 foregoing is a true copy of the Final  
 Decree of Divorce in the cause wherein Lillie  
 Smith is petitioner, and Henry Smith is defend-  
 10 ant, now on the files of my office.

IN TESTIMONY WHEREOF, I have hereto set my  
 hand and affixed the seal of said Court, at Tren-  
 ton, this 14th day of October, A. D. nineteen hun-  
 dred and fifteen.

Robert H. McAdams,  
 Clerk.

(Stamp)

20

38-328

IN CHANCERY OF NEW JERSEY

Between

Lillie Smith,

Pet'r.

—and—

30

Henry Smith,

Def't

CERTIFIED COPY OF FINAL  
 DECREE

40

*Exhibit C. 4.*

**EXHIBIT C. 4.**

THIS AGREEMENT, made this eighteenth day of September, A. D. 1922, between Henry Smith, of the Town of Westfield, Union County, New Jersey, of the first part, and Lillie Smith, of the Town of Irvington, Essex County, New Jersey, party of the second part, witnesseth: 10

WHEREAS, the parties to this agreement were formerly husband and wife; and

WHEREAS, in a suit wherein Lillie Smith, the party of the second part was petitioner and Henry Smith, the party of the first part, was defendant a decree was made by the Court of Chancery of the State of New Jersey divorcing the said parties from the bonds of matrimony; and

WHEREAS, said decree made no provision for the support of the said Lillie Smith and the infant son of the said parties, Theodore Smith; and 20

WHEREAS, on September 11, 1922, the said Lillie Smith filed a petition in the said Court of Chancery of New Jersey praying that an order be made compelling the said Henry Smith to support and maintain the said Lillie Smith; and

WHEREAS, the Chancellor made an order dated September 11, 1922, directing the said Henry Smith to show cause before the Chancellor on September 26, 1922, why an order should not be made compelling the said Henry Smith to pay to the said Lillie Smith a proper amount for her maintenance and support; and 30

WHEREAS, the said Henry Smith is desirous of settling the matter of the alimony and support of the said Lillie Smith out of Court, and the said Lillie Smith is willing and satisfied that the matter of her support be so settled. 40

*Exhibit C. 4.*

NOW THEREFORE, in consideration of the abandonment by the said Lillie Smith of her action on the said petition against the said Henry Smith for alimony and support and in settlement thereof, the said Henry Smith does agree as follows:

10     1. That there shall be paid to the said Lillie Smith for and during her life or so long as she shall not remarry, by the said Henry Smith, his heirs, executors or administrators, the sum of Twenty-five Dollars each and every month, to be paid to the said Lillie Smith on the twenty-fifth day of each and every month after the date of this agreement.

20     2. That the said Henry Smith shall and will, upon his decease, give, devise and bequeath to Theodore Smith, the son of the said Henry Smith and Lillie Smith, the house and premises on Central Avenue, Westfield, now owned by the said Henry Smith and devised or descended to him by his mother or father, and in which he now conducts his business; and in case the said Henry Smith shall sell or convey said premises prior to his decease, then he will make provision for the said Theodore Smith, in place thereof in his will.

30     And the said Lillie Smith does accept the provisions of this agreement in full settlement of any rights or claims of any kind which she shall or may have against the said Henry Smith or his estate either before or after his decease.

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

Henry Smith (L. s.)

Lillie Smith (L. s.)

*Exhibit C. 4.*

Signed, Sealed and Delivered  
in the presence of  
Edward A. Schilling.

State of New Jersey,  
County of Essex. ss.

10

BE IT REMEMBERED, that on this Twelfth day of October, in the year of Our Lord, One Thousand Nine Hundred and Twenty Two, before me, the subscriber, A Master in Chancery of New Jersey, personally appeared Henry Smith, who I am satisfied is one of the persons named in and who executed the within agreement, and I having first made known to him the contents thereof, he acknowledged that he signed, sealed and delivered the same as his voluntary act and deed for the uses and purposes therein expressed.

20

Edward A. Schilling,  
A Master in Chancery of New Jersey.

## AGREEMENT

Between

Henry Smith,

30

—and—

Lillie Smith.

Dated September 18, 1922.

40

*Exhibit C. 6.***EXHIBIT C. 6.**

Est John A Smith

205 Central Ave Town

Westfield, N. J., April, 1923.

10 Your total taxes due the Town of Westfield  
for the year 1923 are:

Page 48 Line 19

No. 205-207 Central Ave

Block 213 Lot 14 Frontage 40 Feet

Description of Property, House and Lot.....

Value of Land .....\$1,600

Value of Improvements .....\$1,200

Value of Personal Property .....\$ 100

---

 Total Valuation .....\$2,900

20 Poll Tax .....  
State, County, School and Town Taxes.\$ 92.80

---

 Total Tax .....\$ 92.80

Your taxes due June 1st, 1923, are:

One-half of Total Taxes as shown above..\$ 46.40

Stamp—Paid May 28 1923 A. H. Clark, Collector

Your taxes due December 1st, 1923, are:

One-half of Total Taxes as shown above..\$ 46.40

30 Interest .....\$ 1.75

---

 Total .....\$ 48.15

Stamp—Paid May 12 1924 A. H. Clark, Collector

*Exhibits C. 7, C. 8, C. 9.*

**EXHIBIT C. 7.**

Westfield, N. J. May 12 1924 No. 2  
 Peoples Bank and Trust Company of Westfield  
 Pay to the order of A H Clark Collector  
\$48 15/100  
 Forty Eight & 15/100 Dollars 10  
David I Turkington  
 Perforation—Paid 5-14-24 55-281

**EXHIBIT C. 8.**

Taxes of 1922  
 REAL ESTATE  
 CITY OF NEWARK, N. J.  
 14th A Taxing District 20  
 Page 111 Line 35  
 Name Margaret Smith,  
 Location 85 Astor St.  
 Assessed  

Block	Lot	Valuation	Exemption	Tax
2813	29	3600	....	136.08

Date of Payment 1st Half  
 Paid F 5-25-22 John Howe Rec.

Date of Payment 2nd Half 30  
 Paid X 12-4-22 John Howe Rec.

**EXHIBIT C. 9.**

Westfield, N. J. May 31 1924 No...  
 Peoples Bank and Trust Company of Westfield  
 Pay to the order of John Howe Receiver  
\$81 27/100  
 Eighty One & 27/100 Dollars 40  
David I Turkington  
 Perforation—Paid 6-5-24 55-281

*Final Decree.***FINAL DECREE.**

IN CHANCERY OF NEW JERSEY.

4661

*Between*

10

DAVID TURKINGTON,  
*Complainant,**and*LILLIE ZUBER, administratrix  
of the estate of Henry  
Smith, *et als.,**Defendants.**On Bill, &c.**Final Decree.*

20 This cause coming on to be heard in the presence of Milton M. Unger, solicitor of the complainant, and Edward A. and William A. Schilling, solicitors of the defendants, Lillie Zuber, administratrix of the estate of Henry Smith, deceased; Lillie Zuber, guardian of Theodore Smith, an infant under the age of twenty-one, and Theodore Smith, an infant under the age of twenty-one, next of kin and heir at law of said Henry Smith, and the Court having examined

30 the pleadings and having taken proofs orally and in open court, and having heard and considered the arguments of counsel thereon, and it appearing to the satisfaction of the Court that on or about the 8th day of January, 1924, one Henry Smith, now deceased, entered into a contract partly verbal and partly in writing, whereby he agreed to convey to the said complainant for the sum of \$4,000 forthwith, all those certain lands and premises known as 205

40 Central avenue, Westfield, New Jersey, located

*Final Decree.*

in the Town of Westfield, in the County of Union and State of New Jersey, particularly described as follows:

BEGINNING at a stake planted for the South corner of the lot herein described on the Northeast side of the main road leading from Westfield to Rahway distant one hundred and forty-two feet on a course leading North forty-seven degrees and eight minutes west along the line of said road from the west corner of Edwin Donners lot, from said beginning running along the northeast side of said road north forty-seven degrees and eight minutes west forty feet to a stake by the side of said road; thence binding on lands of Walter Sparkman formerly Joseph Crane North forty-two degrees and fifty-two minutes east one hundred and eighty-two feet two inches to a stake in the line of land owned by Oren Pierson, formerly the lot of C. A. Leveradge; thence binding on his land south forty-seven degrees and eight minutes east forty feet to a stake; thence binding on Frederick Hinzer land south forty-two degrees and fifty-two minutes west one hundred and eighty-two feet two inches to the place of BEGINNING.

Containing seven thousand two hundred and eighty-six and two thirds square feet of land be the same more or less.

And it further appearing that thereafter the said complainant entered upon and took open and notorious possession of the said lands and premises so as aforesaid agreed to be conveyed to him, and did make valuable and permanent improvements thereon and thereto, and that the said complainant did pay a part of the con-

*Final Decree.*

10 sideration or purchase price of said lands and premises, namely, the sum of \$1,381.27, and that the said Henry Smith died intestate on or about the 4th day of June, 1924, without having made any conveyances to said complainant pursuant to said agreement, and that the defendants herein  
20 are his administratrix and his sole next of kin and heirs at law, and that the said complainant has always been and still is ready and willing to accept the conveyance for said lands and premises, and the Court being of the opinion that the complainant is entitled to specific performance of said contract as prayed in his bill of complaint, with an abatement by way of compensation by reason of such sum or sums of money as the complainant has been paid on account of the purchase price, and it further  
30 appearing that after crediting the complainant with the sum of \$1,381.27 paid on account of the purchase price of said premises, the balance of the consideration amounts to the sum of \$2,618.73.

It is thereupon, on this 29th day of April, 1926, ORDERED, ADJUDGED and DECREED, that said agreement be specifically performed by the said defendants, Lillie Zuber, administratrix of the  
40 estate of Henry Smith; Lillie Zuber, guardian of Theodore Smith, an infant under the age of twenty-one, and Theodore Smith, an infant under the age of twenty-one, with an abatement as aforesaid, and that the said defendants, Lillie Zuber, administratrix of the estate of Henry Smith; Lillie Zuber, guardian of Theodore Smith, an infant under the age of twenty-one, and Theodore Smith, an infant under the age of twenty-one, do make, execute and acknowledge in due form of law and deliver to the com-

*Final Decree.*

plainant, David Turkington, on the 7th day of May, 1926, between the hours of two and four o'clock in the afternoon, at the office of Milton M. Unger, 763 Broad street, Newark, New Jersey, a good and sufficient deed of conveyance for all those lands and premises hereinbefore specifically described and deliver at the same time to the said complainant possession of the said lands and premises. 10

And it is further ORDERED, ADJUDGED and DECREED that contemporaneously therewith said complainant pay to the said defendants the sum of \$2,618.73, being the balance due from the said complainant as hereinbefore recited, which said sums of money shall be payable at the time of the delivery of the said deed.

And it is further ORDERED, ADJUDGED and DECREED that if the parties against whom this decree shall pass shall not comply therewith at the time appointed, then such decree shall be considered and taken in all courts of law and equity to have the same operation and effect and be as effectual as if the conveyance herein provided for has been executed conformably to this decree, notwithstanding the disability of any party to this suit. 20

Respectfully advised, 30

MAJA LEON BERRY,  
V.-C.

*Notice of Appeal.*

**NOTICE OF APPEAL.**

IN CHANCERY OF NEW JERSEY.

	<i>Between</i>	
10	DAVID TURKINGTON, <i>Complainant,</i>	} <i>On Bill, etc.</i> <i>Notice of</i> <i>Appeal.</i>
	<i>and</i>	
	LILLIE ZUBER, administratrix of the estate of Henry Smith, <i>et als.,</i> <i>Defendants.</i>	

20 The defendants hereby appeal from the final  
decree made in this Court in the above-stated  
cause, entered on April 27, 1926, and filed April  
28, 1926, by which it is ORDERED, ADJUDGED and  
DECREED that said agreement be specifically per-  
formed by the said defendants, Lillie Zuber, ad-  
ministratrix of the estate of Henry Smith; Lillie  
Zuber, guardian of Theodore Smith, an infant  
under the age of twenty one, and Theodore  
Smith, an infant under the age of twenty-one,  
do make, execute and acknowledge in due form  
of law and deliver to the complainant, David  
30 Turkington, on the 7th day of May, 1926, be-  
tween the hours of two and four o'clock in  
the afternoon, at the office of Milton M. Unger,  
763 Broad street, Newark, New Jersey, a good  
and sufficient deed of conveyance for all those  
lands and premises hereinbefore specifically de-  
scribed, and deliver at the same time to the said  
complainant possession of the said lands and  
premises.

40 And it is further ORDERED, ADJUDGED and DE-  
CREED that contemporaneously therewith said

*Notice of Appeal.*

complainant pay to the said defendants the sum of \$2,618.73, being the balance due from the said complainant as hereinbefore recited, which said sums of money shall be payable at the time of the delivery of the said deed. And it is further ORDERED, ADJUDGED and DECREED that if the parties against whom this decree shall pass shall not comply therewith at the time appointed, then such decree shall be considered and taken in all courts of law and equity to have the same operation and effect and be as effectual as if the conveyance herein provided for has been executed conformably to this decree, notwithstanding the disability of any party to this suit.

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KALISCH & KALISCH,  
Solicitors for and of Counsel with Defendants.

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I conceive there is a good cause for appeal in the above-stated cause.

SAMUEL KALISCH, JR.,  
Of Counsel with Defendants.

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*Petition of Appeal.*

**PETITION OF APPEAL.**

NEW JERSEY COURT OF ERRORS AND  
APPEALS.

10	<p><i>Between</i></p> <p>DAVID TURKINGTON, <i>Complainant-Appellee,</i> <i>and</i> LILLIE ZUBER, administratrix of the estate of Henry Smith, <i>et als.,</i> <i>Defendants-Appellants.</i></p>	<p><i>On Bill, etc.</i> <i>Petition</i> <i>of Appeal.</i></p>
----	---	---

20 The petition of Lillie Zuber, administratrix of the estate of Henry Smith, *et als.*, appellants in the above-stated cause, respectfully shows that your petitioner, aggrieved by the final decree made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date April 27, 1926, wherein the said David Turkington was complainant, and the said Lillie Zuber, administratrix of the estate of Henry Smith, *et als.*, were

30 defendants, in this respect, to wit, that the said decree orders, adjudges and decrees that said agreement be specifically performed by the said defendants, Lillie Zuber, administratrix of the estate of Henry Smith, Lillie Zuber, guardian of Theodore Smith, an infant under the age of twenty-one, and Theodore Smith, an infant under the age of twenty-one, with an abatement as aforesaid, and that the said defendants, Lillie Zuber, administratrix of the estate of Henry Smith; Lillie Zuber, guardian of Theodore

40 Smith, an infant under the age of twenty-one,

*Petition of Appeal.*

and Theodore Smith, an infant under the age of twenty-one, do make, execute and acknowledge in due form of law and deliver to the complainant, David Turkington, on the 7th day of May, 1926, between the hours of two and four o'clock in the afternoon, at the office of Milton M. Unger, 763 Broad street, Newark, New Jersey, a good and sufficient deed of conveyance for all those lands and premises hereinbefore specifically described, and deliver at the same time to the said complainant possession of the said lands and premises. And it is further ORDERED, ADJUDGED and DECREED that contemporaneously therewith said complainant pay to the said defendants the sum of \$2,618.73, being the balance due from the said complainant as hereinbefore recited, which said sums of money shall be payable at the time of the delivery of the said deed. And it is further ORDERED, ADJUDGED and DECREED that if the parties against whom this decree shall pass shall not comply therewith at the time appointed, then such decree shall be considered and taken in all courts of law and equity to have the same operation and effect and be as effectual as if the conveyance herein provided for has been executed conformably to this decree, notwithstanding the disability of any party to this suit.

And your petitioner humbly appeals from the whole of said decree as aforesaid, upon the ground that the same is erroneous, for that:

1. That the Court below erred in decreeing specific performance as prayed for in complainant's bill.

2. The Court below erred in not finding the facts according to the evidence and the weight thereof.

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*Petition of Appeal.*

3. The Court below erred in not finding as a fact that no written agreement of sale was contemplated between the parties.

4. The Court below erred in granting complainant's prayer of relief as prayed for in his bill, to wit:

10 (1) That Lillie Zuber and Theodore Smith, defendants to this suit, answer this bill of complaint and each statement therein made.

(2) That the agreement so made and entered into by and between the complainant and the said Henry Smith, for the purchase of the said lands and premises, may be specifically performed by the defendants, Lillie Zuber and Theodore Smith, complainant having partly performed the said agreement on his part and being  
20 ready and able to perform his part of the agreement at any time.

(3) That a writ of subpoena 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.

(4) That an order issue restraining the defendants from in anywise proceeding in the prosecution of any action in any court at law for the  
30 possession of said premises during the pendency of this suit.

KALISCH & KALISCH,  
Solicitors of Defendants-Appellants.

*Answer to Petition of Appeal.*

**ANSWER TO PETITION OF APPEAL.**

NEW JERSEY COURT OF ERRORS AND  
APPEALS.

*Between*

DAVID TURKINGTON,  
*Complainant-Appellee,*

*and*

LILLIE ZUBER, administratrix  
of the estate of Henry  
Smith, *et als.,*  
*Defendants-Appellants.*

*On Bill, etc.*

*Answer to  
Petition of  
Appeal.*

10

The answer of the complainant-appellee to the  
petition of appeal of the defendants-appellants  
in the above-entitled cause:

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The complainant-appellee admits it to be true  
that a final decree was made and entered in the  
above-stated cause in the Court of Chancery of  
New Jersey on April 27, 1926, as in the petition  
of appeal is stated; but as to the substance and  
form thereof, they pray to refer thereto when  
the same shall be produced. And this complain-  
ant-appellee is advised and believes that the said  
decree is agreeable to law and equity and he  
prays that the same may be affirmed, with costs.

30

MILTON M. UNGER,  
Solicitor for and of Counsel with  
with Complainant-Appellee.

40



19MAY. T. 1926

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

## New Jersey Court of Errors and Appeals

*Between*

DAVID TURKINGTON,  
*Complainant-Respondent,*

*and*

LILLIE ZUBER, admx. of the  
Estate of Henry Smith, *et*  
*als.,*

*Defendants-Appellants.*

*On Appeal  
from Final  
Decree in  
Chancery.*

### BRIEF OF DEFENDANTS-APPELLANTS.

#### Statement.

The defendant, Lillie Zuber, was the wife of one, Henry Smith, from whom she obtained a divorce on October 1, 1915. (See par. 2, bill of complaint, p. 2, and Exhibit C. 3, p. 106.)

A son, Theodore Smith, was born of the marriage, who at the time this suit was tried was a minor and is a party defendant to this suit. On September 11, 1922, defendant, Lillie Zuber, former wife of said Henry Smith, instituted proceedings in the Court of Chancery of New Jersey, for ~~mainten~~ance and support. At the time that ~~this~~<sup>that</sup> suit was instituted the said Henry Smith was the owner of two pieces of property, one at 85 Astor Street, Newark, New Jersey, and the other 205 Central Avenue, Westfield. On September 18, 1922, the said Henry Smith entered into an agreement with his said former wife, Lillie Zuber, for the support of herself and their said son, Theodore Smith, in consideration of the abandonment by her of the maintenance

proceedings herein above referred to. Section 1 and 2 of said agreement are as follows:

1. That there shall be paid to the said Lillie Smith for and during her life or so long as she shall not remarry, by the said Henry Smith, his heirs, executors or administrators, the sum of Twenty-five Dollars each and every month, to be paid to the said Lillie Smith on the twenty-fifth day of each and every month after the date of this agreement.

2. That the said Henry Smith shall and will, upon his decease, give, devise and bequeath to Theodore Smith, the son of the said Henry Smith and Lillie Smith, the house and premises on Central Avenue, Westfield, now owned by the said Henry Smith and devised or descended to him by his mother or father, and in which he now conducts his business; and in case the said Henry Smith shall sell or convey said premises prior to his decease, then he will make provision for the said Theodore Smith, in place thereof in his will.

And the said Lillie Smith does accept the provisions of this agreement in full settlement of any rights or claims of any kind which she shall or may have against the said Henry Smith or his estate either before or after his decease.

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

Henry Smith (L. S.)  
Lillie Smith (L. S.)

The property on Central avenue, Westfield, mentioned in Section 2 of the agreement, is the subject of this litigation.

In April, 1922, complainant, David Turkington, became a tenant of the said Henry Smith in part of said premises, 205 Central avenue, the remainder of said premises being retained

by said Henry Smith for the purpose of conducting his grocery business.

At or about the time the complainant, Turkington became Smith's tenant, as aforesaid, said Smith became a boarder in the home of the said complainant, Turkington, at said 205 Central avenue, Westfield, aforesaid. During the time that said Henry Smith boarded in said complainant's home he was suffering from an incurable disease, pulmonary tuberculosis.

Some time in the latter part of 1923, complainant David Turkington called at the office of one Harold Simandl, a lawyer in Newark, New Jersey, and consulted him regarding a certain transaction, and after relating to said Harold Simandl his story he was directed by the said Simandl to bring said Henry Smith to his (Simandl's) office. A short time thereafter both Turkington and Smith appeared at Simandl's office, and what took place in Simandl's office is testified to by Simandl himself, who was the main witness in the present chancery proceedings. Bottom of page 18 and continuing to page 20 of the case, he says as follows:

Q Will you tell us what transpired between you and Smith and Turkington; what was said by the three of you with respect to this property? A The first thing when he came in he brought me three papers, which I think you have.

Q Who? A Mr. Smith, and he gave me these at the outset, because there was doubt in his mind as to whether or not he could sell the property, in view of a certain agreement which he showed me.

Q Can you recognize the papers? A I can pick them out. This paper, that paper, and there is another paper—three or four papers; there are two deeds and a decree and the agreement that he had with Mr. Schilling.

Q These are the papers that he brought in to you? A Yes.

Mr. Unger: I will offer these four papers and ask to have them marked for identification.

Mr. Schilling: I have no objection to their going in evidence.

(Marked Exhibits C. 1 to C. 4, inclusive, for identification.)

Q Go ahead. A He showed me Exhibit C. 4, which was an agreement between himself and his former wife, wherein he agreed, among other things, that he wouldn't sell the property unless he took care of his son in some way in his will. I read that agreement, everything; I asked him whether or not he had any other property; he told me that he had a piece of property at Astor street, in Newark, and that he intended to give that to his son. I told him I saw no reason why then he couldn't sell his Westfield property. He then told me that he had been ill and that Dave, as he called Turkington, had been very good to him; he said that he had had early some difficulty with his wife and that she had divorced him, and from what I understood, and he told me, she was trying to bring contempt proceedings against him for failure to pay alimony. He expressed himself as not having seen very much of his son, but that he felt that it was his duty to leave something to his son. He said that Turkington had advanced some moneys to meet these alimony payments that he had agreed to—I think it was twenty-five dollars a month—I am not sure of the amount; he said that Turkington had kept him and treated him almost like a brother, and that he wanted Turkington to have this property, and he told me that they had agreed between them that Turkington was to get this property from him; he wanted me to draw a deed in this fashion, that Turkington was to pay forty dollars a month for the balance of his

life, and keep him for the balance of his life, and he wanted me to have that drawn up in a regular deed. After he had expressed himself in that light I turned around to Turkington and I said, "Turkington, if you die tomorrow and Smith lives, do you want to saddle your wife with this thing? Do you know what you are doing?" Turkington said, "I do." I said, "Now, look here, Smith, suppose that you leave this office, is it your intention that if you get hit by a trolley car and you die tomorrow, that this property goes over to Turkington?" Well, he kind of thought for a moment, and he said, "Well, is there any other way that you can do it?" In other words, he apparently—

Mr. Schilling: I object.

The Court: Just tell what he said.

A I then asked him how much the property was worth; he told me it was assessed for around \$3,000. I said, "Why don't you men agree on a price and then have a mortgage given back for the balance, and in that way it will be a lien on the property, and if Turkington dies, his heirs will have to pay off the lien or else the property will go back to your estate, and Mrs. Turkington, if she dies, will know what she has to have as a lien on that property." There was some discussion between them then as to the value—the exact words I cannot remember, but anyway they arrived at the amount of \$6,000 as being a fair value of the property. Then Turkington had stated that Smith owed him some money, and I think Turkington said it was about \$500, and Smith said, "No, I think it is more than that." There was some question as to the amount of money that Smith owed to Turkington. I said this, "Why don't you men get together and find out how much Smith owes Turkington, and when you agree upon that amount, credit Turkington on account of the purchase price, and I will draw a

mortgage for the balance, and draw an agreement to keep him for life, bed and board." They agreed to that, and they left, leaving behind these deeds, this certified copy of final decree between him and his wife, and that agreement. He asked me one other question, whether he had to leave a will; I asked him whether he had any other heirs than his son, and he said no, and I said that property would pass to his son at his death, without a will. That is all the conversation that we had.

Q Then before these people went away did they make any appointment with you to return at any time? A Yes, that was left as an appointment, that they were to come back.

Mr. Simandl says that in January, 1924, he received a letter signed by complainant, and purporting to be signed by said Henry Smith, a copy of which letter is as follows:

"205 Central Ave.,  
Westfield, N. J.,  
Jan. 8, 24.

Mr. H. Simandl

Dear Sir:

In regards to the contract which is being drawn up by you for the buying of the property at 205 Central Av. might say that the purchasing price has been agreed on by Mr. Smith & myself but he (Mr. Smith) desirous that same be kept a personal affair between ourselves & that contract prices which is to be stipulated in same will only be enough to constitute a legal buy, also that the life annuity of 40\$ (Forty Dollars) per month payable at least Quarterly will be binding not only on myself but on my predessors as long as he lives trusting this will enable you to have this attended to at once as Mr. Smith intends to leave for the winter vacations the 15 inst. & he is anxious to have this settled before leaving. I am submitting this letter

to Mr. Smith before mailing same to you & having him sign same as he does not want to take the trip to Newark if same can be avoided.

thanking you in advance for any early settlement in this matter

Sincerely yours,

Henry Smith      David I. Turkington,  
205 Central Av.,  
Westfield, N. J.

P. S.

Mr. Smith desirous that stipulations be made in contract to the effect that he be permitted to have his board & room the same as usual but same to be at his own discretion & must not exceed at any time over 30\$ per month which agreement is satisfactory to me.

D. Turkington  
Henry Smith''

It appears that no agreement, deed or mortgage was prepared by said Simandl following the receipt of this letter as the letter did not contain the necessary information for that purpose; but along about the middle of January, 1924, said Simandl says that he received a telephone call from the said Henry Smith asking him why the papers had not been drawn up and that he told Smith that he wanted to know the amount of the mortgage and that said Smith said it was \$3,200, that Simandl next learned from Turkington that Smith had gone to Florida and upon his return he, Simandl, had been called away to Canada and hence the papers were not drawn up. Simandl then says in his testimony that the next information he received was that Smith was dead. So that beyond the letter which Simandl says he received no papers were ever signed by either Turkington or Smith.

It is also claimed by the complainant that certain expenditures were incurred by him for re-

pairs and taxes in the belief that he was the owner of the property by reason of his contract with the said Henry Smith, deceased, and that he was in the possession of the same by reason of said alleged contract.

This suit is instituted by the said complainant against the said Lillie Zuber, administratrix of the estate of Henry Smith, and Theodore Smith, heir-at-law of the said Henry Smith, to require them to deed over to the complainant the property 205 Central Avenue, Westfield, aforesaid, because of said alleged contract.

## ARGUMENT.

### POINT I.

(a) The court below erred in decreeing specific performance as prayed for in complainant's bill; and,

(b) The court below erred in not finding the facts according to the evidence and the weight thereof.

The following are the conclusions of the court below on one phase of the case which we wish reviewed by this Court; the learned Vice-Chancellor says (p. 94, beginning at line 24):

"The defense of the statute of frauds does not in my judgment avail the defendant because there is a writing which has been offered in evidence and which in my judgment is sufficient to charge the decedent and to satisfy the requirements of the statute of frauds. That writing is a letter which was written by Mr. Turkington, the complainant, under date of January 8, 1924, and is signed by both Mr. Turkington and Mr. Smith. I think that it cannot be denied that this writing was signed by Mr. Smith. Two witnesses are produced who testify to

having witnessed the signature. In spite of vigorous cross-examination by counsel for the defense and my own examination of at least one of these witnesses, their testimony as to the actual witnessing of this signature is not shaken. I conclude, therefore, that the letter referred to and which was offered in evidence and marked Exhibit C. 5 was signed by Mr. Smith and also by Mr. Turkington, and that that letter is sufficient evidence of the contract which was alleged in the bill of complaint to satisfy the statute of frauds."

The defendant maintains that the evidence does not support the foregoing findings of the learned Vice-Chancellor. It should be kept in mind that while both the complainant and Smith had agreed that a fair value for the property would be \$6,000, yet, it is alleged that the property was sold to the complainant for \$4,000.

Harold Simandl, solicitor for complainant, who took the stand in his behalf, testified (on page 20, ll. 12 to 16) as follows:

"There was some discussion between them then (referring to Smith and Turkington) as to the value—the exact words I cannot remember, but anyway, they arrived at the amount of \$6,000 as being a fair value of the property."

It should be further remembered that when complainant saw that Smith's days were numbered, he consulted a lawyer of his own choosing and after relating the entire matter to the lawyer, arranged with him to bring Smith in at some future time. About three weeks thereafter, complainant and Smith appeared at the lawyer's (Simandl) office. Mr. Simandl represented complainant in the transaction and Smith did not know Mr. Simandl until he was introduced to him by complainant on that occasion, which was the

first and only time he (Smith) was in Simandl's office (p. 17 of Case).

Mr. Simandl testified to the interview he had with Mr. Smith and the complainant when they were both in his office on that occasion. There was, however, one other person present at this interview besides complainant, Smith and Mr. Simandl; and that was a stenographer (see top p. 15), where complainant testified as follows:

Q Who was present when the conversation took place? A In Mr. Smith's office?

Q Yes. A Mr. Simandl, Mr. Smith, and the stenographer and myself.

Q Were you all there at the same time?

A Yes.

Yet, strange to say, this stenographer is not produced in court, nor her absence accounted for and complainant is content to rest his case upon the testimony of his solicitor alone when it was within his power to have supported it by the testimony of a disinterested witness.

The learned Vice-Chancellor, in his conclusions, refers to a telephone conversation between Smith and Simandl in which the statements in the letter or memorandum were confirmed and some additional information was given. (See p. 95 of Case.) The testimony is given by Mr. Simandl and is to be found on page 23, beginning at line 8:

Q What was that? A That was the amount of money of the mortgage; and subsequently, I think, it was in the middle of January, 1924, just before Mr. Smith was going away, he called me on the telephone.

Q Who did? A Mr. Smith told me who he was; told me he was Mr. Smith of Westfield.

Q Did you recognize his voice? A I did, etc.

Mr. Simandl had only spoken to Smith once and that was in the latter part of November, 1923, when complainant and Smith were at his office (see p. 17). Yet, two months thereafter he says he recognized Smith's voice over the telephone. If this is so, it is certainly not in keeping with the experience of most people who even find it difficult sometimes, to recognize, over the telephone, the voice of persons that are in the habit of speaking to them. We maintain that it is almost impossible to recognize over the telephone the voice of a person with whom you have spoken but once in your life, especially after a lapse of two months. Certainly, it would be a dangerous precedent to permit such uncertain testimony to influence the court in arriving at its conclusion.

We have referred to the foregoing evidence and facts before discussing the alleged signing of the memorandum because we think that the case presents such extremely suspicious circumstances that they should be kept in mind in dealing with the question of the signing of the alleged memorandum.

Smith's lips being sealed by death, the important facts in the case are testified to by but two witnesses, both of whom are vitally interested in the outcome; namely Turkington, the complainant, and his attorney, Simandl.

Let us now examine the evidence offered by complainant to prove the signing of the letter or memorandum upon which the learned Vice-Chancellor bases, in part, his conclusions. The main witness offered by the complainant to prove the signature of Smith, to the alleged memorandum is Charles Jansen. On page 61 of the tes-

timony beginning at line 21, Charles Jansen testified as follows:

Q What were you doing there? A At the time being, I was just finishing up the dining-room, putting moulding around the windows and various things.

Q You were working there? A No, I was just finishing up and it was around eight o'clock and I was just going to go home. I was sitting down and talking and he was saying this.

Q What did you hear Mr. Smith and Mr. Turkington talk about while you were there? A MR. SMITH, HE WAS DICTATING TO MR. TURKINGTON WHAT TO WRITE DOWN ON A LETTER AND HE TOLD HIM TO WRITE DOWN THAT THE PROPERTY SHOULD BE BOUGHT FOR \$4,000 on a mortgage of \$3,200.

Q Did you hear that? A Yes.

Q Was TURKINGTON DOING ANYTHING WHILE YOU WERE THERE? A YES, HE WROTE ALL THAT DOWN.

Q What property were they talking about? A Westfield property.

And at page 62, this same witness testifies, beginning at line 4,

Q Tell us anything else that you heard them say about the terms of that property, the terms of sale. A He is supposed to pay \$30 a month and board and lodging.

Q Who was supposed to pay? A Mr. Turkington to Mr. Smith.

Q And did they talk about the price of the property, how much it was to cost?

A The price was to cost \$4,000.

Q Do you know what the \$800 was said to be for? A That is supposed to be money Mr. Smith owed to Turkington, and it was supposed to be taken off.

Q How long did this talk take? How long a time? A It must be an hour's time.

Q And after this letter was written or this paper was written, did you see any-

body sign it; whom did you see sign it? A Mr. Smith.

Q Were you there when he signed it? A I was there.

Q I show you a paper which has been marked Ex. C. 5, and ask you if you ever saw that paper before? A That is the paper that was drawn up that night.

Q You saw that paper that night? A Yes.

Q Is that the paper which you saw Henry Smith sign? A Yes.

Q And he signed that while you were there? A Yes, I was there.

And on page 63, this same witness, on cross examination, testified as follows:

Q You heard Turkington and Smith talking about the terms for which this property was to be sold, is that right? A Yes.

Q And Turkington was sitting there writing, was he? A He was talking that over before he wrote anything.

Q Didn't you say that Smith was talking to Turkington what to put in the letter? A He told him what to put in after the price.

Q And was Turkington writing at that time? A Yes.

Q You heard Smith telling him what to put in it? A The price, yes.

Q He told him to put in that the price is to be \$4,000? A Yes.

Q And \$3,200 is to be mortgage? A After \$800 was taken off.

Q And \$3,200 was to be the mortgage? A After, yes.

Q You saw Turkington write that in, did you? A Yes.

We now beg leave to refer this Court to the letter or memorandum marked Ex. C. 5 (pp. 21 and 22), which was the letter or memorandum which this witness claims he saw written. None of the terms which this witness says he saw

Turkington write down appear in this letter, Ex. C. 5. No mention is made in it of the purchase price of \$4,000 or of the mortgage of \$3,200.00. In fact, the letter expressly says at page 22, "that the purchase price has been agreed on by Mr. Smith and myself, but he (Mr. Smith) desirous that same be kept a personal affair between ourselves and that contract price which is to be stipulated in same will only be enough to constitute a legal buy, etc."

This witness therefore has not identified the letter Ex. C. 5, as being the letter that he saw Smith sign. After all, we are interested for the purpose of identification in the contents of the letter and the contents of that letter according to Jansen's testimony is entirely different than the contents of the letter marked Ex. C. 5. So that, his testimony does not prove that this letter that was offered in evidence was signed by Smith.

The next witness that is offered to prove the signature to the letter is Leslie Hurley. He was an employee of Mr. Turkington, and was such employee at the time this suit was tried. (See p. 76, l. 24.) He testified as follows: (See p. 74, l. 32.)

Q I have shown you this letter which is before you; you have seen this letter before? A That looks like the same one.

Q I showed it to you a few moments ago, did I not, out in the room here (referring to C. 5)? A Yes.

Q You looked it over? A Yes.

Q Do you remember seeing it before? A I do, but I never read it closely.

This testimony indicates only that this witness saw what purported to be a letter, but as to the contents, he knew nothing, and after all,

it is the contents of the letter which identifies it. On page 75, beginning at line 20, this witness testifies as follows:

Q Did you hear any talk about the price of the property? A No.

Q Did you hear any talk as to what was being done with the property? A No, I didn't hear that.

Q Was this paper signed by anybody while you were there? A Mr. Smith; and how I come to notice it was the peculiar "H" that I never saw made before.

Q Had you seen him sign his name before this? A No.

Q You never saw him sign? A No.

Q Did you see him sign this paper, Exhibit C. 5? A I did.

Q Where were you when he signed it?

A I was standing back so that I could look right over his shoulder.

Q Did he have this paper in his hands?

A Yes.

Q You saw him sign it? A Yes.

Q Did you hear anybody there say what was to become of the paper, or what was to be done with it? A I don't know that I did.

It here appears that this witness saw Mr. Smith sign a certain paper, the contents of which he was ignorant of. He does not identify even the circumstances surrounding the signing as Jansen did who said that the price was discussed, the purchase price \$4,000 and the mortgage \$3,200; nor did he hear anybody say that the paper was to be sent to the lawyer as was testified to by Jansen on page 62 (bottom). So that this man's testimony only goes so far as to say that he saw Smith sign a certain paper, but it does not identify the paper as Ex. C. 5. This witness further testifies (p. 76, l. 5) as follows:

Q Outside of Mr. Smith, and Mr. Turkington, who else was in the room? A The man who was just up here.

Q Mr. Jansen? A Yes.

Q Anybody else? A Joseph Woodruff.  
He was around there somewhere.

Yet it appears that Joseph Woodruff was not called to testify concerning this most important fact.

On page 78, this witness (Hurley) testified, beginning at line 22, as follows:

Q How many times did Smith sign it?

A Once is all I know of.

Q In other words, you saw him sign the paper once? A Yes, I did.

An inspection of this paper shows that Smith had signed the paper twice, and on the same page this witness further testified beginning at line 25:

Q Is there any way you can tell us what paper it was, or any recollection in your mind; did you look at it? A I have.

Q Any more than any other paper, any more than it was two papers together, and noticed that "H," and that is the reason you say it is this paper? A Yes, it looks like the same paper; I have no reason to say it is not.

Q You notice there are two Henry Smiths on there; which one did he sign while you were looking at it? A This is the last one I saw.

This testimony is certainly most unreliable and ought not to be accepted as proof of the signing of the letter or memorandum which is such a vital fact in the case.

There is no other testimony concerning the signing of this memorandum, and we respectfully submit that the complainant has failed to prove the execution of it, and since Smith is dead and cannot give his testimony, this Court ought to scrutinize with more than ordinary cau-

tion the proof relied upon by the complainant for proving the execution of this memorandum.

In *Brown v. Brown*, 33 N. J. Eq., page 657, the Court says:

“A specific performance will not be decreed unless the existence and terms of the contract be clearly proved. It must be shown that a contract has been concluded. If it be reasonably doubtful whether the contract was finally closed, equity will not interfere by decreeing a specific performance. Nor will it interfere when the evidence leaves the agreement as to *any of its terms in uncertainty.*”

See also *Clow v. Taylor*, 12 C. E. Green 418; *Cooper v. Carlisle*, 2 C. E. Green 529.

Another phase of this case which seemed to impress the learned Vice-Chancellor was the fact that the complainant entered into possession of the property and spent considerable in repairs and improvements on the property, etc. This will appear from the Vice-Chancellor's conclusions on page 96, beginning at line 24, in which he says as follows:

“It appears that the complainant did enter into possession of the property, which was the subject of the agreement. On the strength of that agreement he spent considerable sums in repairs and improvements on the property. The arrangement for board of the decedent which had existed prior to the time this agreement was made was changed, and thereafter, instead of the decedent paying the complainant board, the complainant apparently paid the decedent some moneys, how much does not appear, and he has been prevented from testifying as to what was paid by the Evidence Act—by the section which excludes such testimony, or at least which this Court has excluded.”

The principle invoked here is that equity will specifically enforce such a parol agreement at the instance of a complainant who shall have completely performed it upon his part. The remedy is afforded upon the ground that it will work a fraud upon him who, induced by the agreement, has, in good faith, so performed it as to irretrievably *change the situation of the parties to his disadvantage*, to permit the other party to refuse fulfillment upon his part.

That principle, however, is applied with considerable caution by our courts. In the case of *Cooper v. Colson*, 66 Eq., page 328, Justice Fort at the bottom of page 330 states the rule as follows:

“In every case, in order to take the case out of the statute, on the ground of part performance, irrespective of other questions, two things are requisite. The terms of the contract must be established by the *proofs to be clear, definite and unequivocal*, and the acts relied on as part performance must be exclusively referable to the contract.”

It is respectfully contended that the terms of the contract in the case *sub judice* are not clear, definite and unequivocal, nor are the acts relied on as part performance exclusively referable to the contract.

If we turn to Exhibit C. 5 on pages 21 and 22 of the case, we find no mention of what the purchase price for the property is. It expressly says in the letter that the purchase price is to be kept a personal affair. The purchase price and the terms are said to be established by oral testimony alone, and this oral testimony is of a most unsatisfactory kind.

As was said in the case of *Cooper v. Colson*, *supra*, at page 333:

“Most scrupulous care should be exercised by the courts in this class of cases, and especially where one of the alleged contracting parties is dead. An allegation of an agreement to convey is easily made, and casual conversations or jocular remarks of intent to devise or convey at death can readily be turned into serious import. The statute declares that agreements to convey land not in writing are void. If equity is to overthrow the statute, on the ground that, owing to the peculiar character of the facts in a given case, it would be a fraud not to hold one of the contracting parties estopped from setting up the statute, such power should be exercised upon the most clear proof, not only of the contract to devise or convey the land in question, but of the fact that the rendition of the services was wholly referable to the contract to convey, and solely predicated upon that agreement, and that proper and adequate compensation for the services cannot otherwise be made, because of the fact that in reliance upon the contract, it appears reasonably probable that the complainant has irretrievably changed the whole course of his life and circumstances in order to fulfill his part of the agreement.”

It appears in this case that prior to the alleged agreement to convey, the complainant was a tenant of Smith and that certain moneys were laid out by complainant in the payment of taxes and certain repairs; some of these repairs, however, were made long before the time of the alleged agreement. According to the testimony of David Turkington, the complainant, repairs were made by him since May, 1923. On page 32, at line 15, he testifies as follows:

Q Prior to that time, had you made any repairs to that house? A Yes, sir, since May, 1923.

It further appears in the testimony that Smith became a boarder in the house of the complainant at the same time that the complainant became a tenant of Smith; and that was in April, 1922, more than a year before the alleged agreement. We would respectfully ask, in what way did the complainant change his mode of living, or course of life, or life work, because of this alleged agreement? The money that was advanced for repairs can be recovered in an action at law. The services rendered by complainant to Smith could be recovered on a *quantum meruit* in an action at law. As was said in the case of *Cooper v. Colson, supra*, at page 333:

“She in no way changed her mode of living, or course of life, or life work, because of them. What she did was of such a character as to be easily and adequately compensated on the *quantum meruit*. There is nothing to establish that she had abandoned any other plan of life work or calling to devote herself to the deceased in consideration of the promised conveyance of a farm.”

In the case at bar, Smith is dead and all of the evidence that is offered by the complainant to show conversations and remarks of intent to convey can easily be made without fear or contradiction. Quoting again from the case of *Cooper v. Colson, supra*, at page 333:

“The mere performance of services, which may be compensated for in damages, is not sufficient to take the case out of the statute.”

It further appears that this property was never in the exclusive possession of the complainant because Smith occupied the ground floor for his store, and under the principle as set forth in 30 Cyc. on page 65:

“Where the vendee continues to occupy or control the land in part, merely sharing

the occupancy or control with the vendor, the mixed possession so resulting does not satisfy the doctrine."

We would respectfully urge a careful reading of the case of *Cooper v. Colson, supra*, as the facts in that case resemble very closely those in the case at bar. See also *Often v. Stout*, 97 N. J. Eq., p. 122; at middle of page 124 the court says as follows:

"Assuming for the sake of argument that the letter and receipt might be taken as a sufficient memorandum in writing, if it were not for the deficiencies now to be mentioned, it is clear that the written memorandum is lacking in at least two essentials. It contains nothing of the alleged terms as to a \$4,000 mortgage, and it contains no description of premises. These defects are fatal."

See also

*Rabinowitz v. Rooney*, 128 Atl. Rep., p. 882;

*Nibert v. Baghurst*, 47 Eq., p. 202;

*Cole v. Potts*, 10 N. J. Eq., p. 67;

*Shipman v. Shipman*, 65 Eq., p. 556.

Also, see *Grove, et al., v. Templin, et al.*, a case decided April 23, 1926, by the Supreme Court of Illinois, in which the Court said *inter alia*, the following:

"An oral agreement to convey real estate in consideration of services to be rendered must be clear, definite and unequivocal in its terms, and a bill to enforce such an agreement must allege the terms directly, clearly and precisely, and must also show what has been done in performance of the agreement. To take such a contract out of the operation of the Statute of Frauds by reason of its part performance and the making of lasting and *valuable* improvements the acts of part performance must be clearly shown, and they must be such as cannot,

under the circumstances, be *fairly compensated in an action at law* and such that to allow the defense of the Statute of Frauds would be a virtual fraud on the party seeking performance of the contract.”

A copy of this opinion is appended to our brief.

We therefore respectfully submit that a decree for specific performance be denied.

KALISCH & KALISCH,  
Solicitors for and of Counsel  
with Defendant.

HARRY KALISCH,  
On the Brief.

## SUPREME COURT OF ILLINOIS.

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CHARLES A. GROVE *et al.*,  
*Appellees,*

*vs.*

EFFIE TEMPLIN *et al.*  
 (MYRTLE LITTERAL),  
*Appellant.*

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Mr. CHIEF JUSTICE DUNN delivered the opinion of the Court.

The Circuit Court of Iroquois County sustained a demurrer to and dismissed an amended cross-bill filed in the partition suit brought for the partition of lots 1, 2, 4 and 6 of Wills' subdivision in the city of Watseka, and Myrtle Litteral, the complainant in the cross-bill, has appealed.

The amended original bill showed that David F. Grove died intestate on May 5, 1924, owning the lots named, lot 6 being under a contract of sale to Frank Beaver and Edith Beaver, and leaving as his heirs a son, Charles A. Grove, and four daughters, one of whom was Effie Templin, the mother of the cross-complainant. The son and three of the daughters filed a bill for partition against the fourth daughter, Effie Templin. Myrtle Litteral was made a defendant to the bill under an allegation that she claimed an equitable interest in the land as shown by a written notice signed by her, filed and recorded in the recorder's office, addressed to all whom it may concern, that she was the equitable owner of lots 4 and 6, the title of record thereto standing in the name of David Grove, deceased. The bill denied that she was such equitable owner,

and averred that the record of the notice was a cloud on the title, which the bill prayed should be removed. She answered the bill, admitting the ownership, death and intestacy of Grove, the contract of sale of lot 6, the heirship of the parties and their interests as set out in the bill, subject to her rights as equitable owner of lots 1, 2 and 4. Her amended cross-bill alleged that she entered into an oral contract with Grove, made about the year 1918, whereby she and her husband should assume the care and maintenance of Grove and should furnish and provide for him a home and comforts thereof for and during his natural life, and that she should make certain lasting and valuable improvements upon the property mentioned in the cross-bill, and in consideration thereof Grove agreed that the described premises should become hers and that he would convey the title to her by deed or will; that in pursuance of the agreement she and her husband went into possession of the property, paid the taxes thereon thereafter, and provided for, cared for and furnished a home for Grove from the time of the making of the agreement until he died, except for the period of about a year; that about the year 1920 her husband went to Kentucky and engaged in tobacco raising as a tenant farmer, and shortly after she followed him and for a part of that year resided with him in Kentucky; that this was done under an agreement with Grove that if they should find it desirable and profitable to make a permanent home in Kentucky he would go there and make his home with them, otherwise they should return to Watseka, and resume the previous arrangement; that before the year expired it became evident that it would not be profitable for them to take up a permanent residence in Kentucky and she returned to Watseka and resumed the

former relation; that during her absence Grove was given the care and attention required by her contract by Effie Templin, and this was by agreement with Grove. The amended cross-bill also alleged that Grove undertook to make a will devising the real estate to her and Effie Templin jointly, but it was not properly executed and for that reason probate of it was denied when it was offered for probate in the County Court. It was further alleged that after the agreement was made the fences on the premises became dilapidated, and pursuant to her agreement she bought at a cost of approximately \$50 a substantial metal fence and built it, the work being done by her husband, with some slight assistance from Grove; that Grove was seventy-six years of age at the time of his death and at all times during the period covered by the agreement needed constant care, and that all things pertaining to her duties and conduct toward Grove, as provided for in her oral agreement, were fully and completely performed according to his express wishes, from the time of the agreement until his death; that she devoted her time and labor to his care and maintenance, furnished him with food and contributed various sums of money to his wants and necessities, provided him with every comfort of home and devoted herself to the duty of making his last years comfortable and pleasant; that she received no compensation whatever from any source for her services or expenditures in this respect; that the real estate was duly inventoried as a part of the estate of Grove, and in the inventory was invoiced as of the value of \$2,000—a sum which would not more than reasonably compensate her for her services and expenditures. The bill prayed for a specific performance of the contract.

The appellees contend that the appeal is from an interlocutory order sustaining a demurrer, which was not appealable. The record shows that the cross-complainant elected to stand by the amended cross-bill and the court thereupon dismissed the cross-bill. This was a final order which disposed of the appellant's claim, and an appeal from it was properly allowed.

The grounds of the demurrer were that the contract was not in writing and was therefore void by virtue of the Statute of Frauds, and that the allegations with reference to the contract and its performance were so vague, indefinite and uncertain as not to justify a decree for specific performance. The bill contains no description of the property which was the subject matter of the contract. The original bill described four lots of which the ancestor died seized, and alleged a claim by the appellant of an equitable interest in all or a part of the premises. The amended cross-bill, after reciting the filing of the original bill for the partition of lots 1, 2, 4 and 6, alleges in regard to the contract that "your oratrix entered into a verbal agreement with the said David F. Grove, whereby your oratrix and her husband should assume the care and maintenance of the said David F. Grove and should furnish and provide for him a home and the comforts thereof for and during his natural life; that it was further orally agreed by and between your oratrix and the said David F. Grove that your oratrix should make certain lasting and valuable improvements upon the property mentioned and described herein, and in consideration of said promises and agreements the said David F. Grove promised and agreed that said described premises should become the property of your oratrix; that at the time of said

oral agreement it was further agreed by and between your oratrix and the said David F. Grove that before his death he would either convey to your oratrix by good and sufficient deed the title to said described real estate, or that he would make, publish and declare a last will and testament, by the terms of which the title to the property herein described should become vested in your oratrix." There is no other description of property in the cross-bill, except in the prayer that the title to said lots 1, 2 and 4 may be vested and decreed to be in oratrix. The notice which the complainant filed for record limited her claim of equitable ownership to lots 4 and 6. The prayer of the bill does not include lot 6, which was included in the contract of sale subsequently made by Grove with the Beavers, but does include lots 1 and 2, which were not included in the notice.

There is no allegation of facts showing the taking of actual possession of any property. The language of the bill is that pursuant to the oral agreement the cross-complainant and her husband "went into possession of said property." This allegation is only a conclusion of the pleader. If there was an actual change of possession the particular facts showing such change should be alleged. The cross-complainant was the granddaughter of David F. Grove, the owner of the property. There is no allegation in regard to the character of the property, whether or not it was improved, whether it was occupied or vacant, or whether Grove, at the time of the alleged agreement, was in the actual possession of it. It is alleged that the cross-complainant provided for, cared for and furnished a home for Grove, but there is no allegation as to any particular acts which she did, and

no facts are alleged showing any actual change in the relation of the parties to the possession or occupancy of the property. Whether the property had before been occupied by the grandfather as a home or otherwise does not appear, or whether any change occurred in the occupation by reason of the agreement. The alleged occupation by the cross-complainant and her husband appears to have been abandoned during a part of the year 1920.

The cross-bill is also uncertain in regard to the improvements to be made on the property. The allegation is of an agreement "to make certain lasting and valuable improvements on the property mentioned." There is no intimation as to what those improvements were. The only work alleged to have been done or expenditure made on the property was the replacement, at a cost of \$50, of a fence which had become dilapidated after the agreement was made, but there are no allegations from which it can be determined that this was a permanent and valuable improvement of the property. There is no allegation of the value of the property. The statement is made that it was invoiced in the inventory of the estate, but this is not an allegation of value.

The cross-bill alleges that Grove was seventy-six years old at the time of his death and during all the period covered by the agreement he needed constant care, and that she devoted her time and labor to his care and maintenance, furnished him with food and contributed various sums of money to his wants and necessities. If he was seventy-six years old at the time of his death he was not over seventy years old at the time of the agreement, and there is no allegation in the bill of any condition or circumstances

showing that he needed constant care. The allegation that she devoted her time and labor to his care and maintenance is altogether indefinite and does not show any particular acts that she did or any necessity for doing them. The objection of indefiniteness also applies to the allegation that she furnished him with food and contributed various sums of money to his wants and necessities.

An oral agreement to convey real estate in consideration of services to be rendered must be clear, definite and unequivocal in its terms, and a bill to enforce such an agreement must allege the terms directly, clearly and precisely, and must also show what has been done in performance of the agreement. To take such a contract out of the operation of the Statute of Frauds by reason of its part performance and the making of lasting and *valuable* improvements the acts of part performance must be clearly shown, and they must be such as cannot, under the circumstances, be *fairly compensated in an action at law* and such that to allow the defense of the Statute of Frauds would be a virtual fraud on the party seeking performance of the contract. (*Gladville v. McDole*, 247 Ill. 34.) Whether the specific performance of a contract will be decreed depends largely upon the particular facts in each case, and in a bill which seeks specific performance the facts must be stated so definitely and clearly that the court can determine from the bill whether the contract is fair, just and not unconscionable and whether the circumstances are such that equity requires that the contract should be specifically enforced. (*Edwards v. Brown*, 308 Ill. 350; *Davier v. Kaiser*, 280 *id.* 334.) It cannot be told from this cross-bill, in the absence of allegation as to the value of the

property, the physical and mental condition of Grove, the acts done by the appellant in performance of the alleged agreement, the acts done in regard to the possession of the property and the character of her alleged possession, whether the contract was fair, just and not unconscionable, whether the appellant was in possession under the alleged agreement, and whether the circumstances require a specific performance of the contract to prevent the perpetration of a fraud on her. It is entirely consistent with the amended cross-bill that the appellant and her husband were living in her grandfather's house with him at the time the alleged agreement was made or moved in with him afterwards, and continued to live there with him, except during their absence in Kentucky, until he died, and there is nothing to indicate that her services would not be fully compensated by a judgment against his estate for their value. The contract itself is vague and uncertain, the allegations of acts done in performance of the contract are equally indefinite, the building of a fence is not shown to be a valuable and lasting improvement and no reason is shown why complainant cannot recover against the estate of Grove the value of any services rendered to him.

The demurrer was properly sustained to the cross-bill, and the decree is affirmed.

*Decree affirmed.*

## New Jersey Court of Errors and Appeals

*Between*

DAVID TURKINGTON,  
*Complainant-Respondent,*

*and*

LILLIE ZUBER, administratrix  
of the estate of Henry  
Smith, *et als.*,  
*Defendants-Appellants.*

*On Bill, etc.  
On Appeal  
from Court  
of Chancery.*

*(Vice-  
Chancellor  
Berry.)*

### BRIEF OF COMPLAINANT-RESPONDENT.

This is an appeal from a decree of the Court of Chancery, ordering the defendants to specifically perform an oral contract for the sale of lands owned by Henry Smith, the intestate of Lillie Zuber and the father of Theodore Smith.

Complainant, David Turkington, in 1922, became a tenant of Henry Smith in premises at 205 Central avenue, Westfield, New Jersey. The defendant, Lillie Zuber, had previously, in 1915, obtained a decree of divorce from Henry Smith, and Smith, suffering from an incurable malady, pulmonary tuberculosis, was cared for by the complainant, Turkington.

By reason of the kindness and affection shown him by the latter, and because of Turkington's making improvements in and about the property and advancing moneys from time to time, Smith desired that the respondent purchase the premises.

Accordingly, on or about June 1, 1923 (the bill of complaint set forth in the state of the

case reading 1924 was amended at the hearing to read June 1, 1923, the correct date), the complainant entered into possession of the premises under an oral contract to purchase from Smith, having been in possession thereof prior to that time as a tenant.

Under the terms of that agreement it was agreed that Smith should receive for the balance of the purchase price, over and above what the complainant had expended in making repairs and additions to the premises, a mortgage which would insure to Smith the payment of \$40.00 per month, with interest on the unpaid principal at the rate of six per cent. A partial payment on account of the purchase price was made by the respondent in the form of an allowance by Smith of \$600.00, already paid on account of the purchase price. In addition it was agreed that the complainant would furnish, during the natural life of Smith, his board and lodging, exclusive of breakfast and dinner, milk, cream and eggs; and in the event that the mortgage should be paid off before Smith should die, then the provision with respect to the board and lodging would still continue until his death.

After the respondent had entered into possession under the agreement of June 1, 1923, he on many occasions made repairs, alterations and valuable *improvements* to the premises, and, in accordance with the terms of the agreement, boarded and fed Smith on the premises until his death about a year later. On December 1, 1923 (the bill as set forth in the state of the case having been amended at the hearing), it was mutually agreed that the amount of payments on the mortgage be reduced from \$40.00 to \$30.00 per month and that in the event that Smith should desire to make his home elsewhere,

-ADDENDA-

On page 20 of the State of the Case the testimony of Mr. Simandl is set forth as follows:-

"\*\*\*\*They arrived at the amount of \$6000 as being a fair value of the property."

The State of the Case was served upon the complainant-respondent after the opening day of the May, 1926, term of this Court. It was, therefore, impossible for the complainant-respondent to object to the State of the Case at the opening of this Term. Application, however, is being made to have this excerpt from the testimony corrected, as well as to have the State of the Case include an amendment of the Bill already referred to, set up in it. This excerpt is clearly erroneous. Mr. Simandl, in his later testimony, consistently said that the value fixed for the property was \$4000. not \$6000. The witnesses called by the complainant-respondent also uniformly testified that they heard the value of the property spoken of between Henry Smith and David Turkington, as being \$4000.

Mr. Simandl testified as set forth on page 23 of the State of the Case, as follows, relating to a conversation he had with Smith over the telephone:-

"\*\*\*\*I told him that his agreement had not stated what I wanted to know, and that was the amount of the mortgage. He said that is \$3200."

And on page 24, Mr. Simandl testified as follows:-

"Q. When Mr. Smith called you on the 'phone as you say, before he went South, did he tell you why the mortgage was to be \$3200?

A. He said they had figured up and that he owed Turkington \$3200." (This is incorrectly reported. The figure should be \$800.)

On page 25, the defendants' own counsel asked Mr. Simandl this question:

"If you already knew that the price was to be \$4000. can you account for that writing?"

This clearly shows that even the defendants' counsel at the hearing (not the counsel appearing in this Court for the appellant, there having been a substitution) took it that Mr. Simandl had said \$4000., and not \$6000.

Throughout this brief the testimony of witnesses called is quoted to the effect that the property was valued by the parties at \$4000. to which the Court is respectfully referred.

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then the complainant, in addition to the \$30.00 monthly payment, would also contribute the sum of \$30.00 per month toward the board and lodging of Smith.

On June 4, 1924, Henry Smith died, leaving him surviving Theodore Smith, a minor under the age of twenty-one years. Lillie Zuber was appointed administratrix of his estate and guardian of the aforesaid Theodore Smith.

Upon the failure of the last-mentioned parties to deliver to the complainant, at his request, a deed for the premises, a bill for specific performance of the contract was filed, which culminated in the decree appealed from. The appellant applied for a rehearing. Briefs were submitted and the application was denied.

The questions on this appeal are:

1. Whether the Court of Chancery was in error in decreeing specific performance as prayed for in complainant's bill, and more particularly:

A. Whether an oral contract for the sale of lands, accompanied by an entering into possession with the consent of the vendor, together with the making of improvements and payment of part of the purchase price by the vendee, will be decreed to be specifically performed at the suit of the vendee.

B. Whether the Court of Chancery was in error in finding that no written agreement of sale was contemplated.

C. Whether the Court below was in error in finding the facts not supported by the weight of the evidence.

The following are the contentions of the respondent on this appeal:

1. The equitable doctrine that an oral contract for the sale of lands accompanied

by a part performance admits of a decree for specific performance is properly applicable in this case.

2. No written agreement of sale was contemplated by the original parties.

3. The decree of the Court below is fully supported by the evidence.

#### POINT I.

The equitable doctrine that an oral contract for the sale of lands accompanied by a part performance admits of a decree of specific performance is properly applicable in this case.

In Pomeroy on Specific Performance of Contracts (1926), it is said on page 247:

“The foundation of the doctrine is fraud; not necessarily an antecedent fraud, consciously intended by the party in making the contract, but a fraud inhering in the consequence of thus setting up the statute. When a verbal contract has been made, and one party has knowingly aided or permitted the other to go on and do acts in part performance of the agreement, acts done in full reliance upon such agreement as a valid and binding contract, and which would not have been done without the agreement, and which are of such a nature as to change the relations of the parties, and to prevent a restoration to their former condition and an adequate compensation for the loss by a legal judgment for damages, then it would be a virtual fraud in the first party to interpose the statute of frauds as a bar to a completion of the contract, and thus to secure for himself all the benefits of the acts already done in part performance, while the other party would not only lose all advantage from the bargain, but would be left without adequate remedy for its failure or compensation for what he had done in pursuance of it. To prevent the success of such

a palpable fraud, equity interposes under these circumstances, and compels an entire completion of the contract by decreeing its specific execution."

This quotation is cited in *Niebert v. Baghurst*, 47 N. J. Equity 201.

In the recent case of *McCormick v. Grogan*, L. R. 4 H. L. 82, Lord Westbury said:

"The court of equity has, from a very early period, decided that even an act of parliament shall not be used as an instrument of fraud; and if, in the machinery of perpetrating a fraud, an act of parliament intervenes, the court of equity, it is true, does not set aside the act of parliament, but it fastens on the individual who gets a title (or right) under that act, and imposes upon him a personal obligation, because he applies the act as an instrument for accomplishing a fraud. In this way the court of equity has dealt with the statute of frauds."

This is the grand principle which underlies this as well as many other instances of equitable jurisdiction.

In this State, in the leading case of *Johnson v. Hubbell*, 10 N. J. Equity 332, Chancellor Williamson said:

"It is said, that this agreement was in parol, and is therefore contrary to the statute of frauds. But although this agreement was a mere parol one, if there was a part performance of it, of such a character as, upon the principles recognized and acted upon by this court, will take a parol agreement out of the statute, then there is nothing peculiar about an agreement of this kind to exclude it from the operation of those principles. If one party to a parol agreement has wholly or partially performed it on his part, so that its nonfulfilment by the other party is a fraud, the court will compel a performance."

In *Wharton v. Stoutenburg*, 35 N. J. Equity 266, Justice Depue, speaking for the Court of Errors and Appeals, said, on page 276:

“Delivery of possession by a vendor or lessor, accepted and acted upon by the vendee or lessee, is such an act or part performance by the former as to take the contract out of the statute of frauds, and to justify a decree of specific performance against the latter.” *Earl of Aylesford's Case*, 2 Stra. 783; *Bowers v. Cator*, 4 Ves. 91; *Harris v. Knickerbacker*, 5 Wend. 638; *Brown on Stat. of Frauds No. 471*; *Pomeroy on Cont. No. 118-124*.

The case of *Young v. Young*, 45 N. J. Equity, 27, was a deliverance of Chancellor McGill, the bill being for specific performance of an oral contract for the sale of lands, in which he said:

“While it is true that the contract concerns an interest in lands, and, within the terms of the statute of frauds, should be in writing, yet there has been, I think, such performance of it on the part of Jacob and his heir and widow, that equity will enforce it though it is merely by parol. It is an established doctrine of equity that where a verbal contract has been performed, in whole or in part, upon one side, so that he who has performed cannot be replaced in his former position, or adequately compensated for the injury he has suffered, in his behalf equity will decree the specific execution of the contract. The foundation of the doctrine upon which this jurisdiction rests is the prevention of a fraud upon him who performs. Wherever the doctrine has been applied, the elements of constructive fraud will be found to exist. When they are absent, equity will refuse to interfere.” *Pom. Cont. No. 104*; *2 Story Eq. Jur. No. 759, 761*; *Fry Spec. Perf. 174*; *Wallace v. Brown*, 2 Stock. 308; *Johnson v. Hubbell*, 2 Stock. 332; *Gilbert v. Trustees of East Newark Co.*, 1 Beas. 180;

Brewer *v.* Wilson, 2 C. E. Gr. 102; Green *v.* Richards, 8 C. E. Gr. 32,536; Dean *v.* Anderson, 7 Stew. Eq. 496.

Although the demurrer filed in this case was allowed, it was upon the ground of laches, and does not make the case any the less an authority for the proposition set forth above.

In *Niebert v. Baghurst*, 47 N. J. Equity 202, Vice-Chancellor Green said, on page 207:

“Equity proceeds on the ground that it would be a fraud for the vendor to allow the vendee to continue in possession and expend his money in improvements, so as to render it impossible for the parties to be restored to their original situations, confessedly on the faith of an agreement of sale, and try to avail himself of the statute of frauds to avoid the contract.” *Young v. Young*, 18 Stew. Eq. 27, 34; *Eyre v. Eyre*, 4 C. E. Gr. 102; *Green v. Richards*, 8 C. E. Gr. 32; *Brewer v. Wilson*, 2 C. E. Gr. 180, 185; *Pom. Cont. No. 104*; *Pom. Eq. Jur. No. 1409*.

In *Krah v. Wassmer*, 75 N. J. Equity 109, the bill was filed against Wassmer and Radcliffe to compel the specific performance of an alleged contract to convey lands. The so-called contract, a copy of which is given below, was signed by Wassmer, although the title to the lands in question was in Radcliffe. It was testified at the hearing that Wassmer and Radcliffe had some sort of a joint interest in a number of lots of land of which the one in question was one, although their titles were separate and distinct, and that Wassmer had authority from Radcliffe to make the contract in question. The bill does not state whether the agreement was in writing or not. The answer alleges that it was oral.

The agreement between the parties was made in September, 1907, at which time the vendee

paid \$50.00 on account of the purchase-money and took a receipt therefor which had been destroyed. On October 3, 1907, he paid \$750.00 more, making \$800.00 up to that time, and some time prior to October 19, 1907, he paid the further sum of \$202.00, these three payments aggregating the total amount of the purchase-money that was to be paid in cash. The land was subject to a mortgage held by a building and loan association on which the vendors were liable as bondsmen. Some time between the first and last payment of the purchase-money installments the vendee executed a new bond and mortgage in his own name to take the place of the ones previously executed by the vendors and held by the building and loan association, these being steps preliminary to the taking of the title. At the time the vendee made the payment of the \$750.00 installment of the purchase-money he received a receipt for it of which the following is a copy:

"Irvington, N. J., Oct. 3d, 1907

"Received from J. L. Krah the sum of eight hundred dollars on account of purchase price of Smith Street property, purchase price to be thirty-five hundred and fifty dollars, two hundred and two dollars to be paid on or before Oct. 19th, 1907. The balance to be paid by said J. L. Krah assuming and agreeing to pay a present Building and Loan mortgage now upon the above premises for twenty-five hundred and forty-eight dollars.

"John Wassmer."

In 1907, vendee, with the knowledge and consent of the vendors, took possession of the premises with his wife and family, and resided there for about a year when this suit was brought. The Court said, on page 114:

"I think that whether the complainant relies upon the receipt of October 3d, 1907, or

upon an oral contract of the character which must be inferred from the bill he has a valid contract which is enforceable in this court. The bill states the complainant's idea of the contract, and it turns out that he has completed the contract which he has set out by payment of the full consideration and was thereupon let into possession at the time of the payment. This, of itself, would give the complainant a right to a decree for a deed in accordance with the contract that was proved, whether it be an oral contract or the written one of October 3d, 1907. If the complainant is compelled to stand upon the oral contract I think he may refer to the receipt for the purpose of showing what the terms of the oral bargain were."

And on page 112, the following appears:

"The law in relation to contracts of this class has received a great deal of judicial attention in this State. In *Cramer v. Mooney*, 59 N. J. Eq. (14 Dick.) 164, it was held that a contract for sale of lands, though signed only by the vendor, would not be held to be unilateral in a case where the vendee had paid nine-tenths of the purchase-money and had tendered the balance thereof and had entered into possession of the lands. Vice-Chancellor Grey says: 'The defendant has not only paid to the vendor complainant the greater part of the purchase-money, but has actually entered into possession of the premises and tendered the balance of the agreed price and demanded a deed and the clearing of the title, and the complainant has accepted him as a purchaser and tendered him a deed, and now files his bill to enforce payment. These acts or part performance are sufficient to establish a contract between the complainant and defendant which would be enforced in equity even if entirely by parol.' Even if the case stood upon this so-called unilateral contract it ceased to be unilateral the very moment the vendee filed his bill for the specific performance of the contract.

Richards v. Green, 23 N. J. Eq. (8 C. E. Gr. 536). In that case Chief Justice Beasley, in the opinion in the Court of Errors and Appeals, says: 'But it will be observed that when such contracts come to be enforced in equity they cease to be unilateral, for upon filing the bill the party who was before unbound puts himself under all the obligations of the contract. By his own act he makes the contract mutual and the other party is enabled to enforce it. The consequence is that in every case that I can find where specific performance has been ordered a mutual remedy existed upon it at the time of the rendering of the decree.' "

A recent case is *D'Elissa v. D'Amato*, reported in 85 N. J. Equity 466. Vice-Chancellor Griffin said, in that case:

"The bill in this cause is filed against the widow, heirs-at-law and administratrix of Francesco D'Amato, for the specific performance of an oral agreement for the sale of lands entered into between said Francesco D'Amato in his lifetime, as vendor, and the complainant, as vendee, for the consideration of \$800.

The agreement was discussed on August 27, 1905, and the terms settled upon. On the following day the vendee paid the vendor \$100, and it was then and there agreed that the vendee might immediately enter into possession, and he so entered the next day, began filling in and grading the lands, fencing the same, and erecting buildings thereon, and has continued in possession ever since, without any claim for rent or other charge for use and occupation being asserted against him.

The balance of the purchase price was paid by two checks of \$300 each, dated March 22d and 23d, 1906, respectively, drawn by the complainant to the order of D'Amato, delivered to him and actually paid by the bank upon which they were drawn, and the de-

livery of a horse by the complainant to D'Amato at the agreed price of \$100.

The complainant from time to time asked D'Amato to give him a deed, but D'Amato explained, first, that he would do so when he discharged a mortgage covering the premises, and later, when about to discharge it and execute another which would cover other property, he said he would give the deed after cancelling the existing mortgage. Again, when asked for a deed, he said by mistake he had executed the new mortgage covering the premises in question and other property; and thus the matter rested until after D'Amato's death, on December 26, 1913.

The parties were close personal friends, and as D'Amato had his money and complainant had the land, evidently they considered that the mere delivery of the deed could wait until D'Amato procured a release of the mortgage.

The contract has been clearly, definitely and unequivocally proven, and, having been performed by the complainant, this court has power to decree specific performance, even though the contract be oral. *Wharton v. Stoutenburgh*, 35 N. J. Eq. 266; *Clement v. Young & McShea Amusement Co.*, 69 N. J. Eq. 347; 1 Pom. Eq. Jr. No. 103.

The defendants also claim that the decree should be in their favor because of the laches of the complainant in failing to obtain a deed or bring this suit during the lifetime of Francesco, who was familiar with the whole transaction. I do not agree with the defendants in this claim. The undisputed evidence, received without objection, clearly proves, first, full performance by the complainant; second, the entry into possession of the lands with the assent of Francesco; third, complainant asked repeatedly for a deed, and Francesco made excuses for not complying; fourth, the improvement of the lands by expenditures by the complainant to

an amount more than double the purchase price of the lands; fifth, the failure of Francesco to demand rent or other charge for the use and occupation of the premises; sixth, in fact, the utter abandonment of the premises to the complainant. All of this makes the complainant's right so clear that to apply the doctrine of laches would aid in the perpetration of a fraud."

This decision was affirmed by the Court of Errors and Appeals in 86 N. J. Equity 244.

In *Brown v. Brown*, 33 N. J. Equity 650, a decision of the Court of Errors and Appeals, it was said, on page 660:

"A brief and comprehensive statement of the conditions under which courts of equity enforce such contracts is found in *Wright v. Puchett*, 22 Gratt. 374. '1. The Parol agreement relied on must be certain and definite in its terms. 2. The acts proved in part performance must refer to, result from, or be made in pursuance of the agreement proved. 3. The agreement must have been so far executed that a refusal of full execution would operate as a fraud upon the party, and place him in a situation which does not lie in compensation. When these three things concur, a court of equity may decree specific execution. When they do not, it will turn the party over to seek compensation in damages in a court of law.'"

It would appear from these authorities that the doctrine is deeply imbedded in the jurisprudence of our Court of Chancery. It remains to consider whether it is applicable to the set of facts at hand.

Looking at the conditions set forth in the quotation from *Brown v. Brown*, it appears conclusively, it is submitted, that each one of them is fulfilled in this case. The parol agreement is certain and definite. The testimony of Mr.

Simandl, to be found on page 18 of the State of the Case, is as follows:

“He then told me that he had been ill and that Dave, as he called Turkington, had been very good to him; he said that he had had early some difficulty with his wife and that she had divorced him, and from what I understood, and he told me, she was trying to bring contempt proceedings against him for failure to pay alimony. He expressed himself as not having seen very much of his son, but that he felt that it was his duty to leave something to his son. He said that Turkington had advanced some moneys to meet these alimony payments that he had agreed to—I think it was twenty-five dollars a month—I am not sure of the amount; he said that Turkington had kept him and treated him almost like a brother, and that he wanted Turkington to have this property, and he told me that they had agreed between them that Turkington was to get this property from him; he wanted me to draw a deed in this fashion, that Turkington was to pay \$40 a month for the balance of his life, and keep him for the balance of his life, and he wanted me to have that drawn up in a regular deed. After he had expressed himself in that light I turned around to Turkington and I said, ‘Turkington, if you die tomorrow and Smith lives, do you want to saddle your wife with this thing? Do you know what you are doing?’ Turkington said, ‘I do.’ I said, ‘Now, look here, Smith, suppose that you leave this office, is it your intention that if you get hit by a trolley car and you die tomorrow, that this property goes over to Turkington?’ Well, he kind of thought for a moment, and he said, ‘Well, is there any other way that you can do it?’ In other words, he apparently—”

Mr. Schilling: I object.

The Court: Just tell what he said.

“A I then asked him how much the property was worth; he told me it was assessed for around \$3,000. I said, ‘Why don’t you men agree on a price and then have a mortgage given back for the balance, and in that way it will be a lien on the property, and if Turkington dies, his heirs will have to pay off the lien or else the property will go back to your estate, and Mrs. Turkington, if she dies, will know what she has to have as a lien on that property.’ There was some discussion between them then as to the value—the exact words I cannot remember, but anyway they arrived at the amount of \$6,000 as being a fair value of the property. Then Turkington had stated that Smith owed him some money, and I think Turkington said it was about \$500, and Smith said, ‘No, I think it is more than that.’ There was some question as to the amount of money that Smith owed to Turkington. I said this, ‘Why don’t you men get together and find out how much Smith owes Turkington, and when you agree upon that amount, credit Turkington on account of the purchase price, and I will draw a mortgage for the balance, and draw an agreement to keep him for life, bed and board.’ They agreed to that, and they left leaving behind these deeds, this certified copy of final decree between him and his wife, and that agreement. He asked me one other question, whether he had to leave a will; I asked him whether he had any other heirs than his son, and he said no, and I said that property would pass to his son at his death, without a will. That is all the conversation that we had.

Q Then before these people went away did they make any appointment with you to return at any time? A Yes, that was left as an appointment, that they were to come back.”

On page 22 of the State of the Case, Mr. Simandl testified as follows concerning the prep-

aration of the mortgage referred to in his testimony quoted just above:

“Q After you received this memorandum did you prepare any agreement? A No, sir.

Q Did you prepare any deed? A No, sir.

Q Any mortgage? A No, sir.

Q Can you give us any reason for your failure to do so? A One of the reasons was that when I first got this letter it didn't contain the information that I wanted.

Q What was that? A That was the amount of money of the mortgage, and subsequently, I think it was in the middle of January, 1924, just before Mr. Smith was going away, he called me on the telephone.

Q Who did? A Mr. Smith; told me who he was told me that he was Mr. Smith of Westfield.

Q Did you recognize his voice? A I did, and he started to—wanted to know why he hadn't had his papers drawn up, and I told him that his agreement had not stated what I wanted to know, and that was the amount of the mortgage. He said that is \$3,200. He told me that he was going away in a few days, and he wanted to have the thing attended to, and then I was notified that he had gone away.”

It would appear from this that if there was any uncertainty in the contract, it was certainly cleared up.

However, it is not seen how it can be said that the contract was initially uncertain, in view of the fact that the parties had *agreed* before they came to Mr. Simandl's office (according to the testimony of the latter quoted above) and at his suggestion adopted an un contemplated *plan* of *concluding* their agreement for their mutual advantage.

There is no doubt that the acts relied upon by the respondent as a part performance are referable to the oral contract, and the testimony of the various witnesses discloses that the possession of Turkington and his expenditures for improvements on the premises were in pursuance of the agreement.

On page 30 of the State of the Case the following appears from the testimony of David Turkington:

“Q Mr. Turkington, after that letter was written, did you add anything with respect to the property at 205 and 207 Central avenue, Westfield? A Yes, sir.

Q What did you do? A Started making general repairs.

Q Can you detail to us what repairs were made and when you made them? A A leaky roof; I had to put a stoop on the back, fix up the back stoop.

Q Who did that for you? A The stoop in the back I believe was fixed by Mr. Hoppel.

Q How much did you pay him? A I don't recall the amount, one hundred and some dollars his work was, altogether.

Q Who else did you have? A Mr. Ziegler, mason work.

Q How much did you pay him? A I believe around \$35.

Q When did you pay it to him? A In January.

Q Did you have anybody else? A Mr. Tice did some electric work.

Q How much did you pay him? A I believe his bill amounted to around the same; I didn't keep track of it.

Q When was that done? A Mr. Tice done a lot in the cellar at that time and a lot in the yard.

Q When? A I believe the best I remember, it was in and around January or February, 1924.

Q Did anybody else, other than you, make or pay for any repairs to the house during 1924? A No, sir.

Q Prior to that time had you made any repairs to that house? A Yes, sir, since May, 1923.

Q Did Smith, the owner, pay any of those bills? A He wasn't the owner at that time.

Q The owner of record; did he order any of this work himself? A No, sir.

Q Who ordered it? A I did.

Q Why did you order it and why did you pay for it?

Mr. Schilling: I object.

The Court: I don't know what the answer is going to be.

Mr. Unger: His motive in advancing money should be known to the Court.

The Court: There can be no objection to the answer, unless the answer represents some transaction between the parties. I will admit it for the present. If the answer is objectionable, I will strike it out.

Q The question is why did you order these repairs and why did you pay these bills? A Because I believed I owned it.

The Court: That is admissible, I think.

Q Did you pay any taxes on this property? A Yes.

Q For what year? A I believe 1923 and 1924.

Q I show you a paid tax bill and your check accompanying the same, and ask you if this is what you referred to when you said you paid the 1924 taxes? A Yes, sir.

Q This is your check receipt? A Yes.

Mr. Unger: I offer it in evidence.

(Marked Exhibit C. 6.)

Q Your check appears to cover half of the taxes for 1924; did you pay the other half? A No, sir, not yet."

Charles E. Houston, a wholesale grocery salesman, testified as set forth on page 46 of the State of the Case:

“Q Do you know whether or not Mr. Smith told you that he had ceased to have anything to do with the store and someone else was the owner of it? A In the general course of the conversation I criticised Mr. Smith’s buying.

The Court: To whom, to Mr. Smith?

The Witness: Yes.

The Court: Was that after he came back from Florida?

The Witness: Yes.

Q What did he say? A I understood he was manager of the store, from Turkington, but I criticised Smith’s buying in such small quantities, and he felt hurt about it, and he turned to me and said, ‘Well, he is boss, talk to him.’

Q Whom did he turn to? A To Turkington; he pointed to Turkington and told me that Turkington was the boss.”

Charles Squier testified on page 52 concerning a conversation with Smith, had in the fall of 1923:

“Q How did you come to talk about it?

A I think something was said about—I said, ‘You are spending quite some money on the property.’ He said, ‘No, it is not me; it is Dave,’ and he said, ‘Why shouldn’t he spend it, it is his property; I have turned it over to him.’”

Andrew Carney, an official of the Town of Westfield, testified as set forth on page 57 of the State of the Case:

“The Court: You were just asked what he said to you, the exact words.

The Witness: He said, ‘I haven’t anything to do with that any more; you will have to see Turkington; he is the owner.’

That was his exact words. 'I haven't anything to do with that any more.'

Q Did he say that Turkington is the owner, or 'I am selling it to Turkington'? A No, he said, 'Turkington is the owner.'

Q And that, to the best of your recollection, was in the latter part of November or beginning of December? A Yes."

Charles Jensen, sworn for the complainant, testified (p. 60):

"Q Did you have any talk about that time with Mr. Smith about why Turkington was doing these repairs? A Different times.

Q With Mr. Smith? A Yes.

Q What did he say to pay? A I used to say why he didn't build up the front; I wanted to build out the front.

Q Whom did you say that to? A Mr. Smith, and he said, 'I have nothing to do with the property; you speak to Mr. Turkington, because that is the man that have to do all the repairing what will be done.'"

Finally, the following appears from the conclusions of the Court, as set forth on page 95 of the State of the Case:

"In addition to this writing, which, while it does not contain all of the terms of the alleged contract, does contain sufficient to indicate that there was at least in contemplation at that time a definite contract of sale of the property, but if any further evidence were required of that fact, it is afforded by the testimony of Mr. Simandl, who interviewed both the complainant and the decedent in his office some time in the fall of 1923, and after receipt of this letter of January 8, which is addressed to him by these parties, he talked with Mr. Smith over the telephone, and there the statements in the letter were confirmed. Some additional information was given to Mr. Simandl, which in my judgment was sufficient to have supplied the incompleteness of the terms of

the contract as they were contained in this letter. In other words, there is no doubt in my mind but that after the conversation with Mr. Smith over the telephone, Mr. Simandl was then in possession of sufficient facts to have prepared an agreement which would have been binding on the parties if such an agreement had been contemplated.”

An examination of the record will show that the respondent was limited on the hearing to the strictest kind of proof. It is also to be noted that there was testimony that Turkington paid on account of the purchase price \$600.00 in the form of an allowance by Smith of that sum already paid on account of the purchase price. The Court below invoked the statute to bar all attempts by the respondent to show the remaining payments.

The third requisite enumerated in the quotation from *Brown v. Brown*, above, makes necessary a showing that a refusal of full execution of the agreement would operate as a fraud. An examination of the record will show that the money expended by the respondent for repairs, alterations, taxes, etc., in connection with the premises was considerable. This, taken together with possession entered into with reliance upon the oral contract, the conducting of the grocery business on the premises, and boarding, feeding and taking care of Henry Smith, together with the consideration that the situation has changed to the extent that the respondent, if denied relief, must now look, if to anyone, to the divorced wife and the infant heir of Smith for any relief, amply satisfy the requirements.

**POINT II.**

**No written agreement of sale was contemplated by the original parties.**

In connection with this phase of the argument it may be well to note one or two excerpts from the testimony taken at the hearing before the Vice-Chancellor. On page 16 of the State of the Case, Mr. Turkington said:

“Q Tell what he said to you about this property. A He suggested it being drawn up in a mortgage form.

Q Draw up what in a mortgage form? A The agreement that we had already come to.

Q Did Mr. Simandl tell you how he thought it ought to be done? A Yes.”

On page 19, Mr. Simandl, on his direct examination, testified:

“He said that Turkington had kept him and treated him almost like a brother, and that he wanted Turkington to have this property, and he told me that they had agreed between them that Turkington was to get this property from him.”

Louis Gattiato, a notary and real estate broker, testified as follows (p. 54, S. C.):

“Q What did Mr. Smith say to you? A He told me that Mr. Smith was very anxious to have a deed drawn.

Q To whom? A To Turkington.

Q Did he say that? A Yes, he did.”

On his cross examination he testified:

“Q You say you think this was in the fall of 1923? A Yes.”

Under Point I, considered above, testimony of several witnesses was quoted to the effect that Smith had, on several occasions, referred to Turkington as the owner of the property. These occurrences took place before the letter set forth on page 21 of the State of the Case was ever written.

An examination of these excerpts from the testimony, together with the explanation of Mr. Simandl, page 25, State of the Case:

“The writer of this letter is apparently using terms that he didn't understand about; the fact is, that the sale purchase price had been agreed upon, but the amount of the mortgage \$3,200, had not been agreed upon in the office, because they didn't know how much was due from Smith to Turkington, and that was the amount that they were to fix and let me know, so that I could draw a mortgage. The question of the legal buy was that he wanted a dollar and other valuable consideration placed in the deed,”

clearly shows that no written contract was contemplated.

Vice-Chancellor Berry, in his conclusions, as reported on page 95 of the State of the Case, said:

“In addition to this writing, which, while it does not contain all of the terms of the alleged contract, does contain sufficient to indicate that there was at least in contemplation at that time a definite contract of sale of the property, but if any further evidence were required of that fact, it is afforded by the testimony of Mr. Simandl, who interviewed both the complainant and the decedent in his office some time in the fall of 1923, and after receipt of this letter of January 8, which is addressed to him by these parties, he talked with Mr. Smith over the telephone, and there the statements in the letter were confirmed. Some additional information was given to Mr. Simandl, which in my judgment was sufficient to have supplied the incompleteness of the terms of the contract as they were contained in this letter. In other words, there is no doubt in my mind that after the conversation with Mr. Smith over the telephone, Mr. Simandl was then in possession of sufficient facts to

have prepared an agreement which would have been binding on the parties, if such an agreement had been contemplated.”

It is a cardinal principle, that a reviewing Court, not having the opportunity of seeing the witnesses, of hearing the intonations of their voices and marking their general demeanor, will, if there is any evidence to sustain the finding of the lower Court, uphold the conclusions of the Vice-Chancellor.

Can it be said that the decree in this case is not warranted by the evidence? It is submitted that upon a review of the entire record such a result cannot logically be arrived at.

The appellant rests largely on cases of the type of *Betcher v. Knapp*, 94 N. J. Equity 434; *Schneider v. Crawford*, 4 N. J. A. R. 369, and *Water Commission v. Brown*, 32 N. J. Law 504. These cases, however, are very distinguishable from the present controversy. In all of them and others of their nature, relied upon by the appellant, the Court found, as a matter of fact, that a writing was contemplated, and denies specific performance of an informal memorandum, which was not meant to be a complete agreement.

In this case, however, as noted above, the Vice-Chancellor specifically found that *no written agreement was ever contemplated*.

Then, again, even considering a case where a written agreement is within the contemplation of the parties, still, this is merely *some* evidence, as stated by Justice Depue in *Wharton v. Stoutenburgh*, *supra*:

“The fact that parties negotiating a contract, contemplated that a formal agreement should be prepared and signed, is some evi-

dence that they did not intend to bind themselves until the agreement was reduced to writing and signed. But, nevertheless, it is always a question of fact, depending upon the circumstances of the particular case, whether the parties had not completed their negotiations and concluded a contract definite and complete in all its terms, which they intended should be binding, and which, for greater certainty, or to answer some requirement of the law, they designed to have expressed in some formal written agreement."

*Wharton v. Stoutenburgh* is cited with approval in *Korflage v. Kahrs*, 94 E. 440, where Justice Bergen, speaking for the Court of Errors and Appeals, said:

"And in the same case Mr. Justice Depue, speaking for this court, said that the fact that a written agreement was in contemplation before the business was to be concluded was cognate, but not conclusive, evidence that the parties did not intend to bind themselves until the agreement was reduced to writing."

Again it appears from the conclusions of the Vice-Chancellor, as set forth on page 94 of the State of the Case:

"The defense of the statute of frauds does not, in my judgment, avail the defendant, because there is a writing which has been offered in evidence, and which, in my judgment, is sufficient to charge the decedent and to satisfy the requirements of the statute of frauds. That writing is a letter which was written by Mr. Turkington, the complainant, under date of January 8, 1924, and is signed by both Mr. Turkington and Mr. Smith."

However this may be, it is the principal contention of the respondent that no written agreement was ever contemplated.

## POINT III.

The decree of the court below is fully supported by the evidence.

The respondent has already adverted to the salutary rule followed by courts of review that findings of fact of a Court of Chancery, so long as they are not palpably unwarranted by the evidence, will be sustained for the reason that the reviewing court has before it nothing but a cold printed page, while in the court of first instance there are in addition the mannerisms and general demeanor of the witnesses, before the Court, to affect their credibility and the weight to be given their testimony.

In *Riddle v. Clabby*, 59 Equity 573, Chief Justice Magee, speaking for the Court of Errors and Appeals, said, on page 583:

“The vice-chancellor, however, conceded that the agreement by Clabby to convey the undivided half of the land to Riddle, could, under the circumstances, be established by parol evidence and was not within the statute of frauds.

I deem it unnecessary to pronounce upon the correctness of this view, for, assuming it to be correct, the parol evidence adduced was held by the vice-chancellor to be insufficient to make out such an agreement, and as the evidence was extremely contradictory, and as the decision thereon must have depended upon the credit given to the witnesses, I feel unable to say that the vice-chancellor who saw and heard the witnesses was wrong in his conclusion.”

Here we have a situation where this Court upheld the finding of the Vice-Chancellor in *denying* specific performance, because there was insufficient evidence by parol to make out the agreement. There is no reason why it should not, in a case where the Vice-Chancellor has

found that there *is* sufficient evidence to establish an agreement, also uphold the findings of the lower court.

Again, in *Cartan v. Phelps*, 91 Equity 312, Justice Trenchard, speaking for this Court, said:

“On an appeal from a decree from the Court of Chancery great weight is given to a finding upon a question of fact, because the Vice-Chancellor, who hears the case, in the court below and sees the witnesses and hears them testify, has better opportunities to judge their credibility than the reviewing court. But that reason does not obtain with full force in the present case because the testimony at the second hearing was taken before a master and certified to the Vice-Chancellor. However, the rule giving great weight in the appellate court to the Vice-Chancellor’s finding on a question of fact imposes no restraint on the power of the former to ascertain by full investigation and analysis of the evidence what the facts are, and whether the general finding is consistent herewith.”

This, it is submitted, is a complete statement of the rule, and in the present controversy, if the Court, following the quotation above, gives “great weight” to a finding upon the question of fact, and at the same time ascertains, “by full investigation and analysis of the evidence, what the facts are and whether the general finding is consistent therewith,” the conclusion will at once become manifest that the decree below was fully supported by the evidence.

Referring the Court again to the particular excerpts from the testimony quoted above in this brief, as well as to the vigorous cross examination to which the witnesses were subjected, it is submitted that it cannot, with propriety, be said that the finding of the Court of Chancery was against the weight of the evidence.

### Summary.

It will thus be seen that the respondent has made out a case which falls within a category of equity jurisprudence which is much exercised and well established; and that all of the requirements for granting relief in that class of cases are completely satisfied by testimony, subjected to a rigorous cross examination.

The contract, specific performance of which was sought, was completely and definitely proved. Performance and possession, referable to that contract, have been made out in unequivocal manner. It requires no argument to show that a refusal of full execution of the agreement would now operate as a fraud upon the respondent.

It is evident that no written agreement of sale was contemplated by the parties. The relationship which existed between them, the many statements of Smith that the respondent was the owner of the premises, and the testimony of Mr. Simandl, all converge to the single result that no written agreement of sale was contemplated. The Court as already adverted to, kept the respondent to the strictest kind of proof. However, a tremendous amount of testimony, bearing directly on the heart of the case, was adduced.

Finally, it is obvious that upon a review of the entire record, it cannot be truly said that there was no evidence to warrant the decree of the Court of Chancery.

Respectfully submitted,

MILTON M. UNGER,  
Solicitor for and of Counsel  
with Complainant-Respondent.