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Notice of Appeal.

IN CHANCERY OF NEW JERSEY.

Between ERMINIA SIMEONE and FRANK SIMEONE, Complainants, and DOMINICK VARLARO and CATERINA VARLARO, Defendants.	On Bill &c.

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The defendants Dominick Varlaro and Caterina Varlaro hereby appeal from the final decree made in the above entitled cause on the 29th day of July, 1929, by the Chancellor on the advice of Vice-Chancellor John J. Fallon, and from the whole and every part thereof to the Court of Errors and Appeals in the Last Resort in All Causes.

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Dated August 7th, 1929.

CHAS. STENBERG,
Solicitor of the Defendant.

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

NICHOLAS S. SCHLOEDER,
Of Counsel with the Defendant.

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Decree for Reformation.

IN CHANCERY OF NEW JERSEY.
(64-120)

Between ERMINIA SIMEONE and FRANK SIMEONE, Complainants, and DOMINICK VARLARO and CATERINA VARLARO, Defendants.	On Bill, Etc.

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This cause coming on to be heard and debated in the presence of N. J. Cafarelli, of counsel with the complainants, and Charles Stenberg, of counsel with the defendants, whereupon and upon reading the pleadings and proofs and having duly considered the same and the arguments of counsel thereon, and it appearing that a certain deed in the pleadings and proofs in this cause mentioned, made and executed by the complainants, Erminia Simeone and Frank Simeone, to the defendants, Dominick Varlaro and Caterina Varlaro, was in part made under mistake and misapprehension of its legal effect; that the agreement between the parties to the said deed was that the grantors in said deed actually did intend to and agreed to convey to the defendants herein, the following described property:

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> "ALL that certain lot, tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the Township of North Bergen, in the County of Hudson and State of New Jersey, which on a certain

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> map entitled, "Map of property belonging to the Estate of Hugh N. Camp, in the Township of North Bergen, Hudson County, New Jersey, County Block No. 2305, made by Thomas H. McCann, Civil Engineer, March, 1900, and filed in the office of the Register of the County of Hudson, New Jersey, on October 14, 1901, as Map No. 1240, is known and designated by the lot number Three Hundred and Ninety-four (394) in Block number Fifteen (15), fronting on Hillside Place, as shown on said Map." 10

and also the right of easement for the purpose of ingress and egress over the following described property:

> "BEGINNING at the southwest corner of Lot No. 27 on map of Austin and Kuhlmann, Township of North Bergen, Hudson County, N. J.; thence running northeasterly along the easterly side of Main Street 3′2″ to a point; thence southerly 3′4″ to the southerly line of Lot No. 27; thence westerly along the southerly line of Lot No. 27 3′10″ to the easterly line of Main Street, the point or place of beginning. A Column space 10″ x 10″ to be allowed at the southwest corner of said lot No. 27 for the purpose of ingress and egress; the above described plot to have a clear height of seven feet above the sidewalk at the northeasterly corner." 20 30

And it further appearing that said deed was not drawn according to the intention and agreement of the parties to it and that through omission and mistake the said deed contained a clause relating to the easement hereinbefore mentioned, reading as follows: 40

"A plot of ground on the southwest corner of lot number twenty-seven (27), as shown on map of Austin & Kuhlmann, now owned by the said parties of the first part, said plot being of the size and dimensions for the purpose building of a stairway, said stairway to be built by the party of the first part hereto at
10 their expense on or before the 15th day of December, 1925, said stairway to be not less than two (2) feet and six (6) inches in width, it is the intention of the said parties of the first part to hereby convey the said part of lot number Twenty-seven (27) on said map of Austin and Kuhlmann to the said parties of the second part hereto for the purpose of giving the said parties of the second part free access to Main
20 Street from the rear of the above described premises, and to give said parties of the second part title to that part of said lot number twenty-seven (27) on map of Austin & Kuhlmann, on which stairway is to be built for their own use forever."

And the Chancellor being of opinion that in accordance with the intention and agreement of the parties to said deed, the said clause relating to the
30 right of easement and of ingress and egress should have read as follows:

"Beginning at the southwest corner of Lot No. 27 on map of Austin and Kuhlmann, Township of North Bergen, Hudson County, N. J.; thence running northeasterly along the easterly side of Main Street 3′2″ to a point; thence southerly 3′4″ to the southerly line of Lot No. 27; thence westerly along the southerly line of
40 Lot No. 27 3′10″ to the easterly line of Main

Street, the point or place of beginning. A column space 10″ x 10″ to be allowed at the southwest corner of said lot No. 27 for the purpose of ingress and egress; the above described plot to have a clear height of seven feet above the sidewalk at the northeasterly corner."

It is on this day of July, 1929, on motion of N. J. Cafarelli, of counsel with complainants, ORDERED AND DECREED that the said deed, dated March 29th, 1924, and recorded on March 31st, 1924, in the office of the Register of the County of Hudson, in Book 1512 of Deeds for said County, page 546, etc., be and it is hereby so corrected and reformed, that the right of easement and of ingress and egress clause therein mentioned, as hereinbefore set forth, to read as follows:

"BEGINNING at the southwest corner of Lot No. 27 on map of Austin and Kuhlmann, Township of North Bergen, Hudson County, N. J.; thence running northeasterly along the easterly side of Main Street 3′2″ to a point; thence southerly 3′4″ to the southerly line of Lot No. 27; thence westerly along the southerly line of Lot No. 27 3′10″ to the easterly line of Main Street, the point or place of beginning. A column space 10″ x 10″ to be allowed at the southwest corner of said lot No. 27 for the purpose of ingress and egress; the above described plot to have a clear height of seven feet above the sidewalk at the northeasterly corner."

And it is further ORDERED that defendants pay to complainants their costs to be taxed, including a counsel fee of $, to be paid to the solicitor of complainants.

Petition.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between ERMINIA SIMEONE and FRANK SIMEONE, Complainants-Appellees, and DOMINICK VARLARO and CATERINA VARLARO, Defendants-Appellants.	On Bill &c. On Appeal from the Court of Chancery.

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TO THE HONORABLE COURT OF ERRORS AND APPEALS IN THE LAST RESORT IN ALL CAUSES:

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The petition of Dominick Varlaro and Caterina Varlaro, the appellants in the above entitled cause, respectfully shows that:

1. Petitioners find themselves aggrieved by a final decree made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date the 29th day of July, 1929, in a certain cause in the said Court of Chancery, wherein the said Erminia Simeone and Frank Simeone were complainants and the said Dominick Varlaro and Caterina Valaro were the defendants in this respect, to wit:

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That the said decree adjudges that the clause in a certain deed, recited in said decree relating to a certain right of way or easement, which deed was recorded in Book 1512 Page 546 of Deeds and which reads as follows:

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"A plot of ground on the southwest corner of lot number twenty-seven (27) as shown on map of Austin and Kuhlmann, now owned by the said parties of the first part, said plot being of the size and dimensions for the purpose of building a stairway, said stairway to be built by the party of the first part hereto at their expense on or before the 15th day of December, 1925, said stairway to be not less than two (2) feet and six (6) inches in width; it is the intention of the said parties of the first part to hereby convey the said part of lot number twenty-seven (27) on said map of Austin and Kuhlmann to the said parties of the second part hereto for the purpose of giving the said parties of the second part free access to Main Street from the rear of the above described premises, and to give said parties of the second part title to that part of said lot number twenty-seven (27) on map of Austin & Kuhlmann, on which stairway is to be built for their own use and benefit."

Be reformed by substituting for the clause last mentioned, a clause to read as follows:

"BEGINNING at the southwest corner of Lot No. 27 on map of Austin and Kuhlmann, Township of North Bergen, Hudson County, N. J.; thence running northeasterly along the easterly side of Main Street 3′2″ to a point; thence southerly 3′4″ to the southerly line of Lot No. 27; thence westerly along the southerly line of Lot No. 27 3′ 10″ to the easterly line of Main Street, the point or place of beginning. A column space 10″x10″ to be allowed at the southwest corner of said lot No. 27 for the pur-

pose of ingress and egress; the above described plot to have a clear height of seven feet above the sidewalk at the northeasterly corner."

and said decree further adjudges that the complainants-appellees shall be held and regarded as having given defendants-appellants a right of easement and
10 ingress over the property above described and that the decree further adjudges and orders that the defendants, Dominick Varlaro and Caterina Varlaro be enjoined and restrained from further prosecution in the Supreme Court of a certain suit against the complainants-appellees for an ejectment instituted on April 13, 1928,

And petitioner appeals from the decree of the Chancellor which decree as aforesaid, upon the
20 ground that the same is erroneous in that,

1. The Court of Chancery had no jurisdiction over the parties and subject matter in said decree mentioned.

2. The proofs produced at the hearing of said cause do not support the allegations of the complainants' Bill of Complaint.

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3. The Court denied the defendants-appellants' motion to dismiss the Bill of Complaint.

4. The proofs adduced by the complainants are not sufficient to justify the reformation of the deed delivered, accepted, and acted upon, on the ground that it did not correctly express the agreement made by the parties.

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5. The complainants' proof indicated that the mistake, if any, in this cause was unilateral and therefore not the subject of reformation.

6. The real question involved in the ejectment suit which was restrained, is peculiarly adapted for decision in the court of law.

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7. The said decree is at variance with the pleadings and proof in said cause.

Petitioner therefore prays that the said decree of the said Chancellor may be wholley reversed, set aside and for nothing holden, and that the petitioner may have such other relief in the premises as to this Honorable Court may be proper.

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NICHOLAS S. SCHLOEDER,
Solicitor for and of Counsel
with Defendants-Appellants.

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Answer to Petition of Appeal.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between
ERMINIA SIMEONE and FRANK SIMEONE,
Complainants-Appellees,

and

DOMINICK VARLARO and CATERINA VARLARO,
Defendants-Appellants.

On Bill, Etc.

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The answer of Erminia Simeone and Frank Simeone the above named appellees to the petition of the above named appellants.

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These appellees, not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereto, nevertheless, say and admit that a decree was on the 29th day of July, 1929, made and entered in the Court of Chancery, and in the cause for that purpose mentioned in the said petition, as is therein stated; but as to the substance and form thereof, these appellees pray to refer thereto when the same shall be produced.

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And these appellees are advised and believe that the said decree is agreeable to equity, and they pray that the same may be affirmed, with costs to be adjudged to these appellees.

N. J. CAFARELLI,
Solicitor for and Of Counsel
with Complainants-Appellees.

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Amended Bill of Complaint.

IN CHANCERY OF NEW JERSEY.

To His Honor EDWIN ROBERT WALKER,
Chancellor of the State of New Jersey:

The complainants, Erminia Simeone and Frank Simeone, of the Township of North Bergen, Hudson County, New Jersey, by their amended bill of complaint respectfully show that: 10

1. On March 29th, 1924, complainants sold to defendants, Dominick Varlaro and Caterina Varlaro, the following described lands and premises:

> "ALL that lot, tract or parcel of land and premises hereinafter particularly described, situate, lying and being in the Township of North Bergen, In the County of Hudson and State of New Jersey, which on a certain map entitled Map of property belonging to the Estate of Hugh N. Camp, in the Township of North Bergen, Hudson County, New Jersey, County Block No. 2305, made by Thomas H. McCann, Civil Engineer, March 1900, and filed in the office of the Register of the County of Hudson, New Jersey, on October 14th, 1901, as Map No. 1240, is known and designated by the lot number three hundred and ninety-four (394) in Block number fifteen (15) fronting on Hillside Place, as shown on said map."

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2. On or about February 9th, 1924, complainants agreed to sell defendants the property described in Paragraph One of this complaint and in addition thereto complainants agreed to give defendants a right of ingress and egress over the southwesterly corner of a certain lot No. 27, owned by the com- 40

plainants, which fronted on Main Street, North Bergen, New Jersey, the strip of property over which complainants agreed to give defendants right of easement aforesaid being described as follows:

"Beginning at the southwest corner of Lot No. 27 on map of Austin & Kuhlmann, Township of North Bergen, Hudson County, N. J.; thence running northeasterly along the easterly side of Main Street 3′ 2″ to a point; thence southerly 3′ 4″ to the southerly line of Lot No. 27; thence westerly along the southerly line of Lot No. 27 3′ 10″ to the easterly line of Main Street, the point or place of beginning. A column space 10″ x 10″ to be allowed at the southwest corner of said Lot No. 27 for the purpose of ingress and egress; the above described plot to have a clear height of seven feet above the sidewalk at the northeasterly corner."

3. On February 16th, 1924, after complainants and defendants agreed upon the right of easement described in the Second Paragraph hereof, went to the office of a Commissioner of Deeds, who having been instructed by the complainants and defendant to prepare contract for the purpose and sale of the property mentioned in Paragraph One herein and to insert in said contract a right of easement as described in Paragraph Two herein, did by mistake, and contrary to the intentions of the parties thereto, insert in said contract a clause regarding said right of easement, reading as follows:

"It is further agreed to by the parties hereto, that they the said parties of the first part will open up an entrance in the rear of the within

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described premises onto Main Street, said entrance to also contain a stairway to be built on the rear of lot number twenty-seven (27) now owned by the parties of the first part, said entrance and stairway to be built at the expense of the said parties of the first part hereto, to be not less than two feet and six inches in width, and to be built at the expiration of a certain lease on the property in rear of No. 649 Main Street said lease to expire on the first day of November, 1925, and the said parties of the first part hereto agree to make entrance and stairway within one month after the expiration of said lease."

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4. On March 29th, 1924, complainants and defendants called at the office of the said scrivener to close title in accordance with the agreement made by them and the complainants did execute a deed prepared by the said scrivener, which deed instead of setting forth a clause regarding said right of easement described in Paragraph Two herein, in accordance with the agreement and intention of the parties thereto, did, inadvertently and without the knowledge of either complainants or defendants, set forth a clause in said Deed reading as follows:

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"A plot of ground on the southwest corner of lot number twenty-seven (27) as shown on map of Austin & Kuhlmann, now owned by the said parties of the first part, said plot being of the size and dimensions for the purpose of building a stairway, said stairway to be built by the party of the first part hereto at their expense on or before the 15th day of December, 1925, said stairway to be not less than two (2) feet and six (6) inches in width; it is the intention

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of the said parties of the first part to hereby convey the said part of lot number twenty-seven (27) on said map of Austin & Kuhlmann to the said parties of the second part hereto for the purpose of giving the said parties of the second part free excess to Main Street from the rear of the above described premises, and
10 to give said parties of the second part title to that part of said lot number twenty-seven (27) on map of Austin & Kuhlmann, on which stairway is to be built for their own use forever."

WHEREAS right of easement aforesaid should have been described as set forth in Paragraph Two of this Complaint.

20 5. Complainants when they signed and executed said contract and said Deed with the defendants, not being able to read and understand the English language and being unaware of the error contained in said contract and said deed regarding said right of easement and being unaware of the mistake and error made by the said scrivener in the clause relating to the said right of easement, did execute said contract and deed and complainants were first informed of the mistake and error above mentioned
30 when a description of an alleged conveyance of a strip of property on Lot No. 27, which also belonged to the complainants, was delivered by Charles Stenberg, Attorney for the Defendants, to the Attorney for these complainants, the former stating to the latter that said description was contained in the Deed executed by the complainants, which description reads as set forth in Paragraph 4 herein.

6. On April 13th, 1927, defendant instituted suit
40 against the complainants in the New Jersey

Supreme Court in ejectment, alleging right to possession over a strip of property described as follows:

> "BEGINNING at a point in the southerly side or line of Main Street where the same is intersected by the northerly line of Lot No. 394, in Block 139 Assessment Map of the Township of North Bergen; running thence (1) easterly and along the northerly line of Lot No. 394, in Block No. 139, as aforementioned, eight and fifty one-hundredths (8.50) feet; running thence (2) northerly and at right angles to the last mentioned course, two and fifty one-hundredths (2.50) feet to a point; running thence (3) westerly and parallel to the first course to a point in the southerly side or line of Main Street; running thence (4) westerly and along the southerly side or line of Main Street three (3) feet more or less to the point or place of beginning."

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

1. That Dominick Varlaro and Caterina Varlaro, who are the defendants in this suit, may answer this amended Bill of Complaint and each statement therein made.

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2. That it may be decreed that the said Deed be corrected and reformed so that the clause regarding said right of easement, as herein mentioned, be inserted and placed immediately following the description of Lot No. 394 in Block No. 15, fronting on Hillside Place, which shall read as follows:

> "BEGINNING at the southwest corner of Lot No. 27 on Map of Austin & Kuhlmann, Town-

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ship of North Bergen, Hudson County, N. J.; thence running northeasterly along the easterly side of Main Street 3′ 2″ to a point; thence southerly 3′ 4″ to the southerly line of Lot No. 27; thence westerly along the southerly line of Lot No. 27, 3′ 10″ to the easterly line of Main Street, the point or place of beginning. A column space 10″ x 10″ to be allowed at the southwest corner of said Lot No. 27 for the purpose of ingress and egress, the above described plot to have a clear height of seven feet above the sidewalk at the northeasterly corner."

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3. That the said defendants, Dominick Varlaro and Caterina Varlaro, be enjoined and restrained from the further prosecution of the Supreme Court suit mentioned in this Amended Bill of Complaint until the further order of this Court.

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4. That the complainants have such relief in the premises as the nature of the case may require and as shall be agreeable to equity and good conscience.

5. That a writ of subpoena may issue directed to the defendants, requiring them to answer this amended Bill of Complaint, without oath, and to abide by such decree as the Court may make in the premises.

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N. J. Cafarelli,
Solicitor and Of Counsel
with Complainants.

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Answer.

IN CHANCERY OF NEW JERSEY

Between ERMINIA SIMEONE and FRANK SIMEONE, Complainants, and DOMINICK VARLARO and CATERINA VARLARO, Defendants.	On Bill for Reformation.

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The Answer of the defendants, Dominick Varlaro and Caterina Varlaro to the Amended Bill of Complaint.

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The said defendants answering the Amended Bill of Complaint, say:

1. It is admitted that on March 20, 1924, complainants sold to the defendants, certain property, but which property is described as follows:

"ALL that certain lot, tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the Township of North Bergen in the County of Hudson and State of New Jersey, which on a certain map entitled 'Map of property belonging to the Estate of Hugh N. Camp, in the Township of North Bergen, Hudson County, New Jersey, County Block No. 2305, made by Thomas H. McCann, Civil Engineer, March 1900, and filed in the office of the Register of the County of Hudson, New Jersey, on October 14, 1901, as map No. 1240, is known and designated by the

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lot number Three Hundred and Ninety-four (394) in Block Number Fifteen (15) fronting on Hillside Place, as shown on said map.

Being the same premises conveyed to the said Erminia Gallo Simeone, one of the parties of the first part hereto, by Hugh N. Camp and Candace E. Q. Camp, his wife, by deed dated September 6th, 1918, and recorded in the office of the Register of Hudson Co., N. J., on May 9th, 1919, in book 1309 of deeds for said County on page 202 &c.

ALSO

A plot of ground on the southwest corner of lot number twenty-seven (27) as shown on map of Austin & Kuhlmann, now owned by the said parties of the first part, said plot being of the size and dimensions for the purpose of building a stairway, said stairway to be built by the party of the first part hereto at their expense on or before the 15th day of December, 1925, said stairway to be not less than Two (2) feet and Six (6) inches in width, it is the intention of the said parties of the first part to hereby convey the said part of lot number Twenty-seven (27) on said map of Austin and Kuhlman to the said parties of the second part hereto for the purpose of giving the said parties of the second part free excess to Main Street from the rear of the above described premises, and to give said parties of the second part title to that part of said lot number twenty-seven (27) on map of Austin and Kuhlmann, on which stairway is to be built for their own use forever."

Answer.

2. Paragraph 2 is denied except that it is admitted that on February 9, 1924, complainants agreed to sell the defendants certain property described in said contract.

3. Paragraph 3 is denied except that it is admitted that a contract was entered into between the complainants and the defendants, containing an excerpt reading as set forth in said paragraph. 10

4. Paragraph 4 is denied except that it is admitted that a deed executed by the complainants contained a clause reading as set forth in said paragraph.

5. Paragraph 5 is denied. Further answering paragraph 5, these defendants say that the said deed expresses the true and final intent of the parties thereto in the premises. 20

6. Paragraph 6 is admitted.

Charles Stenberg,
Solicitor of Defendants.

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Reply.

IN CHANCERY OF NEW JERSEY.

Between ERMINIA SIMEONE and FRANK SIMEONE, Complainants, and DOMINICK VARLARO and CATERINA VARLARO, Defendants.	On Bill for Reformation.

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The complainants in reply to the answer herein filed say:

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1. They deny that the property conveyed on March 20th, 1924, is the property set forth and described in Paragraph One; on the other hand the property conveyed was that described and set forth in Paragraph One of the Complaint.

2. Complainants deny that they agreed to convey to defendants any property except as set forth in Paragraph Two of the Amended Complaint.

3. Complainants deny that a contract was entered into between complainants and defendants containing the excerpt reading set forth at the end of Paragraph Three of the Amended Complaint.

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4. Complainants join issue on Paragraph Four of the Answer.

5. Complainants deny that said Deed expresses the true and final intent of the parties thereto in said premises, as is set forth in Paragraph Five of the Answer.

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N. J. CAFARELLI,
Solicitor for Complainants.

Case.

IN CHANCERY OF NEW JERSEY.

Between ERMINIA SIMEONE and FRANK SIMEONE, Complainants, and DOMINICK VARLARO and CATERINA VARLARO, Defendants.	On Bill, Etc. Minutes of Final Hearing.

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APPEARANCES:

MR. NICHOLAS J. CAFARELLI, for Complainants.

MR. CHARLES STENBERG, for Defendants; Mr. Nicholas S. Schloeder, of Counsel.

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Before—Hon. JOHN J. FALLON, *Vice Chancellor.*

Chancery Chambers, Jersey City, N. J.,
March 20, 1928.

30

THE CASE FOR THE COMPLAINANTS.

The Vice Chancellor: Proceed.

Mr. Cafarelli: Do you want a brief resumé of the facts?

Vice Chancellor: Go on with your evidence.

Mr. Cafarelli: I now state to the Court that Mrs. Simeone died several months ago.

40

Vice Chancellor: Had you not better suggest the death on the record?

Mr. Schloeder: I might say at this time that our principal witness is Mr. Nolan. We have his affidavit in the suit; that is evidence under the circumstances. He died last fall.

Vice Chancellor: I am not so sure it is. My recollection is that the affidavit you had was not in the trial of the suit. It was in some preliminary matter. However we can meet that.

Mr. Schloeder: It was in the trial of a suit in respect to the application for a preliminary injunction. I don't think there is any distinction.

Vice Chancellor: You doubtless have in mind the rule of evidence that suggests that where a witness has testified in a former suit, and dies prior to a subsequent suit involving the same cause, that then the testimony given in the former suit is usable in the latter suit. Is that what you have in mind?

Mr. Schloeder: Yes, your Honor.

Vice Chancellor: I doubt whether that is applicable, but I will not pass on it this morning. I appreciate what counsel may be alluding to.

Frank Simeone, being sworn.

Direct Examination by Mr. Cafarelli:

Q. Mr. Simeone, I show you a contract dated February 16, 1924, between yourself and wife, as parties of the first part, and Dominick and Caterina Varlaro, as parties of the second part, which purports to convey a piece of property in North Bergen, and I ask you whether this Frank Simeone

(indicating on contract) is your signature to the contract? A. Yes, sir.

Q. Were you present when the contract was signed by the other three persons? A. Yes.

Vice Chancellor: Is there any question about the contract? My recollection is the Act of 1927 may obviate the proving of the signature of a witness. 10

Mr. Schloeder (After examining contract): That seems to be all right.

Mr. Cafarelli: I offer the contract in evidence.

(Contract admitted in evidence and marked Exhibit C-1.)

Q. Mr. Simeone did you speak to the defendant, Dominick Varlaro, about what was to be contained in that contract, and relative to a certain entrance and stairway leading from Main Street? Did you have a talk with Mr. Varlaro? A. Yes, sir. 20

Q. When did you have this conversation with Mr. Varlaro? A. Well, before, when he gave me the deposit and when we signed the contract.

Q. How long before this contract was signed? A. About February 9th.

Q. Where did you have this conversation with Mr. Varlaro? A. In my house. 30

Q. Who was present? A. Well, my daughter and my wife.

Q. Who also was present? A. And my son-in-law.

Q. What's his name? A. Frank Marano.

Q. And was anybody with Mr. Varlaro? A. His wife and son.

Q. Tell us the conversation you had about the sale of the property on that day? 40

Mr. Schloeder: I object to that upon the grounds that any evidence pertaining to the conversations relating to the contract, the making of the contract, is incompetent, irrelevant and immaterial, under the well-known and familiar rule of law, and because of the fact that even if we were to have a reformation of the contract on the grounds of mistake, that would be ineffectual, because subsequent thereto there was a deed, and the bill itself alleges a mistake in the deed. If we were to reform the contract in this case that would not mean anything.

Vice Chancellor: It seems to me all you can contend for at the utmost is that the deed should follow the contract, or are you trying to reform the contract?

Mr. Cafarelli: I am trying to reform the deed, and that is the reason why we ought to get at the intention of the parties.

Vice Chancellor: Won't that be manifest if the deed and contract are offered in evidence, and if you claim the variance which you are contending in this suit is manifest from a reading of both instruments, why wouldn't that appear to the Court? The rule of law stated by counsel for the defendants is clear. In Naumberg v. Young it appears that where parties have reduced their negotiations to writing, that writing supersedes all that transpired before, unless the instrument be ambiguous on its face and does not set forth with clarity the contract alleged to be entered into between the parties.

Mr. Cafarelli: This clause relating to the entrance is ambiguous.

Vice Chancellor: Where is it ambiguous? Ambiguity means something dubious upon the face of the instrument.

Mr. Cafarelli: The clause itself is ambiguous when read—I will read it your Honor. I would like to call your Honor's attention first to the description first set forth in the contract, and then the terms of purchase, and then there is an additional clause in the deed which reads as follows: "It is further agreed to, by the parties hereto, that they, the said parties of the first part, will open up an entrance in the rear of the within described premises into Main Street, said entrance to also contain a stairway to be built on the rear of Lot 27, now owned by the parties of the first part, said entrance and stairway to be built at the expense of said parties of the first part hereto, to be not less than 2 feet and 6 inches in width, and to be built at the expiration of a certain lease on the property in the rear of 649 Main Street, said lease to expire on the first day of November, 1925, and the said parties of the first part hereto agree to make entrance and stairway within one month after the expiration of said lease." Now the ambiguity, if the Court please, is that, reading which states "that the party of the first part will open an entrance in the rear of the within described premises into Main Street." The question of ambiguity is what is the rear of this entrance, the rear of the within described premises. In other words which is the rear? I would like to obtain through witnesses what the parties themselves agreed and intended was the rear of the within described premises.

Vice Chancellor: What have you to say about that, Mr. Schloeder?

Mr. Schloeder: That as I say, comes within the general rule where ambiguity is latent any

testimony might be admissible. If there is any ambiguity it is purely a latent ambiguity. Here it distinctly says "the rear of the within described premises".

Vice Chancellor: How can the Court from the instrument itself inform itself as to what would be "the rear of the within described premises"?

10

Mr. Schloeder: It says "the entrance to contain a stairway to be built on the rear of Lot 27." It distinctly states where the stairway is to be built. As a matter of fact, there is no ambiguity here at all. It is very clear in the first place, and in the second place, if his intention, as counsel has stated, is to show there is a variance between the contract and deed and, which your Honor has stated is readily ascertainable from the face of the instrument, and that the contract does not mean what it says, is purely not admissible because it would destroy the validity of it. I object to any such evidence.

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Vice Chancellor: I will admit it subject to your objection, because I would like to know the full import of what counsel intends to bring out. I will admit it subject to your objection.

30

Q. Mr. Simeone, did you have a conversation with Mr. Varlaro about where the entrance and the stairway was to be built, I mean on the day the contract was signed? A. Yes, I show it in my survey.

Q. Did you have this conversation just before this contract was signed on that same occasion? A. Right in my house he happened in.

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Mr. Schloeder: I object to that, your Honor.

Vice Chancellor: You didn't ask him what the conversation was; I think though I will permit the question although it is a little leading.

Q. When did you have this conversation with Mr. Varlaro as to the time before you signed the contract? A. When he made the deposit in my house and when we closed the deal. 10

Q. How long before you closed the contract did you have the conversation with Mr. Varlaro? A. On the ninth, and before we closed the contract.

Q. When, how long before? A. When he gave me the deposit about February 9th.

Vice Chancellor: He says February 9th. 20

Q. Then you had the first conversation February? A. Yes, sir.

Q. Where was this conversation held? A. In my house.

Q. And what was the conversation about the entrance to the stairway you had with Mr. Varlaro, as to its location? What did you say and what he said? A. He says "All right".

30

Vice Chancellor: What did you say to him?

A. I make an entrance on Main Street because in the winter time you know—

Vice Chancellor: I don't know; you said "You know". I don't know. Tell us the conversation.

A. He said "All right". 40

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Vice Chancellor: No; tell me just what you said. Tell me all you said to him and all that he said to you. This is your only chance to tell it.

A. I explained to Mr. Varlaro "Well, if you take it —the corner of the house and the entrance"—

10

Vice Chancellor: I don't understand him; I don't understand a word you said.

Mr. Cafarelli:

Q. Did you say anything to him then about where the entrance and where the stairway was to be built? If so, what did you say? A. In the rear of his property, the entrance to my property on Main Street—

20

Vice Chancellor: He said something about a survey? Have you a survey?

Mr. Cafarelli: I was going to lead to that.

Vice Chancellor: Use it and save time, if counsel has no objection to it.

Mr. Cafarelli: Is it agreeable to Mr. Schloeder?

30

Mr. Schloeder: Yes.

Mr. Cafarelli (Showing survey to witness):

Q. Will you show us what conversation you had with Varlaro about where the entrance and where the stairway was to be? A. I told him "make an entrance to Main Street, this way" (indicating)

Vice Chancellor: I want to tell you gentlemen that what the witness says means nothing

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in this case. He is saying "This way and that way", and it doesn't mean anything.

MR. CAFARELLI:

Q. Where did you agree with Mr. Varlaro, if you agreed at all, where the entrance was to be? A. The entrance—

Q. You don't know from the point of the compass what corner this is on your property? (Indicating on survey.) 10

Vice Chancellor: Make some sort of a map; he won't know what it means.

Mr. Cafarelli: Can we agree it is the southwest corner?

Mr. Schloeder: It is the southwest corner all right.

MR. CAFARELLI:

20

Q. Now then, did you agree to make an entrance or a stairway leading from the southwest corner?

Vice Chancellor: I won't permit that question.

Q. Tell us what you told Mr. Varlaro about where the entrance was supposed to be? A. The entrance, two foot and a half on Main Street, then turn this way (indicating). 30

Q. Viewing the Main Street property, was this entrance and stairway supposed to be on the corner of the map?

Vice Chancellor: I won't permit that question "What it is supposed to be". This is not to be a suppositious case; I will strike it out.

40

Mr. Cafarelli:

Q. Did you have a conversation with Mr. Varlaro as to whether the entrance and stairway was to be on the left or the right hand corner of Main Street property? A. On the right hand corner.

10 Vice Chancellor: Why don't you have this witness tell all the conversation he had with this man, and all the conversation this man had with him? You are asking some leading questions and counsel objected before. He knows his own case, and he ought to know what the other man said.

Mr. Cafarelli:

20 Q. What conversation did you have with respect to that entrance and stairway and where it was to be built? A. It was built right on the corner—on the right hand of Main Street, and turn this way (indicating).

Q. What was the turn? A. Turn into the right hand.

Q. Then where? A. To the right hand and to his lot.

30 Q. What lot do you mean? A. Vacant lots.

Q. What else did you tell Mr. Varlaro—the entrance you told us about the entrance and where it was supposed to be. What did you tell Mr. Varlaro about the stairway? A. The stairway was to be built on his lot.

Vice Chancellor: I will have to strike out the words "supposed to be". I am not going to try the case on suppositions. He must tell what

40 he knows.

Mr. Cafarelli:

Q. What did you tell him about the stairway; where did you agree to put the stairway? A. The stairway must be in his lots.

Mr. Schloeder: I object to that; it is not responsive. He has not said what he told him. 10

Vice Chancellor: He told this man the stairs must be on his lots.

Vice Chancellor (To Witness): Did you tell this man that the stairway must be on his lots?

Witness: Yes, sir.

Vice Chancellor: Did he own some lots there then?

Witness: Yes.

Vice Chancellor: Tell us if you can the whole talk you had with him at that time—tell us everything? 20

Mr. Cafarelli:

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

Q. When you say his lots, where does that line face (indicating)?

Vice Chancellor: I don't care a rap about that. What I am concerned about is the conversation. I am concerned now particularly about what the conversation was between him and this other man, from which you claim there was some understanding. 30

Q. Now then, the day that you signed the contract, have you told us all the conversation you had with this man on this date? A. I explained—

40

Vice Chancellor: You said "you explained" —tell us all you said.

A. He says "all right"—he says "all right".

Q. Had you agreed on the price to—

Vice Chancellor: I won't allow that.

10

Q. I mean on the date—the 9th of February— when you tried to get or made some arrangement with Mr. Varlaro, can't you give us the full conversation from the beginning to the end? What did he say when he came in, and what did you say? Can't you tell us? A. He say he wants to buy my house—I sell it to you—he said "all right", and gave me the deposit. He came in and gave me a deposit.

20

Vice Chancellor: You don't mean that he came in and said "I will give you a deposit". You must have said more. Tell us everything.

Witness: The price was fixed before.

Mr. Cafarelli:

Q. What did he say? A. He says about the price he spoke about, my wife was present too.

30

Q. After you fixed the price what happened? A. We fixed the price and gave me a deposit. About a week after—

Q. Did you speak about the entrance and stairway? A. We spoke about it.

Q. Tell us? A. I said "I make an entrance in Main Street", just like that (indicating). I said "I make an entrance in Main Street and you can get in on this property, because in the winter time it is very stormy". He said "all right, very good".

40

Q. You told us about the entrance; did you have any conversation about the stair-way? A. The stairway I explained which way they got to be; I show him from the sketch.

Q. Was the stair-way supposed to be on the Main Street property? A. In the rear of his lots.

Vice Chancellor: He said something about a sketch, what sketch? You mean this sketch, or another sketch? 10

Witness: No, that's all we got.

Vice Chancellor: You say the stair-way is shown on the sketch, do you?

Witness: Yes.

Vice Chancellor: Where is there any stairway on the sketch?

Mr. Cafarelli: I want to bring this out at Mr. Nolan's office; I want to get out the price conversation. 20

Vice Chancellor. He says something about the stair-way being shown on the sketch.

Mr. Cafarelli:

Q. Did you have a talk with Mr. Varlaro where the stair-way and where the entrance was supposed to be? A. The entrance on Main Street, in my property, and the stair-way in his property. 30

Q. What do you mean about "his property"? A. The property I sold to him.

Q. Where is that property? A. On Hillside Place, facing my place.

Q. What did Mr. Varlaro say? A. "All right."

Q. Then did you sign a receipt? A. He gave me $100.00.

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Vice Chancellor: You asked him if he signed a receipt. If you have it let us have it.

Q. Who did you give the receipt to? A. Mr. Varlaro.

Q. You took the $100.00 and they took the receipt. Then after this occasion of the receipt and

10 deposit, did you go to Mr. Nolan's office, or did you talk to him about going to take the property? A. On February 16th we went to Mr. Nolan's office, and I suggested to go to my Italian lawyer to get more satisfaction. He says well we go Mr. Nolan's office. I said "All right, we go to Mr. Nolan's".

Q. When you got to Mr. Nolan's office before the contract was prepared, did you explain to Mr. Nolan what you and Mr. Varlaro agreed?

20

Vice Chancellor: I can't permit that.

Q. What conversation did you have in Mr. Nolan's office with Mr. Varlaro about drawing up a contract, and what the terms were to be in the contract? What conversation did you have? A. The conversation was about the stair-way.

Q. What did you tell Mr. Nolan, or Mr. Varlaro, about the stair-way? Did you have this sketch at

30 Mr. Nolan's office?

Mr. Schloeder: I object to that.

Vice Chancellor: I sustain the objection; I am getting tired of it; you had better get an interpreter, because I can't make head or tail out of it. He is speaking in an unintelligible manner to me. He is referring to "this and this", and I don't know what it means.

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Q. What conversation did you have in Mr. Nolan's office with Mr. Varlaro, the agreement that you and he, Mr. Varlaro, had with respect to buying that property? A. I told Mr. Nolan to make an entrance in Main Street, and the stair-way on the left hand side goes to the property by me. I told Mr. Nolan from the sidewalk below the beams.

Q. Then you have just stated that the entrance was to go, or the stair-way was to go on his property. Explain what you mean by this, whose property? 10

Mr. Schloeder: I object to that question.

Vice Chancellor: I will sustain the objection.

Q. Tell us what was said at Mr. Nolan's office about the entrance and the stair-way? A. Mr. Nolan said "all right Frank". 20

Q. What did you say to Mr. Varlaro? A. I took the survey and I explained to Mr. Nolan.

Q. What did you explain? A. Which was to be the stair-way.

Q. Which way? A. The pencil marks.

Vice Chancellor: Who made the pencil marks?

Witness: Mr. Nolan himself. 30

Vice Chancellor: Now the pencil marks which the witness refers to as contained on the sketch is on what property?

Mr. Cafarelli: The southwest corner of the Main Street property.

Q. And did Mr. Varlaro see this sketch? A. Yes.

Q. And did he see these pencil marks being put on this sketch? A. Mr. Varlaro and his wife.

40

Q. And you own this Main Street property, do you not? A. Yes, sir.

Q. And you also own a house and lot facing on Hillside Place? A. Yes, sir.

Q. Which property were you selling Mr. Varlaro under this agreement? A. The property right in back of my place, my house on Hillside Place.

10

Vice Chancellor: Suppose you mark this sketch you are alluding to. Have you any objection to putting this sketch in evidence? You have been referring so much to a sketch, and unless that gets on the record I won't know what it means.

Mr. Cafarelli: I offer in evidence a sketch made by Mr. Gaw, to which this witness is referring to.

20

Mr. Schloeder: I want to cross examine him as to the validity and bona fides of the sketch.

CROSS EXAMINATION BY MR. SCHLOEDER:

Q. When was this sketch made? A. Before we signed the contract.

Q. As to the authenticity of this instrument, when was it made? A. When we wrote the contract?

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Q. Who made it? A. Mr. Nolan.

Vice Chancellor: Nolan didn't make that sketch, did he? We are not going to get very far.

MR. SCHLOEDER:

Q. When did Mr. Gaw make that? A. I don't know exactly, about three years ago.

40

Vice Chancellor: How can you expect to prove much about that sketch?

Mr. Schloeder:

Q. Roughly speaking, when was this sketch made after the contract was signed? A. Oh, No, before, many years ago. 10

Vice Chancellor: Is there a year stated on it?

Mr. Schloeder: It states "April 20, 1905".

Q. And to whom did this survey belong, was it yours or Nolan's, or what? A. It belonged to me, the property, to my wife and I.

Vice Chancellor: Is there anything on the survey showing for whom it was made? 20

Mr. Schloeder: No.

Q. What marks are these (indicating on sketch)?

Vice Chancellor: You are referring to pencil marks.

Q. Who made those pencil marks? A. Gentleman in Mr. Nolan's office. 30

Q. Who made them? A. Mr. Nolan himself; I don't know. This was made right there (indicating).

Vice Chancellor: He first refers to a large pencil mark above the words "Main Street", and he secondly refers to a blotched pencil mark at the bottom.

40

Q. Who made the marks which appear to be below to the southwest, that appear to be slight little blurred marks or checks?

Vice Chancellor: What is the significance of that question? How am I concerned with those pencil marks on the sketch? My understanding of the matter is that all counsel for the complainants offers the sketch for is to show that the sketch was made by a surveyor, and the pencil marks on it at the points indicated by Mr. Nolan.

Mr. Schloeder: This is an attack upon the ambiguity of these instruments. We contend that the marks were not there until after the suit was started. The marks that appear here outline what was done and the colored construction of what was correct. As a matter of fact those marks were never on there.

Vice Chancellor: You mean these heavy pencil marks or checks at the bottom here where the words "Main Street" are, were not on there at the time they went to Mr. Nolan's office?

Mr. Schloeder: Yes, sir, that's why I object to the authenticity of it.

Vice Chancellor: He says they were put there by Mr. Nolan. Offer it for identification at this time.

(Sketch marked Exhibit C-1 for identification.)

Mr. Cafarelli:

Q. Who instructed Mr. Nolan to make these pencil marks on this survey indicating the entrance and stair-way? Who told Mr. Nolan to make them? A. I did; Mr. Nolan says "this way and that way".

Q. Who instructed Mr. Nolan to write these pencil marks here, indicating an entrance to Main Street? A. I did.

Q. Was Mr. Varlaro there when you instructed Mr. Nolan? A. Yes, sir.

Q. And did you tell Mr. Nolan before he made these marks where to put the entrance, and where to put the stair-way? A. Yes, on Main Street the entrance, and the stair-way on the right hand side. 10

Q. Now then, this contract offered in evidence as Exhibit C-1, was prepared by Mr. Nolan on that same occasion, was it? A. Yes, it was.

Q. And tell us after the contract was fully prepared, what was said by Mr. Nolan and you and Mr. Varlaro, with reference to the contents of the contract? A. He read the contract, Mr. Nolan, and then I said "all right Mr. Nolan". 20

Vice Chancellor: You said everything was all right?

Witness: I cannot understand much English.

Vice Chancellor: That's the reason I am asking you that question—it is apparent to me you don't speak English very well. You said everything was all right. Now please tell us what you did say to Mr. Nolan?

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Mr. Cafarelli:

Q. He showed you the contract? A. Yes.

Q. What did he say? A. He says, "Frank, read the contract"—I just look over it and read a bit and where it says "exit" and then I stopped.

Q. What did Mr. Nolan say to you?

Vice Chancellor: Where is there any exit on it—refer to anything on that paper about an 40

exit? Is there anything on this paper referring to an exit.

Witness: No; it says "open up an entrance".

Vice Chancellor: You see how difficult it is going to be? If you have any merit in the case it seems to me you ought to be more careful. This witness speaks very imperfect English and I am not sure that he clearly understands the questions being put to him and the answers that he is making in imperfect English.

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MR. CAFARELLI:

Q. Did Mr. Nolan speak to you about what was in the contract?

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Vice Chancellor: I will strike that out. Can you understand the English language?

Witness: No.

Vice Chancellor: If Mr. Nolan read the contract to you would you understand what he read to you?

Witness: I understand.

Vice Chancellor. What do you know?

Witness: I tell "All right, Mr. Nolan—I believe in you, because everything is all right—I said, all right".

30

Vice Chancellor. Can you read English yourself?

Witness: Well, very little.

Vice Chancellor (handing paper to witness): Take and read it and see if you understand what that paper is—read this portion here (indicating in the middle of page 2)—and see if you can read it—read it to yourself. Did you read this whole paper before you signed it

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when Mr. Nolan gave it to you, or did you depend upon his reading it to you?

Witness: I just looked and said "All right, Mr. Nolan—whatever you say—I believe in you".

Vice Chancellor: I want to call attention of counsel to the rule of law that if you can read and don't read, you can't complain of an omission to read the paper. 10

Mr. Cafarelli:

Q. Did you read this contract before you signed it—did you read it all or any part of it? A. Part of it.

Vice Chancellor: Why didn't you read it all? 20

Witness: Because I believed in Mr. Nolan that everything was O. K.

Mr. Cafarelli:

Q. Then you signed it—That's admitted. Before the deed was signed by the parties thereto, tell us what conversation or talk you had between you and Mr. Nolan and Mr. Varlaro? A. I tell him all the business about the stairs. 30

Vice Chancellor: Tell us what conversation you had that morning—or that day—not what you talked of before—what conversation did you have then?

Mr. Cafarelli:

Q. You went into Mr. Nolan's office and sat down. Will you please tell us now exactly who 40

spoke, and what was all said? A. When we went to Mr. Nolan's office, Mr. Varlaro and his son and his wife, sat down and waited until Mr. Nolan was ready to fix the deed. Then after, Mr. Nolan read the contract—then he show it to me, and I read a little bit, and said, "all right, Mr. Nolan, I agree with you—everything is O. K."

10

Vice Chancellor: You are after referring to a contract, and you are picking up the deed. Now what are you alluding to—what was you referring to when you spoke to Mr. Nolan—the deed or contract?

Witness: The both.

Vice Chancellor: When you were in Mr. Nolan's office at the time he drew the deed, did you have both the contract and deed in your hands before you signed?

20

Witness: The deed—we have the deed there, and I don't remember whether the deed or contract. I remember I have this deed in my hands, and I said, "You see"—

Mr. Cafarelli:

Q. What did you say and what did he say? A. I just look over a little bit and I said, "All right, Mr. Nolan, I believe everything you say—I believe everything O. K.— I know you make a square deal for me and Mr. Varlaro", that's what I said.

30

Q. Can you show us in this deed now that portion what says—refers to an entrance in the stairway?

Vice Chancellor: I can't permit that—the deed must speak for itself.

40

Mr. Cafarelli: I withdraw it. I will offer it in evidence.

(Deed marked Exhibit C 2.)

Q. Mr. Simeone, tell us what Mr. Nolan said when he held this deed in his hand just prior to the signing of it by the parties—Can't you tell us? A. "Will you read the deed?" He read the deed and said "Well, everybody satisfied?" 10

Vice Chancellor: Do you mean to say he read everything in that paper—that is referred to in the deed?

Witness: Yes, sir; then he gave it to me and says, "Here, Mr. Simeone". I read a few words, and then I read some place where there is an exit, and I said, "All right, Mr. Nolan; everything in against me and Mr. Varlaro"— that's what I told Mr. Nolan. "I don't think you go against me or Mr. Varlaro—You make a square deal for everybody". 20

Vice Chancellor: This witness has referred several times to exit. I don't recall there is any word "exit" in that paper. If there is, I don't know what he means. I am taking his word "exit" means "by going out". There is no mistake in the witness' mind about it. The proof seems to indicate that Mr. Nolan read the paper completely to him and he made this statement to Mr. Nolan, and signed it. 30

Mr. Cafarelli:

Q. Mr. Nolan read the whole deed—every word? A. Yes, sir.

40

Vice Chancellor: Is there any variance between the contract and the deed?

Mr. Cafarelli: That's what we want to bring out—considerable variance.

Mr. Schloeder: Very slight.

Vice Chancellor: What I am concerned about is why this witness did not call it to the at-
10 tention of Mr. Nolan at that time.

Mr. Cafarelli:

Q. Can you tell us, Mr. Simeone, what difference, if any, there is?

Vice Chancellor: I won't let you say that—the papers themselves show it.

20 Mr. Cafarelli: Just to indicate that the papers themselves will show what the variance are, if any. I don't want him to point out to me the variance.

Q. After the contract was signed—between that time and the time that you signed the deed, did you have any conversation with Mr. Nolan, in the presence of Mr. Varlaro, about making any change between the contract and the deed? A. Oh, no.

30 Q. And when the deed was read to you by Mr. Nolan, was any conversation—did Mr. Nolan say anything about there being any difference between the matters contained in the contract and the deed? A. About the contract and the deed—what do you mean? He says, "that's the contract" and "that's the deed".

Q. Mr. Simeone, just before you signed the deed, was there any talk by anybody, whether you or Mr. Nolan, or Mr. Varlaro—was there any talk about
40 the deed being different from the contract—what

was supposed to go in it? A. He explained to me "that's the deed", and "that's the contract"—he explained, Mr. Nolan.

Q. Did he tell you there was any difference between the two of them? A. Oh, yes, he says that's a difference between one and the other.

Q. What was the difference? A. Because—about the deed, and about the contract—because it has about a mortgage. 10

Vice Chancellor: Do you know what this suit in court here is about?

Witness: Yes, sir.

Vice Chancellor: All right.

Q. Was there any conversation at all between any of you, before the deed was signed, about whether anything in the deed? 20

Vice Chancellor: Don't say anything about "whether".

Q. Talk about any difference between what's in the deed and what's in the contract. Was any changes made or agreed to be made? A. I can't catch counsellor—I can't—

Vice Chancellor: When you don't understand, be sure and say it, and don't attempt to answer something you don't understand. 30

Q. Mr. Nolan read the contract to you when you signed it, and Mr. Nolan read the deed to you when you signed that? A. Yes.

Q. Do you know whether there was any difference in it when it was read to you, with regard to description? A. About description—sure there was a difference—one is a deed and one is a contract. 40

Vice Chancellor: Was anything said about a description—between you and Mr. Nolan?

Mr. Cafarelli: He don't know what a description means.

Q. You knew what you were selling under your contract—didn't you? A. Yes, sir.

10 Q. And you knew there was a clause about an entrance in the stairway in the contract.

Mr. Schloeder: I object to that.

Vice Chancellor: I will permit it, Mr. Schloeder. This witness is awfully difficult to get along with. He has answered some questions he doesn't thoroughly understand, and his answers are all against his own interests.

20 Mr. Cafarelli: I don't think he knows what it is all about.

Vice Chancellor: If he don't understand, it should be presented in a way he should understand it.

Q. You knew you were selling under the contract —the Hillside Place property? A. Yes, sir.

Q. And you knew in the contract there is something about an entrance and stair-way? A. Yes,

30 sir.

Q. Do you know what it says in this contract about the entrance, and the stair-way? A. Yes.

Q. What does it say—about what you proposed to give him? A. The stair-way is to be on his property which I sold—the entrance in my lots, part of lots 27, and the stair-way is in lots the property which I sold to him.

Vice Chancellor: I don't know why you came

40 into court without an interpreter.

Mr. Cafarelli: He spoke plainly when in my office.

Vice Chancellor: You speak the language, and he may have spoken to you partly in English and partly in Italian. I fear very much from what this witness says he doesn't thoroughly understand what some of the questions are that he was answering. He doesn't know the import of certain answers which he has given based on some cross examination. I would like to have it thoroughly tried in an equitable manner.

Mr. Schloeder: He has "supposed" several times.

Vice Chancellor: He has "supposed" and everything. I am not going to put this case off for an interpreter.

Mr. Cafarelli: There are a couple of men on the other side—I am willing to use one of them.

Vice Chancellor: Have you any objection to his using an interpreter, Mr. Schloeder.

Mr. Schloeder: I have no objection.

Mr. Cafarelli: I would rather use one of the other witnesses—the defendant's son.

Vice Chancellor: I don't care—you speak Italian. There are a great many dialogues and they don't all agree.

Mr. Cafarelli: I want to use some one other than one of his family.

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LOUIS VARLARO, being sworn as an interpreter.

Mr. Cafarelli: If the court please, will we continue or go back?

Vice Chancellor: I think you had better continue unless you find afterwards the witness does not thoroughly understand some question.

10 But I will have to ask counsel as to whether he will permit it.

MR. CAFARELLI:

Q. Mr. Simeone, the day that you called at Mr. Nolan's office to sign the contract, what did Mr. Nolan tell you was in the contract—what did Mr. Nolan tell you was in the contract and what was the conversation you had.

20

Mr. Schloeder: I object to that as to its relevancy.

Vice Chancellor: I will permit it.

Q. What conversation was had between Mr. Nolan, Mr. Varlaro and Mr. Simeone about what was in the contract? A. Before he signed the contract Mr. Nolan didn't say anything till after he signed the contract.

30

Q. Did Mr. Nolan read or explain the contract to you before he signed it? A. He did read the contract.

Q. What did Mr. Nolan say? A. If he is satisfied.

Q. Did Mr. Nolan read to you that clause in the contract, word for word, that portion of the contract relating to the entrance and stair-way? A. Yes, sir.

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Q. The day you were in Mr. Nolan's to sign the deed, tell us what conversation took place just before the deed was signed, between Mr. Varlaro, Mr. Nolan and you—about what was in the deed? A. They went to sign the deed—Mr. Nolan explained about the stair-way again before he signed it, and he said he would trust to him everything he would say would be O. K.—trust Mr. Nolan—both parties. 10

Q. When the deed was read to you, did you notice any difference in the reading of the deed with respect to the description, and a stair-way and entrance, between that description and the description as read in the contract? A. No, sir; he can't read in English, and he couldn't say he understand. When Mr. Nolan read it to him he understood it—He said "I leave it to you, Mr. Nolan—a square deal to both parties". 20

Q. When Mr. Nolan read to you that clause relating to the entrance and stair-way the day that deed was signed, did you notice any difference between that clause in the deed and that one in the contract? A. Before he signed the deed he got up and touched to him the way it was going to be—the stair-way before he signed that day; he touched that part—he showed it to him where that stair-way was to be made.

Q. On what paper did he show? A. In the deed. 30

Vice Chancellor: On what paper did he show where the stair-way was to be made.

Witness: On the survey he talked, and talked, and talked. Mr. Nolan says to me "all right, Frank, I know, I know; I know everything—because I wanted to show the portion of my house, and he opened a map of North Bergen—a big book, and he show my house and my lots, 40

and the property I sold to Mr. Varlaro on the map—the North Bergen map, and Mr. Varlaro says "All right, Frank; all right, I know, I know"; I says if you are not satisfied I will convince it to you—come and see the place, the position. I don't lose too much space; I don't want to lose too much of my property. I give
10 him in his lots on his property a stair-way.

Q. What did Mr. Nolan say? A. He says "I know, Frank; I know everything".

Q. On the map of North Bergen did you indicate to Mr. Nolan where the stair-way was supposed to be on his lot? A. On the Hillside Place, and the entrance on my place, just what we talked about this property.

20 Q. Did you show Mr. Nolan on this North Bergen map where the stair-way—upon what property the stair-way was to be built, and on what property the entrance was to be opened? A. The entrance to my property?

Q. Did you show him "Yes or no"? A. Yes.

Q. What did you show him with respect to the stair-way, and the entrance—which property it was supposed to be on? A. On property—on lots.

Q. What did you tell Mr. Nolan?

30

Vice Chancellor: When you were looking at the North Bergen map and pointing out something about it—what did you say to Mr. Nolan?

Witness: I say "The stair-way like that on the Varlaro property" (indicating with a pencil on the table).

Vice Chancellor: You are saying this and that, and it don't mean anything.

Witness: I told him on the Varlaro property.

40

Mr. Cafarelli:

Q. When you and Mr. Nolan were looking at this North Bergen map, did you tell Mr. Nolan anything about where—on which property, you wanted the entrance, and on which property you wanted the stair-way? A. Yes, sir.

Q. Tell us on which? 10

Vice Chancellor: You had the North Bergen map before you and were talking to Nolan—what did you say to Mr. Nolan?

Witness: I show with my fingers the stair-way on my property—the door-way, and the stair-way turn into right hand and then go up (indicating).

Vice Chancellor: On what property.

Witness: On his property—Varlaro property. 20

Vice Chancellor: What street property was that?

Witness: Hillside Place.

Vice Chancellor: And the property that you refer to as the property of the street is Main Street?

Witness: Yes, sir.

Mr. Cafarelli: 30

Q. What did Mr. Nolan say after you told him that? A. He said "All right, Frank; I know; I know".

Q. Then afterwards, how long after this occasion was the deed ready or prepared—was the deed signed the same day that you showed Mr. Nolan on that map where the entrance to the stair-way was supposed to be—was it the same day you signed the deed? A. The same day. 40

Q. And was this conversation about where the entrance and stair-way was supposed to be, did it take place before or after you signed the deed? A. Before.

Q. Then after the deed was ready did Mr. Nolan again explain where the entrance and the stair-way was supposed to be? A. Yes.

10 Q. What explanation did he give you—tell us what Mr. Nolan said when he explained the deed? A. He read the deed and said "the entrance in your lots and part of lots 27, right at this point.

Q. Did he tell you where the stair-way was going? A. And the stair-way on his property—on the Varlaro property.

Vice Chancellor: On what street was the Varlaro property?

20 Witness: Hillside Place.

Mr. Cafarelli:

Q. Then after this conversation you signed the deed? A. Yes, sir.

Q. Did you open up the entrance after the deed was signed? A. Not right away—because I had a lease. I can't do anything because right on the top,

30 over where the stairs is, is to be built a shanty, a coal bin, and I can't do nothing before expired the lease. The lease expired in December 26th. I start the stairway and help him, you know; I did just what my conscience; I did just what was said. Then when Mr. Varlaro he saw the stairs after he was satisfied.

Q. When did he see the stair-way? A. He was sick.

Q. When? A. After Easter.

40 Q. What year? A. 1927.

Vice Chancellor: Was it the Easter following the time when the deed was delivered?

Witness: A year after.

Vice Chancellor: Was it the next Easter, after the deed?

Witness: About a year after.

Vice Chancellor: Then it was March, 1925, Easter? 10

Witness: 1926.

Vice Chancellor: The deed was 1924—was it two years after that?

Witness: Because I had a lease.

Vice Chancellor: And when did the lease expire.

Witness: Expired in October.

Vice Chancellor: What year.

Witness: 1925. 20

Vice Chancellor: Then it was the Easter following—that would be 1926?

Witness: Yes.

Mr. Cafarelli:

Q. Where did you meet Mr. Varlaro—you say you showed him the entrance and the stair-way—where did you meet him? A. In his house and outside on the street; he was sick.

Q. Did you have a talk with him? A. He says "All right". 30

Q. What was "All right"? A. "Are you satisfied?"--he said "All right, I am satisfied to where the stairs be built".

Q. Did he say anything about the entrance? A. "Everything, he say O. K."

Vice Chancellor:

Q. What did he say—he is asking "Did he say anything about the entrance, and you said "Every- 40

thing is O. K." What talk did you have with him? A. That's all, because he was sick.

Q. What did you say, and what did he say? As sick as he was you talked to him—what did you say to him? A. I said "Mr. Varlaro, are you satisfied—there is the entrance—are you satisfied"?

Q. What did he say? A. He says, "All right, O. K."

10

MR. CAFARELLI:

Q. Where were you when this conversation took place? A. Right in front of the job—in front of the sidewalk.

Q. Did Mr. Varlaro ever tell you (I withdraw)—Did Mr. Varlaro and his family—did you see them use that entrance or stair-way, after it was finished?

20

Mr. Schloeder: I object to it as immaterial.

Vice Chancellor: I will admit it—it may not be material—I will admit it. How about estoppel? In other words, if this man was to do a particular thing and didn't do it, and stood by and saw what your man was doing, and ignored it and then used that entrance without complaint, it might be an estoppel.

30

Mr. Schloeder: Assuming for the sake of argument that an estoppel in effect had taken place—if this had been a suit for specific performance—but this is a suit for a mere reformation of an instrument, and consequently if there was an estoppel or not it would not make any difference.

Vice Chancellor: You may be right—but I will receive it subject to your objection.

40

Mr. Cafarelli:

Q. Did you see Mr. Varlaro and his family use the entrance and the stair-way? Did you see them pass in and out? A. I saw the wife a couple of times.

Mr. Schloeder: I object to it—it is leading. 10

Vice Chancellor: As I said before, I am permitting leading questions, because I appreciate the difficulty this witness has when questions are propounded to him.

Q. Who else did you see use the property? A. The son, too.

Q. Who else, the wife and the son—and who else? A. I ain't home very much myself—I am out of my house day and night. 20

Q. When did you fix the stair-way and the entrance?

Mr. Schloeder: I object.

Vice Chancellor: What is the objection?

Mr. Schloeder: In the suit here, we are trying the reformation suit that is going to be immaterial as far as the bill is concerned.

Vice Chancellor: The only thing that I am concerned with is whether or not this breach which you are referring to here is what was considered the contract between the parties. 30

Mr. Cafarelli: What I am trying to show by this evidence is that these parties had an intention when they agreed to give an entrance and a stair-way, and all the line of cases seem to set forth that it is the intent of the parties when the agreement was made that has a great

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deal to do with a reformation of an instrument—what they intended. What did the parties intend? We will show, if the court please, that this stair-way was completed in February, and they used this stair-way month after month, and were satisfied. That would materially indicate that the stair-way was built
10 in agreement with the intent of the parties.

Vice Chancellor: It is a question of practical construction, and it might be admissible along that line of direction. I will receive it subject to your objection.

Mr. Cafarelli:

Q. What date did you finish the entrance and stair-way—in what year? A. In December, 1925,—
20 December 25, 1925.

Vice Chancellor (To Mr. Schloeder): This is of course all subject to the same objection.

Q. From December 25, 1925, to what date did you see—if you did at all, the defendants use this entrance and stair-way? How long did they use the entrance and the stairway. A. Whenever they like—there was no gate or anything.

Q. When was the last time you saw anybody—of
30 the Varlaro family—use the stair-way? A. Varlaro's son, he does in every morning.

Q. Did you see him yourself? A. Sometimes.

Q. And when was the last time you saw any of the family use the entrance or the stair-way? How long ago? A. A couple of months ago—I don't stay on the work and watch.

Q. The last time you saw him? A. About a couple of months ago—last August was the celebration, and it was up and down—nobody stop them.
40

Q. I show you some photographs of your Main Street property, and ask you if the entrance which is spoken about, is that shown on the right side—facing the photograph (showing witness photograph)? A. That's right.

Q. I show you another close-up photograph of the northwest corner of Main Street property, and ask if this photograph shows the entrance, and the stairway, which is subject to this litigation (showing witness another photograph)? A. This is the stairway, and that is the entrance (witness indicating on photograph). 10

Mr. Cafarelli: I would like to offer them in evidence.

Mr. Schloeder: They are not material in this suit—I object to them now—they are material in the foreclosure suit. 20

Vice Chancellor: The only objection you have at this time is to their materiality in this suit?

Mr. Schloeder: Yes, sir.

Vice Chancellor: I will receive them now in the way that this case is being carried on.

(Photographs marked Exhibits C-3 and C-4.)

Q. When was the first complaint that you received from Mr. Varlaro about the entrance and stair-way? 30

Mr. Schloeder: I object to that as immaterial.

Mr. Cafarelli: I withdraw that question.

Q. Did you receive any—did Mr. Varlaro ever complain to you about the manner in which the entrance and the stair-way was built? A. A year after, a year and a half after. 40

Mr. Schloeder: I object to that as immaterial.

Vice Chancellor: I will receive it subject to your objection. I can see a possibility it may be material.

MR. SCHLOEDER:

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Q. After what? A. After the stair-way was built.

Q. That is three years after the deed? A. Yes.

MR. CAFARELLI:

Q. And did you have a conversation with Mr. Varlaro about the entrance and the stair-way at your place of business in the early part of the year 1927?

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Mr. Schloeder: I object to that as immaterial.

Vice Chancellor: What is the pertinency of that, Mr. Cafarelli?

Mr. Cafarelli: I want to bring out the question—as long as the other suit is mixed in this—that the question never came up until the mortgage was due.

30 Vice Chancellor: I will receive it then.

Q. Did you have a conversation with Mr. Varlaro, in the early part of the year 1927, about the entrance and the stair-way—did you have a talk with him? A. No.

Q. Did you have a talk with Mr. Varlaro about the mortgage being due? A. Yes.

Q. At the same time you had this conversation about the mortgage, did he speak to you about the

40 stair-way, and the entrance?

Mr. Schloeder: I object.

Vice Chancellor: What is your objection?

Mr. Schloeder: Not to the specific question —but to the entire line of questions. It is incompetent, irrelevant and immaterial.

Vice Chancellor: I will receive it subject to your objection.

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A. I see sometime Mr. Varlaro, and speak about the stair-way, and we said the best thing it must be finished in Court.

Vice Chancellor: Who said that?

Witness: I said that.

Q. Why did you speak to him about the stairway at that time? (I withdraw that question) Before April 1, 1927, just a little before this mortgage was due—

20

Vice Chancellor (Interrupting): What mortgage—there is no evidence in this case yet about a mortgage.

Mr. Cafarelli: No, there isn't.

Q. Shortly before April 1, 1927 did Mr. Varlaro visit you and talk to you about this mortgage? A. Yes, sir.

30

Q. A certain mortgage on the Hillside Place property? A. Yes.

Q. Did he speak to you about the mortgage? A. Yes.

Q. Did he also talk to you about the stair-way? A. No, we don't talk about the stair-way when we talk about the mortgage.

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VICE CHANCELLOR:

Q. When did you first learn that there was any mistake, as you conceive it to be, as between the contract and the deed? A. When they sent me a letter—Mr. Varlaro, about the lawyer fighting—his lawyer is going to fight me—he sued me; I don't know how much.

10

Q. Is that the ejectment suit which is referred to in the pleading?

Mr. Cafarelli: Yes, sir.

Vice Chancellor: Can't you fix the date about this alleged mistake?

MR. CAFARELLI:

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Q. I show you a letter dated March 22, 1927, which was forwarded to you by James Nolan—do you remember receiving that letter? A. Yes, sir.

Mr. Cafarelli: I offer the letter in evidence.

Mr. Schloeder: I object to that as immaterial.

Mr. Cafarelli: I want to show when he first learned about it.

30

Vice Chancellor: I will sustain the objection—I don't see the materiality of it.

Mr. Schloeder: I hesitate to object to the language of your question in which you refer to a "mistake". I don't think the testimony is to the effect there was any mistake insofar as the difference between the contract and the deed for this reason—that both the contract and the deed concur in the fact that this stair-way is to be built on Lot 27. The only difference of

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whether a mistake or variance is the fact that the contract describes Lot 394, whereas the deed not only describes Lot 394, but describes that portion of Lot 27 upon which the stairway is to be built. In other words, to the description there is added an element. There is no variance at all between the contract and the deed—those things speak for themselves. Both the contract and the deed are in evidence and your Honor will observe they speak for themselves—but I wanted to point that out—that the only difference between the two arises out of that part of the deed which begins "Also"—if your Honor will observe. That adds some additional element that does not appear in the contract.

Vice Chancellor: What I had in mind when I put the question was that the third paragraph of the bill of complaint expressly says that in the preparing of the contract, the scrivener or draftsman did by mistake, and contrary to the intention of the parties thereto, insert in said contract a clause regarding said right of easement running to the following—and then goes on to say it. That is the reason I quoted the word "mistake".

Mr. Schloeder: That would only support our case—even the contract did not express the true intention as far as these two complainants are concerned. It seems that Nolan made a mistake both times. Both instruments indicate a reading and execution and everything else. There is no variance except the difference in the phraseology which begins with the word "Also".

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Mr. Cafarelli: I want to say if the Court please there is a tremendous difference.

Vice Chancellor: You will have to argue that afterwards.

Mr. Schloeder: I might want to cross examine him slightly on the phrases relative to the building of these stair-ways, but I don't want to be considered, or understood, as waiving my objection at that time they are irrelevant, incompetent and immaterial.

Vice Chancellor: I think I will permit you to do that—by permitting you to do so it may save time. If I find the testimony is admissible, and your objection not well founded, you will have had the opportunity of cross examination upon that testimony.

Mr. Schloeder:

Q. Now, Mr. Simeone, when this stair-way was built in December, 1925— A. Yes, in December.

Vice Chancellor:

Q. 1925?—a year after the contract? A. A year after the contract, yes, sir.

Mr. Schloeder:

Q. You mean there was a lease which expired in December, 1925? A. Yes, sir.

Q. During the time you was building Mr. Varlaro was in the hospital? A. Yes, sir.

Q. Didn't get back until about Easter of the following year? A. Yes.

Q. And by the time he got back all of it was built? A. Yes.

Q. There was a tenant in possession of the Main Street property that was owned by you, wasn't there—under the lease? A. Under the lease.

Q. And that man was named Simetz? A. Yes, sir.

Q. And that was the lease that expired in November, 1925, isn't that so? A. Yes.

Q. Now Lot 27, the southwesterly side of Lot 27, is about the same as that covered by your building, is it? A. In the back of it my lots. 10

Q. I mean your building covers all up to the lot line? A. Yes.

Q. So that assuming that you gave a deed for a part of Lot 27, that would require a removal of a portion of that building, would it not—Do you understand what I mean? A. If you please I make a little sketch. 20

Q. If your building covered all of Lot 27, and if a deed was given by you to any part of Lot 27—that would necessitate a removal of some part of that building—if it was so? A. Because it was on my lot.

Q. On Lot 27? A. No, on my building I was remove. Please give me a little paper—I will explain, I have said too much with my mouth.

(Witness makes a sketch on a piece of paper.) 30

Q. This tenant had machines in the building did he not? A. Yes, and he still got the machines.

Vice Chancellor: You have made some marks on that paper. Will you describe what those marks indicate?

(Witness explains marks on sketch.) 40

A. "A" is my house—"F" is factory—"Y" is yard, and "V" is Varlaro's lots.

(Sketch marked in evidence Exhibit C5.)

Vice Chancellor: You are now shown a sketch made by Thourot & Dunham. Look at that and see whether it indicates to any fair degree the marks which you have made on this other paper a moment ago.

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(Witness examines sketch.)

Mr. Schloeder:

Q. I show you Lot 394 as indicated on said sketch. Does that correspond to the pencil mark "V" you placed upon Exhibit C5? A. Yes.

20

Q. I show you that portion of the sketch which is indicated as part of Lot 27. Does that correspond roughly to "F"—the factory? A. Yes.

Q. I now ask you whether or not the giving of a —the cutting away perpendicularly of this portion of the entrance would disturb the tenant in possession, Simetz?

Vice Chancellor: You mean if it was cut away while Simetz was in possession?

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Mr. Schloeder: I might say this line of testimony—I concur with you not all of it is relevant, but it was admitted to evidence the question of construction of these things—was admitted as something subsequent to the time of the making of the contract and deed. I have merely asked for permission to cross examine on these points—but strictly it is not relevant.

Vice Chancellor: It seems to me very much now it is not relevant.

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Mr. Cafarelli: What he had in mind to ask the witness is the whole lease situation. It can be simply explained. Ask him about this lease—why he was to construct this stair-way after the lease expired—then you would be answered.

Vice Chancellor: Reframe the question.

10

Mr. Schloeder:

Q. Suppose the entire portion of the building which is above what you have described on Exhibit C-5 as the entrance were cut away—would that disturb Simetz, the tenant?

Mr. Cafarelli: If the Court please he introduces some supposititious questions by the word "suppose". I think we should get real facts in the case.

20

Mr. Schloeder: I will withdraw the whole line of questions.

Mr. Cafarelli:

Q. Mr. Simeone, you have been asked about a lease on the factory by Simetz?

Vice Chancellor: He mentioned it before when he was asked—he didn't mention Simetz —but he mentioned a lease.

30

Q. Did the lease cover the Main Street building alone?

Vice Chancellor: I can't permit that.

Mr. Cafarelli: As long as the Court does not rely upon that in his argument.

Vice Chancellor: As far as his argument is concerned—I don't know anything about that.

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Rose Simeone, being sworn.

Direct Examination by Mr. Cafarelli:

Q. Miss Simeone, you know Mr. Varlaro and his wife—the defendants? A. Yes, sir.

Q. Were you present on any occasion when a dis-
10 cussion was had between your father and Mr. Varlaro, with respect to buying some property on Hillside Place? A. I was.

Q. When did this conversation take place? A. It took place February 9, 1924.

Q. Where? A. It took place at our home.

Q. Tell us what they said?

Mr. Schloeder: I object to that.

Vice Chancellor: I will receive it now.
20

Q. What conversation was there between Mr. Varlaro and Mr. Simeone, with reference to the purchase of the Hillside Place property, and also with reference to an entrance and a stair-way leading from Main Street?

Mr. Schloeder: I desire to renew my former objection at this time to the testimony of Mr.
30 Simeone—that it is incompetent and irrelevant on the grounds of the well known rule in the case of Naumberg v. Young, as to conversations leading up to the execution of the contract.

Vice Chancellor: I will receive it subject to your objection. It may or may not be relevant.

Mr. Cafarelli: In a reformation suit to reform an instrument we must go back to the intention of the parties and the agreement—

Mr. Schloeder: Not at the time the instru-
40 ment was executed.

Vice Chancellor: There is a difference between the rule in a law court and this court preceding the making of an instrument.

Mr. Schloeder: I am only saving time. The conversation is purported to have happened a week before the contract was signed—and after all we don't rely on the contract or the conversation. We rely on the deed. 10

Vice Chancellor: I will receive it subject to your objection.

Q. Briefly—what was said between everybody? A. The night of February 9, 1924 I was present in my home—my father's home. Mr. and Mrs. Varlargo and their son came to our home.

Vice Chancellor: What son? 20

A. Joe—and spoke about buying oui property that was situate at 686 Hillside Place, in the Township of North Bergen—and of course they talked about the price—and they agreed on a price of $5400. After of course, quite a bit of talking done among friends—Mr. Varlaro gave a deposit of $100.00 to my father and made him a receipt on that $100.00 and after this was done my father promised to give him an entrance. 30

Mr. Schloeder: I object to that, your Honor.

Vice Chancellor: What was said?

A. My father—the very words he said was "Now, Mr. Varlaro, that you have bought our home I'll—I am going to do you something good—I am going to give you a right on our Main Street property—an entrance of 2 feet 6 inches to go into the Hillside

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property, a stair-way, so that he could have the rights of using that entrance on our property—

Vice Chancellor (interrupting):

Q. You are telling us now what your father said to Mr. Varlaro? A. He said he would give him a
10 right to use that entrance that's on our property.

Q. That can't be your father's property on Main Street? A. Formerly that was our property—this Hillside Place—and that was something he was going to do there at the time we lived there ourselves.

Q. You are telling us the whole conversation? A. He says "Because we are good friends—so many years—I will give you that right to use that entrance.

20

Mr. Cafarelli:

Q. What else was said, if anything said, about the entrance that was to be built? A. An entrance, and of course a stair-way, goes in the building.

Q. Who said that? A. My father.

Q. Did he say where? A. He said "I will give it to you this way—the stair-way will go into your lot, and that will make it easier in the winter,
30 because Hillside Place is a very steep hill and it makes it hard for travelers, and you could use this —being Main Street is not so steep—it is not as steep as Hillside Place.

Vice Chancellor:

Q. This was all the conversation? A. Yes, sir— and of course Mr. Varlaro agreed.

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Mr. Schloeder: I object to that.

Vice Chancellor: I will strike out about what he agreed.

A. Mr. Varlaro said "Mr. Simeone, I leave it to you"—and he gave my father a deposit of $100.00.

Vice Chancellor:

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Q. You told me a moment ago this talk was held before the contract was signed? A. I take that back—he give the deposit first.

Q. What are the facts? After Varlaro paid the deposit and obtained the receipt from your father, all this conversation took place? A. Yes, sir.

Mr. Cafarelli:

Q. You live in the Main Street property? A. You mean today?—Yes.

20

Q. And did you observe whether or not the Varlaro family have used the entrance or steps?

Mr. Schloeder: I object.

Vice Chancellor: How is that material, Mr. Cafarelli? Here you are trying to reform an instrument, and how can it be material as to what use the property is put to years after.

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Mr. Cafarelli: As I stated before, merely to show the intent of the parties—to show that that really was the agreement.

Vice Chancellor: I will receive it subject to the objection.

Q. Have you observed? A. At the time I was going out to business, and I really don't know.

Q. Have you ever seen them? A. I never was home enough.

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LILLIAN SMILARI, being sworn.

DIRECT EXAMINATION BY MR. CAFARELLI:

Q. Mrs. Smilari, were you present in your home when Mr. Varlaro called with respect to buying the Hillside property? A. Yes, sir.

10 Q. Will you relate what talk was had between the different parties? A. That evening of February 6th, Mr. and Mrs.—

VICE CHANCELLOR:

Q. You say February 9th or February 6th? A. When I mean in February I don't really remember the date—it was sometime in February. I remember it was the beginning—around the 6th. Mr. and
20 Mrs. Varlaro and Joe Varlaro were there, and they were talking about buying our home. They came to agreements and terms about buying this house, and everything was settled, and so Mr. Varlaro gave a deposit of $100.00. After that my father, Mr. Frank Simeone, said "Now, Mr. Varlaro, as a good friend, I am going to give you a present—the stairway to be built in the property on the Hillside Place side, which will be an entrance or opening on my
30 Main Street property, and I will give you the rights which I was going to do for myself when I moved." Mr. Varlaro thought it was a very good idea and said "I thank you", and said "When you are getting ready I will give you cement and make the stairway quick without any trouble whatever".

Q. Did they have any conversation as to where the stair-way was to be? A. My father said "I will build the stair-way—it will be so convenient to you when winter comes". He said "I am going to leave
40 it to you, and I will be pleased when you do it".

Q. Did you observe whether or not the defendants—the Varlaro family used that stair-way?

Mr. Schloeder: I object to that.

Vice Chancellor: I will receive it subject to your objection.

A. Yes, in the day time I saw Mrs. Varlaro back and forth a few times. 10

Q. Did you see any other members of the family? A. Yes, the kiddies.

PETER A. SIMEONE, being sworn.

DIRECT EXAMINATION BY MR. CAFARELLI:

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Q. You are an M. D.—you are a doctor? A. Yes, sir.

Q. And you are the son of Mr. Simeone, the complainant? A. I am.

Q. Were you present on an occasion in the early month of February at the home when Mr. Varlaro called to speak to your father about buying some Hillside Place property? A. I was.

Q. Will you tell us what conversation took place? 30

Mr. Schloeder: I make the same objection, your Honor.

Vice Chancellor: I will receive it subject to your objection.

A. Mr. Varlaro and his wife, and Joe Varlaro, their son, entered that evening—we had just finished our supper, and asked about the price of the house. There was the usual talk about the price. After the 40 price was settled—

Mr. Schloeder: I object to it.

Vice Chancellor: I will receive it subject to your objection.

A. The price was settled, and Mr. Varlaro gave a deposit of $100. and my father told him "I am going to do you a special favor; I am going to put something on the house which I was going to put on there when I was living there; I am going to open up an entrance in the house so that you can go in there in the winter time, or summer time—to go in the building. I am going to give you an entrance at a point where my house ends by building a stairway about two foot six inches—I don't know how thick the wall is; and I am going to open up that stair-way"; and Mr. Varlaro was satisfied and said "I thank you very much, and I am going to give you cement and I am going to help you with the labor". After that there was the usual family discussion, and so on.

Q. Have you seen any of the Varlaro family actually using the stair-way and entrance? A. No, I have not.

FRANK MORANO, being sworn.

Vice Chancellor: Counsel for the defendant concedes that this witness will testify substantially to the same as preceding witnesses as to what took place on February 9th. With that understanding the witness is excused—subject to the same objections of course.

COMPLAINANTS REST.

Motion to Dismiss.

Mr. Schloeder: I rest, and move to dismiss the bill of complaint.

Vice Chancellor: You are here now as counsel, and your associate, Mr. Stenberg, is the solicitor in this cause, and he coincides with you that you rest your case.

Mr. Schloeder: The grounds for the motion on these—the evidence disclosed— 10

Vice Chancellor: You are moving now to dismiss the bill. You rest—for the defendant?

Mr. Schloeder: Yes; on the grounds that the facts have not been—the bill of complaint has not been substantiated by the testimony here. In the first place, there was the testimony of the principal witness, Simeone. Simeone testified that with respect to the conversation of February 9, 1924, that certain conversations were had and a deposit taken. Thereafter on 20 February 16th, I believe, subsequent to that time, a contract was entered into and at that time again there were conversations relative to what they intended to do, which were reduced to a written contract. Any conversations that were had on February 9th then, would be immaterial—and that would apply to the statements of witnesses for the complainants. In other words, all the corrobora- 30 tive testimony merely goes to an earlier conversation pertaining to the drawing of a receipt and the entering into of a preliminary agreement of some sort, which subsequently must have been modified, because both times—in the making of the contract and the deed there appears to be a slight difference. That testimony becomes entirely immaterial. Mr. Simeone testified that at the time the deed was made—and the deed must be considered the 40

final expression of the parties—he had the deed read to him, looked over part of it and talked to Mr. Nolan. That is the whole tenor of his testimony on the stand with respect to that. The rest of it relates only to things which happened a year or so after, during a time when Mr. Varlaro was in a hospital—
10 certain alterations were made. The rule of law application to these cases is the burden of course is upon the complainants, and in the memorandums that have been previously submitted to your honor we have adduced the various authorities. The deed itself is very clear.

Vice Chancellor: Those memorandums were on the question of the motion to dismiss the bill of complaint.

20 Mr. Schloeder: No; they were on the question as to whether or not a restraint should lie pending the final hearing.

Vice Chancellor: I don't think you need refer to the law. I think I would like to hear the other side.

Mr. Cafarelli: There was an ejectment suit started in the Supreme Court two or three weeks prior thereto. The status of the situation if the court please, there is a mortgage in-
30 volved indirectly in this property.

Vice Chancellor: How can I consider that? You are referring to an ejectment suit.

Mr. Schloeder: That was referred to in the motion to enjoin the ejectment suit—that was based on the allegations in the complaint. I can leave out that ejectment suit if your honor please.

Vice Chancellor: I am reading the bill of complaint as to the ejectment suit—it is in
40 Paragraph 6.

Mr. Cafarelli: The testimony of course is not disputed—by that I mean that everything that was testified to by the complainants and their witnesses is absolutely true—

Vice Chancellor (Interrupting): If evidential—because it has been objected to a great deal by the other side.

Mr. Cafarelli: There were a great many things which have been testified to that could have been denied by the other side of course. 10
They could have denied for instance, that after the defendant came out of the hospital he saw the stair-way and said, "It was fine—it is just what we agreed to". There has been some talk by counsel to evidence that the contract and the deed were the same. May it please the court the contract says nothing about a conveyance whatever—nothing at all; just open an entrance in the rear of Lot 27.

Vice Chancellor: It says nothing about a conveyance? 20

Mr. Cafarelli: No; not upon any strip of property upon which was to be constructed an entrance. Then comes a clause down at the foot of the figures and description which speaks of a certain entrance. If we examine the deed relating to the entrance—to the stair-way, we find nothing in that clause whatever which sets forth a conveyance by metes and bounds. This 30
additional clause is added—"Also a plot of ground on the southwest corner of lot number 27 as shown on map of Austin & Kuhlmann, now owned by the parties of the first part". It goes on to say, "Being of the size and dimensions for the purpose of building a stair-way, said stair-way to be built by the party of the first part thereto at their expense on or before the 15th day of December, 1925".

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Vice Chancellor: The apparent purpose of that was to create an easement.

Mr. Cafarelli: That is our contention. The reformation we are seeking is to give these parties their entrance. We will give them their easement—but their contention is that the complainants must tear down one side of an 18 inch stone wall in order to give these people the stair-way—that heavy stone wall which is part of this building, when there is a vacant lot—property they don't know what to do with —I mean to show the intent of the parties.

Vice Chancellor: Does defendant claim here in the answer filed that by this deed they acquired title to it?

Mr. Cafarelli: Certainly they do (continuing reading) "Said stair-way to be built by the party of the first part hereto at their expense on or before the 15th day of December, 1925, said stair-way to be not less than 2 feet 6 inches in width. It is the intention of the said parties of the first part to hereby convey the said part of lot No. 27 on said map of Austin & Kuhlmann to the said parties of the second part hereto for the purpose of giving the said parties of the second part free access to Main Street from the rear of the above described premises—

Mr. Schloeder: Read on.

Vice Chancellor: Don't interrupt him.

Mr. Cafarelli (Continuing): For the purpose of giving the said parties of the second part free access to Main Street from the rear of the above described premises, and to give said parties of the second part title to that part of said lot No. 27". That part of said lot —which part? I want to say to the court that the clause as annexed has a newer purpose.

The intention is to give free access—the intention is not to convey. The deed itself says first the intention is to a right of ingress and egress forever. We contend not the title—we contend that meant the access. They contend that meant the title. The deed was prepared by a layman who was not trained to prepare clauses of that particular type. It is not an ordinary conveyance. Now then, if the court is satisfied that that clause is vain, indefinite and not understandable as to whether that meant to convey a title or whether to give access to the property, I refer to the case of Cochran v. Burns as to the intent of the parties. We have had the uncontradicted testimony as to their intention, and on the question of their right to testify is clearly governed by the case of Cochran v. Burns.

Vice Chancellor: Where is that reported?

Mr. Cafarelli: 107 Atl. 476. The syllabus reads that "where an instrument professes, or is intended to carry into execution a previous parol or written agreement, but by mistake of the draftsman, either as to fact or law, violates the manifest intention of the parties, equity will correct the mistake so as to produce a conformity thereto". There is a parallel case of a scrivener who did not prepare a paper properly.

Vice Chancellor: Have you in your consideration and preparation of this case examined the Conveyance Act to see what effect the law would give to question the form of a deed?

Mr. Cafarelli: I have not, your honor. It has impressed me as unquestioned law that you can't convey a piece of property having no purpose—having no dimensions at all. You have got to specify—

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Vice Chancellor: I am only inquiring of you as to whether or not you did give consideration to that act.

Mr. Cafarelli. Supposing for the purpose of argument that under the construction of the Conveyance Act that would be construed—that portion of it as conveys titles, etc. What would we do with the other portion as to ingress and egress?

10 Vice Chancellor: From your point of view the real question is the intention or purpose of the deed must be construed to be that only an easement is granted by the deed, whereas the other side is contending that a fee is acquired by the deed.

Mr. Cafarelli: That's the point—but the other point is the location of the stairway.

Vice Chancellor: I had that in mind.

20 Mr. Cafarelli: On the question of the stairway our evidence remains undisputed. Mr. Simeone says that was an agreement with Mr. Varlaro to build this stair-way in that vacant property in the rear lot.

Vice Chancellor: Suppose he said all that and there is nothing said to the contrary, do you think that is sufficient to grant a reformation of the instrument? In other words, I call your attention to the law that there must be a

30 mutual mistake between the parties. If your client said what he did say and the other party said something different, there might be great difficulty in your prevailing. I say that now because I have in mind the case of Stern v. Connolly and that line of cases.

Mr. Cafarelli: But if the court please Stern v. Connolly is different entirely. It is different in this respect—in the case of Stern v. Connolly there were 25,000 barrels.

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Vice Chancellor: I was in the case, and I was very much surprised that the court went so far in the case.

Mr. Cafarelli: If the court please, I went into the Connolly case, and I happened to meet Mr. Connolly two nights ago, and he told me he counted 25,000 barrels. This case is a case of a scrivener who balled it up.

Vice Chancellor: Who made a mistake, in your estimation. 10

Mr. Cafarelli: There is one thing about the intention of the parties and the agreement that they made that I would like to bring to your attention. Both Mr. Varlaro and Mr. Simeone agreed to have an entrance and a stair-way. Both Mr. Varlaro and Mr. Simeone both knew the property and the location. They both knew that that entrance was in the corner of the Main Street property. Both parties knew 20 or rather agreed that Mr. Simeone in order to build a stair-way would agree—neither did Mr. Varlaro agree to expect Mr. Simeone to agree that he was to tear down an 18 inch wall; nor is it possible that Mr. Simeone would agree to tear down this wall in order to afford Mr. Varlaro the opportunity of the use of a stair-way which could be built on that vacant lot of land. There is space galore. On the question of intention how is it possible that 30 these two men ever intended—in the face of the fact that they have a rear vacant lot—how could they ever intend to tear down this stone wall to build this stair-way when both parties knew that right next to that stone wall was ample and sufficient space—hundreds of inches in the rear end of the property—where that stair-way could be constructed.

Vice Chancellor: Not hundreds of inches—2 and a half feet. 40

Mr. Cafarelli: The point I am bringing out —I would like to bring that home to the court before you consider what decision you are going to give in the matter, this entrance is in the corner of Main Street. As soon as you make a little turn into the Main Street property there is nothing but vacant property 30 or 40 feet—the rear end of Hillside place.

Vice Chancellor: No proof before me as to 10 this; I am obliged to take the evidence. What have you got to say about your own client's most positive insistment—I even interrogated him on it—that he thoroughly understood the deed that he was reading with Nolan and made through Nolan. He not only can read English, but malifested that by reading a paragraph of the deed or contract. He read it audibly so that counsel could hear, and I heard him pro-20 nounce the words very well—some words very hard for a foreigner to pronounce, and then says that not only did he read it, but that Mr. Nolan read it to him, word for word. He said in one instance explained it to him, and he follows it up and says "All right, Mr. Nolan, I trust you", etc. What I have in mind is when a man can read and fails to read—

Mr. Cafarelli: If you find that Mr. Simeone could read intelligently enough to understand 30 the purport of what he read, of course that would be the situation. But I think the court should take into consideration the attitude of Mr. Simeone, and the English language—he can't even express himself very much. He don't speak English very clear and could not understand what the deed was.

Vice Chancellor: You offered him as a witness and you examined him accordingly, and I thought you must have appreciated he knew 40

the significance of the questions you were asking him in the English language. I am frank to say I do not think he thoroughly understood many of the questions that were put to him. When the interpreter was brought to the front he did not wait for the interpreter to put the question to him but immediately answered the questions in English. I don't want either one of you to think that is indicative of what my finding is to be, but I am calling your attention to what I consider. When a party comes into court and testifies, it is fair for me to assume that he knew what he was here for. I purposely asked him if he knew what the suit was about and he said, "Yes, sir". You told me that he and you were speaking together in your office and you thoroughly understood each other. 10

Mr. Cafarelli: If the court please you must take into consideration he did talk differently in my office. 20

Vice Chancellor: You doubtless recall that I asked him to listen carefully and if he didn't understand the question to say so before he answered it, and I cautioned him that this was the day and the time to present his case fully to the court. When I asked him if he knew the difference between the contract and the deed he said, "I don't know". I believe gentlemen that I ought not to decide this case off hand no matter what I may have in my mind now. It is a property right that ought to be considered carefully, and I feel I ought to reserve my decision in the matter but I ought to dispose of it as soon as possible. Counsel may, if they wish, submit a memorandum to me within the next five days. 30

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Exhibit C-1.

ARTICLES OF AGREEMENT, made the Sixteenth day of February, in the year of Our Lord One Thousand Nine Hundred and Twenty-four;

BETWEEN ERMINA SIMEONE and FRANK SIMEONE, her husband, of the Township of North Bergen, in the County of Hudson and State of New Jersey, 10 party of the first part;

AND DOMINICK VARLARO and CATERINA VARLARO, his wife, of the Township of North Bergen, in the County of Hudson and State of New Jersey, party of the second part;

WITNESSETH, That the said party of the first part, for and in consideration of the sum of Fifty-four Hundred Dollars ($5400.) to be paid and satisfied as hereinafter mentioned, and also in consideration 20 of the covenants and agreements hereinafter mentioned, made and entered into by the said party of the second part, doth agree to and with the said party of the second part, that they the said party of the first part, will well and sufficiently convey to the said party of the second part, their heirs and assigns, by Deed of Full Covenant Warantee free from all enucumbrance except as hereinafter stated on or before the first day of April next ensuing the 30 date hereof, all that lot, tract, or parcel, of land and premises, hereinafter particularly described situate, lying and being in the Township of North Bergen, in the County of Hudson and State of New Jersey, which on a certain map entitled "Map of property belonging to the Estate of Hugh N. Camp, in the Township of North Bergen, Hudson County, New Jersey, County Block No. 2305, made by Thomas H. McCann, Civil Engineer, March, 1900, and filed in the office of the Register of the County 40 of Hudson, New Jersey, on October 14th, 1901, as map No. 1240, is known and designated by the lot

number Three Hundred and Ninety-four (394), in Block Number Fifteen (15) fronting on Hillside Place as shown on said map.

Subject to a certain mortgage lien now of record against the above described premises in the amount of Twenty-eight Hundred Dollars ($2800.) of which there has been paid off the amount of Two Hundred and eighty Dollars ($280.) leaving a balance unpaid of Twenty-five Hundred and Twenty Dollars ($2520.). 10

And the said Dominick Varlaro and Caterina Varlaro, his wife, for themselves, their heirs, executors and administrators, doth covenant, promise and agree to and with the said party of the first part, their heirs, executors, administrators and assigns, that they the said party of the second part, will pay and satisfy, or cause to be paid and satisfied, unto the said party of the first part, the said sum of Fifty-four Hundred Dollars ($5400.) as and 20 for the purchase money of the foregoing described land and premises, in the following manner, that is to say:

On Execution of this agreement for which this is also a receipt	$100.00
On delivery of deed, cash	900.00
On Bond and Mortgage, same containing usual interest, tax, assessment, insurance and default clauses, and an agreement not to claim credit on the interest payable on the bond and mortgage, by reason of any tax assessed, or to be assessed against the premises, with interest at Six per cent. payable half-yearly for Three years	1880.00

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Said mortgage to contain a clause permitting the said parties of the second part to pay off an amount of not less than One Hundred Dollars ($100.) on any 40

interest paying period. And to assume a mortgage now of record against the within described premises in the amount of Twenty-eight Hundred Dollars of which there has been paid off the amount of Two Hundred and Eighty Dollars ($280.) leaving a balance of... 2520.00

Total $5400.00

10

It is further agreed to by the parties hereto, that they the said parties of the first part will open up an entrance in the rear of the within described premises onto Main Street, said entrance to also contain a stairway to be built on the rear of lot number twenty-seven (27) now owned by the parties of the first part, said entrance and stairway to be built at the expense of the said parties of the first part hereto, to be not less than two feet and six inches in width, and to be built at the expiration of a certain lease on the property in rear of No. 649 Main Street, said lease to expire on the first day of November, 1925, and the said parties of the first part hereto agree to make entrance and stairway within one month after the expiration of said lease.

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And the said party of the first part hereby agrees to pay to a commission of % on the purchase price aforesaid, said commission to be paid in consideration of services rendered in consummating this sale; said commission to be paid upon delivery of deed.

30

And it is further Agreed, by the parties to these presents, that the said party of the second part, their heirs and assigns, may enter into and upon the said land and premises on the first day of April next ensuing the date hereof, and from thence take the rents, issues and profits to their and their use.

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And it is further Agreed, by the parties hereto, that the said Deed Full Covenant Warrantee shall be delivered and received at the office of James Nolan, #940 Hackensack Plank Road, North Bergen, N. J., between the hours of nine in the forenoon and nine o'clock in the afternoon on the said first day of April next ensuing the date hereof.

The rents of said premises, insurance premiums, water rents, taxes, and interest on Mortgage, if any, shall be adjusted, apportioned and allowed as of the day of delivery of said deed. 10

Gas and electric fixtures, gas stoves, hot water heaters and chandeliers, carpets, linoleum, mats and matting in halls, screens, shades, awnings, ash cans, heating apparatus, if any, and all other personal property appurtenant to or used in the operation of said premises is represented to be owned by seller and is included in this sale.

The risk of loss or damage to said premises by fire or otherwise until the delivery of said deed is assumed by the party of the first part. 20

In case the premises shall suffer injury beyond the ordinary wear and tear, the party of the first part, shall repair the damage before the date set for delivery of said deed or make an appropriate deduction from the purchase price herein stated.

It is understood and agreed that the buildings upon said premises are all within the boundary lines of the property as described in the deed therefor, and that there are no encroachments thereon and that the buildings comply with municipal ordinances and regulations and the provisions of the New Jersey State Tenement House Act as enforced by the State Board of Tenement House Supervision, to be shown by the report of the department or board enforcing the same where such ordinances, regulations and said act apply. 30

It is expressly understood and agreed that the title to the land and premises hereby agreed to be 40

conveyed is not derived from any Martin Act proceedings or any Act for the Sale of Land for nonpayment of the municipal taxes or assessments.

If at the time for the delivery of the deeds, the premises or any part thereof shall be or shall have been affected by an assessment or assessments which are or may become payable in annual installments of which the first installment is then due or has been paid, then for the purposes of this contract all the unpaid installments of any such assessment, including those which are to become due and payable after the delivery of the deed, shall be deemed to be due and payable and to be liens upon the premises affected thereby and shall be paid and discharged by the seller thereof, upon the delivery of the deed.

AND for the performance of all and singular the covenants and agreements aforesaid, the said parties do bind themselves and their respective heirs, executors and administrators; and they hereby agree to pay, upon failure to perform the same, the sum of which they hereby fix and settle as liquidated damages therefor.

IN WITNESS WHEREOF, the said parties have hereunto interchangeably set their hands and seals the day and year first above mentioned.

ERMINIA SIMEONE (L. S.)
FRANK SIMEONE (L. S.)
his
DOMINICK X VARLARO (L. S.)
mark
her
CATERINA X VARLARO (L. S.)
mark

Signed, Sealed and Delivered
in the presence of:
JAMES NOLAN.

STATE OF NEW JERSEY, }
COUNTY OF HUDSON, } SS.:

BE IT REMEMBERED, That on this sixteenth day of February in the year of our Lord One Thousand Nine Hundred and twenty-four before me, the subscriber, a Notary Public, in and for the County and State aforesaid personally appeared Erminia Simeone and Frank Simeone, her husband who, I am satisfied, are the grantors mentioned in the within Instrument, to whom I first made known the contents thereof, and thereupon they acknowledged that, they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed. 10

JAMES NOLAN,
Notary Public,
Hudson Co., N. J. 20

(On Back)

CONTRACT

For the Sale of Property

ERMINIA SIMEONE and FRANK SIMEONE,
her husband 30

TO

DOMINICK VARLARO and CATERINA VARLARO,
his wife.

Dated, February 16th, 1924

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Exhibit C-2.

THIS INDENTURE, made the twenty-ninth day of March, in the year of our Lord One Thousand Nine Hundred and twenty-four;

BETWEEN ERMINIA GALLO SIMEONE and FRANK SIMEONE, her husband, of the Township of North Bergen, in the County of Hudson and State of New
10 Jersey, party of the first part;

AND DOMINICK VARLARO and CATERINA VARLARO, his wife, of the Township of North Bergen in the County of Hudson and State of New Jersey, party of the second part:

WITNESSETH, That the said party of the first part, for and in consideration of One Dollar ($1.) and other good and valuable consideration lawful
20 money of the United States of America, to them in hand well and truly paid by the said party of the second part, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said party of the first part being therewith fully satisfied, contented and paid, have given, granted, bargained, sold, aliened, released, enfeoffed, conveyed and confirmed, and by these presents do give, grant, bargain, sell, alien,
30 release, enfeoff, convey and confirm unto the said party of the second part, and to their heirs and assigns, forever, ALL that certain lot, tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the Township and State of New Jersey, which on a certain map entitled "Map of property belonging to the Estate of Hugh N. Camp, in the Township of North Bergen, Hudson County, New Jersey, County Block No. 2305, made by Thomas H. McCann, Civil Engi-
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neer, March 1900, and filed in the office of the Register of the County of Hudson, New Jersey, on October 14, 1901, as map No. 1240, is known and designated by the lot number Three Hundred and Ninety-four (394) in Block Number (15) fronting on Hillside Place, as shown on said map.

Being the same premises conveyed to the said Erminia Gallo Simeone, one of the parties of the first part hereto, by Hugh N. Camp and Candace E. Q. Camp, his wife, by deed dated September 6th, 1918, and recorded in the office of the Register of Hudson Co., N. J. on May 9th, 1919, in book 1309 of deeds for said County on page 202 & etc. 10

ALSO

A plot of ground on the south-west corner of lot number twenty-seven (27) as shown on map of Austin & Kuhlmann, now owned by the said parteis of the first part, said plot being of the size and dimensions for the purpose building of a stairway, said stairway to be built by the party of the first part hereto at their expense on or before the 15th day of December 1925, said stairway to be not less than Two (2) feet and Six (6) inches in width, it is the intention of the said parties of the first part to hereby convey the said part of lot Number Twenty-seven (27) on said map of Austin and Kuhlmann to the said parties of the second part hereto for the purpose of giving the said parties of the second part free excess to Main Street from the rear of the above described premises, and to give said parties of the second part title to that part of said lot number Twenty-seven (27) on map of Austin and Kuhlmann, on which stairway is to be built for their own use forever. 20 30

It is understood and agreed to by the parties hereto that the aforesaid lot number Three Hun- 40

dred and Ninety-four (394) hereby conveyed is subject to a certain mortgage now of record against the aforesaid lot in the amount of $2800., held by the Steneck Trust Co. interest at and after the rate of six (6) per cent per annum payable quarter-yearly.

TOGETHER with all and singular the houses, buildings, trees, ways, waters, profits, privileges, and advantages, with the appurtenances to the same
10 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,
20 their heirs and assigns, to the only proper use, benefit and behoof of the said party of the second part, heirs and assigns forever:

AND the said Erminia Gallo Simeone does for herself, her heirs, executors and administrators covenant and agree to and with the said party of the second part, their heirs and assigns, that she the said Erminia Gallo Simeone, is the true, law-
30 ful 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
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premises, can or may be changed, charged, altered or defeated in any way whatsoever:

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

And also, that the said Erminia Gallo Simeone will warrant, secure, and forever defend the said land and premises unto the said Dominick Varlaro and Caterina Varlaro, his wife, their heirs and assigns, forever, against the lawful claims and demands of all and every person or persons, freely and clearly freed and discharged of and from all manner of encumbrance whatsoever. 10

In Witness Whereof, the said party of the first part have hereunto set their hands and seals the day and year first above written. 20

Erminia Gallo Simeone (L. S.)
Frank Simeone (L. S.)

Signed, Sealed and Delivered
in the Presence of
James Nolan.

($2.50 Documentary Stamps Cancelled.) 30

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STATE OF NEW JERSEY, }
COUNTY OF HUDSON, } ss.:

BE IT REMEMBERED, That on this twenty-ninth day of March in the year of our Lord One Thousand Nine Hundred and twenty-four before me,the subscriber, a Notary Public in and for the County and State aforesaid personally appeared Erminia Gallo Simeone and Frank Simeone, her husband who, I am satisfied, are the grantors mentioned in the within Instrument, to whom I first made known the contents thereof, and thereupon they acknowledged that, they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed.

JAMES NOLAN,
Notary Public,
Hudson Co., N. J.

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(On Back)

Register's Office—Mar 31, 2.05 P. M., 1924

DEED

ERMINIA GALLO SIMEONE and FRANK SIMEONE,
her husband

TO 10

DOMINICK VARLARO and CATERINA VARLARO,
his wife.

Dated, March 29th, 1924

Received in the Register's Office of the County 20
of Hudson N. J. on the 31st day of Mar. A. D., 1924,
at 2.05 o'clock, in the afternoon, and Recorded in
Book 1512 of Deeds for said County, on page 546.

Not legible.
Register.

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Exhibit ~~D-1~~ C-3

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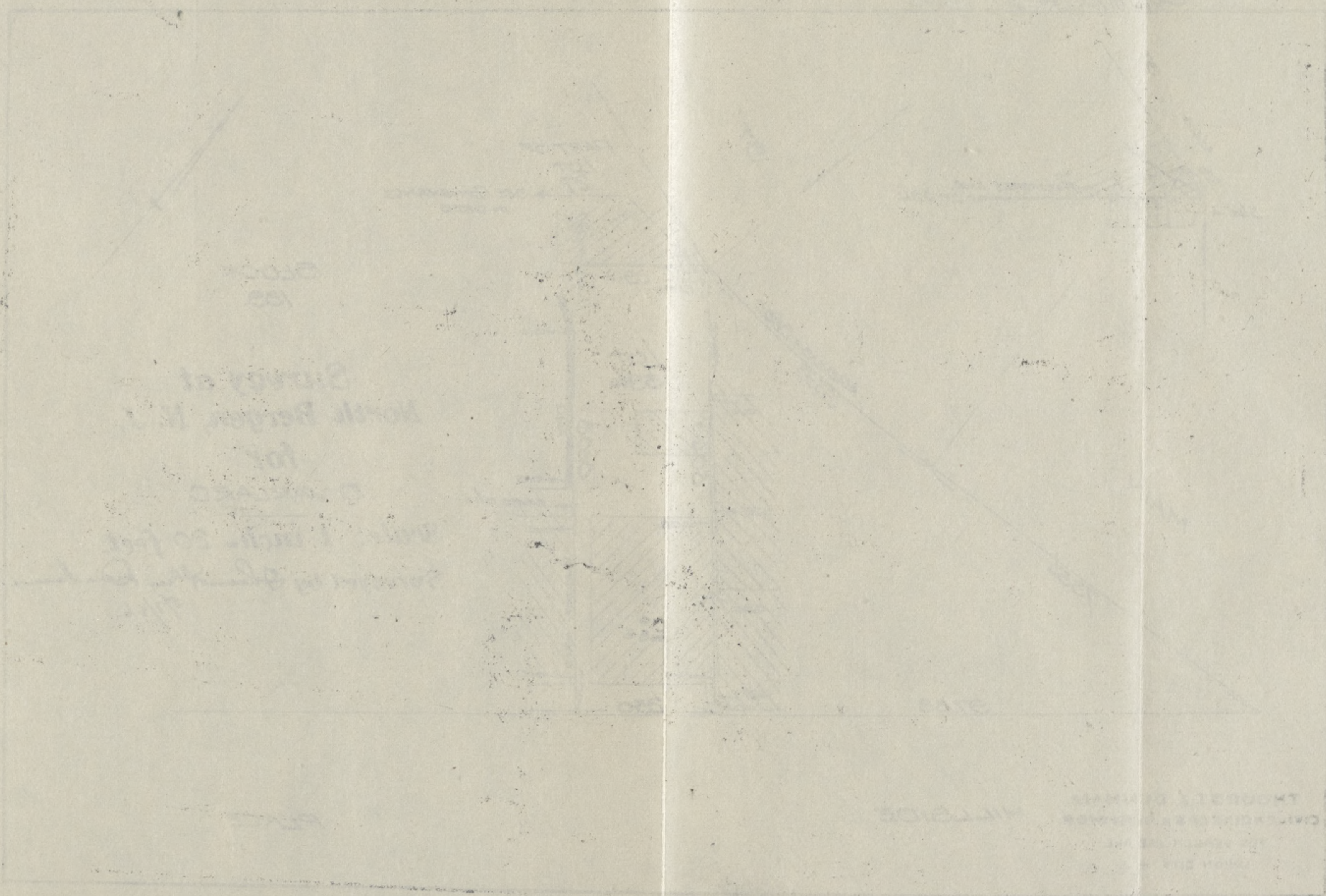

Exhibit D-1 C-3

MAIN ST.

ST.

3.40

3.20

7°

3.40

NORTHERLY LINE OF LOT 394

PART OF LOT 27

SEE CONVEYANCE IN DEED

0.10

0.30

2.50

STEPS

BLOCK 139

RADIUS = 280.0

53.33

FENCE

LOT 394

WALL

80.10

81.08

MAIN

73.54

No 686

OPEN WINDOWS

97.88

25.0

Survey at North Bergen, N. J. for

D. VARLARO

Scale: 1 inch = 20 feet.

Surveyed by Thomas Henry Dunham

5/7/26

THOUROT & DUNHAM
CIVIL ENGINEERS & SURVEYOR
705 BERGENLINE AVE.
UNION CITY N. J.

HILLSIDE PLACE.

Memorandum.

IN CHANCERY OF NEW JERSEY.

(64-120.)

Between ERMINIA SIMEONE and FRANK SIMEONE, Complainants, and DOMINICK VARLARO and CATERINA VARLARO, Defendants.	On Bill, Etc. On Final Hearing.

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(NOT TO BE PRINTED OR PUBLISHED.)

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NICHOLAS J. CAFARELLI, Solicitor of Complainants.

CHARLES STENBERG, Solicitor of Defendants.

FALLON, V. C.:

My consideration of the aforesaid matter actuates me in determining that the relief prayed for by the complainants, in their amended bill of complaint filed May 23, 1927, should be granted. I am convinced that James Nolan, who was the draftsman of the contract bearing date February 16, 1924, and also the deed bearing date March 29, 1924, recorded in the Register's Office of the County of Hudson, March 31, 1924, in Book 1512 of Deeds, on page 546, and also the bond and mortgage bearing date March 29, 1924, which mortgage was recorded

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March 31, 1924, in Book 1230 of Mortgages on page 68, did not appreciate the intention of the parties. Mr. Nolan was not a lawyer. He was engaged in the real estate and insurance business. If the parties had a lawyer representing them in their business dealings, and particularly a lawyer of their own nationality (Italian), I believe the real intention of the parties would have been effectuated by proper instruments. The proofs indicate that on or about February 9, 1924, the defendants negotiated with the complainants for the purchase of a parcel of land known as Lot No. 394 in Block No. 15, fronting on Hillside Place, North Bergen, N. J., as shown on a map entitled "Map of property belonging to the Estate of Hugh N. Camp, in the Township of North Bergen, Hudson County, New Jersey, County Block No. 2305, made by Thomas H. McCann, Civil Engineer, March, 1900, and filed in the office of the Register of the County of Hudson, New Jersey, on October 14th, 1901, as Map No. 1240", subject to a certain mortgage lien then of record against said lot, in the amount of $2800.00, on which there had been paid off the sum of $280.00, leaving a balance unpaid thereon of $2520.00. *After* said business transaction had been consummated and a receipt given by the complainants for the sum of $100.00 on account of the purchase price of $5400.00 agreed upon, the complainant, Frank Simeone, gratuitously offered to the defendants, with whom the complainants were on very friendly relations, an easement on a remaining parcel of property owned by the complainants, abutting Main Street, so as to afford the defendants a means of exit to said street. As stated by Miss Rose Simeone in her testimony, her father stated that his purpose in so doing was to make it easier for the de-

fendants, in winter-time, because Hillside Place is a very steep hill, hard for traveling, and Main Street, being not so steep as Hillside Place, would serve as a better means of exit by the defendants from their Hillside Place property to gain access to Main Street, I recall that at the hearing counsel had much difficulty in examining the complainant, Frank Simeone, and the court had much difficulty in understanding him. Part of his testimony, because of such difficulty, was given through an interpreter. The testimony of Rose Simeone, Lillian Smilari, Peter A. Simeone and Frank Morano, was quite explicit, and clearly indicates, in my judgment, the intention between the parties. I do not appreciate that Mr. Nolan thoroughly understood what the complainants and the defendants intended and contemplated. The proofs disclose that the complainant, Frank Simeone, undertook to explain to Mr. Nolan, by reference not only to a surveyor's sketch made by Robert Gaw, dated April 20, 1905, which was exhibited in court and with respect to which the witness was examined and cross-examined, upon which there are some pencil marks, to which said complainant referred, but also by reference to a property map of North Bergen, which Mr. Nolan exhibited to the parties. That Mr. Nolan did not appreciate the intention of the parties and their contemplated purpose is somewhat manifested by the aforesaid contract, for it appears therein that Mr. Nolan, after describing the property which was to be conveyed, on the first page thereof, added on the second page of the contract a recital as to an entrance to be opened up in the rear of the described premises unto Main Street "said entrance to also contain a stairway to be built on the rear of Lot No. Twenty-Seven (27) now owned by the parties of the

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first part, said entrance and stairway to be built at the expense of the said parties of the first part hereto, to be not less than two feet and six inches in width, * * *". The testimony of Frank Simeone evidences that he wanted to go to his *Italian lawyer* to explain to him the business transaction between the parties and have him attend thereto,
10 but the defendant, Dominick Varlaro, said they should go to Mr. Nolan's office, and Mr. Simeone agreed. Mr. Simeone, as evidence by his testimony, after having endeavored to explain to Mr. Nolan what was intended between the parties, said to Mr. Nolan they would look to him and trust to him to make a square deal for all parties. There appears to have been no ascertainment or determination between the parties as to where the *entrance* and the
20 *stairway* was to be *located,* nor was there any ascertainment or determination as to a description or dimensions thereof. I am convinced that Simeone gratuitously offered to the defendants an opportunity for them to gain access to Main Street by means of the property of the complainants, abutting said street. I am also convinced that the complainants did not intend to sell to the defendants, nor did the defendants intend to purchase from the complainants, any portion of the property of the com-
30 plainants, abutting Main Street. I am also convinced that the intention between the parties was merely that the complainants should afford to the defendants an easement such as above referred to, and that gratuitously. The scrivener, Mr. James Nolan, undoubtedly made a mistake in the preparation of the contract, and also in the preparation of the deed. No testimony or proofs was offered in behalf of the defendants. The case is before the
40 court upon the uncontradicted testimony and proofs offered in behalf of the complainants. No

consideration was paid by the defendants to the complainants for the land in question, which was to serve as a means of exit by and for the use of the defendants, from their Hillside Place property which they were purchasing from the complainants, to gain access to Main Street. The complainants do not question the right of the defendants to the easement aforesaid, and their amended bill of complaint manifests their willingness to afford the defendants a right thereto. Where, as in this case, the width of an easement is not definitely determined by the deed, the law requires that it shall be of reasonable width to accomplish the purpose contemplated between the parties. If the defendants are dissatisfied with the location and description of easement contained in the complainants' amended bill of complaint I will hear counsel as to the advisability of my appointing a master to determine the reasonableness of the easement thus proposed by the complainants.

In the case of *Louis Stern Sons* v. *Connolly,* 95 N. J. Eq. 356, at p. 359, appears an excerpt from the case of *Hunt* v. *Rhodes,* 26 U. S. 1, which I consider apropos. wherein the United States Supreme Court stated: "Where an instrument is drawn and executed which professes or is intended to carry into execution an agreement, whether in writing or by parol, previously entered into, but which, by mistake of the draftsman, either as to fact or law, does not fulfill or which violate the manifest intention of the parties to the agreement, equity will correct the mistake, so as to produce a conformity of the instrument to the agreement." Citing cases.

I will advise a decree accordingly.

Dated, Hoboken, N. J., January 26, 1929.

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New Jersey Court of Errors and Appeals

Between ERMINIA SIMEONE and FRANK SIMEONE, Complainants-Appellees, and DOMINICK VARLARO and CATERINA VARLARO, Defendants-Appellants.	On Appeal from the Court of Chancery.

MEMORANDUM FOR DEFENDANTS-APPELLANTS.

Facts.

This is an appeal from a final decree of the Court of Chancery, decreeing the reformation of a deed to real estate.

Briefly, it appears that on February 9, 1924, the complainant by an informal agreement, agreed to sell property on Hillside Place, North Bergen, to the defendant. The defendant gave complainant $100.00 and took a receipt therefor. Later, on February 16th, a formal written contract was entered into and on March 29, the deed was given and transaction consummated. Thereafter, a dispute arising, defendant brought ejectment under deed, and complainant brought this suit seeking reformation and restraining ejectment suit.

The reformation embraces two matters in the description, (1) respecting the location of the property and (2) the character of the grant, changing it

in part from the grant of a fee to a mere easement. This is accomplished by emendating entirely that portion of the description reading as follows:

> "Also
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> A plot of ground on the southwest corner of lot number twenty-seven (27) as shown on map of Austin & Kuhlmann, now owned by the said parties of the first part, said plot being of the size and dimensions for the purpose building of a stair-way, said stairway to be built by the party of the first part hereto at their expense on or before the 15th day of December, 1925, said stairway to be not less than Two (2) feet and Six (6) inches in width, it is the intention of the said parties of the first part to hereby convey the said part of lot number Twenty-seven (27) on said map of Austin and Kuhlmann to the said parties of the second part hereto for the purpose of giving the said parties of the second part free excess to Main Street from the rear of the above described premises, and to give said parties of the second part title to that part of said lot number Twenty-seven (27) on map of Austin & Kuhlmann, on which stairway is to be built for their own use forever."

and substituting thereto the following description:

> "Beginning at the southwest corner of Lot No. 27 on map of Austin & Kuhlmann, Township of North Bergen, Hudson County, N. J.; thence running northeasterly along the easterly side of Main Street 3′2″ to a point; thence southerly 3′4″ to the southerly line of Lot No. 27; thence westerly along the southerly line of Lot No. 27 3′10″ to the easterly line of Main Street, the point or place of beginning. A column space 10″ x 10″ to be allowed at the southwest corner of said Lot No. 27 for the purpose of ingress and egress; the above described plot to have a clear height of seven feet above the sidewalk at the northeasterly corner."

The complainant in obtaining the reformation based this on mutual mistake resulting from the claim that James Nolan, the scrivener who drew the deed, failed to express the true agreement of the parties.

In detail the mistake claimed appears to be as follows:

1. That the deed erroneously placed both the stairway and entrance over complainant's lot, 27 on Main Street, whereas the entrance only was to be on said lot (stairway to be on defendant's lot 394 on Hillside Place), and

2. That the deed erroneously gave a fee, instead of an easement, only, to that portion of complainant's lot 27 necessary for the stairway and entrance to Main Street.

The complainant's claim is predicated upon a prior agreement resting in parol which the deed does not properly express. The proof of the existence of this agreement is roughly divided into three parts, (1) that pertaining to the transaction occuring on February 9, 1924, (2) that relating to the execution of a formal written contract on February 16, 1924, (3) and that relating to the execution of the deed on March 29, 1924.

Complainant produced four witnesses, but their testimony was confined to the first transaction, that of February 9th. Inded the case for the complainant ends with the evidence relating to this transaction. As to the other two later and more pertinent transactions relating to the execution of the contract and deed only, we have the testimony of the complainant, Frank Simeone, alone, and this testimony, as will be demonstrated in the argument, wholly fails to prove any mistake.

So complete was the apparent failure of the complainants to produce anything relating to the trans-

action of March 29, 1924, resulting in the execution of the deed, that counsel felt that there was nothing to contradict in the testimony and rested.

As will be pointed out, even if the transaction of February 9, 1924, is exactly as the complainants say, this does not impeach the deed, for the deed simply added an additional element, the carrying of a fee along with the easement.

Further facts will be adverted to under the argument.

Introduction.

The legal principles regarding the reformation of a deed are too well established to require a lengthy discussion. I therefore will content myself with a succint statement which cannot be better expressed than in the syllabus of the leading case of *Green* v. *Stone,* 54 N. J. Eq. 387, 388 (Court of Errors). It is there said:

> "To justify the reformation of a deed delivered, accepted and acted upon, on the ground that it did not correctly express the agreement made by the parties, the proof must be clear and convincing and upon testimony that is unexceptionable, both with regard to the agreement actually made by the parties and the mutuality of the mistake through which a different agreement was put in the deed. Until a mistake has been established by such force of proof as leaves no rational doubt of the fact, no change in the writing sought to be reformed is entitled to be called a correction."

POINT ONE.

The proof of mistake does not meet the legal requirements.

As before pointed out, the demonstration of the mistake, if any, is confined to the transaction of February 9, 1924. The testimony respecting this transaction is very vague. Perhaps the most complete account is that given by Rose Simeone, daughter of the complainant. Briefly, to quote some of her language:

> "The night of February 9, 1924, I was present in my home—my father's home. Mr. and Mrs. Varlaro and their son came to our home.
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> Joe—and spoke about buying our property that was situate at 686 Hillside Place, in the Township of North Bergen—and of course they talked about the price—and they agreed on a price of $5400. After of course, quite a bit of talking done among friends—Mr. Varlaro gave a deposit of $100.00 to my father and made him a receipt on that $100.00 and after this was done my father promised to give him an entrance.
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> My father—the very words he said was, 'Now, Mr. Varlaro, that you have bought our home I'll—I am going to do you something good—I am going to give you a right on our Main Street property—an entrance of 2 feet 6 inches to go into the Hillside property, a stairway, so that he could have the rights of using that entrance on our property—.'
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> He said, 'I will give it to you this way—the stairway will go into your lot, and that will make it easier in the winter, because Hillside

> Place is a very steep hill and it makes it hard for travelers, and you could use this—being Main Street is not so steep—it is not as steep as Hillside Place'." (Case, pp. 67, *et seq.*)

This leaves many matters expressed by the written contract, such as the method of securing the payment of the purchase price, the terms of the mortgage, etc., to be left for future negotiations.

First of all, let us inquire in what respect this transaction differs from that expressed in the deed. The complainants contend and the Vice Chancellor found that this transaction resulted in the promise by the complainant, Frank Simeone, that the complainant should afford the defendants an easement to Main Street. Curiously, this is exactly what the deed expressed, for it uses these words:

> "It is the intention of the said parties of the first part to hereby convey the said part of lot Number twenty-seven (27) on said map of Austin and Kuhlmann to the said parties of the second part, hereto for the purpose of giving the said parties of the second part free excess to Main Street from the rear of the above described premises. * * *"

This is the very thing that is contended for. Hence, there is no mistake shown whatsoever on the only point which this transaction on February 9th covered.

Immediately after this clause in the deed, the following words appear:

> "* * * and to give said parties of the second part title to that part of said lot number twenty-seven (27) on map of Austin and Kuhlmann, on which stairway is to be built for their own use forever."

When Mr. Nolan wrote this, he must have been aware of the intention to give an easement. There

was a deliberate inclusion of the granting of a fee in the phrase that expressed the intention to give an easement. In other words the deed added an element to the transaction. If it had been otherwise, and the reference to the giving of an easement had been omitted, it might have suggested an error.

The learned Vice Chancellor refers to the transaction of February 9, 1924, as a "business transaction" in which the promise to give an easement was gratuitously given. To quote:

> "*After* said business transaction had been consummated and a receipt given by the complainants for the sum of $100.00 on account of the purchase price of $5400.00 agreed upon, the complainant, Frank Simeone, gratuitously offered to the defendants, with whom the complainants were on very friendly relations, an easement on a remaining parcel of property owned by the complainants, abutting Main Street, so as to afford the defendants a means of exit to said street" (Memorandum, p. 96).

It will be noted that the Vice Chancellor italicized the word "after".

I respectfully submit that his insistence on this point reveals the fundamental error in his finding.

As before pointed out, the so-called agreement of February 9th is very vague. It is silent on most of the details (apart, even, from the disputed ones) which were later expressed in the written contract and deed. These matters on February 9th clearly remained in *fieri*. The written contract of February 16th itself, is incontestable proof that the transaction of February 9th was preliminary. Tested by whether this transaction would have been enforceable by specific performance (disregarding such considerations as the Statute of Frauds)—it clearly could not, for too many essential terms were left for future negotiations, which in turn was

proof of an uncompleted contract. *Moose* v. *Galupo,* 65 N. J. Eq. 195; *McKibben* v. *Brown,* 1 McCart. 19; 2 McCart. 498; *Wharton* v. *Stoutenberg,* 35 N. J. Eq. 266; *Bettcher* v. *Knapp,* 94 N. J. Eq. 433; *Kuskin* v. *Gutman,* 98 N. J. Eq. 617, and a host of others.

Now, it seems a little short of extraordinary to me that this transaction, too indefinite and incomplete to be the subject of specific performance, unenforceable in either law or equity, should yet have such peculiar efficiency as to vitiate a written instrument solemnly entered into more than six weeks later, with all the formalities prescribed by law for the protection of the ignorant, and—still more extraordinary—that the principal proof relied on to show the mistake claimed, arises from the incompleteness (and therefore ineffectuality) of the transaction which is supposed to be controlling.

This would in effect deny the right of persons to add to or subtract from their uncompleted agreements, or indeed to change their mind by subsequent agreement. If any difference exists between the deed and the early negotiations, even if such negotiations constituted a contract, the inference of novation arises, not mistake, particularly in view of the intervening written contract. The relation between the deed which was the final expression of the parties and the transaction of February 9th is too remote. Perhaps the controlling legal principle is expressed in the following case of *Davis* v. *Clark,* 47 N. J. L. 338:

> "Where a deed is made and accepted in pursuance of an executory contract, the law presumes that it fully expresses the final intentions of the parties as to so much of the contract as it purports to execute."

As a matter of fact, the proof clearly indicates that the complainant was fully aware of the change,

and, at the later dates, he thoroughly understood the solemn written agreements. Thus, by the complainant's own testimony (the only testimony we have on these events) it is shown that Mr. Nolan who drew the contract on February 16, 1924, read the contract (p. 39, fol. 10). The complainant also declares that when Mr. Nolan read the contract he understood it (p. 40, fol. 20). Furthermore, Mr. Nolan read the deed (p. 43, fol. 10). Every word of it (p. 43, fol. 30). Again upon interrogation by the Court, the complainant repeats that both the contract and deed were read to him. He testifies that he was aware that there was a difference with regard to the description (p. 45, fol. 30). He repeatedly admits that Mr. Nolan read the clause and every word relative to the entrance and stairway (p. 48, fol. 30). He also admits (p. 49, fol. 10) "when Mr. Nolan read it to him he understood it" A typical example is the following (p. 52):

> "Q. What explanation did he give you—tell us what Mr. Nolan said when he explained the deed? A. He read the deed and said 'the entrance in your lots and part of lots 27, right at this point'."

Incidentally, Mr. Nolan himself, died prior to the hearing, so that his testimony was not available.

POINT TWO.

The mistake, if any, in this case is unilateral and therefore not the subject of reformation.

The leading case of *Green* v. *Stone, supra,* outlines the following rule:

> "To warrant reformation in the absence of fraud or imposition, there must be a mutual mistake; that is, a mistake shared by both parties."

There is not a scintilla of evidence in the case that, if, the complainant failed to understand what Mr. Nolan read and explained, that the defendant likewise was under misapprehension as to what was being read. The only evidence we have of the defendant, Mr. Varlaro's attitude, is that relating to the transaction of February 9th. As before pointed out, this fails to establish any mistake at all.

The only evidence we have on Varlaro's attitude is that about three years afterwards, some of his relatives used the stairway. In the first place, that could have no bearing on the question of his mental attitude years before, and secondly, the use by the defendant of this property, is certainly not inconsistent with his claim of title. A person is more likely, if anything, to make use of his own property than a mere easement on another's.

Furthermore, if the complainant had failed to make himself clear to Nolan at the time the deed was drawn and both parties had different ideas of what the deed meant, this might have been the subject of rescission but not reformation. The fact that that portion of the description beginning with the word ALSO is ambiguous as contended for by the

complainant, would only serve to prove that the mistake was not mutual. In the language of Justice Swayze, speaking for the Court of Errors in denying reformation and reversing Vice Chancellor Garrison in *Burns* v. *Thomas,* 81 N. J. Eq. 168, says:

> "There was no mutual mistake since each construction was equally open; the defendant might well think he was agreeing to sell only the lot particularly described, and the complainant that he was agreeing to buy the building by its exterior lines regardless of the land on which it stood. Their minds upon that theory never met. The complainant might indeed be entitled to rescind for the mistake, but that he does not ask, and has not put himself in shape to ask, by the necessary offer to restore the property to the defendant. In view of the ambiguity and the construction by the parties, the complainant fails to establish this case for reformation by that clear and convincing proof and that unexceptionable testimony both with regard to the agreement actually made by the parties and the mutuality of the mistake through which a different agreement was put in the deed, which we have said is necessary to justify the reformation of a deed executed, delivered, accepted and acted upon."

POINT THREE.

The real question involved in the rejectment suit is peculiarly adopted for decision in the court of law.

The complainant contends with great vigor that that portion of the deed beginning with ALSO was ambiguous and not clear. The defendant contends that it is unambiguous in two respects: That the stairway was to be built on lot 27 and that title

was to go with that portion of lot 27 used for that purpose. The defendant, however concedes that the use of the phrase, 2 feet and 6 inches is ambiguous in respect to whether it meant the opening or whether it was parallel to the lot lines. This being so, a court of law is the proper forum in which to try title to that part claimed by the defendant in the ejectment suit.

Indeed the situation here is almost exactly the same as that presented in the case of *Higgins* v. *Linstra,* 7 N. J. Adv. Rep. 609. The court there says in part:

> "The question involved in this issue is the right of the complainants to restrain the defendants from the proceeding with an ejectment suit. In the ejectment proceedings, Linstra, one of the defendants herein, has demanded the possession of certain lands and premises located in the borough of East Paterson, New Jersey. To invest this court with jurisdiction, the complainants ask for a reformation of deeds to their property and the defendants, both of which properties were acquired from Louis A. Allen, a member of the bar now deceased.
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> * * * * * * *
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> It is quite apparent from a perusal and consideration of the evidence of the other witnesses that the dispute between the parties is one involving legal title. The question of legal title, therefore, being involved, it is pre-eminently a case for the law courts. The relief in this jurisdiction should be adequate. Hart v. Leonard, 42 N. J. Eq. 416; Mason v. Ross, 77 N. J. Eq. 527; Hall v. Swinley, 83 N. J. Eq. 349; Ostrander v. United New Jersey Railroad and Canal Co., 83 N. J. Eq. 645."

POINT FOUR.

The decree itself is not supported by the proofs and constitutes a new agreement for the parties made for them by the Court of Chancery.

If the complainant and defendant had any different ideas as to what constituted their bargain, there is certainly no evidence to support the decree as reformed. There is nothing whatever in the testimony which would justify any such description as the following:

> "A column space 10″ x 10″ to be allowed at the southwest corner of said lot No. 27 for the purpose of ingress and egress; the above described plot to have a clear height of seven feet above the sidewalk at the northeasterly corner."

That description is a pure creation of counsel. Thus, the decree as framed is admittedly the product of conjecture. The learned Vice Chancellor says:

> "There appears to have been no ascertainment or determination between the parties as to where the entrance and the stairway was to be located, nor was there any ascertainment or determination as to a description or dimensions thereof" (Opinion, p. 98).

In other words, the court holds that the description in the deed as to the location of the stairway and entrance must be expunged and there must be substituted therefor, something which did not exist in the parol agreement.

It would seem, that the court, guided by what appears to it as most equitable, makes a new agree-

ment for the parties. The reasoning appears to be that the carrying of a fee is really not necessary for the defendants to afford them egress to Main Street, and the location of the stairway on complainants' lot 27 as agreed is too burdensome.

But surely, that the complainants might have been unwise, is not a concern of the Court of Chancery. At most, this would only make the mistake probable from the complainants' standpoint, which is, after all, the only argument of the complainant.

But:

> "Courts of equity do not grant the high remedy of reformation upon a probability; nor even upon the mere preponderance of evidence, but only upon a certainty of error. Pom. Eq. Jur. 859, cited in Hupsch v. Resch, 45 N. J. Eq. 657; affirmed, 46 N. J. Eq. 609, on the opinion of Vice-Chancellor Pitney in which he said, 'that he who asks to have a written instrument reformed must make out a perfectly clear case, free from doubt. The complainants, having failed to make out a perfectly clear case free from doubt, the decree in their favor will be reversed and the bill of complaint dismissed'. Giammares v. Allemannia Fire Ins. Co., 91 N. J. Eq. 114, 119 (Court of Errors)."

CONCLUSION.

The decree of the Court of Chancery should be reversed, and the parties left to their remedies at law.

Respectfully submitted,

CHARLES STENBERG,
Solicitor of Defendant.

NICHOLAS S. SCHLOEDER,
Of Counsel.

Feb. Term — Case # 33

1930

New Jersey Court of Errors and Appeals

Between ERMINIA SIMEONE and FRANK SIMEONE, *Complainants-Appellees,* and DOMINICK VARLARO and CATERINA VARLARO, *Defendants-Appellants.*	On Appeal from the Court of Chancery.

MEMORANDUM FOR COMPLAINANTS-APPELLEES

Facts

This appeal is from a final decree in the Court of Chancery, decreeing the reformation of a deed made by the complainants as grantors to the defendants as grantees.

On February 9, 1924, the complainants agreed to sell certain property situated on Hillside Place, North Bergen, to the defendants for the price of $5400. The defendants paid the complainants $100 as a binder and one of the complainants gave the defendants a receipt.

After delivery of the receipt one of the complainants offered to give an entrance to the Hillside Place property from property which complainant owned adjoining the Hillside Place property in the rear, which property fronted on Main Street.

On February 16, 1924, a formal contract was executed and delivered. The contract was prepared by a real estate broker. The contract provided for the sale of the premises fronting on Hillside Place for the sum of $5400. The conveyance was to be made by deed of full covenant warranty on or before April 1, 1924. The contract did not provide for the conveyance of any part of lot 27.

Lot 27 is the property which was owned by the complainants, fronting on Main Street. The written contract provided that the complainants were to open an entrance in the rear of the Hillside Place property to the Main Street property. The entrance was to contain a stairway, to be built on the rear of lot 27 at the expense of the complainants. It was to be built subsequent to November 1, 1925, and prior to December 1, 1925.

On March 29, 1924, a deed, prepared by the real estate broker, was executed by the complainants. The deed conveyed lot 394, as required by the formal contract of sale. It also conveyed a plot of lot 27, said plot being of the size and dimensions for the purpose of building a stairway, the stairway to be built by the grantors before December 15, 1925. The written contract did not provide for this conveyance of lot 27.

A bill was filed in this cause, for the purpose of reforming the deed, in accordance with the oral agreement made between the parties. The oral agreement provided for a right of ingress and egress over lot 27. After the filing of the bill and before the hearing, Erminia Simeone, one of the complainants, died.

A decree was entered in the Court of Chancery, in accordance with the prayer of the bill of complaint, and this appeal brings up this decree for review.

Point I.

The proof of mistake does meet the legal requirements.

The defendants under Point I of their brief set forth testimony given by Rose Simeone, daughter of the complainant.

The testimony quoted proves that the sale of lot 394 was for the sum of $5400 before anything whatsoever was said regarding an entrance to the Hillside Place property. Rose Simeone testified "Mr. Varlaro *gave a deposit of $100* to my father and made him a receipt on that $100 and *after* this was done my father promised to give him an entrance." According to the testimony of this witness the entrance was to be of two feet, six inches.

All evidence presented in the case proves that the right of ingress and egress over Main Street property was not part of the contract for the sale of the Hillside Place property, but that the right of ingress and egress was voluntarily given.

The formal contract, dated February 16, 1924, bears out the contention of the complainant that the right of ingress and egress was not part of the contract of sale of the property known as lot 394, but that the right of ingress and egress was voluntarily given.

Exhibit C-1 (pages 82 to 86 of the State of the Case) is the usual printed form of contract for the sale of real estate used by real estate brokers, being commonly known as the long form contract of sale.

By this written contract, the complainants agreed that upon the payment of the sum of $5400 and in consideration of the covenants and agreements made in said contract by the defendants, that they would convey to the defendants,

their heirs and assigns by full covenant warranty deed, free from all encumbrances, on or before the *1st day of April next* ensuing the date thereof all that lot, tract or parcel of land and premises hereinafter particularly described, situate, lying and being in the Township of North Bergen, in the County of Hudson and State of New Jersey, which on a certain map entitled "Map of property belonging to the estate of Hugh N. Camp, in the Township of North Bergen, Hudson County, New Jersey, County Block No. 2305, made by Thomas H. McCann, Civil Engineer, March, 1900 and filed in the Office of the Register of the County of Hudson, New Jersey, on October 14, 1901, as Map No. 1240, is known and designated by the lot number 394, in block No. 15, fronting on Hillside Place, as shown on said map (State of Case, page 82, lines 25 to 40).

The defendants by said contract covenanted that they would pay unto the complainants the sum of $5400 as and for the *purchase money* of the *foregoing described lands* and premises (State of Case, page 83, lines 10 to 20).

Under the terms of the written contract complainants were under no duty or obligation to convey even an easement for right of ingress or egress over lot 27. By the terms of the written contract the consideration of $5400 and the covenants made by the defendants was for the conveyance of lot 394.

By said written contract complainant agreed to open an entrance in the rear of the property described in said contract, which is lot 394, and agreed the entrance should contain a stairway, to be built on the rear of lot 27. Said entrance and stairway to be built at their expense at the expiration of a certain lease on the Main Street property expiring on November 1, 1925. The

entrance was to be constructed within one month after the expiration of said lease (State of Case, page 84, lines 10 to 30).

This written contract indicates that the covenant as to the entrance and stairway was made without consideration.

The contract for the sale of lot 394 was to be completed by a conveyance of the same on the delivery of the deed on or before April 1, 1924. The consideration of $5400 was to be paid on delivery of the deed. The contract was consummated on March 29, 1924.

The covenant contained in the written contract for the giving of an entrance and constructing of the stairway was executory. It was not to be performed until after November 1, 1925.

The covenant for the giving of the entrance and the construction of the stairway did not merge in the delivery of the deed. This was an independent and collateral provision and the rule of merger does not apply.

> *Merchants & Traders Developing Company* vs. *Mercer Realty Co.,* 99 N. J. L. 442.
>
> *Ireland* vs. *Penn Motors Co.,* 100 N. J. E. 166.

The oral testimony and written contract justified the conclusion of the learned Vice Chancellor that the granting of the right of ingress and egress over lot 27 was voluntary.

The case of *Davis* vs. *Clark,* 47 N. J. L. 338, cited by the defendants, is not applicable to the case at bar. In the cited case, action was instituted at law to recover damages for a deficiency in the quantity of land. In passing upon said facts the court enunciated the law quoted in defendants' brief. The facts in that case were that

the land provided for by the terms of the contract was actually conveyed.

The undisputed evidence is that there was an agreement that the complainants would grant to the defendants the right of ingress and egress over lot 27; that a stairway would be constructed on or before December 1, 1925; that the stairway was constructed in accordance with the agreement by the complainants at some time subsequent to December 1, 1925; that the stairway was used by members of the defendants' family.

The defendants have not testified. The uncontradicted evidence is that there was no authority for the conveyance of lot 27 to be inserted in the deed. The written contract did not require or authorize the easement to be inserted in the deed. The insertion regarding lot 27 was made on the initiative of the scrivener.

The evidence cited in defendants' brief conclusively proves that both defendants and complainants relied upon the scrivener.

Defendants point out the fact that the scrivener died prior to the hearing and that his testimony was not available. The testimony of the defendants was available but the defendants did not testify. It must therefore be inferred that the testimony that they could give would not contradict the complainant or his witnesses.

Point II.

The mistake in this case is mutual.

The undisputed evidence is that the deed in question was prepared under the impression that it carried out the terms of the contract dated February 16, 1924. As heretofore set forth, the oral contract or the written contract did not require the deed to mention the right of ingress or

egress for lot 27. The deed was prepared by the scrivener without any specific instructions from the complainants or defendants. The scrivener was not a member of the bar. The undisputed evidence is that the complainants and defendants relied upon the scrivener.

Defendants have offered no evidence that they knew that the deed conveyed the fee to any part of lot 27 at the time of the execution and delivery of said deed. Defendants have not taken the stand and testified that the agreement was that they were to have the deed to a part of lot 27.

All the facts in this case indicate that neither of the parties knew that the fee of part of lot 27 was conveyed by said deed.

The draftsman who prepared the contract and deed was a layman. The clauses incorporated by him both in the contract and deed, relating to the entrance and stairway, are vague as to the intention of the parties. The documents indicate that the draftsman was under the impression that unless the stairway was mentioned in the deed that the complainants could not be compelled to construct the stairs or pay damages. The fact that learned counsel for the appellant has urged in Point I of his brief that the deed was a final expression of the parties would justify this inference being drawn.

In the case of *Cochran* vs. *Burns,* 91 N. J. E. 7, the Court reformed the instrument because of the mistake of the draftsman. The Court states:

> "Where an instrument is drawn and executed which professes or is intended to carry into execution an agreement, whether in writing or by parol, previously entered into, by which, by mistake of the draftsman, either as to fact or law, does not fulfill, or which violates the manifest inten-

tion of the parties to the agreement, equity will correct the mistake so as to produce a conformity of the instrument to the agreement."

Point III.

The question involved is peculiarly adopted for a court of equity and not for a court of law.

In the case at bar the complainant contends that the deed was improperly drawn and that it was not the intention of the parties to convey a fee to any portion of lot 27.

Defendants assert and claim that the deed, Exhibit C-2 (pages 88 and 89 of the State of the Case) by its granting clause conveys a fee to a plot of lot number 27.

Complainant would have no remedy in a court of law in an action of ejectment so long as the deed is permitted to stand as drawn.

It is therefore peculiarly a case for a Court of Equity to expurge from the deed that part which was improperly inserted through mistake.

The case cited in Point III of the appellants' brief is not applicable to the case at bar. In that case the question was what land was covered by the deeds. The reformation of the deeds was incidental for the purpose of conferring jurisdiction on the Court of Equity. The facts in the cited case were entirely different than in the case at bar.

Point IV.

The decree is supported by the proofs and does not constitute a new agreement.

The defendants are in error when they state that the complainant and defendants had different views as to what constituted the bargain.

There is not a scintilla of evidence as to what the defendants claim was the bargain. The defendants have not testified.

The findings of the learned Vice Chancellor are founded on the evidence offered by complainant of the oral agreement providing for the stairway. The complainant testified that before the contract dated February 16, 1924, was drawn, he furnished the scrivener with a survey of the property in question and that there was drawn on the survey by the scrivener the location of the stairway (pages 37 and 39 of the State of the Case).

The stairway was subsequently constructed, according to the marks on the survey. The family of the defendant used the stairway. The defendant never objected to the manner in which the stairway was constructed.

Defendants did not dispute or deny any of the testimony given by the complainant and his witnesses. This is the only evidence in the case as to the location of the stairway.

It is respectfully submitted that the contention of the defendants argued in Point IV of their brief is erroneous. The complainant is not asking the Court of Chancery to make an agreement between the parties. He has come into a Court of Equity to ask the reformation of a deed. He has proven that the deed was improperly drawn. He has proven that there was no consideration for the agreement for the easement or entrance. He has proven what the oral agreement was as to the easement.

Coming into a Court of Equity, asking for equity, complainant has offered to do equity. The Chancellor has framed the decree in accordance with the oral agreement as the oral agreement appears from the evidence in this case.

CONCLUSION

The decree of the Court of Chancery should be sustained.

Respectfully submitted,

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Complainants-Appellees.