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Petition on Appeal.

(Filed July 23, 1930.)

New Jersey Court of Errors and Appeals

Between: American Plaster Drill Company, a corporation, Complainant-Appellant, *and* William H. Francisco, *et al.*, Defendants-Respondents.	On Appeal from the Court of Chancery. Petition on Appeal.

To the Honorable the Court of Errors and Appeals in the Last Resort in All Causes:

The petition of the American Plaster Drill Company, the complainant-appellant in the above entitled cause, respectfully for its petition on appeal, shows:

1. The appellant finds itself aggrieved by a final decree made in the Court of Chancery of New Jersey by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, on the advice of the Honorable John O. Bigelow, one of the Vice-Chancellors, bearing date the thirtieth day of June, Nineteen Hundred and Thirty, in a certain cause in said court pending wherein the American Plaster Drill Company, a corporation, is complainant, and William H. Francisco, *et al.*, are defendants; in that, said decree adjudges that the bill of complaint filed in the Court below be dismissed, unless within thirty days after the thirtieth day of June, Nineteen Hundred and Thirty, the complainant file a written consent or election accepting either one or the other of the following options and agreeing to abide by and

perform the respective conditions attached thereto, to wit:

"1. If the complainant shall agree to pay in cash within a time to be fixed by the Court, to a Master to be designated by the Court, the sum of Seventy-five Thousand ($75,000.00) Dollars, for the purpose of refunding to the members of the unincorporated association known as the Ferncliffe Golf & Country Club, the respective amounts paid by such members as consideration for life memberships purchased by them, as set forth in the pleadings herein (the complainant to be subsequently repaid any portion of said sum of Seventy-five Thousand ($75,000.00) Dollars which may prove to be in excess of the requirements aforesaid), and will agree to comply with the requirements of the contract of sale between the defendants, Franciscos, and the defendant, Recreation Development Corporation, and the subsequent assignment thereof and the new contract of sale between the Recreation Development Corporation and Complainant, then this decree, so far as it orders a dismissal of the bill, shall be without force and effect, and a decree may be entered in lieu thereof, on notice, decreeing specific performance of the said contracts upon the conditions hereinabove mentioned.

2. If the said complainant will agree to comply with the requirements of said contract and assignment and to execute and deliver to a corporation to be formed, in which said members shall have equal rights, or to trustees for said members, or to such other designated person or persons as the Court may select, a lease of all of the lands and premises described in the pleadings for the term of the joint lives of the said members, approximately nine hundred twenty (920) in number, upon payment by way of rental of reasonable greens fees and like charges for the use of the facilities that may be provided at complainant's expense upon said premises (this Court to settle from time to time what

shall be considered reasonable greens fees and like charges), which said greens fees and like charges shall be applied first to the payment of interest on any mortgage or mortgages upon said premises, taxes thereon and upkeep of the property, any excess of said sum after the payment of such charges to be paid over to the lessor or its assigns, and upon terms providing that the said complainant shall provide upon said premises such facilities from time to time for the use of such members as the Court shall determine, then this decree so far as it orders the dismissal of the bill of complaint, shall be without force and effect, and a decree may be entered in lieu thereof, on notice, decreeing specific performance of the said contracts upon the conditions hereinabove mentioned."

Petitioner appeals from the aforesaid decree on the ground that the same is erroneous, in that:

(a) It adjudges that the complainant is not entitled to the relief prayed for, but dismisses the bill of complaint, unless the said one or the other of the aforesaid options are accepted by the complainant,

(b) That the contract in question should have been specifically enforced by a decree of the Court of Chancery.

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

Dated, July 22, 1930.

LIONEL P. KRISTELLER,
Solicitor of Appellant.

MERRITT LANE,
Of Counsel.

A True Copy
JOSEPH F. S. FITZPATRICK
Clerk

Notice of Appeal.

(Filed July 3, 1930.)

IN CHANCERY OF NEW JERSEY.

61-499.

Between

AMERICAN PLASTER DRILL COMPANY, a corporation,
Complainant,

and

WILLIAM H. FRANCISCO, *et al.*,
Defendants.

On Bill, Etc.
Notice of Appeal.

To William H. Francisco, et al., Defendants.

Sirs:

The complainant, American Plaster Drill Company, hereby appeals from the Final Decree made in the above entitled cause on June 30th, 1930, and from the whole and every part thereof to the Court of Errors and Appeals, and the last resort in all causes. The aforesaid decree was made by the Chancellor, on the advice of Vice-Chancellor Bigelow.

Dated: July 2, 1930.

Yours, etc.,

LIONEL P. KRISTELLER,
Solicitor for and of counsel
with Complainant.

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

MERRITT LANE,
Of counsel with Complainant.

Petition of Appeal.

(Filed July 24, 1930.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between AMERICAN PLASTER DRILL COMPANY, a corporation, Complainant-Appellee, *and* WILLIAM H. FRANCISCO, *et al.*, Defendants-Appellees, *and* RECREATION DEVELOPMENT COMPANY, a corporation, Defendant-Appellant.	On Appeal from the Court of Chancery. Petition of Appeal.

To the Honorable the Court of Errors and Appeals in the Last Resort in All Causes:

The petition of Recreation Development Company, the defendant-appellant in the above entitled cause, respectfully shows that your petitioner finds itself aggrieved by a final decree made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, on the advice of the Honorable John O. Bigelow, one of the Vice-Chancellors, bearing date June 30, 1930, in a certain cause in said Court pending wherein the American Plaster Drill Company, a corporation, was complainant and William H. Francisco and others were defendants, in that said decree adjudges that the bill of complaint filed in the Court below be dismissed, unless

within thirty days after June 30, 1930, the complainant should file a written consent or election accepting either one or the other of the two options provided for in said decree.

Petitioner appeals from the said decree on the ground that the same is erroneous in that:

(a) It adjudges that the complainant is not entitled to the relief prayed for, but dismisses the bill of complaint unless one or the other of the aforesaid options are accepted by the plaintiff.

(b) That the contract in question should have been specifically enforced in accordance with its terms upon the complainant complying with the terms of said contract and with the terms of the assignment thereof made by your petitioner to the complainant, by a decree of the Court of Chancery.

(c) While the decree appealed from does not specifically adjudge your petitioner guilty of fraud, yet as it was based upon the memorandum of the learned Vice-Chancellor filed in said suit in which he found as follows: "I find that the Development Corporation and the Golf Company were mere *alter egos* of Davidson, and that with him they engaged in a scheme to defraud the members," your petitioner appeals from the whole and every part of said final decree on the ground that such finding of the said Court was erroneous and was contrary to the evidence and the law.

(d) That said decree was based upon the memorandum of the learned Vice-Chancellor filed in said suit in which he found as follows: "Any title or interest which the Development Corporation has in the property is held in trust for the

members to the extent that may be necessary to make good the representations which induced the members to join the Club:" and also "The practical effect of the foregoing is that the members, in equity, have the entire title and interest of the Development Corporation for the term of their joint lives." Your petitioner appeals from the whole and every part of said final decree on the ground that such findings of the said Court were erroneous and were contrary to the evidence and the law.

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

Dated July 24, 1930.

SMITH & SLINGERLAND,
Solicitors of Recreation Development
Company, Defendant-Appellant.

Notice of Appeal.

(Filed July , 1930.)

IN CHANCERY OF NEW JERSEY.

Between

AMERICAN PLASTER DRILL COMPANY,
Complainant,

and

WILLIAM H. FRANCISCO, *et als.*,
Defendants.

On Bill, &c.
Notice of Appeal.

The defendant, Recreation Development Company, hereby appeals from the final decree made by the Chancellor on the advice of Vice-Chancellor John O. Bigelow in the above entitled cause on June 30, 1930, and from the whole and every part thereof to the Court of Errors and Appeals in the Last Resort in All Causes.

Dated, July 3, 1930.

SMITH & SLINGERLAND,
Solicitors for and of Counsel with defendant, Recreation Development Company.

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

ARCHIBALD F. SLINGERLAND,
Of Counsel with Defendant, Recreation Development Company.

Notice of Appeal.

(Filed July 10, 1930.)

IN CHANCERY OF NEW JERSEY.

61-499.

Between

AMERICAN PLASTER DRILL COMPANY, a corporation, Complainant,

and

WILLIAM H. FRANCISCO, *et als.*, Defendants.

On Bill, Etc.
Notice of Appeal.

To American Plaster Drill Company, a corporation, complainant; and to Recreation Development Corporation, a corporation, defendant.

Sirs:

The defendants, William H. Francisco, Mary F. Francisco, his wife, Richard S. Francisco, Mary A. Francisco, his wife, and D. W. Dryden and others similarly situated, hereby appeal from that part of the final decree made in the above entitled cause on June 30th, 1930, which provides that that portion of said decree which dismisses the bill of complaint shall be without force and effect in the event that the complainant shall exercise either one of the options provided for in said decree, and from that portion of said decree which provides certain options in favor of the complainant, to the Court of Errors & Appeals of the last resort in all causes; the aforesaid de-

cree having been made by the Chancellor on the advice of Vice-Chancellor Bigelow.

Dated: July 10, 1930.

Yours, etc.

DOUGAL HERR,
Solicitor for and of counsel with defendants, William H. Francisco, Mary F. Francisco, his wife, Richard S. Francisco, Mary A. Francisco, his wife, and D. W. Dryden and others similarly situated.

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

DOUGAL HERR,
Of Counsel with defendants, William H. Francisco, Mary F. Francisco, his wife, Richard S. Francisco, Mary A. Francisco, his wife, and D. W. Dryden and others similarly situated.

Petition of Appeal.

(Filed July 23, 1930.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

AMERICAN PLASTER DRILL COMPANY, a corporation,
Complainant-Appellee,

and

WILLIAM H. FRANCISCO, MARY F. FRANCISCO, his wife, RICHARD S. FRANCISCO, MARY A. FRANCISCO, his wife, and D. W. DRYDEN and others similarly situated,
Defendants-Appellants,

and

RECREATION DEVELOPMENT CORPORATION, a corporation,
Defendant-Appellee.

On Appeal from the Court of Chancery.

Petition of Appeal.

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

The petition of William H. Francisco, Mary F. Francisco, his wife, Richard S. Francisco, Mary A. Francisco, his wife, and D. W. Dryden and others similarly situated, the appellants in the above entitled cause, respectfully shows that your petitioners find themselves aggrieved by a final

decree made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date the 30th day of June, 1930, in a certain cause in said Court of Chancery wherein the said American Plaster Drill Company, a corporation, was complainant, and the said William H. Francisco, Mary F. Francisco, his wife, Richard S. Francisco, Mary A. Francisco, his wife, D. W. Dryden and others similarly situated, and Recreation Development Corporation, were defendants, in this respect, to wit, that the said decree adjudges and decrees that that portion of said final decree which dismisses the bill of complaint shall be without force and effect in the event that the complainant shall exercise either one of the two options provided for in said decree.

And petitioners appeal from the final decree of the Chancellor which decrees aforesaid, upon the ground that same is erroneous because the said decree should have dismissed the bill of complaint without condition, and because it should not have provided any options whatsoever in favor of the complainant, and on the ground that the option first decreed, to wit, the payment of the sum of Seventy-five thousand ($75,000.00) Dollars to a Master to be designated by the Court, is not equitable and just to these appellants, nor justified by the facts or the law, and that the second option decreed in said final decree is likewise unjust and inequitable to the appellants, and is not justified by the facts or the law.

Petitioners therefore pray that the said decree of the said Chancellor may be, in the particulars aforesaid, reversed, set aside and for nothing holden, and that insofar as the said final decree adjudges and decrees the dismissal of the bill of

complaint, the same is agreeable to equity and should be affirmed by this Court; and that petitioners may have such other relief in the premises as to this Honorable Court shall seem proper.

DOUGAL HERR,
Solicitor for and of Counsel with Appellants.

Bill of Complaint.

(Filed August 9, 1926.)

IN CHANCERY OF NEW JERSEY.

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

The complaint of the American Plaster Drill Company, a corporation of the State of New York, having its principal place of business in the Borough of Brooklyn, County of Kings, State of New York, complaining of the defendants, says:

1. That heretofore on the eleventh day of June, 1924, the defendants, William H. Francisco, Mary F. Francisco, his wife, Richard S. Francisco, and Mary A. Francisco, his wife, entered into a written agreement with the Recreation Development Corporation, a New Jersey corporation, for the sale of certain lands and premises in the Borough of West Caldwell, in the County of Essex, in accordance with a written agreement, a copy of which is hereto annexed, marked Schedule A, and hereby expressly referred to as if the same were herein set forth fully and at length.

2. That under and by virtue of said agreement, in consideration of Recreation Development Corporation agreeing to pay to the defendants, William H. Francisco, Mary F. Francisco, his wife, Richard S. Francisco, and Mary A. Francisco, his wife, the sum of $75,000 as set forth in said agreement, said defendants, William H. Francisco, Mary F. Francisco, his wife, Richard S. Francisco, and Mary A. Francisco, his wife, agreed to convey the property by a full covenant and warranty deed conveying to the said Recreation Development Corporation or its assignees the fee simple of said premises free and clear of all encumbrances except as expressly set forth in the said agreement.

3. That thereafter the said Recreation Development Corporation paid or caused to be paid to the said William H. Francisco and Richard S. Francisco the payments agreed to be made under and pursuant to the agreement, Schedule A hereto annexed, and on the eleventh day of June, 1925, the said defendants, William H. Francisco, Mary F. Francisco, his wife, Richard S. Francisco, and Mary A. Francisco, his wife, entered into a further agreement with the said Recreation Development Corporation, a copy of which is hereto annexed and made part hereof, marked Schedule B, and hereby referred to as if herein set forth fully and at length, wherein and whereby the payment due on June 11, 1925, of $2,500 was extended so that said payment might be made on or before September 11, 1925, and reaffirmed all of the agreements contained in the contract attached hereto, marked Schedule A, and said payment was thereafter duly made, so that the said defendants, William H. Francisco and Richard S. Francisco received $2,500 and interest on account

of the $20,000 in cash agreed to be paid under and pursuant to said agreement.

4. That thereafter and on the second day of January, 1926, the said Recreation Development Company entered into an agreement with the complainant wherein and whereby the said defendant, Recreation Development Corporation, sold, transferred, and assigned all of its rights in and to the aforesaid contract of June 11, 1924, to the complainant, and the said William H. Francisco and Richard S. Francisco approved and consented to the said assignment and sale of said agreement, and the said complainant did, on the second day of January, 1926, pay to the Recreation Development Corporation the sum of $7,000 in cash, to be paid on account of the purchase price of the lands mentioned in the said agreement, marked Schedule A, and which said deposit of $7,000 was immediately endorsed, transferred and signed over and delivered to Robert W. Cromley, who was present and appeared with the said defendants, William H. Francisco and Richard S. Francisco, at the making and execution of said assignment and the agreement hereinafter referred to, and acted as attorney for the said Franciscos at the time of the sale and transfer of the agreement marked Schedule A.

5. On the same day the said Recreation Development Corporation entered into two agreements with the complainant, in one of which agreements said Recreation Development Corporation agreed in writing to convey to the complainant, the premises described in the exhibit marked Schedule A in consideration of the complainant agreeing to pay to the Recreation Development Corporation the sum of $130,000, a copy of which

agreement is hereto annexed, marked Schedule D, and herein referred to as if set forth fully and at length. The other agreement entered into between the said complainant and the defendant, Recreation Development Corporation was an actual assignment of said contract marked Schedule A, a copy of which assignment is hereto annexed and marked Schedule E, and herein referred to as if set forth fully and at length.

6. That at the time the said defendants, William H. Francisco, and Richard S. Francisco, received by endorsement the $7,000 in cash paid by the complainant on account of the purchase price of the lands and premises herein set forth, making a total of $12,000 on account of the contract marked Schedule A, the said Franciscos, in consideration of the payment of the said deposit of $7,000 by the complainant to the Recreation Development Corporation and the payment of said deposit of $7,000 to them as a further payment on account of the purchase price, entered into an agreement with the said Recreation Development Corporation, a copy of which is hereto annexed and marked Schedule C and herein referred to as if set forth fully and at length, wherein and whereby the said Franciscos extended the time for the payment of the third payment required to be made to them under and pursuant to the agreement dated June 11, 1924, Schedule A hereto annexed, to the first day of March, 1926, at which time title was to pass and the original agreement (Schedule A) was modified so that the amount of the purchase money mortgage to be accepted by the defendants, Franciscos, at the passing of title was to be $70,000 instead of $55,000.

7. That thereafter the complainant caused a search of the property to be made by the Fidelity Union Title Mortgage and Guaranty Company of the City of Newark, which search disclosed that on February 5, 1926, a *lis pendens* was filed against the said property, giving notice of suit then pending between C. W. Dryden, complainant, and Joseph W. Donaldson, *et al.*, defendants, and that the said Richard S. and William H. Francisco were defendants in said suit, and that said suit related to the title of the property mentioned in Schedule A hereto annexed.

8. That prior to the time set for the passing of title, to wit, on March 1, 1926, the agreement annexed hereto and marked Schedule C, extending the time of closing to March 1, 1926, was further extended by the defendants Franciscos to the first day of April, 1926, and on said day, the said *lis pendens* not having been removed and all of the said defendants having been advised that said *lis pendens* was a lien against the said property, the said defendants, Franciscos, consented and assented in writing that the time of closing was further extended to April 20, 1926.

9. That on the said 20th day of April, 1926, and at all times thereafter, the complainant was ready, able, and willing to carry out the terms of all the agreements hereto annexed, but the said defendants Franciscos were and still are unable to convey the said lands and premises by a full warranty deed because of the said *lis pendens* upon the said property, and said *lis pendens* has not been removed from the record to the date of the filing of this bill.

10. That the complainant has often requested said defendants William H. Francisco, Richard

S. Francisco, and The Recreation Development Corporation, to deliver their and its deed in accordance with the terms of said contracts, and the said defendants have utterly failed and refused so to do, although the said complainant has in all respects fulfilled its part of said contract on its part to be performed.

11. That thereafter and on or about the twenty-fourth day of July, 1926, the defendants William H. Francisco and Richard S. Francisco commenced an action in the New Jersey Supreme Court, Essex County, by which the plaintiffs therein seek to eject the said Recreation Development Corporation and the Ferncliffe Golf & Country Club, Inc., from the lands herein described and now under contract of sale to this complainant.

12. That your complainant has agreed (see Schedule D) to take a deed to the said lands and premises subject to the lease of the Ferncliffe Golf & Country Club, Inc., and subject to the rights of its members, and in the event that said ejectment suit is permitted to be continued to the entry of judgment therein, the said lands and premises will be vacated and there will be no tenants upon the said premises, and the complainant will be deprived of a large annual income therefrom and the value of the property will be materially decreased.

13. That the said lands and premises consist of 157 acres of uncultivated ground which the said tenant, the Ferncliffe Golf & Country Club, has improved by the building of a large and beautiful golf course and the said lease provides that the said tenant shall maintain the said ground as a golf course and shall pay all the taxes upon

the property, and in addition thereto shall pay an annual rental of $15,000 a year.

14. That your complainant alleges that if the said suit at law is permitted to continue, it will suffer irreparable loss and damage in that said lands will not be improved and protected and the said lands cannot be readily rented, and the income thereon amounting to $15,000 a year, will terminate.

15. That said golf club is used by a large number of persons every week day and on Sundays and the income received for the use of said course by the players thereon amounts to a very large sum per week, and the complainant alleges that the ejectment suit heretofore referred to has been commenced and is being continued for the purpose of preventing your complainant obtaining the title to said property, and depreciating the value of said land so that the complainant will be defeated and deprived of its bargain and the rights under its contract.

16. That your complainant alleges that it is absolutely necessary that the entire property be preserved during the pendency of this litigation so that in the event that the complaint is successful, and a decree of specific performance is entered in this cause, it will receive a deed for the premises in the same condition in which they were contracted for; together with the valuable lease-hold and also the rents, issues, and profits derived therefrom, and that in order that the lands and premises may be preserved, a receiver or receivers of this Court should be appointed to collect the rent, issues, and profits therefrom and maintain the property during the pendency of this suit.

YOUR COMPLAINANT IS WITHOUT ADEQUATE REMEDY IN THE COURTS OF LAW, AND THEREFORE PRAYS:

1. That the defendants William H. Francisco, Mary F. Francisco, his wife, Richard S. Francisco, and Mary A. Francisco, his wife, The Recreation Development Corporation, may answer this bill of complaint and each and every statement therein made.

2. That the said defendants and each of them be compelled and decreed to convey the said lands and premises to the complainant therein and to specifically perform each and every the terms and conditions of the agreements and contracts herein referred to and hereto annexed, or, in the alternative, that the said complainant be decreed to have a lien upon the said premises for the amount paid on the said contract on account of the purchase price of the said lands and premises and for its costs and disbursements in that behalf and that the said defendant be decreed to pay said lien or, upon their failure to do so, that the said lands and premises be sold to pay and satisfy the said lien.

3. That a receiver or receivers be appointed to collect the rents, issues, and profits of the said lands and premises pending final hearing of this Court, and that the said receiver or receivers be authorized to protect and preserve the subject matter of this litigation.

4. That the suit or proceeding now pending in the New Jersey Supreme Court wherein William H. Francisco, *et al.*, are plaintiffs and Recreation Development Corporation, *et al.*, are defendants be perpetually stayed and enjoined and the parties thereto restrained and enjoined from taking any further proceedings therein.

5. That a writ or writs of subpoena may issue out of this Court commanding the said defendants William H. Francisco, Mary F. Francisco, his wife, Richard S. Francisco, and Mary A. Francisco, his wife, and the Recreation Development Corporation, to answer the bill of complaint and to abide by and perform the said order or decree as the Chancellor may think just and proper in the premises.

And your complainant will ever pray.

LIONEL P. KRISTILLER,
Solicitor for and of Counsel
with Complainant.

Dated, August 9, 1926.

Affidavit of Michael Tannenbaum.

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

MICHAEL TANNENBAUM, being duly sworn according to law, deposes and says that he is the President of the American Plaster Drill Company, the complainant in this cause; that he has read the foregoing bill of complaint and knows the contents thereof, and that the same is true according to the best of his knowledge and belief.

1. That on the eleventh day of June, 1924, William H. Francisco and his wife and Richard S. Francisco and his wife made a written agreement with the Recreation Development Corporation to sell to them certain lands and premises in the Borough of West Caldwell, in the County of

Essex, as more particularly described in Schedule A hereto annexed.

2. That the purchase price for the said lands was $75,000 and the property was to be conveyed by a full covenant and warranty deed conveying to the Recreation Development Corporation or its assigns the fee simple to said premises free and clear of all encumbrances except those expressly set forth in the agreement.

3. That the Recreation Development Corporation paid or caused to be paid the payments due to the said Franciscos and on June 11, 1925, the said Franciscos and their wives made a further agreement with the Recreation Development Corporation, a copy of which is annexed to the bill of complaint and marked Schedule B, and in that agreement extended the time of payment of $2,500 from June 11, 1925, to September 11, 1925, and reaffirmed all of the conditions of the agreement marked Schedule A, and the Franciscos received thereafter $2,500 on account of the cash consideration for the conveyance of said land.

4. That on January 2, 1926, the Recreation Development Corporation made an agreement to sell the same lands to the complainant and assigned all of its rights in and to the contract marked Schedule A to the complainant, and the complainant paid $7,000 in cash, which $7,000 was paid pursuant to an agreement to which the said Franciscos and their attorney consented and at the making of which agreement they were all present, and the $7,000 was thereafter immediately paid to the said Franciscos and accepted by them on account of the purchase price of the property mentioned in Schedule A.

5. Two agreements were entered into on January 2, 1926, by the complainant and the defendant, Recreation Development Corporation, one of which was an assignment of the contract marked Schedule A and which is annexed to the complaint and marked Schedule E. Another was a contract of sale to purchase the said land from the Recreation Development Corporation for the consideration of $30,000, although the Recreation Development Corporation agreed to pay only $75,000 to the defendants Francisco.

6. That when the defendants Franciscos received the $7,000 in cash, which was paid by the complainant on account of the purchase price of the said lands, the Franciscos had received $12,000 on account of the contract marked Schedule A, and at the time the Franciscos extended the time of making the third payment under their contract Schedule A to March 1, 1926, and modified their original agreement so that they were to accept a $70,000 first mortgage upon the land instead of the $55,000 first mortgage, which mortgage was to be made a purchase money mortgage at the time title passed.

7. On behalf of the complainant I caused a search to be made of the property by the Fidelity Union Title Mortgage and Guaranty Company. That search disclosed that a *lis pendens* was filed against this property on February 5, 1926, giving notice of a suit then pending between C. W. Dryden, complainant, and Joseph W. Donaldson, and others, defendants, among which defendants were the said Richard S. Francisco and William H. Francisco and that the suit related to the title of the property in this cause.

8. That prior to March 1, 1926, the defendants Franciscos not being able to remove the *lis pendens* from the property, consented and assented in writing that the time of closing be further continued to April 20, 1926.

9. That on said day and at all other times the complainant has been ready, able and willing to carry out all the terms of its agreement, but the defendants and all of them have been and are still unable to give to our complainant a full warranty deed because the *lis pendens* above mentioned still remains on the property.

10. That I have on behalf of the complainant often requested the defendants William H. Francisco and Richard S. Francisco to have the said *lis pendens* removed so that the complainant might receive a good warranty deed for the premises; that the defendants have utterly failed and refused to carry out their agreement and to have the *lis pendens* removed from the title, although the complainant has always been and still is ready to fulfill its part of the contract.

11. That on the twenty-fourth day of July, 1926, the defendants William H. Francisco and Richard S. Francisco commenced an action in ejectment in the New Jersey Supreme Court, in which suit they are endeavoring to regain possession from the Recreation Development Corporation and its tenant, the Ferncliffe Golf & Country Club, Inc.

12. That the complainant has agreed as set forth in Schedule D to accept a deed to the said lands and premises subject to the lease of the golf club and in the event that judgment is to be entered into that ejectment suit, the lands will

be vacant and there will be no tenants and the complainant will be deprived of a large annual income under the terms of that lease and the value of the property will be materially decreased.

13. The lands in question consist of 157 acres of uncultivated ground upon which the tenant, the Ferncliffe Golf & Country Club, has built a large and beautiful gold course, and among the terms of the lease of the golf club the golf club pays an addition to the rental of $15,000 a year all the taxes upon the property.

14. If the suit at law is permitted to continue the complainant will suffer irreparable loss and damage inasmuch as the lands will not be improved and the present improvements will not be protected and the lands cannot be readily rendered and the income in excess of $15,000 a year will cease and terminate.

15. The golf course is used by a large number of persons every day of the week and large sums are received for the privilege of playing thereon, and the ejectment suit hereinbefore referred to has been commenced and is being continued by these defendants for the purpose of preventing complainant from obtaining title to the said lands and preventing the complainant from obtaining the benefit of this bargain.

16. It is absolutely necessary that a receiver be appointed to protect the property and reserve it until the final hearing of this cause, so that the leasehold and the rents, issues and profits may be collected and used to maintain the property until the final hearing of this suit.

The complainant in this case is a corporation, and the verification is made by me as the Presi-

New Jersey State Library

dent thereof, and I have full knowledge and information concerning the facts stated in this affidavit.

WHEREFORE, I respectfully pray for the granting of the relief requested in the bill of complaint.

MICHAEL TANNENBAUM.

Sworn and subscribed to before me this 9th day of August, 1926.

SAUL J. ZUCKER,
An Attorney at Law of N. J.

Schedule A.

ARTICLES OF AGREEMENT made the Eleventh day of June, 1924, between WILLIAM H. FRANCISCO and RICHARD S. FRANCISCO, of Caldwell, New Jersey, parties of the first part and RECREATION DEVELOPMENT CORPORATION, a domestic corporation organized under the Laws of the State of New Jersey and having its principal office in the City of Paterson, State of New Jersey, party of the second part.

WITNESSETH, that the parties of the first part agree to sell and convey and the party of the second part agrees to purchase,

ALL that tract or parcel of land and premises situate, lying and being in the Borough of West Caldwell, in the County of Essex and State of New Jersey, comprising one hundred fifty-seven and twenty-seven one hundredths (157.27) acres and being the land and premises shown on a map entitled "Map of Part of Farm owned by Francisco Brothers, West Caldwell, Essex County, N. J." dated May 29, 1924, George E. Jenkins, Esq. Dover, N. J.

Schedule A, Annexed to Affidavit of Michael Tannenbaum.

Said premises are intended to include a large cow barn, a well located near the cow barn and also a house and barn on the westerly end of the premises, AND IT IS FURTHER AGREED:—

The premises are sold to the party of the second part for the purpose of constructing golf links, tennis courts and the erection of a club house thereon, and the use of said premises by the party of the second part is limited to such purposes until the deed thereof is given as hereinafter provided.

The property is to be conveyed also subject to the right of the parties of the first part to use the well above mentioned for the purpose of supplying water to their houses, outbuildings, and property located on Clinton Road free of any charge therefor for a period of twenty-five years from the date hereof, and this agreement is to survive the deed and a covenant to that effect is to be inserted in the deed.

The parties of the first part are to pay the taxes on said land and premises for the year 1924 and thereafter the taxes are to be paid by the party of the second part.

The parties of the first part are to have the right to use said premises for farming purposes in 1924, but the party of the second part is to have the right to proceed with the development of said lands and premises for golf links, tennis courts and the erection of a club house, and the party of the second part is to have possession of the house and barn located at the westerly end of the premises as shown on said map herein referred to immediately upon the signing of this agreement.

Schedule A, Annexed to Affidavit of Michael Tannenbaum.

The purchase price is SEVENTY-FIVE THOUSAND DOLLARS ($75,000) payable as follows:

$500.....FIVE HUNDRED DOLLARS thereof on the execution and delivery of this agreement, the receipt whereof is hereby acknowledged;

$2,000.....TWO THOUSAND DOLLARS thereof on the 11th day of December, 1924;

$2,500.....TWENTY-FIVE HUNDRED DOLLARS thereof on the 11th day of June, 1925;

$5,000.....FIVE THOUSAND DOLLARS thereof on the 11th day of December, 1925;

$10,000.....TEN THOUSAND DOLLARS thereof on the 11th day of June, 1926;

$55,000.....FIFTY-FIVE THOUSAND DOLLARS thereof by the execution and delivery of a bond of the party of the second part secured by a purchase money mortgage on the premises contracted to be conveyed hereby which shall be dated the 11th day of June, 1926 and shall run for five years with interest payable semi-annually at six (6%) per cent., which shall contain the usual interest, tax, assessment, insurance and default clause, 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, and shall contain the privilege to the mortgagors to pay all or any portion of said principal at any time during said five years, which bond and mortgage shall be drawn by the counsel for the parties of the first part and the expenses thereof, and all fees and revenue stamps in connection with the giving and recording of said mortgage and the giving of said bond shall be paid by the party of the second part.

Schedule A, Annexed to Affidavit of Michael Tannenbaum.

The deed shall be a full covenant and warranty deed so as to convey to the purchaser the fee simple of said premises free and clear of all encumbrances except as above stated and shall be delivered at the residence of said William H. Francisco, Clinton Road, Caldwell, New Jersey, on the 11th day of June, 1926, between the hours of twelve o'clock noon and nine o'clock P. M., provided the said sums aggregating TWENTY THOUSAND ($20,000) DOLLARS have been paid on account of the purchase price of said premises as hereinabove agreed.

If default be made in the payment of the several sums aggregating Twenty Thousand ($20,000) Dollars as above provided then this contract at the option of the parties of the first part is to be null and void and the parties of the first part may retain all sums paid on account of said purchase price as liquidated damages.

Any of the payments above set forth may be anticipated and the party of the second part shall be entitled to a deed prior to the 11th day of June, 1926, provided the sum of Twenty Thousand ($20,000) Dollars has been paid upon account of the purchase price of said premises.

The party of the second part is to pay interest upon the balance of the purchase price remaining unpaid at the rate of six (6%) per cent. per annum from April 1, 1925, such interest to be paid semi-annually on the 11th days of June and December.

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

The stipulations, covenants and agreements hereinabove contained are to apply to, bind and

enure to the benefit of the heirs, executors and administrators, successors and assigns of the respective parties hereto.

In Witness Whereof the parties of the first part have hereunto set their hands and seals and the party of the second part has caused its corporate seal to be hereto affixed and these presents signed by its proper officers, the day and year first above written.

Witness as to
William H. Francisco
Richard S. Francisco
Robert H. Cromley

William H. Francisco (LS)

.....

Mary F. Francisco (LS)

.....

Richard S. Francisco (LS)

.....

Mary A. Francisco (LS)

Recreation Development Corporation
By J. W. Donaldson
Pres.

Attest:
John F. Cullen, Secretary.

Schedule A, Annexed to Affidavit of Michael Tannenbaum.

STATE OF NEW JERSEY }
COUNTY OF ESSEX } SS.:

On the 17th day of June, 1924, before me personally came WILLIAM H. FRANCISCO and RICHARD S. FRANCISCO to me known and known to me to be the individuals described in and who executed the foregoing instrument, and they duly acknowledged to me that they executed the same.

ROBERT W. CROMLEY, (L. S.)
Attorney of the Supreme Court
of New Jersey.

STATE OF NEW JERSEY }
COUNTY OF ESSEX } SS.:

BE IT REMEMBERED, that on this 17th day of June, 1924, before me personally appeared John F. Cullen, who being by me duly sworn on his oath says he is the Secretary of the RECREATION DEVELOPMENT CORPORATION, the grantor named in the foregoing instrument, that the seal affixed to said instrument is the corporate seal of said corporation; that the said seal was so affixed and the said instrument signed and delivered by J. W. Donaldson, who was, at the date thereof, the president of said corporation, in the presence of this deponent, the said President at the same time acknowledged that he signed, sealed and delivered the same as his voluntary act and deed, and as the voluntary act and deed of said corporation, and that deponent, at the same time, subscribed his name to said instrument as an attesting witness to the execution thereof.

ROBERT W. CROMLEY, (L. S.)
Attorney of the Supreme Court
of New Jersey.

Schedule A, Annexed to Affidavit of Michael Tannenbaum.

December 6, 1924.

Received from Recreation Development Corporation $2000. in payment of the second installment of the consideration for the conveyance of premises in the Borough of West Caldwell, Essex County, New Jersey, to be conveyed to the said Recreation Development Corporation by William H. Francisco and Richard S. Francisco according to articles of agreement dated June 11, 1924.

Wm. H. Francisco (L. S.)
R. S. Francisco (L. S.)
Mary A. Francisco (L. S.)
Mary F. Francisco (L. S.)

Paid 6-11-24	$500.00
Paid 12-11-24	2000.00
	2500.00
Due 6-11-25	2500.00

Schedule B.

Agreement made this 11th day of June, 1925 between William H. Francisco and Richard S. Francisco of Caldwell, New Jersey, parties of the first part and Recreation Development Corporation, a domestic corporation organized under the laws of the State of New Jersey, party of the second part,

Witnesseth, whereas, by agreement dated June 11, 1924, the parties of the first part hereto agreed to sell to the party of the second part, and the party of the second part agreed to purchase from the parties of the first part a tract of land in the Borough of West Caldwell, County of Essex and

Schedule B, Annexed to Affidavit of Michael Tannenbaum.

State of New Jersey, containing 157.27 acres of land, and

WHEREAS, by the terms of said agreement an installment on account of the purchase price thereof amounting to $2500 was due on June 11, 1925, and also interest on the unpaid purchase price from April 1, 1925, amounting to $737 and

WHEREAS, the parties hereto wish to extend the time of payment of said instalment of principal and interest.

NOW, THEREFORE, it is mutually agreed between the parties hereto that the time for the payment of said installment of $2500 due on the 11th day of June, 1925, and of said interest due on June 11, 1925, be and the same hereby is extended so that said installment of principal of $2500 and said interest shall become due and payable on September 11, 1925, and except as hereby modified said agreement of June 11, 1924, is hereby ratified and confirmed.

IN WITNESS WHEREOF the parties of the first part have hereunto set their hands and seals, and the party of the second part has caused its corporate seal to be hereto affixed and these presents signed by its proper officers the day and year first above written.

WILLIAM H. FRANCISCO (L. S.)
MARY F. FRANCISCO (L. S.)
RICHARD S. FRANCISCO (L. S.)
MARY A. FRANCISCO (L. S.)

RECREATION DEVELOPMENT CORPORATION,

By J. W. DONALDSON,
President.

Attest:

HERBERT A. BLANCHET
Secretary.

Schedule C.

AGREEMENT made this 2nd day of January, 1926, between WILLIAM H. FRANCISCO and RICHARD S. FRANCISCO, parties of the first part, and RECREATION DEVELOPMENT CORPORATION, party of the second part, witnesseth,

WHEREAS by agreement dated June 11, 1924, the parties of the first part agreed to sell and convey to the party of the second part certain premises in the Borough of West Caldwell, Essex County, New Jersey, upon the terms and conditions therein mentioned.

AND WHEREAS the said agreement provided for certain cash payments on account of the purchase price on dates set forth in said agreement,

AND WHEREAS the first two payments required by said contract were duly made and the time for the payment of the third and fourth payments required by the said contract was extended by the parties of the first part until January 2, 1926,

AND WHEREAS the parties of the first part have agreed to accept the sum of $2,500, being the third payment required by said contract with interest upon the unpaid purchase price and have agreed to accept payment of the balance of said purchase price amounting to $70,000 by the execution and delivery of a purchase money bond and mortgage as hereinafter provided;

NOW THEREFORE in consideration of the premises and of the sum of One dollar each to the other in hand paid the receipt whereof is hereby acknowledged, the parties hereby agree as follows:

Schedule C, Annexed to Affidavit of Michael Tannenbaum.

1. The parties of the first part hereby extend the time for the payment of the third payment required by said agreement of June 11, 1924 (the first two payments required by said contract having been heretofore made), together with interest upon the unpaid purchase price, amounting to the sum of $3,262.50 until March 1, 1926.

2. The parties of the second part agree to pay said third payment and said interest on or before March 1, 1926, and the parties of the first part agree to accept the balance of said purchase price, amounting to $70,000 by the execution and delivery to them of a bond of the party of the second part, secured by a purchase money mortgage on the premises agreed to be conveyed by said agreement of June 11, 1924, which mortgage shall be dated March 1, 1926, on or before which date the deed is to be delivered, and shall run for nine years with interest payable semi-annually at six per cent. per annum, and which mortgage shall contain the 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 and shall contain the privilege to the mortgagors to pay said mortgage at any time upon giving sixty days previous notice in writing, and also to contain the privilege of paying $5,000 or more of the principal of said mortgage on any interest date. In all other respects the said agreement of June 11, 1924, is to remain in full force and effect.

In Witness Whereof, the parties of the first part have hereunto set their hands and seals and the party of the second part has caused its corpo-

rate seal to be hereto affixed and these presents to be signed by its proper officers the day and year first above written.

WILLIAM H. FRANCISCO (L. S.)
by ROBT. W. CROMLEY, Atty.
RICHARD S. FRANCISCO (L. S.)

RECREATION DEVELOPMENT CORPORATION.
By
President.

Attest:
Secretary.

The time to make the third payment under the contract of June 11, 1924, above mentioned and to close title is hereby extended to April 1st, 1926.

WILLIAM H. FRANCISCO (L. S.)
and R. S. FRANCISCO "
by ROBT. W. CROMLEY, Atty.

Further continued to April 20, 1926.

W. H. & R. S. FRANCISCO,
by ROBT. W. CROMLEY, Atty.

Schedule D.

RECREATION DEVELOPMENT CORP.

AND

AMERICAN PLASTER DRILL CO.

ARTICLES OF AGREEMENT made this second day of January, 1926, between Recreation Development Corporation, a corporation of New Jersey, of the first part, (hereafter for convenience

called the Vendor) and American Plaster Drill Co., a corporation of New York, of the second part, (hereafter for convenience called the Purchaser).

WHEREAS the Vendor has purchased and is about to have conveyed to it the premises hereinafter described, consisting of 157 acres in the Borough of West Caldwell, in the County of Essex and State of New Jersey, subject to a purchase money mortgage for $70,000., payable in nine years with interest at the rate of six per cent per annum, payable semi-annually, and

WHEREAS the Vendor has had possession of said premises under an agreement of sale and has leased the same to the Ferncliffe Golf and County Club, Inc., a corporation of New Jersey, the terms of which lease are known to the party of the second part,

AND, WHEREAS, a portion of said premises has been laid out and improved by the Ferncliffe Golf and County Club, Inc., as a golf course, and said Ferncliffe Golf and Country Club, Inc., has sold to certain persons the right to use said course, subjct to daily charges therefor, and

WHEREAS, by agreement dated September 19, 1925, made by the Vendor and said Ferncliffe Golf and Country Club, Inc., with Essex Title Guaranty and Trust Company and J. W. Donaldson, the stock of the Vendor and said Ferncliffe Golf and Country Club, Inc., were offered to the persons to whom the privilege of playing golf on said golf course had been granted and sold, the terms of which agreement are known to the party of the second part, and

Schedule D, Annexed to Affidavit of Michael Tannenbaum.

WHEREAS said members have failed to exercise their rights under said agreement,

NOW, THEREFORE, the said Vendor, in consideration of the sum of $130,000. to be paid and satisfied as hereinafter mentioned, and also in consideration of the covenants and agreements herein contained, made and entered into by the Purchaser, doth agree to and with the said Purchaser, that it will well and sufficiently convey to the Purchaser, its successors or assigns, by deed of warranty free from all encumbrances except as herein set forth, on or before the 1st day of March, 1926, ALL that tract or parcel of land and premises situate, lying and being in the Borough of West Caldwell, in the County of Essex and State of New Jersey, comprising one hundred and fifty-seven and twenty-seven one hundredths (157.27) acres and being the land and premises shown on a map entitled, "Map of Part of Farm owned by Francisco Brothers, West Caldwell, Essex County, N. J." dated May 29, 1924, George E. Jenkins, C. E. Dover, N. J.

The premises are to be conveyed subject as follows:

a. Subject to the right of William H. —— and Richard S. Francisco, their heirs and assigns, to use the well located near the large barn on said premises, for the purpose of supplying water to their houses, outbuildings and property located on Clinton Road, free of any charge therefor for a period of twenty-five years from June 11, 1924.

b. To the lease hereinbefore referred to and to the rights of members of the Ferncliffe Golf & Country Club, Inc., to use said premises under

their said memberships as provided and set forth in their certificate of membership and the by-laws of said company, and to such state of facts as an accurate survey of said premises would show.

c. To an easement given by William H. —— and Richard S. Francisco to one William A. Harris to the right of way to lay, maintain and operate pipe lines for the transportation of oil, and erect, maintain and operate a telegraph line if the same shall be found necessary, said easement being recorded in Book V 32 of Deeds for Essex County, Page 339.

And the said Purchaser and its successors, doth covenant, promise and agree to and with the Vendor, its successors and assigns, that it, the said Purchaser, will pay and satisfy, or cause to be paid and satisfied, unto the Vendor, the said sum of $130,000 as and for the purchase money of the foregoing described land and premises, in the following manner, that is to say:

1. On the execution of this agreement the sum of $7,000 cash, the receipt whereof is hereby acknowledged.

2. Upon the delivery of the said deed of conveyance this sum of $23,000 in cash.

3. By accepting said premises subject to a mortgage for $70,000 payable in nine years from the date thereof, bearing interest at six per cent per annum, payable semi-annually, containing the usual interest, tax, assessment and insurance default clauses. Said mortgage also to contain the privilege to any owner of the land covered thereby to pay said mortgage at any time upon giving

sixty days previous notice in writing, and also to contain the privilege of paying $5,000 or more of the principal of said mortgage on any interest day.

4. By the execution and delivery of a purchase money mortgage by the Purchaser to the Vendor, or its assigns, in the principal sum of $30,000 payable in semi-annual installments of $3,000. each with interest at the rate of six per cent payable semi-annually, the full principal sum of said mortgage to be due and payable in three years from the date thereof. Said second mortgage shall contain a release clause providing for the execution of releases at the expense of the owner of said premises according to the schedule substantially as follows:

a. Payment on account of the principal of said mortgage of the sum of $5 per foot on land fronting on Clinton Road to a depth of 200 feet.

b. Payment on account of the principal of said mortgage at the rate of $500 per acre of land at a greater distance than 200 feet from said Clinton Road.

c. Payment of the sum of $5,000 for the release of the house and barn and the land surrounding the same not to exceed one and one-half acres.

The said release clause shall provide that for each foot of land released on said Clinton Road, the mortgagor will pay for the release an equal proportion of the land at a distance greater than 200 feet from said road, to the end that the ratio between the land fronting on said road and the land greater than a distance of 200 feet therefrom

remaining subject to the lien of said mortgage, shall at all times be equitably preserved.

The said mortgage shall contain an agreement on the part of the mortgagee to subordinate the lien of the said mortgage to that of any mortgage which may be placed upon said premises to take the place of the said first mortgage of $70,000. provided the said new mortgage shall not exceed in amount the balance then remaining due upon the said first mortgage plus the sum of $5,000.

5. It is further agreed that the taxes, insurance premiums and other carrying charges shall be adjusted between the parties as of the date of the delivery of said deed.

6. The conveyance shall be by deed of warranty free of encumbrances, but subject to the lease hereinbefore referred to and to the rights of the members of the Ferncliffe Golf and Country Club, Inc. to use said premises under their said memberships, as provided and set forth in their certificate of membership and the by-laws of said company, and subject to such state of facts as an accurate survey of said premises will show.

7. The vendor agrees to assign to the purchaser all its right, title and interest of, in and to the lease entered into between it and the Ferncliffe Golf and Country Club, Inc., hereinabove mentioned, upon the delivery of the deed as herein provided for.

8. The purchaser may, at its option, pay the entire purchase price over and above the said first mortgage of $70,000 in cash at the time of the delivery of the deed as herein mentioned, in

which event the purchase price is to be $120,000 instead of $130,000.

9. Thomas Booth is recognized as the agent affecting the sale of the said premises on behalf of the vendor and the vendor agrees to pay to the said Booth the sum of $5,000. in full payment of all commissions or compensation to which the said Booth may be entitled as agent or broker; and in case the purchaser shall exercise the option of paying all cash at the time of closing title, the vendor agrees to pay the said sum in full upon receipt of the purchase price from the purchaser; but in the event that the purchaser shall not exercise such option, then the said Booth agrees to accept payment of the said $5,000 by the payment of $2,000 in cash on the date of closing title, $2,000 in six months from the said date out of the first payments on account of the second mortgage received by the vendor, and the balance of $1,000. in one year from said date out of the payments on account of said second mortgage, received by said vendor. This agreement with respect to the payment of commissions is to be incorporated as one of the provisions of the said second mortgage.

10. Said deed shall be received and delivered at the office of Smith & Slingerland, 765 Broad Street, Newark, New Jersey, on the first day of March, 1926, between the hours of ten o'clock in the forenoon and four o'clock in the afternoon, or at such other place as the parties hereto may agree.

And it is agreed that the purchaser may enter into and upon said land and premises on the date of the delivery of said deed.

Schedule D, Annexed to Affidavit of Michael Tannenbaum.

In Witness Whereof, the parties hereto have caused there presents to be signed by their officers thereunto duly authorized.

Recreation Development
Corporation,
By J. W. Donaldson
President.

Attest:
Norman R. Lemcke
Secretary.

(Corporate Seal
in ink.)
No impression.

State of New Jersey, }
County of Essex. } ss.:

Be it remembered, That on this 4th day of January, in the year of our Lord One Thousand Nine Hundred and Twenty six, before me the subscriber, a Master in Chancery of New Jersey, personally appeared Norman R. Lemcke, who being by me duly sworn on his oath says that he is the secretary of the Recreation Development Corporation *Company,* the grantor named in the within Instrument; that J. W. Donaldson is the president of said corporation; that deponent well knows the corporate seal of said corporation; and the seal affixed to said Instrument is such corporate seal and was thereto affixed, and said Instrument signed and delivered by said president, as and for his voluntary act and deed and as and for the voluntary act and deed of said corpo-

ration, in presence of deponent, who thereupon subscribed his name thereto as witness.

NORMAN R. LEMCKE.

Sworn and subscribed before me, at Newark N. J., the date aforesaid, Archibald F. Slingerland, Master in Chancery of New Jersey.

The time for closing title under agreement between Recreation Development *Company* and American Plaster Drill Corporation, dated January 2, 1926, is hereby extended until April 1st, 1926, at the same time and place.

Dated: March 1, 1926.

RECREATION DEVELOPMENT *Company,*

By J. W. Donaldson
President.

AMERICAN PLASTER DRILL CORPORATION,

By Michael Tanenbaum

Schedule E.

For value received, the RECREATION DEVELOPMENT COMPANY does hereby sell, assign, transfer and set over unto AMERICAN PLASTER DRILL COMPANY, its successors or assigns, all its right, title and interest of, in and to a certain contract made between WILLIAM H. FRANCISCO and RICHARD S. FRANCISCO, and the said RECREATION DEVELOPMENT COMPANY, bearing date June 11, 1924.

It being understood that this assignment is to be delivered to the American Plaster Drill Company only in the event of the failure of the said Recreation Development Company to carry out its agreement with the said American Plaster Drill Company, bearing date January 2, 1926, and upon payment to the said Recreation Development Company, or its attorneys, of the balance of the purchase price due to it from said American Plaster Drill Company, under said contract.

IN WITNESS WHEREOF the said RECREATION DEVELOPMENT COMPANY has caused these presents to be signed by its president, and its corporate seal to be hereto affixed, attested by its secretary this 4th day of January, 1926.

RECREATION DEVELOPMENT COMPANY

By J. W. DONALDSON
President.

Attest:

By NORMAN R. LEMKE
Secretary

Answer.

(Filed September 16, 1926.)

IN CHANCERY OF NEW JERSEY

Answer of the defendants William H. Francisco and Mary F. Francisco, his wife, and Richard S. Francisco and Mary A. Francisco, his wife, to the bill of complaint of the complainant herein:

These defendants answering say:

1. They admit that on June 11, 1924, the defendants William H. Francisco and Richard S. Francisco entered into the written agreement set forth in the first paragraph of the bill, but they deny that the defendants Mary F. Francisco and Mary A. Francisco entered into said agreement.

2. They admit that under and by virtue of the said agreement, in consideration of Recreation Development Corporation agreeing to pay to the defendants William H. Francisco and Richard S. Francisco the sum of Seventy-five Thousand ($75,000) Dollars, that they, the said William H. Francisco and Richard S. Francisco, would convey as set forth in paragraph two of the bill of complaint, but they deny that it was agreed that the said Mary F. Francisco and Mary A. Francisco were to join in making the said conveyance.

3. Answering the allegations of the third paragraph of the bill of complaint, they deny that the Recreation Development Corporation paid or caused to be paid to them, or any of them the payments agreed to be made under and pursuant to the said agreement, but they admit that certain payments were made, as follows:

On June 11, 1924	$ 500.00
On December 11, 1924	2000.00

and they admit that an agreement was made on or about June 11, 1925, in the form attached to the bill of complaint, Schedule "B", extending the time of payment of the installment of Twenty-five Hundred ($2500) Dollars due June 11, 1925, to September 11, 1925.

4. Answering the allegations of the fourth paragraph of the bill, they admit that the Recreation Development Corporation entered into a certain agreement with the complainant in the form set forth in the copy thereof attached to the bill of complaint, but they call attention to the fact that the so-called assignment was conditional, and they deny that the conditions have been fulfilled, and insist that said paper writing could not and has not amounted to an assignment of the rights of the Recreation Development Corporation in and to the contract marked Schedule "A", and that without proof of the fulfillment of said conditions these defendants could not safely convey to the complainant in accordance with said agreement. These defendants admit that they knew of the making of said assignment, but deny that they consented thereto. They admit that the complainant paid the Recreation Development Corporation the sum of Seven Thousand ($7000) Dollars, in cash, on or about January 2, 1926, and they admit that the said sum of Seven Thousand ($7000) Dollars was used by the said Recreation Development Corporation to pay off encumbrances upon the land which, under the agreement marked Schedule "A" the Recreation Development Corporation was in duty bound to do, and that a small balance remaining of said sum of Seven Thousand ($7000) Dollars was paid to the defendants William H. Francisco and Richard S. Francisco as part payment of the purchase price

pursuant to the contract Schedule "A". They admit that the said Robert W. Cromley acted as attorney for the said William H. Francisco and Richard S. Francisco in this matter, and say that he also acted as attorney for the Recreation Development Corporation.

5. They admit that the Recreation Development Corporation entered into the two agreements with complainant, mentioned in the fifth paragraph, except that they deny that one of said two agreements, marked Schedule "E", was an actual assignment.

6. They deny that after the application of the Seven Thousand ($7000) Dollars as aforesaid, the said William H. Francisco and Richard S. Francisco had received a total of Twelve Thousand ($12,000) Dollars on account of the purchase price of said land, and say, on the contrary, that the amount received was about Nine Thousand ($9000) Dollars. They admit that they further extended the time for the payment of the third payment required to be made, substantially in accordance with the allegations of the sixth paragraph.

7. These defendants are without knowledge as to when complainant caused a search of the property to be made, but say that upon the discovery that a *Lis Pendens* was filed against said property, the complainant announced to the defendants William H. Francisco and Richard S. Francisco and the Recreation Development Corporation that they would not accept title to said premises unless said notice of *Lis Pendens* was removed. The subsequent extensions were granted in order that the same might, if possible, be removed. These defendants insist that the existence of the *Lis Pendens* did not constitute a valid,

legal objection to the title available to the complainant, for the reason that the complainant had contracted to take title subject to the rights of members of the Ferncliffe Golf and Country Club, Inc., to use said premises under their membership, as provided and set forth in their certificates of membership and the by-laws of said corporation, and that the Lis Pendens above referred to was and is notice of a suit brought by members of the Ferncliffe Golf and Country Club, Inc., in this Court to assert such rights, and for the further reason that said notice of *Lis Pendens* is and always has been null and void for the reason that the said suit by the members of the Ferncliffe Golf and Country Club, Inc., has never been instituted or pending within the meaning of the *Lis Pendens* Act. The complainant never tendered to these defendants, nor so far as these defendants know, did the complainant ever tender to the Recreation Development Corporation the moneys which, under their contract with the Recreation Development Corporation, they were under obligation to pay, nor did they demand a deed except free and clear of the said *Lis Pendens*. These defendants insist that it was the complainant's duty, so far as the Recreation Development Corporation was concerned, to make such tender, and to accept a deed if delivered, notwithstanding the said notice of *Lis Pendens,* and that so far as these defendants were concerned, it was the complainant's duty to have carried out and performed the conditions set forth in the alleged assignment.

8. These defendants say that by virtue of the premises and of the circumstances surrounding the granting of the last two extensions, time became of the essence of the complainant's agreement, and that it would be inequitable to hold these

defendants and the Recreation Development Corporation, if they or either of them has at any time been under obligation to convey said lands to the complainant, indefinitely under such obligation, and that because of the lapse of time and the other facts hereinabove set forth the complainant is in the position of having committed a breach of said agreement because of its failure to act with reasonable promptness and because of its announcing that it would refuse under any circumstances to take said title unless the said notice of *Lis Pendens* was first removed.

9. They deny the allegations of the ninth paragraph of the bill.

10. They deny the allegations of the tenth paragraph of the bill, except as hereinabove admitted.

11. They admit the allegations of the eleventh paragraph of the bill.

12. They admit the allegations of the twelfth paragraph of the bill, except that they deny that the complainant will be deprived of any considerable revenue from the property.

13. They are without any knowledge as to the alleged lease of the golf course mentioned in the thirteenth paragraph, except that they understand that if any lease was made it was made in fraud of the rights of the life members of the Ferncliffe Golf and Country Club, Inc., and subsequent to the accrual of such rights, and was made by and between two corporations, to wit: the Ferncliffe Golf and Country Club, Inc., and the Recreation Development Corporation, the entire stock of each of which was owned by one Donaldson, and that in effect, therefore, said lease was made by the said Donaldson with himself, and in equity the same is

void and of no effect as against the rights of the members of the Ferncliffe Golf and Country Club, Inc.

14. They deny the allegations of the fourteenth paragraph.

15. They are without knowledge as to the allegations of the fifteenth paragraph, except that they admit that the purpose of the ejectment suit was to terminate any alleged rights which the complainant might have in said lands.

16. They deny the allegations of the sixteenth paragraph.

17. Complainant has refused to accept the repayment to it of the said deposit and expenses, and has insisted upon receiving a deed free and clear of the said notice of *Lis Pendens.*

HOPKINS & HERR,
Solicitors of Defendants William H. Francisco and Richard S. Francisco, Mary F. Francisco and Mary A. Francisco.

Replication by Complainant to the Answer of Franciscos.

(Filed September 22nd, 1926.)

The complainant joins issue with the Answer filed by the defendants, WILLIAM H. FRANCISCO and MARY F. FRANCISCO, his wife, and RICHARD S. FRANCISCO and MARY A. FRANCISCO his wife.

Dated: September 20, 1926.

LIONEL P. KRISTELLER,
Solicitor of Complainant.

Answer of D. W. Dryden and Others Similarly Situated.

(Filed June 30th, 1930.)

The answer of D. W. Dryden and others similarly situated, intervening as defendants in the above entitled matter, shows:

1. Defendants are members of the Ferncliffe Golf and Country Club, a voluntary and unorganized association of approximately nine hundred twenty (920) persons, holders of life memberships hereinafter described, entitling them for the term of their joint lives to use as a golf course the lands and premises described in the bill of complaint herein, and these defendants intervene herein and file this answer for the purpose of protecting the rights of the members of said association in the said lands and premises.

2. They admit the allegations of the 1st paragraph of the bill of complaint.

3. They admit the allegations of the 2nd paragraph of the bill of complaint.

4. They are without knowledge of the allegations of the 3rd paragraph of the bill of complaint, and therefore neither admit nor deny the same.

5. Answering the allegations of the 4th paragraph of the bill of complaint, they admit that the Recreation Development Corporation entered into a certain agreement with the complainant in the form set forth in the copy thereof attached to the bill of complaint, but they call attention to the fact that the so-called assignment was conditional, and they deny that the conditions have been fulfilled, and insist that said paper writing

could not amount and has not amounted to an assignment of the rights of the Recreation Development Corporation in and to the contract marked Schedule "A", and that without proof of the fulfillment of said conditions these defendants could not safely convey to the complainant in accordance with said agreement. These defendants are without knowledge as to the further facts alleged in paragraph 4 of the bill of complaint, and therefore neither admit nor deny the same.

6. They admit that the Recreation Development Corporation entered into the two agreements with complainant, mentioned in the 5th paragraph, except that they deny that one of said two agreements, marked Schedule "E", was an actual assignment.

7. They are without knowledge as to the allegations of the 6th paragraph of the bill of complaint, and neither admit nor deny the same.

8. They are without knowledge as to the allegations of the 7th and 8th paragraphs of the bill of complaint, and neither admit nor deny the same.

9. They deny the allegations of the 9th paragraph of the bill of complaint.

10. They deny the allegations of the 10th paragraph of the bill of complaint.

11. They admit the allegations of the 11th paragraph of the bill of complaint.

12. They admit the allegations of the 12th paragraph of the bill of complaint, except that they deny that the complainant will be deprived of any considerable revenue from the property.

13. As to the allegations of the 13th paragraph of the bill of complaint, these defendants say that very little improvement was made to the ground so as to render it suitable for playing golf thereon, only nine holes having been opened up. These defendants have never seen the alleged lease mentioned in the 13th paragraph of the bill of complaint, but admit that a lease was made as hereinafter set forth, which among other provisions included those mentioned in the 13th paragraph of the bill of complaint. These defendants further say that said lease was made in fraud of the rights of these defendants and other members of said association, and subsequent to the accrual of such rights, and was made by and between two corporations, the entire stock of each of which was owned by one Joseph W. Donaldson, and that in effect, therefore, said lease was made by the said Donaldson with himself, and in equity the same is void and of no effect as against these defendants.

14. They deny the allegations of the 14th paragraph of the bill of complaint.

15. They are without knowledge as to the actual amounts of money which may have been received for the use of said golf course by the players, since said money was taken in by the said Donaldson or one or the other of the said two corporations and never accounted for to these defendants. They deny the other allegations of paragraph 15 of the bill, except that they admit that the purpose of the ejection suit was to terminate any alleged rights which the complainant might have in said lands.

16. They deny the allegations of the 16th paragraph of the bill of complaint.

Answer of D. W. Dryden and Others Similarly Situated.

17. Defendants further say that some time in the year 1924, two corporations were organized under the laws of the State of New Jersey, known as the Recreation Development Corporation and the Ferncliffe Golf and Country Club, Inc.; that these corporations were organized and owned by Joseph W. Donaldson, and were organized by said Donaldson only for the purpose of perpetrating the frauds hereinafter set forth; and all the stock was issued and at all times owned by the said Joseph W. Donaldson in both corporations, except qualifying shares.

18. On the 11th day of June, 1924, the Recreation Development Corporation entered into a contract with the defendants William H. Francisco, Mary F. Francisco, his wife, Richard S. Francisco and Mary A. Francisco, his wife, for the sale of certain lands and premises in the Borough of West Caldwell, in the County of Essex, described in the bill of complaint, which agreement is attached to the Bill of Complaint in the above entitled matter and marked Schedule "A".

19. Your defendants further show that after making said contract the Recreation Development Corporation then entered into a lease with the Ferncliffe Golf and Country Club, Inc., whereby said lands were leased to said Ferncliffe Golf and Country Club, Inc., for the sum of Fifteen thousand ($15,000.00) dollars yearly, said lease being given although the Recreation Development Corporation was not the owner of lands at this time, nor had any right to issue said lease, and defendants further show that said lease was not recorded but was kept secret throughout the transactions hereinafter described.

Answer of D. W. Dryden and Others Similarly Situated.

20. Defendants further show that subsequent to the transactions above set forth the said Joseph W. Donaldson, through his creature, Ferncliffe Golf and Country Club, Inc., made preparations, or pretended to make preparations, for the construction of a golf course to be built upon the lands aforementioned, and some grading work and other small work on the lands was actually done, and issued certain certificates of membership in said Ferncliffe Golf and Country Club, Inc., which he later caused to be sold to defendants and other members of the Ferncliffe Golf and Country Club.

21. Defendants further show that said Joseph W. Donaldson and authorized agents of Joseph W. Donaldson and the Ferncliffe Golf and Country Club, Inc., in order to induce the sale of said certificates to defendants, made the following representations upon which defendants and other members of the Ferncliffe Golf and Country Club relied:

(a) That said Ferncliffe Golf and Country Club was the owner of land upon which the golf club was constructed.

(b) That all moneys received as green fees and for membership fees would be used in improving and completing the golf course;

which said representations defendants now know were false. Defendants were further informed that the receipt of one hundred ($100.00) dollars, which sum was paid by each of defendants, entitled defendants and other members who paid said fee, to a life membership and interest in said golf course, which could never be disturbed. Said Joseph W. Donaldson or the Ferncliffe Golf and

Country Club, Inc., and his or its agents, further concealed from defendants and the other members of the Ferncliffe Golf and Country Club the existence of the Recreation Development Corporation and the fact that the lease above referred to from said corporation to the Ferncliffe Golf and Country Club had been entered into.

22. Defendants further show that said Joseph W. Donaldson and the Ferncliffe Golf and Country Club, Inc., further represented to defendants and other prospective purchasers of membership certificates in said Club the following inducements:

(a) That the said Golf Company was organized for developing the land and building said golf course, after which it would turn the management of said club into the hands of the members of said corporation.

(b) That the Golf Company would make numerous improvements on said grounds, to wit, build a swimming pool, build a new club house, build tennis courts, and add other features which would make the golf club a first-class and up-to-date country club, the use of which features defendants were entitled to upon payment of certain fees, and the use of such privileges and features during their lifetime was guaranteed defendants by the Golf Company.

23. Defendants further show that as president and manager of said Golf Club, Joseph W. Donaldson has received in membership fees alone the sum of seventy-five thousand ($75,000.00) dollars,

and in green fees during the years 1924 and 1925 approximately ten thousand ($10,000.00) dollars.

24. Defendants further show that in spite of receiving such moneys, neither the Ferncliffe Golf and Country Club nor Donaldson have done anything toward improving said golf course, as guaranteed in representations to defendants and others.

25. Defendants charge that because of the facts set forth as aforesaid, said Joseph W. Donaldson, and/or Recreation Development Corporation, and/or Ferncliffe Golf and Country Club, Inc., held such interests in said lands as vested in them as trustees for the holders of the life membership certificates in the Ferncliffe Golf and Country Club as aforesaid, and further, that it was and is the right of said members to have such interests in said lands held in trust for them by a friendly trustee, and a trustee of their own choosing. Defendants object to the transfer of any interests in said land to the complainant herein, even though such transfer may be made expressly in trust for the benefit of the players, because they believe and charge that the complainant is hostile to them, and intended and intends, if it succeeds in securing the lands, to use every effort to defeat the rights of the players and to oust them from possession, and defendants charge that the act of Recreation Development Corporation in entering into said contract with the complainant and again assigning, or attempting to assign, to complainant the contract which the Recreation Development Corporation had with the defendants William H. Francisco and Richard S. Francisco, was and is a fraud on the rights of the players.

26. These defendants do not ask for any affirmative relief herein, but pray that the bill of complaint in the above entitled cause be dismissed.

BUTLER & BUTLER,
Solicitors for Intervening defendants, D. W. Dryden and others similarly situated.

DOUGAL HERR,
Of Counsel.

Replication to Answer of D. W. Dryden and Others.

(Filed .)

In reply to the defenses stated in the answer of the intervening defendants, D. W. Dryden and others similarly situated and not anticipated in the bill of complaint, complainant says:

1. Answering paragraph 2 complainant says that it has no knowledge as to whether said D. W. Dryden is a member of a committee appointed by the members of the Ferncliffe Golf and Country Club or no, and says that if he was he has no right to appear herein, and that the said Ferncliffe Golf and Country Club and its members are not in any wise concerned with the controversy, the subject matter of this suit.

2. They deny the statements contained in paragraph 5 of the answer and say that the statements are immaterial.

3. It admits the statements contained in paragraph 6.

Replication to Answer of D. W. Dryden and Others.

4. It has no knowledge or information sufficient to form a belief as to the statements contained in paragraph 7 and therefore denies the same, and further says that the statements contained in said paragraph are wholly immaterial to the determination of the subject matter of this litigation.

5. It has no knowledge or information sufficient to form a belief as to the statements contained in paragraphs 8, 9, 10, 11 and 12 of the answer, and further says that all the statements therein contained are wholly immaterial to the determination of the controversy involved in this litigation.

6. It denies the statements contained in paragraph 13.

Further replying the complainant says:

7. That the said answering defendants are guilty of gross laches in that the said members represented by the said answering defendants have known of the sale of said property to this complainant for over a year, and have made no move or effort to question the bona fides of the sale until the present suit.

8. That the said answering defendants associates held several meetings with the owners of the contract of the property and others, for the purpose of completing the purchase under the agreement first mentioned in the bill of complaint, but that said committee and their associates refused to have anything to do with the matter, and made no effort, and commenced no proceedings to ques-

tion the title of complainant to said contract and option, and complainant was permitted by the answering defendants and their associates to advance the cash consideration for the purchase of said contract; because of the conduct of the said answering defendants and their associates and relying upon their refusal to negotiate for the carrying out of the purchase of the said property, complainant entered into the contract for the property set out in the bill of complaint.

9. That said answering defendants by their conduct, have permitted complainant to change its status, advance cash money on account of the said contract, and to interfere with the purchase by complainant of the lands and premises mentioned in the bill of complaint, will cause complainant irreparable injury and damage.

10. That these said answering defendants and those whom they represent are estopped by their conduct from attacking the validity of the agreement between complainant and the defendant, The Recreation Development Company.

11. That said answering defendants are improperly admitted as parties defendants herein; that they have no right to be heard in the controversy which is the subject matter of this litigation and they have no interest therein nor have they any interest in the lands and premises, the subject matter of this suit; that this court has no jurisdiction to determine the rights and interests of the said answering defendants and those whom they represent, whatever rights and interests they have being determinable at law.

12. That the said answering defendants and those whom they represent are not bona fide

seeking to protect their own interests but that they have made some agreement, the details of which complainant does not know, with the owners of the said land, the said William H. Francisco, Mary F. Francisco, his wife, Richard S. Francisco and Mary A. Francisco, his wife, under the terms and conditions whereof the said defendants aforesaid, the owners of said land will reap a large profit and the supposed interest of the said answering defendants and those whom they represent is being used in this litigation purely for the benefit of the said owners of said lands and for the purpose of defeating the right of the complainant to specific performance, and to secure a conveyance of said lands and the rights of the said Franciscos heretofore mentioned therein, and that the said Franciscos and the said answering defendants and those whom they represent are parties to a conspiracy to deprive complainant of that to which it is legally and equitably entitled.

13. Complainant further answering says that the said answering defendants and those whom they represent have lost any interest which they have had in said lands and premises and have abandoned and surrendered such interest.

14. With respect to the other matters and things it joins issue.

LIONEL P. KRISTELLER,
Solicitor for Complainant.

Answer of Defendant, Recreation Development Company.

(Filed March 3rd, 1927.)

Answer of the defendant, Recreation Development Company, to the bill of complaint of the complainant herein:

This defendant, answering said bill, says:

1. It admits the allegations of paragraph one.

2. It admits the allegations of paragraph two.

3. It admits the allegations of paragraph three.

4. It admits the allegations of paragraph four, but refers to the assignment therein referred to and annexed to said bill and marked Schedule E, for the complete terms thereof.

5. It admits the allegations of paragraph five.

6. Answering paragraph six, it admits that the defendants, William H. Francisco and Richard S. Francisco, received by endorsement $7,000. paid by the complainant on account of the purchase price, agreed to be paid under the agreement made between the complainant and this defendant, but it has no knowledge as to what portion of said sum was received by the said defendants, William H. Francisco and Richard S. Francisco, on account of the purchase price agreed to be paid under the agreement between them and this defendant; and it denies that the sum of $12,000. has been paid to the said defendants, William H. Francisco and Richard S. Francisco, on account of the contract between them and this defendant.

7. It has no knowledge or information sufficient to form a belief as to the allegations of paragraph seven and leaves the complainant to its proof.

Answer of Defendant, Recreation Development Company.

8. It admits the allegations of paragraph eight.

9. It denies the allegations of paragraph nine.

10. It denies the allegations of paragraph ten.

11. It admits the allegations of paragraph eleven.

12. It admits that the complainant, by its agreement referred to in paragraph 12, agreed to accept a deed from this defendant for the said lands and premises, subject to the lease of the Ferncliffe Golf and Country Club, Inc., and subject to the rights of its members. It has no knowledge or information sufficient to form a belief respecting the other allegations of paragraph 12.

13. It admits the allegations of paragraph thirteen.

14. It has no knowledge or information sufficient to form a belief as to the allegations of paragraph fourteen.

15. It has no knowledge or information sufficient to form a belief as to the allegations of paragraph fifteen.

16. It has no knowledge or information sufficient to form a belief as to the allegations of paragraph sixteen.

Further answering said bill, this defendant says:

1. On or about January 2, 1926, this defendant entered into an agreement with the complainant, (a copy of which agreement is annexed to the bill of complaint and marked Schedule D) wherein and whereby this defendant agreed to sell and

convey unto the complainant the lands and premises referred to in the bill of complaint and described in the agreement marked Schedule A, annexed to said bill; that by the terms of said agreement, the title to said premises was to close on or before March 1, 1826 at which time the consideration of $130,000, mentioned in said agreement was to be paid to this defendant; that the time for closing the agreement between the defendants, William H. Francisco and Richard S. Francisco, and this defendant, was, on or about said January 2, 1926, extended until March 1, 1926, by agreement between the said Franciscos and this defendant, a copy of which agreement is annexed to said bill and marked Schedule C; that if the complainant had duly performed its said agreement with this defendant by paying to this defendant the consideration money of $130,000., this defendant at the same time would have been able to have completed its contract with the said Franciscos, but because of the failure of the complainant to carry out and perform the terms of its said agreement with this defendant, this defendant was unable to carry out its contract with the said Franciscos.

2. That the reason given by the complainant for its refusal to carry out its agreement with this defendant, namely the existence upon the record of a lis pendens in a suit pending between C. W. Dryden, complainant, and Joseph W. Donaldson, et als, defendants did not constitute a valid and sufficient reason for the complainant's failure to carry out and perform its said agreement with this defendant, inasmuch as the said lis pendens was filed in a suit instituted for the

purpose of determining the rights of the members of the Ferncliffe Golf and Country Club, and this defendant's agreement with the complainant expressly provided that a conveyance of said lands and premises by this defendant to the complainant was to be made subject to the lease to the said Ferncliffe Golf and Country Club, and subject to the rights of the members of the said Ferncliffe Golf and Country Club.

3. This defendant was ready and willing on said March 1, 1926, and upon the dates to which the closing of title was thereafter adjourned as alleged in the bill of complaint, to convey the said lands and premises to the complainant, subject to the lease of the said Ferncliffe Golf and Country Club, and subject to the rights of the members of the said Ferncliffe Golf and Country Club, and but for the failure of the complainant to carry out and perform its contract with this defendant, would have been on said dates able to make said conveyance in accordance with its said agreement, because it could, but for such failure on the part of the complainant, have carried out its agreement with the said Franciscos and could have obtained title to the said premises; and this defendant avers that because of the failure of the complainant to carry out and perform its said agreement with this defendant, this defendant was unable to perform its contract with the said William H. Francisco and Richard S. Francisco.

4. It avers that on said January 2, 1926, it did assign to the complainant all its right, title and interest of, in and to the said contract made between the said William H. Francisco and Richard S. Francisco and this defendant

bearing date June 11, 1924, but said assignment was to be delivered to the complainant only in the event of the failure of this defendant to carry out its agreement with the said complainant bearing date January 2, 1926, and upon payment to this defendant, or its attorneys, of the balance of the purchase price due to it from the said complainant under said contract. This defendant avers that its failure to carry out its agreement with the complainant was due to the complainant's own failure to carry out its part of said agreement; and if a decree be made in this cause for the conveyance of said premises to the complainant, this defendant avers that such conveyance should be decreed only upon the condition that the balance of the purchase price due to this defendant from the complainant under its said contract be paid by the complainant to this defendant.

SMITH & SLINGERLAND,
Solicitors for Defendant,
Recreation Development Co.

Memorandum.

IN CHANCERY OF NEW JERSEY.

Between
AMERICAN PLASTER DRILL COMPANY, a corporation,
Complainant,

and

WILLIAM H. FRANCISCO, *et al.*,
Defendants.

(Not for print.)
On Bill, etc.
Memorandum.

May 12, 1930.

MERRITT LANE, Esq., and LIONEL P. KRISTELLER, Esq., for the Complainant.

SMITH & SLINGERLAND, Esquires, for Defendant, RECREATION DEVELOPMENT COMPANY.

DUGAL HERR, Esq., for Defendants, FRANCISCO, and Defendants, DRYDEN, and others similarly situated.

BIGELOW, V. C.:

This is a bill for specific performance of a contract for the sale of land.

The complainant is the assignee of the defendant, Recreation Development Corporation, the vendee named in the contract. The defendants, William H. Francisco, Richard Francisco, and their wives, are the vendors. Defendant, Dryden "and others similarly situated" have been admitted as defendants by order of the Court, but decision on their application for leave to file an

answer was reserved until final hearing. Dryden and his associates are referred to herein as the members.

Prior to June 11, 1924, the Franciscos, were the owner of a tract of 157 acres in the Borough of West Caldwell, in Essex County. On that day they agreed to sell this tract to the Development Corporation, for $75,000.00, of which $500.00 was paid upon the execution of the agreement; $2,000.00 was payable in six months; $2,500.00, in one year; $5,000.00 in eighteen months; $10,000.00 in two years; and the balance, $55,000.00, by a purchase money mortgage to run for five years. The deed was to be delivered when $20,000.00 had been paid, that is, in two years after the date of the contract, if the payments were made as therein provided.

The contract gave the vendee the right to immediate possession of the premises for the purpose of developing the lands for golf links, tennis courts, and the erection of a club house, and for no other purpose. The vendee immediately entered, and it (or some persons claiming under it) has since remained in possession. Nine holes of the golf course are completed, and in use.

The certificate of incorporation of the Development Corporation was executed the very day on which the contract was made and was filed with the Secretary of State two days later. One Joseph W. Donaldson was the negotiator of the transaction, and the sole stockholder in the Development Corporation. On July 25, 1924, the corporation leased the premises to the Ferncliffe Golf and Country Club, Inc. (hereinafter called the Golf Company), for the term of 20 years, at a yearly rent of $15,000.00. The lease is signed on behalf of both corporations, by Donaldson, as

President, and by one Herbert A. Blanchet, as Secretary. It should be here noted that the Golf Company was not actually incorporated until one month after the date of the lease, namely, August 28, 1924, when it was chartered under "An Act Concerning Corporations" (Revision of 1896). Donaldson appears to have been substantially the sole stockholder of this corporation. Apparently the only asset of either corporation was the $500.00 paid to the Franciscos at the time of executing the contract.

The certificate of incorporation of the Golf Company included among the objects for which the corporation was formed, "To establish, maintain, and conduct an association of members as a golf and country club, and to that end to solicit and sell subscriptions to the membership of such association upon such terms and under such conditions, and subject to such dues, penalties, privileges, obligations and restrictions as may be set forth and prescribed in the by-laws of the corporation or the rules and regulations of such association". It is unnecessary to inquire whether the Corporation Act of 1896 authorizes the formation of a corporation for this purpose. The Golf Company adopted by-laws for itself and for "the association of members of Ferncliffe Golf and Country Club". The first section of the by-laws of the association reads: "This association shall be known as the Ferncliffe Golf and Country Club." Thus Donaldson laid the foundation for the creation of an unincorporated association, with name exactly the same as one of the corporations which he had formed, except for the abbreviation "Inc."

Immediately the lease was signed, or perhaps earlier, Donaldson inaugurated a drive to acquire

members for his voluntary association. It might be more accurately termed a campaign to swindle the unwary. On July 30, 1924, appeared a half-page announcement in one of the newspapers of Newark "Announcing the Ferncliffe Golf and Country Club, comprising 157 acres of rare beauty in West Caldwell, N. J." It set forth that by the payment of $50.00 life membership in the Club might be obtained, although "the membership committee has been instructed to exercise great care in selecting the members." There would be no annual dues, no stocks or bonds to buy, and no assessments for deficits. The only charge to members would be a greens fee for actual play. "This is in accordance with the plan adopted by the most successful European Clubs."

The campaign was pressed not only by advertisement, but by booklets and solicitors. It was successful. The membership fee was increased, first to $100.00, and then to $200.00 plus 10 per cent. for the Federal tax on dues. In all, 920 persons joined the association, and paid for the privilege about $75,000.00. The Club was held out to be the owner of the land; the 157 acres is referred to as the property of the Club. There was no suggestion of the agreement of sale, or the lease, or the $70,000.00, still payable for the land, or the $15,000.00 rental; there was no hint of the existence even of either stock company. Dryden and his associates who joined the association were intentionally led to believe that the association was the owner of the land on which would be developed a golf course. If they gave a thought to financing, they naturally concluded that their initiation fees, plus probably a mortgage, were paying for the land and the development. In fact, so far as the purchase price was paid and so far

as a golf course was developed, they did provide the money. If they wondered whether their club was incorporated or not, they could properly assume that it was incorporated under "An Act to incorporate associations not for pecuniary profit" or some similar statute, because the Corporation Act of 1896 does not authorize membership corporations.

The bad news was divulged September 19, 1925, when the Development Corporation and the Golf Company offered to sell to the members all their capital stock for $300,000.00, and agreed, in case the offer was accepted, that title to the land would be vested in the Development Corporation subject only to mortgages of $70,000.00, and that all other debts of both companies would have been paid. If this offer had been accepted by the members, they would have found themselves, upon payment of approximately $300.00 apiece, the owners of a tract of land on which $5,000.00 of the purchase price had been paid, and nine holes of a golf course had been completed. Naturally, the offer was not accepted.

On January 2, 1926, the Development Corporation agreed to sell the premises to the complainant for $130,000.00, subject to the lease of the Golf Company, and subject "to the rights of members of the Ferncliffe Golf and Country Club, Inc., to use said premises under their said membership as provided and set forth in their certificate of membership and the by-laws of said company." The same day, the Development Corporation also assigned to complainant its contract with the Franciscos.

About January 24, 1926, Dryden filed in this Court a bill of complaint against Donaldson, the Development Company, the Golf Company, and

the Franciscos, asking for the appointment of a receiver for the two companies, and an accounting of the moneys received and expenses by them, and for an injunction restraining the Franciscos from disposing of the property. A *lis pendens* was filed in that suit. That suit has been dormant ever since.

April 20, 1926, was fixed by complainant, and the Franciscos as the day for passing title. Complainant was then ready to purchase the property, provided the Franciscos would cause the *lis pendens* in the Dryden suit to be cancelled; but the Franciscos were unwilling or unable so to do. On July 24, 1926, the Franciscos commenced an action in ejectment against the Development Corporation and the Golf Company to recover possession of the premises. The bill of complaint in the present cause was filed August 6, 1926, and the ejectment proceeding was stayed and a receiver of the premises appointed *pendente lite*. He is, I am informed, collecting the greens fees of the members and applying them to the upkeep of the property.

Complainant tenders itself willing to accept title, subject to the rights of the members; but it asks the Court to leave those rights unsettled. The members, or their representatives, have been made parties to this suit. The facts have been fully developed. Their rights should be now established and not left to future litigation. The instant case is the third suit in this controversy; it should be the last. The Development Corporation joins in the prayer of complainant.

The Franciscos are anxious only that the rights of the members be protected and, if the decree of the Court accomplishes this end, they are willing, I understand, to waive such defenses as they have

to specific performance. They have even instructed their counsel in this cause to appear for the members and thus they have demonstrated the unity of interest among them.

The complainant stands in the shoes of the Development Corporation. So it is necessary, first, to determine the position of that company. I find that the Development Corporation, and the Golf Company were mere *alter egos* of Davidson, and that with him they engaged in a scheme to defraud the members. The complainant, or the Development Corporation, should be permitted to discharge all equities of the members by refunding the amount paid by the members and, in such case, complainant can have a decree for specific performance in the ordinary form. If this is to be done, a special master can be designated to receive and disburse the fund, or other machinery to that end may be devised. Assuming that complainant and Development Corporation elect not to discharge the rights of the members, I proceed.

Any title or interest which the Development Corporation has in the property is held in trust for the members to the extent that may be necessary to make good the representations which induced the members to join the Club. First, is the right of a membership of not more than 1,000 to use the tract of 157 acres, in the ordinary manner that a country club property is used, during the joint lives of the members. Second, this right is dependent on the payment only of reasonable greens fees and like charges for the use of the facilities that may be provided. The advertisement mentions greens fees of 50 cents, but I think it must have been understood that if conditions changed, or these greens fees proved inadequate for the upkeep of the property, then larger fees would be charged. Third, the company is under

a duty to acquire the land and construct the golf course and other facilities.

The practical effect of the foregoing is that the members, in equity, have the entire title and interest of the Development Corporation for the term of their joint lives. With a membership limited to 1,000 greens fees of $1.00 instead of 50 cents, would not produce a gross annual income of more than $25,000.00, and even this amount could not be obtained until 18 or 27 holes were built and opened for play. This amount would be no more than sufficient to pay interest on the mortgage, taxes, and upkeep of the property. Golf is an expensive game.

Just how to take care of this situation is a practical question of some difficulty. Counsel have not argued this phase of the matter. Hence, they may regard the following as more or less tentative rather than indicative of a fixed conclusion on my part.

An unorganized group of 920 men and women, as are the members, is almost impossible to deal with satisfactorily. It appears that they, or some of them, have appointed a committee to protect their interest. I suggest that Mr. Dryden and the members of the committee immediately incorporate a club in such manner that all the 920 shall have the right to join it on equal terms. If they do so and the new club asks to be admitted as a party to this suit, I will advise an order permitting it and recognize it as the successor to the rights of the members. If that course should prove inadvisable, I will appoint three trustees to hold title for the members. The Development Corporation, which is now trustee by operation of law, has forfeited by its conduct the right to continue as trustee.

Memorandum.

I incline to advise a decree for specific performance on these terms: the complainant shall satisfy to the Franciscos the balance of the purchase price and shall satisfy to the Development Corporation the balance of the consideration for the sub-sale and assignment, and shall at the same time execute a lease to the new club, or to the trustees, for the term of the joint lives of the members. The lessee shall agree to discharge (up to the amount of income) taxes, interest on the mortgage, a reasonable amount for the upkeep of the property, and to pay any surplus income annually to complainant.

I realize that it is most unlikely that complainant will care to take the property upon the terms above stipulated. In that event, the new club or the trustees to be appointed, will be subrogated to all the rights of complainant and a decree will be made directing a conveyance to it, or them, upon the same payments to the Franciscos that the complainant would have made.

I apprehend that the solution of this controversy above outlined does not do exact justice to the members. The beautiful club house, the swimming pool, etc., promised them, are all forgotten. But I cannot devise a practical plan which will more nearly secure their rights. That the Court cannot do exact justice, is no reason for declining to do approximate equity. The other parties cannot well complain. The Franciscos get the price they bargained for; the Development Corporation is relieved of the expense of making the improvements it promised; the complainant receives all that its assignor could give and may have the property subject to the rights of the members.

There remain many details to be settled. The first step would seem to be to put complainant

and Development Corporation to an election whether or not to refund the membership fees of the members. I would ask counsel for the members to bring the matter before the Court, on notice, at an early day.

Final Decree.

(Filed June 30, 1930.)

This matter coming on to be heard at final hearing on bill, answers and replications, and the Court having heard the testimony of witnesses and other proofs taken in open court on behalf of each of the parties hereto, and having heard counsel for each of said parties and being of opinion that the bill of complaint herein should be dismissed unless the complainant shall within the time hereinafter limited avail itself of either one of the two options hereinafter mentioned;

IT IS THEREUPON, on this 30th day of June, 1930, in the presence of Merritt Lane and Lionel P. Kristeller, Esquires, of counsel with the complainant, Smith & Slingerland, Esquires, of counsel with the defendant Recreation Development Corporation, Dougal Herr, Esq., of counsel for the defendants, William H. Francisco, Mary F. Francisco, his wife, Richard S. Francisco, Mary A. Francisco, his wife, and D. W. Dryden and others similarly situated, and Butler & Butler, solicitors of the said D. W. Dryden and others similarly situated, ORDERED, ADJUDGED AND DECREED that the bill of complaint herein be and the same is hereby dismissed, unless within twenty (20) days from and after the date of this decree the complainant shall file herein a written consent or election accepting

either one or the other of the following options, and agreeing to abide by and perform the respective conditions attached thereto, to wit:

1. If the complainant shall agree to pay in cash within a time to be fixed by the Court, to a Master to be designated by the Court, the sum of Seventy-five thousand ($75,000.00) Dollars, for the purpose of refunding to the members of the unincorporated association known as the Ferncliffe Golf & Country Club, the respective amounts paid by such members as consideration for life memberships purchased by them, as set forth in the pleadings herein (the complainant to be subsequently repaid any portion of said sum of Seventy-five thousand ($75,000.00) Dollars which may prove to be in excess of the requirements aforesaid, and will agree to comply with the requirements of the contract of sale between the defendants, Franciscos, and the defendant Recreation Development Corporation, and the subsequent assignment thereof and the new contract of sale between the Recreation Development Corporation and complainant, then this decree, so far as it orders a dismissal of the bill, shall be without force and effect, and a decree may be entered in lieu thereof, on notice, decreeing specific performance of the said contracts upon the conditions hereinabove mentioned.

2. If the said complainant will agree to comply with the requirements of said contract and assignment and to execute and deliver to a corporation to be formed, in which said members shall have equal rights, or to trustees for said members, or to such other designated person or persons as the Court may select, a lease of all of the lands and premises described in the plead-

ings for the term of the joint lives of the said members, approximately nine hundred twenty (920) in number, upon payment by way of rental of reasonable greens fees and like charges for the use of the facilities that may be provided at complainant's expense or which may have been provided upon said premises (this Court to settle from time to time what shall be considered reasonable greens fees and like charges), which said greens fees and like charges shall be applied first to the payment of interest on any mortgage or mortgages upon said premises, taxes thereon and upkeep of the property, any excess of said sum after the payment of such charges to be paid over to the lessor or its assigns, and upon terms providing that the said complainant shall provide upon said premises such facilities from time to time for the use of such members as the Court shall determine, then this decree, so far as it orders the dismissal of the bill of complaint, shall be without force and effect, and a decree may be entered in lieu thereof, on notice, decreeing specific performance of the said contracts upon the conditions hereinabove mentioned.

And all further equity (including the discharge and compensation of the receiver, counsel fees, and all other incidental matters) is reserved until the time shall elapse within which the complainant is to exercise its said election as aforesaid.

Respectfully advised:

V. C.

Testimony.

(Taken Mar. 28th, 1927, and Feb. 21, 1928.)

IN CHANCERY OF NEW JERSEY.

Between
AMERICAN PLASTER DRILL COMPANY, a corporation,
Complainant,

and

WILLIAM H. FRANCISCO, *et al.*,
Defendants.

Transcript.
On Bill, &c.

Transcript of the testimony taken in the above-stated cause, on final hearing, at the Chancery Chambers in Jersey City, on Monday, March 28, 1927, at 10 o'clock in the forenoon, before His Honor JOHN BENTLEY, Vice-Chancellor.

Appearances:

LIONEL P. KRISTELLER, Esq., for the Complainant;

Messrs. HOPKINS & HERR, Solicitors; DOUGAL HERR, Esq., of Counsel, for Defendants Francisco;

Messrs. SMITH & SLINGERLAND, Solicitors; A. C. SLINGERLAND, Esq., of Counsel, for Defendant Recreation Development Co.;

Messrs. BUTLER & BUTLER, Solicitors; JAMES A. BUTLER, Esq., of Counsel; HARVEY G. STEVENSON, Esq., of Counsel, for Country Club.

ARCHIBALD F. SLINGERLAND, sworn on behalf of the complainant, testified as follows:

Direct examination by Mr. Kristeller:

Q. You are an attorney and counsellor at law in New Jersey? A. I am.

Q. Of the firm of Smith & Slingerland? A. I am.

Q. I show you a paper signed and executed by William H. Francisco, Mary F. Francisco, Richard S. Francisco, and Mary A. Francisco, and ask you whether this is a contract which was delivered to you by Mr. Donaldson for the property in Caldwell? A. It is.

Mr. Kristeller: I offer it in evidence.

Mr. Herr: I must object to it, because the copy of the contract I have doesn't bear any signatures of the wives, only of the husbands.

The Court: Well, let me see the contract a moment. What do you mean, that there are no subscribing witnesses?

Mr. Herr: No, sir; I mean that the wives haven't executed the original contract, and I think we ought to require strict proof.

Mr. Kristeller: That is our copy.

The Court: I don't understand what you mean by strict proof.

Mr. Herr: Well, the witness isn't the subscribing witness who took the acknowledgment.

The Witness: I am not.

Mr. Herr: Well, I object to the offer. I don't understand that an acknowledged paper can be offered without proof of the subscribing witness.

The Court: Who is this man Cromley?

Mr. Herr: He is here in court, sir.

Mr. Kristeller: I can prove it by him, and if part of it is admissible the rest of it will be. Do you object to it now?

Mr. Herr: Yes, I object to it.

Mr. Kristeller: Then I will withdraw Mr. Kristeller and put Mr. Cromley on.

(Witness steps aside.)

Robert W. Cromley, sworn on behalf of the complainant, testified as follows:

Direct examination by Mr. Kristeller:

Q. Mr. Cromley, what is your address? A. Essex Fells, N. J.

Q. Are you a member of the bar of the State of New Jersey? A. I am an attorney of the Supreme Court of New Jersey.

Q. Are you the subscribing witness to this agreement I show you? A. I am one witness.

The Court: Sole subscribing witness.

Mr. Kristeller: I now offer the contract.

Mr. Herr: I would like to ask a few questions, if I may.

By Mr. Herr:

Q. Did you take the acknowledgment of the wives of the two Franciscos mentioned in that contract? A. I did not. They did not sign then.

Mr. Herr: I object to it.

Mr. Kristeller: Yes, sir; I offer the contract in evidence.

The Court: Mr. Kristeller, there is nothing here to show that these married women ever did acknowledge it.

Mr. Kristeller: Yes, on the last two pages. It seems that the women both re-acknowledged it and this is one of them, at the top there.

The Court: Did you see these acknowledgments, Mr. Herr?

Mr. Herr: No, sir; I didn't.

The Court: I didn't either until Mr. Kristeller pointed out where they were.

(Mr. Herr examines paper.)

A. They are not in the body of it.

Mr. Herr: Apparently what happened was, they acknowledged before some other officer.

Mr. Kristeller: What exactly happened was, when this contract was shown to Smith & Slingerland they said that the contract wasn't any good. I don't suppose that Mr. Donaldson wanted to give them a bad contract and they went up and had it acknowledged.

The Court: Now, I suppose strictly, Mr. Kristeller, there isn't any proof by anybody of the signatures of those two women.

Mr. Kristeller: If one part of it goes in the rest will go in. There is no dispute that it isn't their signature.

The Court: I understand Mr. Herr insists upon strict proof.

Mr. Kristeller: If he insists upon strict proof, my understanding is when I prove one signature by the subscribing witness I don't have to prove every signature.

The Court: You have not offered any evidence that the signatures are those of the two women.

Mr. Kristeller: All right; then I will ask for an adjournment and I will subpoena them. In view of the opening statement I don't think that they wanted to give us a bad contract.

By the Court:

Q. Mr. Cromley, were you present when that agreement was executed by the parties? A. I was. The women didn't sign then. They are not named in there. I will tell you all about it, Judge.

Q. Well, I don't know; you are in Mr. Kristeller's hands.

The Court: I don't know what you are going to do.

Mr. Kristeller: I will ask for an adjournment. I was always under the impression when I proved an agreement the agreement goes in.

Mr. Herr: I don't want to be captious at all, but I don't know whether they signed it or not. I understood they didn't.

A. They didn't sign it in my presence.

By Mr. Kristeller:

Q. Do you know their signatures? A. Well, I couldn't say.

Q. Did you deliver this paper to anybody? A. No.

Q. Do you know whether that is signed by the women (handing paper to the witness)? A. I don't know.

Mr. Kristeller: All right; if they want me to subpoena the women I will have to ask for an adjournment, although I think, under the law, that is not necessary.

Mr. Herr: My understanding is, if the document is recorded then it may be proved without the subscribing witnesses. However, mightn't the matter be left this way: I will consent to have it go in, subject later to a motion to exclude it if I find upon investigation that they did not sign.

Mr. Kristeller: Oh, that is all right.

The Court: They are now to be marked by consent, being a paper purporting to be a contract for the sale of land by William H. Francisco and his wife, and Richard S. Francisco and his wife, subject to the right of counsel for the Franciscos to move to strike out the agreement if it is determined later that it was never signed by either of the women.

(The same is marked Exhibit C-1.)

Mr. Kristeller: I also offer in evidence a receipt, dated December 6, 1924, for $2,000, signed by William H. and Richard S. Francisco and their wives.

Mr. Herr: Let it go in under the same condition.

Mr. Kristeller: Yes, I have no objection.

Mr. Herr: I mean, I will not object to it going in provided I have an opportunity to strike it out later, if I find that the wives did not sign it.

(The same is marked Exhibit C-2.)

Mr. Kristeller: I now offer in evidence a contract between The Recreation Development Corporation and the American Plaster Drill Corporation, recorded in the office of the Register of Essex County, Book L-74 of deeds, page 494, together with the copies of the extension agreement, a copy of the agreement dated Jan. 2d, 1926, between William H. Francisco, by Robert M. Cromley, his attorney, and Richard S. Francisco, extending the time of payment to March 6, 1926, on their original agreement; and the extension signed by Mr. Cromley, attorney, extending the time to April 1, 1926.

Mr. Herr: No objection.

(The same is marked Exhibit C-3.)

Mr. Kristeller: I now offer in evidence the assignment from the Recreation Development Co. to the American Plaster Drill Company, of the agreement dated June 11, 1924.

Mr. Herr: No objection.

(The same is marked Exhibit C-4.)

Archibald F. Slingerland, resuming the stand, testified as follows:

Direct examination by Mr. Kristeller (continued):

Q. Mr. Slingerland, did you have charge of this title during the time that the thing was examined? A. Just when do you mean?

Q. I mean February and March, 1926. A. I think I took charge of it in connection with the

preparation of a contract, and so on, about that time.

Q. I show you a letter from me, dated February 27, 1926, in regard to the title; did you receive that letter? A. Yes, sir.

Mr. Kristeller: I offer that letter in evidence.

Mr. Herr: No objection.

(The same is marked Exhibit C-5.)

Q. I show you a letter, dated March 22, 1926, calling your attention to the *lis pendens* filed in the Dryden suit, and ask you if you received that letter? A. I did.

Mr. Kristeller: I offer the letter in evidence.

Mr. Herr: No objection.

(The same is marked Exhibit C-6.)

Q. I show you a letter dated July 2d, and ask you if you received that letter? A. I did.

Mr. Kristeller: I offer that in evidence.

(Admitted and marked Exhibit C-7.)

Q. Has the *lis pendens,* up to the present time, been removed? A. Not to my knowledge.

Q. Has the Recreation Development Co. been able to obtain a deed from the Franciscos for that land without the *lis pendens?* A. I understand that the *lis pendens* has been on file during all of this period and still is, so far as I know.

(No cross-examination.)

ROBERT W. CROMLEY, recalled on behalf of the complainant, testified as follows:

Direct examination by Mr. Kristeller:

Q. You were at my office on several occasions between January 1st, 1926, and the date of the filing of the present bill of complaint, weren't you? A. I was.

Q. And at that time we offered to take title from your clients, the Franciscos, providing you released the *lis pendens* in the Dryden suit? Is that right; yes or no? A. In January the Dryden suit hadn't been started.

Q. I didn't ask you that; I said, when you came to my office we offered to take title from your clients provided the *lis pendens* were removed? A. At one time, you did, yes.

Q. And you refused to give us title except we settled with the members; is that right? A. No.

Q. You were always anxious about the members' rights, and you said you couldn't give us title without taking care of the members; isn't that what you said? A. I said, if you were going to take title subject to the rights of the members I didn't see that the *lis pendens* in their suit was any objection to the title, so far as you were concerned.

Q. I called your attention to the fact that the *lis pendens* was against the Franciscos, and their agreement with the corporation was free and clear of the *lis pendens,* didn't I? A. Yes.

Q. And you said you wouldn't make any effort to clear the *lis pendens* off the record, didn't you? A. I did.

Cross-examination by Mr. Herr:

Q. Mr. Cromley, on the occasion of that conversation was anything further said about the players' rights?

Mr. Kristeller: That is not proper cross-examination at this time.

Mr. Herr: You brought that out yourself, the conversation about the rights of the players.

Mr. Kristeller: All right; I will withdraw the objection.

Q. That conversation was largely about the rights of the players, wasn't it A. Yes, we discussed their rights to some extent.

Q. And at that time did you show Mr. Kristeller a copy of one of these certificates of membership that was issued to the members? A. I did.

Q. Did he say that that is the first he had known of it? A. He said that was the first he had ever seen one—the first time.

Q. Did you show him a copy of the by-laws of the Ferncliffe Golf and Country Club, Inc.? A. Yes.

Q. Did you, on behalf of the Franciscos, offer him the $7,000 deposit back, together with a reasonable search fee, and say "All right, if you will agree to take it back and call the contract off"?

Mr. Kristeller: I object to that question. It puts me in an embarrassing position of having to take the stand. If he had any offer it should have been made in the proper manner to my client or by letter. I don't want to take the stand and testify in a case that I am trying.

New Jersey State Library

The Court: I will overrule the objection and let the question be answered.

Mr. Slingerland: I object, on behalf of the Recreation Development Co., as not binding upon us at all, because whatever offer he made to Mr. Kristeller wouldn't affect our rights under the assignment. Of of course, it would not be binding upon us.

The Court: It would not, but that doesn't alter the fact of its being admissible.

A. Yes, we agreed to give him the deposit back and a reasonable fee for examination of the title, and cancel the contract.

Q. What did he say to that suggestion? A. He said, no, he wouldn't do it.

Q. Did he say why? A. Before there was anything more said, as I remember it, the discussion came up as to what the property was to be used for, and I said that I understood he didn't buy it to retain a golf course, and in view of these certificates that had been issued to members it seemed to me to be questionable whether he could use it for development purposes, and he replied there was a lease on there for $15,000 a year rent and if the members didn't pay the $15,000 he would put them out.

Q. Did you tell him that there was any question about the validity of that lease as regards the members? A. I told him that the members had told me—or some of them had—that they never heard of the lease when they paid the money and that there might be some question as to the validity of it against them; and he replied that they would have to take that risk and if they were beaten it was their hard luck.

Re-direct examination by Mr. Kristeller:

Q. When was that conversation, Mr. Cromley? A. I haven't the date in my mind.

Q. Well, approximately when? A. Well, I should say last November.

Q. That was long after this litigation had started? A. Oh, yes.

Q. Did you ever have any talk with me before the litigation started? A. I'm not sure about that.

Q. How many times did you come to my office? Once, twice, three times or four times? A. I think I was in your office on three occasions.

Q. And on which occasion was this conversation in which you offered me the down money back? A. I think the last one.

Q. Sure about that? A. I am quite positive about it, yes.

Q. Quite positive you offered me a sum of money? A. Yes.

Q. Now, isn't it a fact that you conducted yourself throughout this litigation as you have on the stand, in a decisive determination always to protect the players and never offering me one chance to get the property or to decline it?

Mr. Herr: I object to the form of the question. This is not cross-examination.

Mr. Kristeller: I think he is a hostile witness and I have a right to use cross-examination.

The Court: Unquestionably he is a hostile witness. I will overrule the objection.

A. No, that is not so.

Q. Did you, on any one of the three occasions that you came to my office, ever talk about anything except protecting these players' rights? A. Yes, I did.

Q. When? A. I think every occasion I was there I talked about protecting our own rights.

Q. And didn't we try to get a state of facts for the purposes of this trial, and didn't you then say that you wouldn't consent to any statements of facts because you were going to protect these players? A. No, I don't recollect anything like that.

Mr. Kristeller: It is admitted, isn't it, Mr. Herr, that the property consists of 157 acres in Caldwell, and that a suit was instituted by your clients, the Franciscos, in ejectment, that brought about this litigation? Is that right?

Mr. Herr: That is correct.

Mr. Kristeller: I now offer in evidence the lease between the corporation, the Recreation Development Corporation, and the Franciscos, dated July 25, 1924.

Mr. Herr: I object to it, on the ground that it cannot bind the other parties to the suit.

Mr. Kristeller: It binds the Recreation Co.

The Court: That corporation is a party. I think it is very important that I should know something about this lease.

Mr. Herr: We haven't seen it.

The Court: Of course, you are entitled to see any paper that is admitted in evidence, if that is what you mean.

(The same is admitted and marked Exhibit C-8.)

Mr. Kristeller: I now offer in evidence, if your Honor please, a certified check, dated January 2, 1926, to the Recreation Development Company, for $7,000, endorsed by the Recreation Development Co., J. W. Donaldson, President, to Robert W. Cromley, attorney for W. H. and R. S. Francisco, and deposited in the Chatham-Phoenix National Bank in New York. That is the down payment.

(Admitted and marked Exhibit C-9.)

Mr. Kristeller: I also offer in evidence two checks, both dated March 2d, 1926, to the Recreation Development Corporation, one in the sum of $200 and another in the sum of $300, being payments on account as set out at our meeting and in the contract. That is not binding, I suppose, on Francisco, but is on the corporation.

(Admitted and the $200 check is marked Exhibit C-10, and the other C-11.)

Mr. Kristeller: It is admitted, isn't it, Mr. Herr, that you haven't conveyed to the Recreation Development Co.?

Mr. Herr: It is.

Mr. Kristeller: And that you have refused?

Mr. Herr: We have refused to convey to the complainant free from the *lis pendens.*

Mr. Kristeller: Complainant rests.

DEFENDANTS FRANCISCOS' CASE.

ROBERT W. CROMLEY, recalled on behalf of defendants Francisco, testified as follows:

Direct examination by Mr. Herr:

Q. Mr. Cromley, I show you what purports to be a contract between William H. Francisco and Richard S. Francisco with the Recreation Development Corporation, dated June 11, 1924, and signed "William H. Francisco and Richard S. Francisco" and acknowledged before you; are you the subscribing witness to those signatures? A. I am, yes.

Q. And those are the signatures of William H. Francisco and Richard S. Francisco? A. Yes.

Q. And the wives did not sign before you at that time or any other time? A. No.

Mr. Herr: I offer this.

Mr. Kristeller: I don't want to be objecting all the time, but we have one contract and you agreed if the wives did sign it you would not object. We don't want two copies of the same contract.

Mr. Herr: This is what we say was signed, and if it turns out later that the wives did not sign then this is in evidence; otherwise it can be ignored.

The Court: The only difficulty would be the expense of printing in the event of appeal. I will overrule the objection and allow this to be marked in evidence. But if there is no proof of forgery of the women's names, if the proofs remain as they are now, I will strike out the one which was

signed by the women so as to avoid duplication in printing.

(The same is marked Exhibit D-1.)

Q. You, as the attorney for the Franciscos, received the $7,000 deposit money that was paid by the complainant, did you? A. I did.

Q. Did you disburse that money? A. Yes.

Q. Will you state, in general, for what items you made those disbursements? What was the character of the payments? A. Payments on debts incurred by the Recreation Development Company and the settlement of some suits that had been started. It was almost entirely used up that way.

Q. Did the Recreation Development Company owe the Franciscos any money for anything outside of the contract to buy the land? A. Oh, yes, they owed them a large sum of money.

Cross-examination by Mr. Kristeller:

Q. Most of this money was spent for improvements made by the Recreation Development Company on the Francisco property; isn't that so? A. Very largely, yes.

Q. And the payment for settlement of these suits was also payment for suits for materials furnished or work performed upon the Francisco property in connection with the golf course? A. Yes, pretty much all of it.

Q. And did you pay some taxes, too? A. Yes.

Q. And practically this entire $7,000 was used for the benefit of the Franciscos, wasn't it? A. Was used in payment——

Q. Don't explain it now; explain it later. Most of it was used for the benefit of the Franciscos? A. No.

Q. You had a bill against the Recreation Development Company for $200, didn't you? A. Yes.

Q. You took that out of that money? A. Yes.

Q. There were taxes on the Francisco farm for 1925 which the Development Company hadn't paid, and which the Franciscos would have had to pay, wouldn't they? A. Yes.

Q. That amounted to thirteen and some hundred dollars. That was paid out of that $7,000? A. It was.

Q. And the Essex Fells Plumbing & Heating Company bill was for some work done on the Francisco farm at that time at the club house, wasn't it? A. I think so; I'm not sure.

Q. So that if the money wasn't paid by the Recreation Development Company there might have been a mechanic's lien against the Francisco property?

Mr. Herr: I object, because it calls for a conclusion.

Mr. Kristeller: He was their solicitor or attorney at the time. I have a right to show that this money went for the benefit of the Franciscos. However, I will withdraw the question to save time.

Q. And of that $7,000 you deposited over $1,600 to the credit of Francisco in the Caldwell National Bank? A. Something like that.

Q. How much of this $7,000 went for things other than for the benefit of Francisco? A. I can't tell you how it was apportioned without the list. I made a list at the time.

Q. You sent a list, didn't you, to Mr. Slingerland, of Smith & Slingerland, at Newark? A. I did, yes.

Q. Is this your letter, and is this the list (handing papers to the witness)? A. Yes, that is my letter.

Mr. Kristeller: The letter and list are produced by Mr. Slingerland, upon notice.

Q. Is that the letter and the list? A. Yes.

Mr. Kristeller: I ask that those be marked for identification.

The Court: They are admitted and might as well go into evidence.

(The letter is marked Exhibit C-12 and the list Exhibit C-13.)

Re-direct examination by Mr. Herr:

Q. Didn't Francisco's bill against the Recreation Development Company, outside of the amounts owed on the contract, exceed the sum of $1,643.65? A. Yes.

Mr. Kristeller: Wait a minute. I object, on the ground that we are not bound by what the Francisos did with the deposit of the down money. They got it.

Mr. Herr: The whole purpose is to show it wasn't taken on account of the contract price. It is set up in the pleadings that the Franciscos got $2,500 on account of the contract price of this property. I don't want it to be understood that this $1,625 in addition was taken on account of the debt.

The Court: I don't understand that yet, Mr. Herr. What about this $1,643? You don't want that to be misunderstood.

Mr. Herr: The testimony is that the Franciscos had money coming to them from

the Recreation Development Company outside of the money due, or which might become due, on this contract of sale, and that they credited this $1,643 on account of the money so due. It had nothing to do with the contract of sale of the land.

Mr. Kristeller: We maintain, on the other hand, that they got $2,500, and then they got $7,000 from the Recreation Development Co., and the $7,000 was paid on our contract. If they saw fit to apportion and pay off other things, that is no concern of ours. We are entitled to the credit of $7,000 as against Francisco.

Mr. Herr: There is no question but what they are entitled to $7,000 against somebody; but I thought it might shape up later so that the question would become material how much was paid on account of this contract with the Franciscos by anybody.

The Court: The question has already been answered. I will allow it to stand.

Mr. Herr: Defendants Francisco rest.

Mr. Slingerland: I don't think it is quite fair to go into the question of fraud in the absence of my client. I think he ought to hear the testimony, because they are going to try to fasten fraud upon Donaldson, and I think he ought to hear it.

The Court: I quite agree with you.

Mr. Kristeller: I want to make this point, if your Honor please: Your Honor ruled against me on the proposition that the members' case might be joined to this.

Surely, it came at a very late date. And as to that, we are not offering any evidence. These fellows have known all this time that they were going to come in here last year. Now, at the last moment, they served the notice, and I said then and I say now that I object to the shortness of notice, because up to last Tuesday I didn't know that they were going on.

Mr. Butler: So far as Mr. Kristeller's objection is concerned, I think when it comes to that it is up to Mr. Slingerland. He knew it. I would be very anxious to have Mr. Donaldson here.

The Court: Now, Mr. Slingerland, I think, in all fairness, you are entitled to know just what you express—to have your client hear the evidence against him. Do you mean that literally?

Mr. Slingerland: I do. I don't want to be in a position to be criticised without the opportunity for him to be here. If I can't get him I will try to.

The Court: All the parties want this expeditiously wound up. How long a time, Mr. Slingerland, do you think this case ought to be continued?

Mr. Slingerland: I should think a couple of weeks ought to be time enough. If I can't get him, or if he refuses to come, I will be free to go head.

The Court: You have means of communicating with him?

Mr. Slingerland: I have his last address. I haven't heard from him in a long time, but I know he must have gotten one of my letters, because it hasn't come back. But all I can do is to try to get him.

Mr. Herr: The report is that he has gone to Australia.

The Court: Do you know any of his affiliations or associations?

Mr. Slingerland: No, I have only one address. I don't want him to come here and say, "Why didn't you let me know?"

Mr. Kristeller: May we then consider that our case is through?

Mr. Herr: It is a part of my case to have their case come in.

Mr. Kristeller: Well, that is news. I didn't realize that; I didn't think that.

Mr. Slingerland: I don't see why the complainant couldn't pay the money into court and let us fight it out.

Mr. Butler: I don't see why. We are fighting for the members, between Mr. Francisco and the Plaster Drill. Now, this gentleman doesn't represent any of the parties except Mr. Donaldson, and I don't see why he is so interested in having the money paid into court.

The Court: I understand he represents the Recreation Development Corporation and they have got to pay $55,000.

Mr. Butler: Yes.

The Court: They claim about $55,000 and interest, the difference between the amount of their contract with Francisco and the amount of their contract with the Plaster Drill Co. Suppose we lay the case over to April 15th, Good Friday.

(On April 15th a further adjournment was had, and it is now set for Tuesday, February 21, 1928, at 10 o'clock in the forenoon, at the Chancery Chambers in Jersey City.)

IN CHANCERY OF NEW JERSEY.

Between AMERICAN PLASTER DRILL CO., a corporation, Complainant, *and* WILLIAM H. FRANCISCO, *et als.*, Defendants.	On Bill, &c. Transcript.

Transcript of testimony taken in the above stated cause, on final hearing, continued from March 28, 1927, at the Chancery Chambers in Jersey City, on Tuesday, February 21, 1928, at 10 o'clock in the forenoon, before his Honor JOHN BENTLEY, Vice-Chancellor.

Appearances:

LIONEL P. KRISTELLER, Esq., Solicitor, Hon. MERRITT LANE, of Counsel, for the Complainant;

Messrs. HOPKINS & HERR, Solicitors, DOUGAL HERR, Esq., of Counsel for Defendants Francisco;

Messrs. SMITH & SLINGERLAND, Solicitors, A. C. SLINGERLAND, Esq., of Counsel for Defendant Recreation Development Co.;

Messrs. BUTLER & BUTLER, Solicitors, JAMES A. BUTLER, Esq., and HARVEY G. STEVENSON, Esq., DOUGAL HERR, Esq., of Counsel for Defendant Country Club.

Judge Butler: Before we start I want to say to your Honor that the interests of the Players in this case and the Franciscos are common interests, and we have agreed that Mr. Herr shall act as counsel and will handle the case.

Mr. Slingerland: If your Honor please, may I at this time press my motion, of which I gave notice, to dismiss the suit of Dryden against the Recreation Development Co., on the ground of lack of prosecution. The bill was filed over two years ago. There was an order to show cause granted; we had an argument upon that, and that is the last step taken in the case. There was never any subpoena issued, no order taken upon the order to show cause. Now, I think it will clarify this present case if we will eliminate that suit, under the rule; and I, therefore, ask that that be dismissed, and the rights of the parties determined in the present suit in which they have asked to intervene as parties. It seems to me it is useless to continue with a suit that has never actually been started and in which no subpoena has been issued at all.

Mr. Kristeller: I oppose that application because, realizing as I will have to sooner or later, that the Francisco affairs are going to be joined with the other defendants, if that suit is dismissed it may change this suit. The *lis pendens* has gone.

We object to taking title, in view of the stipulation as corrected by Mr. Herr that they had refused to convey to us free from that *lis pendens,* and it may be, with that *lis pendens* off, the real meat of our case is disposed of and they will have to convey to someone, whether to us or to the Recreation Development Co., I am not going to make the point now. But here is the situation: We not having a direct contract with the Fran-

ciscos it will create a situation where we will have to take title. With that *lis pendens* off, we say we are entitled to get title from Francisco. And that is what we don't want to do. He has made a contract to convey and we want him to live up to that contract. It was a contract from Francisco to the Recreation Development Co., and the Recreation Development Co. assigned their original contract to us. In the original contract to Francisco there were no exceptions; it was to be free and clear, and the only thing on that title was the *lis pendens*. Now, how is it going to avoid conveying that land? He has got to convey it to someone, certainly. That *lis pendens* ought not to stay if the suit is in the condition that he says it is.

Mr. Butler: I understand notice has been given.

The Court: I understood Mr. Slingerland to say it had.

Mr. Slingerland: Yes, right on top of the bill.

Mr. Butler: There was, sometime ago, a bill which your Honor refused to dismiss. If your Honor will refer to the files you will find that you allowed an amended bill, and after that Mr. Slingerland asked for a chance to hand in an accounting from Mr. Donaldson, and the matter was then adjourned, and Mr. Slingerland gives as a reason for not submitting an accounting that there has been an adjudication and settlement.

The Court: The notice was served on the 25th day of February, 1926.

Mr. Butler: At that time we had a hearing before your Honor and you allowed an amended bill, and Mr. Slingerland said, "We want no receiver; there is nothing wrong; we can give an accounting", and your Honor said, "All right", and Mr. Slingerland left the court room and said he would

have an accounting from Mr. Donaldson. And we have never to this day had it, and that suit was not dismissed at the time, as the records show.

The Court: Well, there is no notice in the file.

Mr. Slingerland: I think the fact is, your Honor, that you decided to hold that motion, along with the rest of the things, until the final hearing.

The Court: Well, that is what I intend to do now. Your motion and Mr. Kristeller's argument on it are noted; but it has been so long since I have had any contact with this case that I think it would be a foolish thing for me to pass upon the motion now, but I will reserve it and deal with it after the proofs are in.

Mr. Butler: "I shall refuse to strike out the bill". That is what your Honor said.

The Court: Well, orders are supposed to be taken and amendments are supposed to be made. Of course, I can allow an amendment at any time.

Mr. Herr: I would like to offer in evidence certified copy of certificate of incorporation of the Ferncliffe Golf & Country Club, Inc.

Mr. Kristeller: I object as not binding on this complainant and not material to the issue of specific performance. Your Honor has permitted some defendants to be joined here. I think that you have to really decide two matters, and probably now a third. One is, whether or not these people have to convey, and if they do have to convey, whether or not any one of us takes subject to any rights. I don't like to have the record show that this has any materiality or any bearing.

Mr. Herr: There are two distinct main defenses to this suit—this bill of Mr. Kristeller's; one is made by the Franciscos and the other is by the Recreation Development Co. The first is, in a word, that the complainant had no legal

right to refuse to take title with the *lis pendens* on it, because under the contracts they agreed to take subject to the rights of the players, whatever those rights may be. Now, this *lis pendens* is filed in a suit by the players to assert those very rights and, therefore, it is not for complainant to say, "you must take that *lis pendens* off". The other one is on behalf of these players. They say that Donaldson and his two concerns, the Ferncliffe Golf & Country Club and the Recreation Development Company, both business corporations of which he owned all the stock—both his creatures—misled them when he sold them membership certificates entitling them to play for the balance of their lives on this particular property; that he represented to them that the property was owned by the Ferncliffe Golf & Country Club, Inc., when, as a matter of fact, it was not owned by that company, and that company never even had a contract to buy it; that he at that time had only a contract with the Franciscos for which he paid a small amount of cash—a shoestring transaction. This was all based upon that $500 payment; that he gave them glowing accounts of what this would be,—a 36-hole golf course, and all kinds of things that they were going to get, when he knew that they couldn't get them. Now, if that be so, as we are prepared to prove, whatever equity Donaldson with his two companies had by virtue of the contract he had with the Franciscos was subject to the equitable estate which, by their fraud, accrued for the benefit of these players. In other words, if the court is dealing with an equitable estate, then it has got to take into consideration the rights of these players, what they would have had if these contracts had not been made with the complainant. If these

contracts had not been made with the complainant, these players would have had a right to the property itself, together with an accounting, as your Honor intimated in the Dryden suit. That is to say, they would have whatever right Donaldson had in the property. Now, then, it is the right that Donalson had in the property that these complainants are trying to reach, and since in their contract they take subject to these rights that were created, it is important to show what those rights were, and the defense is that to enforce this contract will be to enable Donaldson to defraud these players, because the contract was made in fraud of the players' rights.

Mr. Kristeller: Let us convey that property to a trustee, or clerk of the court—anyone to get it out of Francisco, and then let us fight out these players' rights. There is no equitable estate here. There is a legal obligation on the part of Francisco to convey this property, and we hold that by assignment. He has got to convey to the Recreation Development Company. Let him convey it to anybody, but get it out of Francisco and then see what our battle is. Don't let them hide behind the skirts of this so-called agreement. There is no definite agreement by Francisco to convey.

Mr. Herr: This complainant is a third party to the transaction. He has said himself that the contract is between Francisco and the Recreation Development Company. This assignment that he speaks of was a conditional assignment. It was only to take place in case the contract between the players and the Recreation Development Company was not carried out, and it was to take effect so that the difference in price would be paid over to the Development Corporation. What the com-

plainant was entitled to have was not what the Franciscos agreed to give, and, therefore, in order to reach the Franciscos they must deal with the equities and not the law. They are not entitled to the legal estate unless equitably they are entitled to it. I say it was not Donaldson's to give, and they know it. They were on notice.

The Court: For the purpose of saving time, because these arguments consume a great deal of time, I am going to overrule the objection and let it in, and I will deal with it when I come to decide the case.

(Admitted and marked Exhibit D-2.)

Mr. Herr: I offer in evidence certified copy of certificate of incorporation of the Recreation Development Company.

Mr. Kristeller: The same objection.

The Court: Same ruling.

(Admitted and marked Exhibit D-3.)

Andrew J. Pitney, sworn on behalf of the defendant Francisco, testified as follows:

Direct examination by Mr. Herr:

Mr. Kristeller: May I ask your Honor if there has been an order admitting these parties. If so, I have not had a copy of it.

Mr. Herr: There has been an order admitting these parties to defend.

Mr. Kristeller: I don't remember that there was any order, but they are in equity and we want to do equity, and the case has been handled that way.

The Court: Which case is that?

Mr. Herr: American Plaster Drill Co.

Mr. Kristeller: There is no order drawn and no answer filed by these defendants. If we are going to go into the members' case I think the record ought to be straight.

The Court: Is there any objection to filing the answer now and giving copies of it?

Mr. Herr: There is a copy of the order, apparently signed by your Honor.

The Court: The order here is that application is granted to Dryden and they are admitted as parties defendants herein. But what are you going to do about that answer?

Mr. Herr: I will stick to that, and I move that it be filed as within time.

Mr. Kristeller: I object to the filing of the answer. There is sufficient in the answer to show a lot of things that we are not prepared to meet.

Mr. Herr: In this case bear in mind that the agreement which the complainant rests on is an agreement which says on its face that the title is to be taken subject to the rights of these outside parties, whatever those rights may be. Now, that's a little different than the ordinary case to prove a fraud. We are trying to show what these rights are, in equity. In order to show it we have got to show the fraud. It is not a fraud against the complainant; it is a fraud against somebody else entirely.

The Court: I am troubled now by Mr. Kristeller saying that he is in a position where he is surprised if that answer is allowed.

Mr. Herr: If he is in that position, of course I haven't anything further to say. The question in my mind is, whether that amounts to surprise. Under our answer we show that this was a fraudulent lease.

The Court: Do you go further and plead facts?

Mr. Herr: No, sir; not in our answer.

Mr. Kristeller: That brings us right down to what we started out with before, that they thought they had something to hang their hat on, and they pleaded this general fraud. I don't blame my friend Herr at all. They thought that was another chance to get out of this; that the contract hadn't been signed by the wives; but the fact is that it was a good contract. Now, when people take that angle in equity, to my mind they ought not to be given an awful lot of consideration.

* * * * * *

The Court: Well, Mr. Kristeller, if I sustain the objection to the application to file the answer it means that these intervenors can't be heard at all in their defense. I couldn't permit the litigation to go off on any such issues as that.

(At this point Mr. Lane enters the room.)

Now, here is your associate, Mr. Kristeller, for whom you are waiting.

Mr. Lane: I had no idea that you were waiting for me. Mr. Kristeller handled the case before and I thought he was going on with it.

(After argument covering about 20 pages of typewriting the Court made the following ruling:)

The Court: Suppose we go on. We have now spent almost an hour over the offer to file this answer. Suppose you proceed with your proofs and I will have to determine what I will do about the answer. I don't know what I am going to do about it.

Q. Mr. Pitney, are you a member of the association known as the Ferncliffe Golf and Country Club, Inc.? A. I am.

Q. Do you remember about the date that you became a member? A. Yes, about August, 1924.

Q. How did you come to purchase a membership there?

Mr. Lane: I object to that, if the Court please. It is intended to prove interest in land, I suppose, by parol when there is something also in writing.

The Court: I suppose it is to prove fraud. Just what do you mean by that question, Mr. Herr?

Mr. Herr: I mean, under what circumstances did he purchase his membership.

The Court: I am going to overrule the objection. We are getting nowhere.

A. Through one of his representatives, Mr. Lancaster.

Mr. Slingerland: Whose representative?

A. The Ferncliffe Golf & Country Club.

Mr. Slingerland: Now, I object to that. He has no way of telling that this man was a representative of the Ferncliffe Golf & Country Club. It has no binding effect upon our company. He is not qualified to tell that.

The Court: I suppose that is so.
Mr. Slingerland: I move to strike it out.
The Court: It may be stricken out.

Q. Did you pay anything for your membership? A. I did.

Q. What did you pay; how much? A. $50 for a life membership.

Q. To whom did you pay it? A. To the Ferncliffe Golf and Country Club.

Q. How did you pay it? A. By check.

Q. Have you got the check voucher with you? A. I have.

Q. Will you produce it? A. (Witness produces paper.)

Q. I show you cancelled check voucher, drawn to the order of the Ferncliffe Golf & Country Club, under date of August 12, 1924, signed A. J. Pitney, for $55; is that the check with which you paid you club membership? A. Yes, sir.

Mr. Herr: I offer it.

(Admitted and marked Exhibit D-4.)

Q. Did you also receive a membership certificate? A. Yes, I did.

Q. I show you what purports to be a membership certificate in the name of Andrew J. Pitney, signed Ferncliffe Golf & Country Club, Inc., by J. W. Donaldson, President, and Herbert A. Blanchet, Secretary; is that the document you received? A. Yes, sir; it is.

Mr. Herr: I offer that in evidence.
Mr. Lane: I suppose this is subject to my general objection.

(The same is marked Exhibit D-5.)

Q. Prior to sending your check for this life membership, did you have a talk with anybody about it? A. Yes, Mr. Lancaster.

Q. Who is Mr. Lancaster, if you know? A. Why, as far as I know, he represented himself to be a representative of the Ferncliffe Golf & Country Club.

Q. Did you send for him to come and see you? A. I did not.

Q. How did you get in touch with him? A. He came to see me.

Q. At whose request? Was it at your request that he came to see you? A. No, it wasn't.

Q. How, if you know, did he come to call on you? A. Well, I had known Mr. Lancaster quite a long while, and he used to come over to the house once in a while, he living across the street, and by way of conversation he brought up the question of the Ferncliffe Golf & Country Club,

Q. As the result of your conversation with him did you send your check and get this membership? A. I did.

Q. What did Mr. Lancaster say to you about the club?

Mr. Slingerland: I object.

Mr. Lane: I also object. Here is the evidence, the contract between the parties, in writing, and it is an attempt to alter or vary the contents of a written contract by parol evidence, the transaction and parol evidence happening before the contract was made. In the second place, there is no proof of any authority on the part of the principal doing the speaking to bind anybody.

The Court: Is there any more classical exception to the rule of parol evidence

than for the purpose of showing where a written contract is obtained on the ground of fraud? They charge Donaldson and his agents with fraud. Now, as to the second objection, that no authority is shown, it seems to me that there is as a result of the representations made by that agent or individual, that this witness acted upon it, paid his money, and the money was accepted by the person said by the representative to be his principal. I overrule both objections.

Q. The question is, what did Mr. Lancaster say about the club? A. When he called to see me about the membership——

Mr. Slingerland: Pardon me for interrupting, but it seems to me that the defendant in this suit is the Recreation Development Company, and he is now attempting to relate this conversation on behalf of the Ferncliffe Golf & Country Club. It is not binding upon this defendant.

The Court: The complaint of the Players is that the Development Association and the Country Club and Donaldson were all one and the same. There is no jury here. Objection overruled. Now, go ahead and tell us what he said.

A. Mr. Lancaster called to see me at different times and he spoke of this club. I didn't know anything about it. And finally he asked me to drive over and see the club and see how they were developing it, and so on, so far as they had gone, which I did; and then I asked Mr. Lancaster who owned this property. He said that the Ferncliffe

Golf & Country Club owned the property. And I also asked him if there were other interests, and he said absolutely none; and as I had known Lancaster for some little time and thought he was a man of integrity, and on the strength of what he told me about the new club house, swimming pool, tennis courts, bridle-paths, and all those things, I bought the membership.

Q. When you were up to see the club with him, was there any bridle-paths or club house or swimming pools there? A. I didn't see any.

Q. What did he say to you about those things? A. Well, it would only be a matter of a short time when they would all be built.

Q. Did you discuss with Mr. Lancaster the way that this new work was to be financed? A. No, I didn't.

Cross-examination by Mr. Lane:

Q. How did you think it was going to be financed? A. Why, by the dues that were being paid in by the one thousand members.

Q. Did he say how many members he had at that time? A. Yes, he told me that they had about 300, because it was getting pretty well to the end of the $50 initiation, and after they had taken the 300 members the dues were to be advanced to $100 for the next 200 members. So my idea of financing it was that the dues taken from a thousand members would do it nicely.

Q. It was rather an expensive thing that was going to be developed? A. Not so heavily expensive.

Q. When did you discover that anybody had any interest in this property except the club? A. Oh, just here, when this case started in a few months ago, whenever it was. This is the first time I had been to any of the hearings.

Cross-examination by Mr. Slingerland:

Q. Mr. Pitney, do you remember singing any application for membership? A. I do.

Q. Would you remember the appearance of that application if I showed you one, do you think? Look at that and see whether that is the form of application that you signed (handing paper to witness). A. I don't think it is; I wouldn't make an affidavit on that, but I don't think so.

Q. Did you keep a copy of the application which you signed? A. I am pretty careful about those things, but I haven't got it.

Q. I see you have a copy of the by-laws; did Mr. Lancaster give you that? A. No, that was sent to me sometime afterwards.

Q. Now, will you look at this application and tell me in what respect it differs from the one that you signed, if you recall. A. That I couldn't tell you without seeing a duplicate of the one I signed.

By the Court:

Q. I understand your position to be, that you are unable to say whether that is an exact copy? A. No.

Q. You don't say that it isn't? A. I don't say that it isn't or that it is.

By Mr. Slingerland:

Q. It may have been a form like this? A. It may have been but I doubt it.

By the Court:

Q. Why? A. It seems to me that the form that I signed was a different one entirely than that.

Q. Then you think it was not? A. Yes.

By Mr. Slingerland:

Q. In what respect do you think it differs? A. That I am not in a position to say. I see that that says there $100 dues, doesn't it?

Q. It does. Is that the only respect in which it differs? A. That's all I can see at the present time.

Q. Otherwise, you think it is the same? A. I wouldn't say so.

Q. Did you see any of the literature of this country club before you became a member? A. I saw some of it; yes, sir.

Q. In any of that literature that you saw did it state that the club was the owner of this property? A. I never knew of anything connected with the club but the Ferncliffe Golf & Country Club.

Q. Please answer the question. (The question is read by the reporter.) A. I don't know that it did.

Q. When did you first see the by-laws of this club? A. They were sent to me, I couldn't tell you when; sometime after I put in my application.

Q. Shortly after, or was it with your certificate of membership? A. No.

Q. Didn't it come with your certificate of membership? A. No, I don't know.

Q. It may have? A. I don't remember about that.

Q. Did you read the by-laws? A. I have read them since.

Q. Did you read them at the time? A. I possibly did.

Q. Will you let me have the copy of by-laws that you have, Mr. Pitney? A. (Witness hands by-laws to counsel.)

Mr. Slingerland: I offer this copy of by-laws in evidence.

(Admitted and marked Exhibit D-6.)

Recess until 2 P. M.

AFTERNOON SESSION.

WILLIAM J. SURY sworn on behalf of the defendant Francisco, testified as follows:

Direct examination by Mr. Herr:

Q. Mr. Sury, did you purchase a membership in the Ferncliffe Golf & Country Club? A. I did.

Q. About when was that? A. I should say about June, 1924—June or July, somewhere around there.

Q. What did you pay for it? A. $55.

Q. To whom did you pay that money? A. To Mr. Pike.

Q. Did you pay it by check? A. Yes.

Q. Have you got your cancelled voucher? A. I have not.

Q. Did you receive a membership card? A. I did.

Q. Have you that with you? A. I have.

Q. Will you produce it? A. (Witness produces card.)

Q. I show you what purports to be a membership card, dated September 12, 1924, in your name; is that the membership card you received? A. Yes.

Mr. Herr: I offer that.

(Admitted and marked Exhibit D-7.)

Q. Did you also receive a membership certificate? A. I did, but I haven't it with me.

Q. Did you sign an application? A. Why, I imagine I must have, but I don't recall it.

Q. Did you see Mr. Pike? A. Why, he came to me representing the Ferncliffe Golf & Country Club——

Mr. Slingerland: I move that that be stricken out, on the ground that he is not qualified to say that he was representing the Ferncliffe Golf & Country Club.

A. (Continuing) Representing the agent of the Club.

The Court: Well, I suppose it will be shown that, as the result of seeing the solicitor, representations were made by that man which induced him to join, and that the Club accepted the witness's money for such membership.

Mr. Herr: He testified that he paid his money to Pike. He has already said that.

The Court: I will overrule the objection.

Q. Did you have a talk with Mr. Pike about the Club? A. I did, certainly.

Q. Was that prior to your purchase of the membership? A. Yes, sir.

Q. Now, what was the conversation between you and Mr. Pike about it?

Mr. Slingerland: I object, if Your Honor please, on the ground that there is no evidence of any authority on the part of Mr. Pike to represent this club.

The Court: I will overrule it, for the reason just stated.

A. Mr. Pike—I don't know—called two or three times at my place of business, and he pictured the different features of the Ferncliffe Golf & Country Club.

By the Court:

Q. Now, when was this with reference to the time you paid for your admission to the club? A. That was before I paid for it.

Q. All right; proceed.

Direct examination resumed:

A. He pictured the golf club with 36 holes, and a swimming pool and bridle-path, and tennis courts——

Q. What did he say about those things? A. He said that it was the Ferncliffe Golf & Country Club, and he told me that the initiation fee would be $50 for the first 300 members, and thereafter it would be $100 or $110, I am not sure which. So I thought it was a pretty good proposition. I spoke to several other men in town and they said——

Q. Never mind what they said. What else did Mr. Pike say to you about the club before you bought your membership? A. Well, he said so much that I can hardly remember it.

Q. Did he say anything about the ownership of land? A. Oh, yes; certainly.

Q. What did he say about that? A. He told me that it was owned by the Ferncliffe Golf & Country Club and that it was all paid for; it strictly belonged to the Ferncliffe Golf & Country Club.

Q. What did he say to you about bridle-paths and the swimming pool? A. He told me that that was all being fixed up or would be after they had gotten a certain number of members.

Q. Did he say how many members? A. I think it was 500.

Cross-examination by Mr. Lane:

Q. Did he say who had paid for all this? A. No.

Q. Well, you were one of the first 300 members? A. That I don't remember.

Q. Well, that is what you said. A. Yes, after the first 300 he said it would be $100 or $110.

Q. How did he say they were going to get revenue except from the members? A. That I don't know.

Q. You knew that there wasn't any money coming in to this club except what they could get from the members? A. Yes.

Q. And you knew that the membership hadn't yet reached 300? A. Yes.

Q. Did he tell you how many members they had? A. No.

Q. And yet he said that the land was all of it paid for? A. Yes, he told me that the Ferncliffe Golf & Country Club owned the land.

Q. You were the Club, and the Club consisted of only the members of which you were one? A. Yes, after I paid the $50, yes.

Q. Did you know that there wasn't enough money from members to buy that land? A. Of course, I didn't know how they went about it in that way.

Q. You had no idea how or by what process the Club owned and paid for the land? A. No.

Q. You had no explanation of that? A. No.

Q. What is your business? A. Garage.

Cross-examination by Mr. Slingerland:

Q. Did you go and look at the property before you got your membership? A. Why, I lived not very far from it, and I go there very often.

Q. You didn't go and look at it? A. No, I didn't expect to buy a membership.

Q. Mr. Pike didn't tell you that the swimming pool, bridle-paths and tennis courts were there? A. No.

Q. What he told you was that they were contemplated? A. That's it.

Q. Did you see any printed literature of this club before you bought your membership? A. I think he brought some literature around and showed it to me.

Q. You read it over? A. Glanced at it.

Q. Would you recognize any of it if you saw it? A. I think so.

Q. I show you a pamphlet and ask you if that is some of the literature that you saw? A. I don't recall this.

Q. Well, if you don't, you don't; look at this one. Do you recall that? A. I don't recall that.

Q. Do you recall this one (counsel showing witness another paper)? A. Yes, I remember this.

Mr. Slingerland: I would like to have that marked for identification; or, have you any objection to it going right in evidence?

Mr. Herr: No. That may go in as one of my exhibits.

(The same is marked Exhibit D-8.)

Q. You say you think you signed an application for membership? A. Yes, it seems to me I did sign one, but I didn't read it over or anything like that.

Q. You didn't read it over; do you think you would recognize it if I should show you a form? A. I might.

Q. Do you recognize that (showing paper to witness)? A. I can't say that I do, no. I don't remember.

Q. You made an investigation of this proposition before you accepted Mr. Pike's importunities, didn't you? A. I spoke to several other men around town.

Q. And you came to the conclusion that it was a good proposition, didn't you? A. Yes.

Mr. Lane: Your Honor has the proposed answer of the players; I would like to see it.

Mr. Herr: I think it ought to go in. It hasn't been filed yet.

Mr. Lane: I understood it was for the court to decide.

Mr. Herr: Let it go in now (handing paper to counsel). If it isn't in, I am perfectly willing to have it go in.

The Court: Yes, I understand you are quite eager to have it go in.

Mr. Herr: When counsel takes it now as a pleading I think it is in.

Mr. Lane: You have offered it as a proposed pleading; I may have some objections to raise after examining it.

The Court: Don't you think when an adversary is out of time in filing a pleading he is entitled to know what you plead before he consents to your filing of it? I don't know what I am going to do; I wish I did know.

Ernest W. Heilig, sworn on behalf of the defendants Francisco, testified as follows:

Direct examination by Mr. Herr:

Q. Mr. Heilig, did you purchase a membership in the Ferncliffe Golf & Country Club? A. I did.

Q. How did you first hear about the Club? A. I saw an advertisement in the "Sunday Call"—I think it was—"Newark Sunday Call".

Q. Have you a copy of that advertisement here? A. Yes, and I went to the office of the Club in Newark the next morning, by the Lackawanna station, on the other side, and inquired about it, and I was introduced to a man they said was Mr. Donaldson, President of the Ferncliffe Golf & Country Club, and he told me he would send a man to see me.

Mr. Herr: I offer this Sunday Call advertisement in evidence.

Mr. Slingerland: No objection.

(Admitted and marked Exhibit D-9.)

A. (Continuing) And then a man by the name of John L. Benjamin, I think his name was, came to my house in Montclair, and I had quite a discussion with him about the Club and how they were expecting to make it pay, and that sort of thing, and he gave me certain literature, part of which is this picture of the Club, a design. And I then put it up to a personal friend, who wanted to know who drew the design, and I was more interested in it then.

Q. This design or plan of a club house you say he showed you and handed it to you? A. Yes.

Q. What did he say to you? A. He said that was the proposed club house to be built when the

memberships were entirely gotten—the first 300, as I understood it. When they had gotten 300 members at $50 each, which would yield $15,000, 200, as I recall, at $100 each which would yield $20,000 more, and 500 more at $200 each which would give $100,000, that is a total of $135,000, and they calculated their running expenses would be about $24,000 a year, and that would bring, if the 1,000 memberships were sold in the first year, or at any time they were sold, about $111,000 with which I could see they could readily purchase the land. I didn't know the value of land in that section, but it was farm land, and I presumed $100,000 could purchase 157 acres. I inquired about Donaldson, and he said he was in New York, at 160 Broadway, and that he had been successful in syndicating Columbia Park and something else I have forgotten now. On that visit I gave him several names of friends of mine on whom he might call. He asked me for names of my friends, and I gave him a half dozen or so, and later he called and I paid him $50 as one-half of the membership fees for myself and wife, and got his receipt, signed "John L. Benjamin", representative, on the form of the Ferncliffe Golf & Country Club. This was paid on August 19, 1924, and the balance was to be paid on October 1, 1924. Then on October 3d I sent my check, and received a letter signed by the Treasurer of the Ferncliffe Golf & Country Club, Herbert A. Blanchet, Treasurer, acknowledging full payment of the two memberships. I have here the cancelled checks. On the back of the first cancelled check I recall I very carefully wrote "In full of half membership in the Ferncliffe Golf & Country Club at West Caldwell, New Jersey, for Ernest W. Heilig and Emma Heilig, including tax, in full.

He told me there was to be an 18-hole Golf Course. That was in the ad. and also vouched for by Mr. Benjamin, and later I received from the Treasurer again, Herbert A. Blanchet, a letter enclosing a membership card signed by himself for membership in the Ferncliffe Golf & Country Club for life, and the letter stated particularly——

Q. Never mind reading the letter. A. Then, later on, I received this letter stating that a certificate and copy of the by-laws will be forwarded as soon as they are available from the printers. I got that later on—the by-laws and certificate of membership.

And then, later than that, was sent a list of the first 300 names; and I found that my name was among those, and a number of persons whose names I had sent Mr. Benjamin to see, who had also gone into the Club. Here is a list of the first 300 members. I counted them and there are 298 members on it.

Mr. Herr: I offer in evidence the plan of the club house which the witness has spoken of.

(Admitted and marked Exhibit D-10.)

Q. I show you a paper, purporting to be a plan of the Ferncliffe Golf & Country Club; is that one of the papers that Mr. Benjamin handed to you prior to your purchasing your membership? A. Yes, and he signed his name at the bottom. You will find it the same signature as on the receipt.

Q. What did he say to you about that, if anything? A. He told me that the first nine holes would be completed immediately, and the second nine holes would be completed within the next year or some time about then. The whole thing

was to be completed by the following spring, as I understood it.

Mr. Herr: I offer that map.

(Admitted and marked Exhibit D-11.)

Mr. Herr: I offer the cancelled check voucher of Ernest W. Heilig for $55, dated October 3d, 1924.

(Admitted and marked Exhibit D-12.)

Mr. Herr: I offer in evidence the letter to Ernest W. Heilig from the Ferncliffe Golf & Country Club, dated October 3, 1924, and signed "Herbert A. Blanchet, Treasurer."

(Admitted and marked Exhibit D-13.)

Mr. Herr: I offer the check of Ernest W. Heilig for $55, dated August 19, 1924.

(Admitted and marked Exhibit D-14.)

Mr. Herr: I offer the receipt, dated August 19, 1924, of the Ferncliffe Golf & Country Club, to Mr. and Mrs. Ernest W. Heilig, for $55 signed by John L. Benjamin, representative.

(Admitted and marked Exhibit D-15.)

Mr. Herr: I offer the letter of the Ferncliffe Golf & Country Club, Herbert A. Blanchet, Secretary, under date of September 19, 1924, addressed to Mr. and Mrs. Ernst W. Heilig.

(Admitted and marked Exhibit D-16.)

Mr. Herr: I offer the membership card in the name of Mr. Ernest W. Heilig, signed

Herbert A. Blanchet, Secretary, dated September 3, 1924.

(Admitted and marked Exhibit D-17.)

Mr. Herr: I offer the membership certificate in the name of Ernest W. Heilig, dated October 31, 1924, and signed J. W. Donaldson, President, and Herbert A. Blanchet, Secretary.

(Admitted and marked Exhibit D-18.)

Mr. Herr: I offer the list of 298 members entitled "Ferncliffe Golf & Country Club organization enrollment."

(Admitted and marked Exhibit D-19.)

Q. Did you have any talk with Mr. Benjamin about the ownership of the land? A. Why, in the discussion as to how the matter would be financed, and so forth, and how it could possibly be run on a greens fee of 50 cents a day, except Sundays and holidays when it was $1.

I asked him who owned it—whose name the title was in—and he said it belonged to the Club; that Mr. Donaldson was the President and the organizer and the title of the property was in the name of the Club. That satisfied me, because I could see where they could get the money out of a thousand memberships, and I could readily see how it could be done.

Q. Did Mr. Benjamin or anybody else say anything to you before you purchased your certificate about the Recreation Development Company? A. No, I never heard of that until recently—well, not until a year or so ago, I think.

Q. Did Mr. Benjamin or anyone else say to you before you purchased your certificate anything

about a lease of the land? A. No, I understood the land was owned—at least, Benjamin told me it was owned by the Ferncliffe Golf & Country Club.

Q. Did you afterwards have any talk with Mr. Donaldson about where the money had gone to that was paid in for memberships? A. There was a meeting at Fulton Hall in Montclair of the members, and Mr. Donaldson was present. I think that was over a year ago in the fall, as I recall it, the first one of the meetings——

Mr. Lane: I object to this as immaterial. I understand they are trying to prove fraud as an inducement for this member to become a member of the association.

Mr. Herr: I think it is proper to prove the fact that this money that was paid in didn't go into the land, but went somewhere else. It is a part of the fraudulent scheme, and that is the purpose of the question.

Mr. Lane: But they are making charges that representations were made to induce them to become members of the club. Now that happened afterwards. If they say the representation was false, well and good. What happened a year or two afterwards, it seems to me is entirely immaterial.

Mr. Herr: It isn't a question of what happened a year or two afterwards.

The Court: I will overrule the objection.

A. At the meeting I asked Mr. Donaldson particularly what became of all the money collected, and he was very evasive.

Mr. Lane: I move that that be stricken out.

The Court: Yes, the evasion may be stricken out.

A. (continuing) He told me it had all been used in the building of the club.

Q. Anything further said about it at that time? A. I couldn't get Mr. Donaldson to make any further reply on that matter.

Q. Was there any further question asked him? A. Yes, there was a lot of general questions from the floor, and Mr. Ebert asked Mr. Donaldson a number of questions from the platform; he was the Chairman of the meeting, I think; I don't recall particularly.

Q. Do you know what Mr. Ebert asked him about that matter? A. I don't think I can recall now just what he did say, so much talking went on.

Cross-examination by Mr. Lane:

Q. You saw this land, didn't you? A. No, I didn't see the land.

Q. You knew where it was? A. I knew about where it was.

Q. You knew it was valuable land? A. I didn't know the value of it. I presume West Caldwell, this was. I know the section quite well, and it was farm land, and it seemed to me perfectly reasonable that you could have bought it for that amount.

Q. What amount? A. $111,000.

Q. Where did you get the 111? A. They were collected from the thousand members, $135,000, $24,000 for the first year's operation would leave $111,000, wouldn't it?

Q. Yes. A. Well, they had $111,000 with which to buy the land. Now, in the meantime, it is com-

mon knowledge that in purchasing property of that sort it could be held on part payment and mortgage and so forth and could be completely paid off or anything they desired. For $111,000 they could put the title in the hands of the Club, easily.

Q. It could be paid for and a good many things could happen if and when you got a thousand members; but you stated to Mr. Dougal Herr, as I understood it, that the title was in the Club and the land belonged to the Club. A. Yes, Mr. Donaldson was to put some of his own money in.

Q. They could do a good many things; I want to know what was said. A. Mr. Benjamin told me that the ownership of the land was held by the Club.

Q. Yes, you told me that before. A. Yes.

Q. And you didn't make any inquiry to determine how it was that the ownership could be in the Club; and you up to date had money from only these 298 members, and the money collected was less than $15,000? A. Yes.

Q. You knew that wouldn't buy the land? A. Why, it would certainly secure title to the land under some financial arrangement which Mr. Donaldson could make, and Mr. Benjamin's representations to me were that he was capable of handling it and that the land was paid for by the 298 members' fees. I thought Mr. Donaldson, the President of the Club, had some financial scheme by which he had gotten title to the property and was now organizing on the basis of a thousand members and the title then was in the name of the Club.

Q. You didn't expect him to make a present of the property to the Club, did you? A. Mr. Donaldson? No. He was the President of the Club.

Q. And you didn't expect him to give the land to the Club, or anything like that, did you? A. I understood they had it; he didn't have to give it.

Q. You expected the Club would ultimately have to pay for the land, didn't you? A. Yes, ultimately, but in the meanwhile the title could be gotten.

Q. Ultimately, however, all of the money had to come from the Club members? A. Yes.

Q. And you didn't know whether you could complete your thousand members, or couldn't? A. No, for I assisted in getting some additional members myself.

Q. And you read yourself the advertisement, and you saw this building on it, and this Club House? A. Yes.

Q. How much did you think that Club House was going to cost, besides the land? A. I thought that Club House might probably be worth $75,000.

Q. And that was another $75,000 on top of the land and that all had to come from the members, too, didn't it? A. Yes, because the Club House, according to the ad., was to be built from the first 300 members. At least, it didn't say it was to be built from that; the ad. stated after the first 300 members' subscriptions the dues were to be raised to $200, and I think it states in there a Club House would be built. I wasn't assisting in the financial arrangement, of course, but I was told by Mr. Benjamin that, and the Club House was to be a later development.

Q. So that you had to buy the land and do the building, lay out of the golf course, swimming pool and all, from the moneys you were going to get from these thousand members; and if it wasn't to be done with the $135,000 where else was it to come from? A. It might come from the

greens fees which the members had to pay. If we had 1,000 members and 50% of them went out there during the year you could probably calculate on receiving $200 a week for five months out of the year, which would be $1,000 a month, and that would give them $5,000 right there, and further collections from their tennis courts, and from their riding school—and they were going to have horses rented and all that sort of thing, and with the affairs that they would have at the Club House—why it would be possible to pay those things off.

Q. Possible, but not probable. You fully realized that it was all depending upon the happening of certain contingencies? A. Yes, and the interest of the individuals, if everybody worked together.

Q. If everybody worked together? A. Yes.

Q. And if you got the members and they paid in the greens fees, which would yield a certain amount of money, and if everything had turned out as you expected, you were willing to gamble $50 on the result? A. There wouldn't be any gamble about it.

Q. You thought it would be a certainty that this thing was a success? A. No business venture is certain, but if honest people work together it will pull through.

Cross-examination by Mr. Slingerland:

Q. What is your business? A. I am with the Public Service Corporation of New Jersey, Secretary of the Welfare Committee.

Q. Before you made this large investment of $50 you made a pretty thorough investigation of this property? A. Only in discussion with Mr. Benjamin and my talk with Mr. Wenderbeck.

Q. Didn't you check up on any of these statements of Mr. Benjamin? A. In what respect?

Q. To verify them? A. I never checked up on anything Mr. Benjamin told me unless it was I went to New York and saw who Mr. Donaldson was. I took his word that he had an office there.

Q. I want you to tell me if you will what Mr. Benjamin told you that you claim was not true? A. The main thing that he told me wasn't true was that the Club at that time owned the land.

Q. Did you check up on that at all? A. No, I didn't examine the records to see where the title lay.

Q. You could have done that? A. No, I don't know that I am expert enough for that. I would have to employ an attorney for that.

Q. Did you know the architect of the Club House? A. Yes, I know Wenderbeck of Caldwell.

Q. Did you talk with him about the proposition? A. Yes, in this way. I met Wenderbeck one day and I said, "I see you are drawing some plans for the Ferncliffe Golf & Country Club?" and he said "Yes". I said, "Do you know Donaldson"? He said, "I have had business dealings with him". "Did he seem all right?" "He seemed all right to me, but I haven't got any money yet." "I suppose you expect to get paid for it, don't you?" And he said, "Oh yes".

Q. What did you think you were buying when you paid this $50? A. I thought I was buying a life membership in the Ferncliffe Golf & Country Club.

Q. Didn't think you were buying any real estate with it, did you? A. With the $50?

Q. Yes. A. I couldn't buy very much with that.

Q. You read the literature, I think you said? A. I read the ad.

Q. Can you point out to us anywhere in that literature any statement to the effect that the Ferncliffe Golf & Country Club owned this property? A. No, it isn't there.

Re-direct examination by Mr. Herr:

Q. When you said "in the literature of the club there was no reference to the ownership of the land" did you intend to include the membership certificate that you received? A. Well, that wouldn't be literature; that would be the certificate of membership.

Re-cross-examination by Mr. Slingerland:

Q. Can you show me anywhere in this certificate where this property is owned by the Club? A. I would have to examine it. This certificate says, "this certifies"——

Q. I know, we can read it, but just tell us where it says it is owned by the Club. A. It says here, "That he has paid in full his said subscription, and in consideration of such payment he is entitled during his lifetime, without further payment on such subscription to use the club property, golf courses, building and equipment at West Caldwell, Essex County, New Jersey".

Q. That is what you claim was a statement that the Club was the owner of the title of this property? A. Well, it certainly carries——

Q. Just answer my question? A. Yes; it says I have a right to use the Club's property, and if the property didn't belong to the Club how could they give me the right to use it if they didn't own it? That is the inference I would get.

By Mr. Herr:

Q. If you had known that this property was subject to a lease under which it was necessary to pay $15,000 a year rent, plus the taxes, would you have subscribed for the membership?

Mr. Slingerland: I object to what he would or would not have done under certain conditions. The condition of his mind can't be considered as a factor. It is entirely improper what he would or would not have done. He may say now that he doesn't think he would have, but he doesn't know what he would have done at that time.

The Court: Well, I think there is merit to the objection. If you were to ask him what he was told in that respect it might not be so objectionable.

Q. Did Mr. Benjamin or anyone else say anything to you about a lease on the property? A. No, I never heard anything about a lease. I understood the property was owned by the Golf Club. Mr. Benjamin told me so.

By Mr. Lane:

Q. If it was owned by the Club and you knew it was so owned, you knew it must have been subject to heavy indebtedness? A. Probably, but I didn't know of any debt on that property.

By Mr. Slingerland:

Q. But you thought notwithstanding that, the scheme was a feasible one and could be made to pay? A. Oh yes.

JOHN H. STRIGNER, sworn on behalf of defendant Francisco, testified as follows:

Direct examination by Mr. Herr:

Q. Mr. Strigner, you are a member of the Ferncliffe Golf and Country Club? A. Yes.

Q. When did you join? A. October 4, 1924.

Q. How did you come to learn about the Club? A. In August and September, 1924, I was attracted to a very alluring advertisement in a Newark newspaper, particularly the Newark Evening News and the Sunday Call. In September, desiring to play golf, and the Club being limited and the roster filled, I thought it desirable to make inquiry, and I made inquiry at the office of the Ferncliffe Golf & Country Club, which was located at Broad Street in the Berwick Hotel. One or two days after, a telephone message came to my home in New York asking for an appointment. I told my folks I would consent to it, so that on the arrival at the office about 7 o'clock Mr. E. Glenn Bowke called as a representative of the Club, and he told me just what I read in the newspaper ads, and he went on to verify what they had; and I asked him, of course, after receiving all the information which substantiated the advertisement, —I said, "Well, it sounds attractive". I says, "What is it going to cost me?" He says, "$110., $100. for the subscription and $10. for the tax". I says, "You advertise here $50." He says, "The quota is filled with 300 members, and if you don't come in with the next 110 members then that quota will be filled and you will have to pay $200." I says, "I don't work that fast".

He says, "Why don't you fill out this application blank? They are going to do all the things

they say they are". He showed me some literature that they had.

Q. Did he show you an application card? A. Gave me an application card.

Q. Have you got that? A. He gave me three, trying to get all of the family into it (witness producing cards).

Mr. Herr: I offer the white membership card in evidence.

(Admitted and marked Exhibit D-20.)

Q. Did he also hand you an application on pink paper for ladies' membership? A. Yellow sheet. It was $50 and $50 for membership and $5 for tax.

Mr. Herr: I offer that in evidence.

(Admitted and marked Exhibit D-21.)

I asked Mr. Bowke, I says, "You make mention here according to the by-laws; I would like to see those by-laws".

He says, "They have the by-laws somewhere; I will get you a copy".

I says, "Have you got any printed to go along with the applications for membership?"

And he says, "No". He never gave me any.

I says, "Before you get me into it you will have to furnish me a copy of the by-laws so that I will know what I am signing".

He says, "They have copies down in the office and I will have copies sent you".

And I said, "I don't intend to buy anything until I see what I am going to get".

He says, "Why not take a run up and see the property?"

And I says, "I will, and in the meantime I will give you the application". So, I delayed going to

see the property. This was the latter part of September, the third week, I believe, in September he called again, and he says: "Why don't you get into this? Have you been up to the property?"

I says, "No, I haven't; where are the by-laws?"

He said, "Why, they are not printed, but we will have them for you all right".

I says, "All right; I will go up and look at this property and see what there is to it". So I went up and saw the property, which was in West Caldwell, and I asked for Mr. Bowke. They told me, "Mr. Bowke is not here".

I says, "Who represents this property here?"

And he says, "Why, there is a salesman by the name of Lancaster who will take care of you".

I says, "Where is this man Donaldson; he is the head of the property, isn't he?"

And he says, "Yes". This happened to be a workman and I didn't ask his name. So a man by the name of Lancaster who happened to be in that temporary club house approached me, and he says: "I can tell you all there is about this property".

I says, "Well, I am investigating it; representations have been made to me about getting so much for $110". I says, "What is your capacity or position here?"

He says, "I am the agent and also golf constructor; that is, constructor of the golf course".

I says, "You have got it here that you are going to have 18 holes eventually; you are going to build more holes; where are they?"

He says, "Here they are. There are 9 holes".

I says, "This man Bowke told me you are going to put up this nice Club House, and bridle-paths, and tennis court, and have a swimming pool; how are you going to do all this on this money?"

He said they intended to have all those from the membership. He said they already had 500.

I says, "Is it true that you intend to have those on completing the first 500?"

He says, "That is the plan".

I says, "How do you plan to support this golf links on the property?"

He says, "Well, on the membership fee".

I says, "Who owns the property?"

He says, "The Ferncliffe Golf & Country Club".

I says, "Do they own all this property and do they intend to do this themselves?"

He says, "Yes".

"Who is the head of it?" I asked.

"Donaldson. You wait here and he will be around. He will be in with his car soon".

I talked with that man for quite some time, and in the course of the conversation I asked him, "Are you going to build this Club House here?"

And he says, "Yes, build it up on the knoll".

"How do you plan to build that Club House on the fees you are going to get in? I understand the capacity is not to exceed 1,000 and you have 500 now?"

And he says, "Yes, we can do that very readily; there's the sand and all these field-stone, and all they have to do is to get a little lumber, and they can build to the second story with clapboards for about 50 or 60 fees".

I says, "Mr. Bowke told me the greens fees would be 50c and $2 holidays".

And he says, "You can figure it out yourself. It may average around a dollar, and you can figure on 25 playing weeks in the year, and they will have an annual income of somewhere in the neighborhood of twenty-five or thirty thousand dollars".

"That sounds plausible, but", I says, "where are your horses going to be kept?"

"Down in the barn".

"Does the barn belong to the property?"

"Yes".

I says, "How many acres is this property?"

And he says, "157".

"Where is the bridle-path going to be?"

"All around the outside of the property; all around the road that goes back of the knoll and comes down here."

I says, "That all sounds pretty good, but", I says, "how am I to know that they are going to do these things?"

"Here you are", he says; "here is the golf course; here is the whole 18 holes; there's where the Club House is going to be, and the swimming pool will be here" (witness referring to an exact duplicate of Exhibit D-11). He said, "On the knoll here; here is the plan", and I readily saw there was a barn that he pointed out, and there was the temporary Club House that was being used and which he spoke about at the time. Then he says, "This is the pavilion there" that they were tearing down and making into a temporary dance pavilion. And then he showed me the 9-holes, and he says, "You see this is all farm land and it costs us very little and the grass grows so very fast and in a very short time, by next spring, it will be so that you can use it, and then we will begin work immediately on the rest of the course, and that will be all sod so that you can use it in the fall of 1925".

I says, "Well, it looks very feasible to me". I says, "Let me see what type of membership you have", and then he handed to me this printed list of members of the first 300 (witness referring to

Exhibit D-19). He had his name stamped on it, "J. E. Lancaster".

So I scrutinized the list of membership carefully, and says, "Have all the members paid?"

"Yes, they got in for $50".

And I says, "I happen to know some of these people", and I says, "This is very attractive so far; it looks pretty good. Do you expect this man Donaldson around here soon?"

And he says, "Yes; very few agents are here on Sunday", and he said, "Wait here and he will be here". And I waited until 5 o'clock and I couldn't wait longer. Then Mr. Bowke came for his answer, and I says, "There are a lot of promises made and I am going to give you one-half of the $110", and I tendered this check of October 4th for $55 and it was endorsed by the Ferncliffe Golf & Country Club.

Mr. Herr: I offer the check signed by him to Ferncliffe Golf & Country Club, dated October 4, 1924, for $55.

(Admitted and marked Exhibit D-22.)

And then I received this acknowledgment of the payment from Herbert A. Blanchet on October 8th.

Mr. Herr: I offer the letter acknowledging the check in evidence.

(Admitted and marked Exhibit D-23.)

Then in thirty days I said I would pay the balance, providing they would show me the by-laws, and I gave them my check on November 5th.

Mr. Herr: I offer the check of Nov. 5, 1924, to the Ferncliffe Golf & Country Club for $55.

(Admitted and marked Exhibit D-24.)

Then I received this card for life membership with all of those privileges.

Mr. Herr: I offer the card in evidence.

(Admitted and marked Exhibit D-25.)

And then to substantiate what he said, that there would not be more than 1,000 members, the by-laws were printed and they were sent to me, which I received the first week in November, 1924. The only thing that didn't suit me about the by-laws was that it mentioned a quota of 1,000 members, but it didn't contract that they would not charge more than 50 cents green fees and $1 on Sundays, Saturdays and holidays. And then a little later on I found that there was a dual organization, the Ferncliffe Golf & Country Club that owned the property, and we were to be what was called an association of members of the Ferncliffe Golf & Country Club.

During that fall, there was nothing going on, and the spring set in, and we went up to see the property, but nobody was permitted to play, and I was a little skeptical, because I thought they should have started in putting in greenswards and putting up the house and bridle-paths and all those features, and the club greens were opened up, the first 9 holes in the later summer. This was about June or July of 1925.

Q. Is that all? A. Of course, I would say this: I verified a good deal of what they said on the general run of the advertisements that appeared in the paper in the warm weather months. Before the golf course was opened they seemed to require more members, because they put out this attractive literature of what Mr. Hanan knows about the Ferncliffe Golf & Country Club, and the next day the advertisement in the Newark Evening

News, on June 22, 1925, showing the Club House, tennis grounds, bridle-paths. It would take a long time to tell it.

Mr. Herr: I offer these two advertisements in evidence. The first one is June 22, 1925.

(Admitted and marked Exhibit D-26.)

Also the advertisement of June 23, 1925.

(Admitted and marked Exhibit D-27.)

Well, to verify the privileges, I received letters giving the rates of the horseback riding. So I went up there one Sunday, before the course was open. That was in June, and I asked one of the—I presume he was a member, I don't know; I didn't know him by name; I asked him about the horses——

Mr. Slingerland: I object to that, what he asked.

Mr. Herr: I withdraw that.

Q. Have you been up to the golf club grounds recently? A. Yes.

Q. How lately have you been there? A. Well, what I call recently. I played there even under the receivership right up until the last week in October or the first week in November.

Q. What was the condition of the premises in October last? A. 1927?

Q. Yes. A. Well, there were 9 greens and hazards operated by the receiver with the assistance of the professional Jack O'Connor.

Q. Was there any new club house built? A. Oh, no; even the temporary club house was closed.

Q. Were any tennis courts built? A. Yes, there were three tennis courts built in 1925, but they

had run to weeds toward the end of the season, I would say about October.

Q. Was there any swimming pool built? A. None whatever.

Q. Was there any bridle-path built? A. None whatever.

Cross-examination by Mr. Lane:

Q. You made quite an investigation, didn't you? A. Yes, and I was very careful about it.

Q. Did you ask how much they paid for the land? A. I asked the agent, Mr. Bowke, and it was verified by Mr. Lancaster, whether the Ferncliffe Golf & Country Club owned the land.

Q. Exactly; but how did they pay for it? A. Lancaster as well as Bowke verified the fact that Donaldson and his associates owned the land.

Q. Donaldson and his associates weren't the Club? A. They said they were, and it was verified by the by-laws.

Q. Who were going to pay for it? Did you think that Donaldson and his associates were making a present to the Club of the land? A. No, I didn't think they were making the Club a present of the land, but I assumed that the Ferncliffe Golf & Country Club owned it, subsequently.

Q. Then you weren't told that the Club at that time owned the land at all; is that right? A. Not when I joined, no.

Q. What? A. Not when I joined—the Ferncliffe Golf & Country Club owned the land, yes.

Q. Well, then, how was it to be paid for? A. I assumed that they owned it, as it was stated to me.

Q. Well then the members of the Club weren't supposed to own the land, were they? A. No, they were to get all the privileges out of the

50-cent daily greens fees, except Saturdays, Sundays and holidays when it was to be $1.

Q. They were to get the privileges by using land owned by somebody else? A. Yes.

Q. Whether the money was sufficient to pay for it or not? A. I didn't get that question.

Q. Whether the money was sufficient to pay for the improvements and so forth or not? A. Well, it is easily to be figured. If they had a thousand dollars weekly on an average they could operate the Club and give the members all that they promised they would.

Q. What is the point of the Ferncliffe Golf & Country Club as distinguished from the Club members? What was it to get for the land finally? A. Why, as I understood it, Donaldson was to get a salary, and he was to get the surplus, I believe, over operating expenses.

Q. Surplus of what? A. Surplus of what the geen fees would be over the operating of the Club House, bridle-paths, tennis courts, and so forth.

Q. And all that surplus he was to put in his pocket, as you understood it? A. I suppose he was.

Q. Without any accounting? A. None whatever.

Q. Who was to determine how the money was to be expended? A. The by-laws provide that six members of the Associates of the Ferncliffe Golf & Country Club were to compose a Board of Governors with the three of the Ferncliffe Golf & Country Club who owned the land, and these men were to administer the affairs of the property.

Q. The members had nothing to do with that? A. They were to elect the Board of Governors and three of them were to be members of the Fern-

cliffe Golf & Country Club who owned the property.

Q. A separate organization? A. Yes.

Q. So that before you went in you knew there were two separate organizations? A. Not when I went in; I got it when I paid my second installment after the by-laws came by mail.

Q. I am trying to get back before you made your first installment; at that time how did you understand that the land was to be paid for? A. I asked who owned it and they said the Ferncliffe Golf & Country Club.

Q. But did you understand how in the world the Club could pay for it when it only had $15,000, approximately? A. They were paying for the property out of subscriptions. These subscriptions would amount to $110,000, and then it would be $220, for each member up to the 1,000, and they were to have the money from the first 500 memberships for the land and the rest of it was to pay off the cost of the course and club house, and the greens fees would sustain the whole property. I asked who owned the property and they said the Ferncliffe Golf & Country Club, and they owned it outright.

Q. Did you understand that that meant this Club of which you were becoming a member owned it? A. No.

Q. Then I don't understand you at all, because you told me a moment ago that you didn't discover the two organizations until after you paid the second installment. Now I am talking about it back of that before you paid your first check. A. I didn't know there was a dual organization when I paid my first check.

Q. Who did you think owned it then? A. The Ferncliffe Golf & Country Club.

Q. Of which you were becoming a member? A. Yes.

Q. Did you ask how this Club was to pay for it? A. I understood that with the proper financial activity that the Club would pay for it.

Q. You understood fully that the land was not to be owned by you? A. Exactly.

Q. How was it to be paid for and where was the profit to come to the person owning the land? A. I asked the agent Bowke, and it was verified by Lancaster, that Donaldson and his associates owned the land. I asked him, "Do they really own it" and he said they did.

Q. They weren't making a present of it to the Ferncliffe Golf & Country Club? A. They weren't making a present of it to the Club when the Club owned it.

Q. The whole success of this club depended upon two things, didn't it; first, that the membership would be filled up and the people would play as contemplated? A. That's it.

Q. And, secondly, that your calculations, and those calculations which were told you, were accurate? A. I wouldn't say they were accurate; they were approximate.

Q. Well, approximately accurate? A. Yes.

Q. You knew a great deal of money had to be paid and considerable expense had to be met at that time in promotion expenses? A. Well, it would depend on how fast they were going.

Q. They were going pretty fast when they were putting in such advertisements in the Newark newspapers? That costs money, doesn't it? A. It does.

Q. And they were sending several persons around soliciting subscribers? A. I asked about that, and understood they were putting about 20% into sales promotion.

Q. That is, excluding the advertisements? A. Yes. May I add to what I was saying. I says. "What success is there to this proposition?" and Mr. Bowke said to me, "Mr. Donaldson is familiar with this sort of thing and he has had operations like this and he is going to have a chain of them throughout the country, and you will have interlocking privileges to the various Clubs in various cities."

Q. That was in the future? A. That was in the future. I assumed Donaldson was a man of financial means.

Q. When was the receiver appointed? A. The receiver was appointed the latter part of May or June, 1927. I have the date, but I didn't expect to be called upon to answer that.

Q. Whatever is left of this Club is in the receivership? A. Yes; and not only that, but members who paid for greens fees at the rate of 50c. each and $1, all that money went into the hands of the Committee Treasurer and was handed over to the receiver, so that we are missing out on that, too, in the hands of the receiver.

Cross-examination by Mr. Slingerland:

Q. Did you read the application for membership, Mr. Strigner, before you signed it? A. I did.

By the Court:

Q. I don't understand what was said to you at all by Bowke or anyone else as to the condition of the title of the land on which the Club was to be established. A. Well, I didn't question that particularly, because I assumed that that was rather a personal question; anyway they told me

that they owned the property, and that was verified by Lancaster.

Q. Who owned the property? A. Donaldson and his associates, the incorporation of the Ferncliffe Golf & Country Club.

Q. The Club into which you were contemplating the purchase of membership? A. Yes. All I was to get was the privilege of the Club, no financial equity in the property, so I didn't go there and find out how much they had paid, and all that sort of thing. If a business man was going into it to take stock as an investment he might get all the particulars; but I was satisfied to get the privileges to play on all of these premises. That is, the use of the club house, and the privilege to play on the tennis court and all that; and he particularly stressed the point that they were going to raise the fees from 50c. to $1, and I thought it would exclude a lot of members that they took in, and they wouldn't pay that. It would militate against their financial success, I thought.

Cross-examination by Mr. Slingerland (continued):

Q. You knew that you weren't buying stock in the company? A. I knew I wasn't buying stock. I might say, if I can add here, the first I heard there were other organizations was in 1925, when they sent out a prospectus to members to buy the property. That particularly hit me as being a kind of an inefficient way of doing business, these concerns very seldom put any dates on what they have to offer, and you can see that prospectus is without a date, and I had to mark a pencil notation: "Received October 29th."

JOSEPH F. EBERT, sworn on behalf of the defendant Francisco, testified as follows:

Direct examination by Mr. Herr:

Q. Mr. Ebert, you are a member of the Ferncliffe Golf & Country Club? A. Yes, sir.

Q. About when did you become a member? A. In September, 1924.

Q. Were you furnished with any list of the members, outside of this D-19 list, and subsequently to that list? A. Yes, sir; I was.

Q. I show you a typewritten list, consisting of a large number of pages, of 920 names and addresses, and ask you if that is the list to which you referred? A. Yes, sir.

Q. And where did you get that list? A. That list was presented to the Committee by Mr. J. W. Donaldson.

Q. And you were on the Committee? A. I was Chairman of the Committee.

Q. What was the date? A. It was in the fall of 1924.

Q. What date was it that you were furnished with this list? A. In the fall of 1925.

Mr. Herr: I offer these lists in evidence.

(Admitted and marked D-28.)

Q. Mr. Ebert, you spoke of the formation of a committee of which you were chairman; will you state when that was formed. A. In the early part of November, 1924. I think the date was November 5, 1924. Mr. Donaldson arranged for a meeting of the members in Fulton Hall, Montclair.

Q. Are you sure of the year? A. Did I say 1924? I meant 1925. That meeting had for its

purpose the submission to the members of a plan whereby the members could perhaps acquire rights in the property which, according to a printed agreement, was set forth in these printed agreements and were distributed at the meeting; and previous to that the agreement purported to be between J. W. Donaldson individually, his two companies, the Ferncliffe Golf & Country Club, Inc., and the Recreation Development Company, and the Essex Title Guarantee & Trust Company of Montclair. That was rather an elaborate scheme of a stock-promoting nature whereby, by a new subscription—I think the subscription price was $300—the members could acquire further rights in its enterprises.

Q. What was done by the Committee on Donaldson's suggestion? A. Well, at that meeting, at the time this offer was discussed, it didn't meet with much favor with the members that were meeting, and it resulted in the appointment of a Committee of which I was made the Chairman. The Committee was advised to look into the proposition submitted by Mr. Donaldson and report back to the members at a later date. Following that, the Committee met with Mr. Donaldson in the office of the Ferncliffe Golf & Country Club, which then had an office in Montclair. At that meeting Mr. Donaldson was present and two or three other members of his organization. He agreed to give the Committee a list of the members, which he subsequently did. The list he furnished was the typewritten list which I handed you a short time ago (witness indicating Exhibit D-28).

Q. The result of the Committee's action was a letter sent to Mr. Donaldson under date of December 18, 1925? A. Yes, there was. Under that

date a letter was addressed to Mr. Donaldson, signed by Joseph B. Bloom, who was a member of the Committee assisting in investigating the matter. In this letter a certain plan——

Q. Never mind that. I show you a letter under date of December 18, 1925, addressed to Mr. J. W. Donaldson, and ask you if that is the letter to which you refer? A. Yes, it is.

Mr. Herr: I offer that.

(Admitted and marked Exhibit D-29.)

Q. Did Mr. Donaldson furnish you or your committee with any classified list of members? A. Yes, he did.

Q. About what date? A. It was at the time we had the meeting that I spoke of in Mr. Donaldson's office in Montclair. He handed me a typewritten list at that time, which he said represented the classification of membership according to the date on which this list was filed. According to this list he has the membership classified as "full life men $100" and under that he gives the number 421——

Q. Never min dthat. I show you what purports to be such a classified list or statement and ask you if that's the paper you refer to? A. It is.

Mr. Herr: I offer that.

(Admitted and marked Exhibit D-30.)

Q. Did Mr. Donaldson furnish you or the Committee with a financial statement at or about that same time? A. He furnished us with a typewritten sheet of paper on which there were certain figures. It was a very general financial statement. The items that he had listed on there represented, as I recall it——

Mr. Slingerland: Now, if your Honor please, is this some——

Q. Never mind about that. I show you a typewritten sheet, entitled "Statement as of August 25, 1925 of the Recreation Development Company and the Ferncliffe Golf & Country Club", and ask you if that is the statement to which you refer? A. No, it isn't; but I notice here that there are certain items on this list that were also on the other list, that was furnished at the same time that I received this list.

Q. Have you with you the list that was furnished at that time by Mr. Donaldson? A. No, I have not.

Q. Where did this list that I now show you come from? A. From Mr. Donaldson.

Q. When did you get that from Mr. Donaldson? A. I got this list at the meeting to which I referred, but at that time there were two sheets of paper. This was one of the two sheets. The other sheet had other figures. The other sheet had——

Mr. Slingerland: Never mind what the other sheet had.

Q. Where is the other sheet? A. I don't know. I think it was furnished to Judge Butler.

Mr. Herr: I offer this single sheet.

(Admitted and marked Exhibit D-31.)

In connection with the membership list which Mr. Donaldson furnished the Committee, I might say that the total is marked on that, if my memory serves me correctly, I think 920, and that membership was scattered in the immediate vicinity of

Caldwell, and the Committee afterwards, in sort of organizing that list for certain purposes, segregated the names and towns. I think it represents something like 40 towns from which the memberships were drawn. Those memberships and one of the papers introduced here in evidence will show the number of varieties.

Cross-examination by Mr. Lane:

Q. The letter of December 18, 1925, Exhibit D-29, is in reply to a letter from Mr. Donaldson to you of December 14, 1925, copy of which I show you, was it not? Have you the original of that letter? A. No, I have not.

Q. Haven't you got the whole file of correspondence here? A. No, I haven't.

Q. Where is the rest of it? A. It has been scattered. A lot of it has been furnished to Judge Butler, and others are in the possession of the various members of the Committee.

Q. Well, do you mean that all you have got here are letters which you picked out? A. No, I might say the letters which I have is correspondence which I have left that has not been furnished to other members of the Committee or to Judge Butler.

Q. Well, do you remember this letter (showing paper to the witness)? A. Yes, I think this appears to be the letter to which Mr. Bloom's letter is a reply.

Mr. Lane: I offer it.

(Admitted and marked Exhibit C-14.)

Q. Now, was there any further correspondence, after Mr. Bloom's letter, after December 18, Exhibit D-29; was there any further correspondence? A. With whom?

Q. With Mr. Donaldson, or with Smith & Slingerland, who represented him? A. I don't recall any further correspondence.

Q. Well, what was done? A. We attempted to get in contact with Mr. Donaldson directly.

Q. Did you do it? A. Yes.

Q. What happened? A. Mr. Donaldson came over to my home in Glen Ridge, at the request of the Committee. At that time the Committee was present, and we discussed with Mr. Donaldson the possibility of purchasing the property from him. He represented to the Committee that he was in a position to pass title. I remember their distinctly asking him if he could do that, and he said "yes". I was sort of skeptical about it, because I didn't know but what there might be some reason why he was not in position to pass title, and he assured us that he could.

Q. Well, then what happened? A. We discussed the proposition by which the Committee was trying to negotiate for the purchase of the property. The offer which we then discussed with Mr. Donaldson didn't seem to appeal to him; he seemed to have the impression——

Q. What did you offer? A. As I recall the offer, it was that we would pay him $75,000 for the property and, in addition, there was to be, I think, another $25,000 to be paid to Donaldson to square off the indebtedness, and then he claimed that he should be entitled to a profit; so I think the proposition then made was to give Donaldson a total of $110,000. The reason the Committee felt that that was a fair offer was because, they argued with him, that the money he received as the result of these memberships, subscriptions had been paid in on the property to develop it, and because of that we should be given a pre-

ferred offer rather than to some outsider. For reasons, sufficient to himself, he didn't choose to accept our offer.

Q. Is that the offer contained in the letter D-29, of December 18? A. No, sir.

Q. Where did it differ? A. The sum total here, as I see it, is $100,000. At that time we were going to give Mr. Donaldson a profit to himself.

Q. At which time? A. The time which I mentioned as he being at my house to meet the Committee.

Q. When was that, by the way? A. It was, as I recall it, during the holidays of 1925; that is, shortly before Christmas, or during the Christmas holidays, because Mr. Donaldson, the way I fix the time, he happened to be in New York and said he had come up that way, I think, from North Carolina, and because of that he was able to get in touch with the Committee.

Q. And what happened after that conference in your office? A. In my home.

Q. I beg pardon. A. Mr. Donaldson 'phoned me once or twice, and wanted to know if the Committee would make him a better offer. I told him the Committee would not. I told him that I felt that that was really more than what he was entitled to receive; that we understood that he had purchased the property for $75,000; that he had received the income from the sale of these memberships, and that that offer would allow him $10,000 profit in addition to that. Mr. Donaldson countered, however, with the argument that there was considerable indebtedness. When we asked him to give us a list of the indebtedness he was very evasive and non-committal. All he would say is that there were certain expenses that he would have to pay for, but he would guarantee

that they did not exceed, I think, 25 or 30 thousand dollars. We told him we didn't see how he could have this indebtedness and at the same time expended the money which he received from the property as the result of subscriptions for memberships. He didn't make a very satisfactory explanation.

Q. Did that end the negotiations? A. The negotiations ended after two or three telephone calls that I made.

Q. Where were you going to get the money from to make this purchase? A. We had a subscription planned whereby the members would incorporate and take the shares of stock in the corporation, and in that way make it a sort of mutual proposition.

Q. When you say you had the subscription planned, you mean that you had planned to go out and get the subscriptions, don't you? A. I think prior to that time we had actually circulated something in the way of a definite offer to members.

Q. Is that the one that you hold in your hand now? A. Yes. It don't seem to have a date on it.

Q. I know; but can't you identify it as the one you used at the time? A. I can identify this as being the first communication to the membership body. I am uncertain as to the date in which it was circulated.

Mr. Lane: I offer that in evidence.

(Admitted and marked Exhibit C-15.)

Q. Now, you never obtained sufficient subscriptions to put that plan into effect, did you? A. I wouldn't say that. We obtained something over 200 subscriptions of $300 each. Our activities were slackened up because of the idea that per-

haps some form of compromise might be worked out, and, further, on account of pending litigation. If I remember correctly, this case was called some time last spring. At that time it was adjourned.

Q. Well, at least your response to that was so unsatisfactory that you sent that communication out to your membership, didn't you? A. This communication and letters was a response made to the plan you have just introduced, the letter as an exhibit. That is not the plan that I was talking about as the final plan Mr. Donaldson turned down.

Q. I am talking about different things: You did not get a satisfactory response to the circularization of Exhibit C-15? A. No, we did not. But that wasn't the only plan that was submitted.

Q. And the unsatisfactory nature of your response resulted in your sending this letter that I now hold in my hand, didn't it? A. Yes. I will explain that by saying that at that time the membership was unorganized and there was a lot of work to do. All of the work was voluntary service and the membership was unacquainted, and the only way of getting in contact with the members was through the membership list which was furnished by Mr. Donaldson. It wasn't perhaps natural that a very healthy response was received in reply to that form letter. However, I have subscription blanks signed by something over 200 members. I have, I think, a copy of those subscription blanks.

Mr. Lane: I offer that in evidence.

(Admitted and marked Exhibit C-16.)

Now, I have a form of that. There is over 200 subscribers to these subscription blanks. There is

a printed list gotten out July 1, 1926. I think it was the first 150 or 125. I am more interested in money than I am in numbers.

Q. How much do those subscriptions amount to? That is what I am getting at. A. Each share was for $300 and there are over 200. That would be something over $60,000. There was not that much collected, but that was what they were obligated for. They merely obligated themselves to pay that.

Q. Who constitute the managing directors of the golf club at the present time? A. You mean the association?

Q. The association. A. There are no directors. I think there was a second meeting of the membership and they effected an organization and I was elected President of the organization and Mr. A. P. Dickinson was elected Secretary and Treasurer. The Committee appointed previously, continued in office.

Q. I show you another circular and ask you if that was sent out by your Committee, and if so, when? A. That calls for a meeting on Wednesday, May 12th, no year, but I think it was 1926. Apparently, this was circulated a few days before the date of the meeting.

Mr. Lane: I offer that.

(Admitted and marked Exhibit C-17.)

In connection with these letters I might say that there is a certain amount of serious effort put into that. It was of a discouraging tone, for the simple reason that in any unorganized body there is a certain amount of inertia in the membership, and although there were a goodly number of active individuals we had to regard those as somewhat

of a passive disposition. That is, some of these circular letters were made pessimistic.

Q. The one that I refer to says, "The Court of Chancery has decided in our favor". What decision do you refer to? A. That was probably a little optimistic. The decision referred to there was, I think, the opinion that His Honor made on a receivership application, I think on our application. I am not sure which one it was, but there was a decree entered in this case at one time in which there were certain statements made that it appeared to the court as though the members had some equity in the property.

Q. Now, what kind of a response did you get to that? A. Well, that response was more favorable than the previous one. By that time we began to get organized and the members began to have some confidence in the Committee, and the whole movement gathered momentum.

Q. I show you——

The Court: Your cross-examination will be rather extensive?

Mr. Lane: Yes, I'm afraid we can't finish today. I do want to ask him one question before we adjourn.

Q. Have you any contract agreement with Mr. Francisco with respect to this property?

Mr. Herr: I object as not being relevant and material to the issue here.

The Court: Well, I don't know whether it will be or not. I will overrule the objection at this time. By "you" you mean the association?

Q. The association, yes. A. We have an understanding with the Franciscos.

Q. And when did you have that understanding with them?

Mr. Herr: The same objection.

The Court: The objection may stand to the entire line of inquiry.

A. Previous to today.

Q. How long previous to today? A. I have been discussing the proposition off and on for the last six months.

Q. When did you make your agreement, or the agreement you have, or understanding if you choose to call it an understanding? A. Why, I think I finally consummated it within the last week.

Q. What is the agreement?

Mr. Herr: I object, on the same ground. I renew my objection now, because that is as to the terms of the agreement. I think that is entirely irrelevant. I think that the terms of any agreement that was made is irrelevant.

The Court: I overrule the objection.

A. The agreement contemplates, in the event the Franciscos are successful in this litigation and are in a position to transfer title, that they transfer title to the members in trust. That is, the title to be taken in the trustees for the benefit of the members, for a stipulated sum.

Q. That is just what I am interested in. One of the most important things I am interested in is that stipulated sum. What is the sum?

Mr. Herr: Same objection.

The Court: Same ruling.

A. We are to get title to the property, free and clear of all and any encumbrances, for $150,000. The Franciscos have agreed to take back a purchase-money mortgage of $100,000, which shall continue in effect for five years, and they are to receive a second mortgage for the amount of $25,000, payable, or to be retired, at the rate of $5,000 a year. They are to receive $25,000 in cash at the time the title to the property passes.

Q. Is that agreement in writing? A. The agreement was reduced to writing but it is not signed.

Q. Who has copies of the agreement reduced to writing but not signed? A. I have a copy, but I haven't it with me. Mr. Herr, I think has a copy, and I don't know who else has a copy.

Q. When was that arrangement made, and where?

The Court: He said about a week ago.

Q. Now, have you given me all the terms of all that the Franciscos are to get? A. Yes, with one possible exception. That you may be sure that I have covered your question I will answer that. The original property I think included 157 acres. Since that time there has been a strip off of the eastern edge of it sold to I think the Public Service Company for putting over transmission lines. With that exception, that is all we will get. In other words, we buy less property than was originally covered by the original contract.

Q. And the Franciscos are to retain the benefit of that? A. I don't know that they get anything for that, but if they did there is nothing been said about our receiving anything on it.

The Court: Does that complete that subject of the cross-examination?

A. What I would like to do is to finish my testimony, if possible, as I expect to take a trip in the near future. I may have to go Thursday out to Kansas City, and that depends, of course, upon my presence being required here. I will be out there a week or ten days.

The Court: Oh well, you needn't worry about that.

Mr. Lane: May I ask one more question?

Q. Will you tell me how much money you have got in the treasury to pay for this property?

Mr. Herr: I object to that.

The Court: Same ruling.

A. We have no money in the treasury to pay for this property. Whatever money we did have in the treasury was turned over to the present receiver.

Q. And that was about a couple of thousand dollars, wasn't it? A. I don't recall, but it was a reasonably small amount.

The Court: Now, how many more witnesses will you swear for the defendants?

Mr. Herr: It is almost all cumulative evidence. There is one more witness I would like to put on, and after that it is all cumulative.

The Court: I wonder if Vice-Chancellor Lane wouldn't stipulate as to what they would testify to.

Mr. Lane: We may be able to do that.

The Court: Now, then, for the complainant; how much rebuttal will there be?

Mr. Lane: Practically none, so far as I am concerned. What Mr. Slingerland will have I don't know. Of course, he is more interested in this part of it than I am.

Mr. Slingerland: It looks now as if I wouldn't have anything; but I don't want to decide that now. The case will have to be continued to another day, anyway.

The Court: Oh yes, but the length of time it will be necessary to close it will, to a large extent, influence the date to be assigned for a continuation of the trial.

Mr. Slingerland: I certainly won't take long.

The Court: Then it looks as though one more day would be necessary.

Mr. Herr: Half a day, I should think.

The Court: What about arguing it at the close of the proofs?

Mr. Lane: I shall be ready.

Exhibit C-1.

This consists of original contract of June 11, 1924, between William H. Francisco and Richard S. Francisco of Caldwell, New Jersey, and Recreation Development Corporation, a copy of which is attached to the bill of complaint as Schedule A.

Exhibit C-2.

This is a receipt signed by the Franciscos and their wives under date of December 6, 1924, and is a copy of the receipt attached to the bill of complaint following Schedule A.

Exhibit C-3.

This is a contract dated January 2, 1926, between Recreation Development Corporation and American Plaster Drill Co. and is the same instrument as appears attached to the bill of complaint under the caption "Schedule D".

Exhibit C-4.

This is an assignment from the Recreation Development Company to the American Plaster Drill Company, and appears as Schedule E attached to the bill of complaint.

Exhibit C-5.

LIONEL P. KRISTELLER

SAUL J. ZUCKER

JACOB L. NEWMAN
COUNSELLOR AT LAW

810 Broad Street
Newark, N. J.

Market 5721

February 27, 1926.

Messrs. Smith & Slingerland
Prudential Building
Newark, N. J.

Mr. Robert W. Cromley
176 Broadway
New York City

Re: Recreation Development Co.

Gentlemen:

I have received my preliminary report from the Fidelity Union Title & Mortgage Guaranty Co. in

this matter. There are 29 questions among them, some judgments against William P. Francisco and others, and certain Chancery proceedings which have to be checked, and also some wills which have been handed to the solicitor of the Fidelity for approval.

The Recreation Development Co. is also required to present certain affidavits respecting the non-forfeiture of its charter, etc., and I have instructed the title company to have their clearing department to get in touch with you gentlemen and try and clean up the questions.

In the meantime, will you be good enough to arrange the time of closing until such time as this report is finally approved.

Yours very truly,

JACOB L. NEWMAN.

K:G

Exhibit C-6.

LIONEL P. KRISTELLER
COUNSELLOR AT LAW

810 Broad Street
Newark, N. J.

Market 5721

March 22, 1926.

Messrs. Smith & Slingerland
Prudential Building
Newark, N. J.

Re: Reclamation Development Co.

Gentlemen:

The Fidelity Union Title & Mortgage Guaranty Co. advises me that the report heretofore sent me has been cleared, except:

Exhibit C-6.

a. The lis pendens and suit of Dryden v. Donaldson and others; and

b. They have not yet received copy of the by-laws certified by the Secretary, together with an affidavit that the said company is not in the hands of a receiver, has committed no act of bankruptcy or has not lost or forfeited its charter, together with a copy of resolution of the directors authorizing the sale.

Will you not be good enough to see that this matter receives your immediate attention, so that we will not have to obtain another extension of time to close? My clients do not desire to negotiate the loan of the necessary funds until they are certain that the matter is clear and, of course, as this will take a few days, it is quite likely that if this matter is not cleared during this week, it will be impossible for us to have the closing on time, and we will have to ask your indulgence for a short time thereafter.

I am sending a copy of this letter to Mr. Cromley.

Yours very truly,

LIONEL P. KRISTELLER.

K:G
1.

Exhibit C-7.

JACOB L. NEWMAN
COUNSELLOR AT LAW

810 Broad Street—Newark, N. J.
Market 5721

Lionel P. Kristeller Saul J. Zucker

June 2, 1926.

Messrs. Smith & Slingerland
Prudential Building
Newark, N. J.

Re: Recreation Development Co.—to—
American Plaster Drilling Co.

Gentlemen:

Will you be good enough to advise me whether the Chancery proceedings have been terminated, so that we can arrange to close this title?

Your attention to this matter will be appreciated.

Yours very truly,

JACOB L. NEWMAN.

K:G

Exhibit C-8.

This indenture made this twenty-fifth day of July Nineteen hundred and twenty-four, BETWEEN RECREATION DEVELOPMENT CORPORATION, a corporation of New Jersey, party of the first part (hereinafter designated as the Lessor) and FERNCLIFFE GOLF AND COUNTRY CLUB, INC., a corporation of New Jersey, party of the second part (hereinafter designated as the Lessee).

Exhibit C-8.

WHEREAS, the Lessor has heretofore made and is now the holder of an agreement for the purchase of certain lands and real estate situate, lying and being in the Borough of West Caldwell and county of Essex, consisting of 157 acres of land with the buildings located thereon, which said agreement was made on 11th day of June 1924 by William H. and Richard S. Francisco to the said Lessor, and

WHEREAS, the said Lessor has heretofore granted an option to Joseph W. Donaldson, dated July 25, 1924, which said option has been duly assigned to the said Lessee and which extends to the said Lessee the right to have, hold and use the said lands and premises as tenant to the extent that the said Lessor would be entitled to the possession thereof under said contract for the annual rent of $15,000. per annum, and

WHEREAS, the said Lessee desires to exercise said option in accordance with the terms thereof and pursuant thereto desires to vest said right of possession in the party of the second part.

NOW, THEREFORE, in consideration of the premises and of the sum of One Dollar paid by the party of the second part to the party of the first part, it is agreed by and between said parties as follows:

1. That the Lessor doth hereby lease and demise unto the Lessee all of the lands and premises, buildings and appurtenances comprised and described in the said agreement of sale made by the said William H. and Richard S. Francisco to the said Lessee, as fully and completely as the possession of the same may be vested in the said Lessor under and by reason of said agreement, for the term of twenty years from the date hereof

at the yearly rent or sum of $15,000. to be paid quarter yearly in advance.

2. And it is hereby agreed that if any rent shall be due and unpaid or if default shall be made in any of the covenants on the part of the said Lessee, herein contained, then it shall be lawful for the said Lessor to re-enter the said premises and the same to have again, repossess and enjoy.

3. And the said Lessee covenants with the Lessor to pay to the Lessor the said yearly rent as herein specified; that it, the said Lessee, will not assign this lease nor let or underlet the whole or any part of the said premises or make any alteration thereon without the written consent of the Lessor; that it will not occupy or use, or permit to be occupied or used, the said premises for any improper purpose and that at the expiration of the said term it will quit and surrender the premises herein demised in as good state and condition as reasonable wear and tear would permit, damages by the elements excepted.

4. And the said Lessor covenants with the Lessee that the Lessee will pay the said yearly rent and perform the said covenants on its part, and may peaceably and quietly have, hold and enjoy the demised premises during the term aforesaid.

It is further understood and agreed between the parties hereto that at the time of the execution and making of this lease rights of possession of the said Lessor to said premises are bounded and determined by the agreement of sale herein referred to and it is the purpose and intention of the parties hereto to bind not only the right of possession now vested in the said Lessor, but to

vest in the said Lessee the right to continue in occupancy of said premises under the terms of this lease after the said premises are conveyed to the said Lessor under said agreement. And it is agreed on the part of the Lessee that it will execute any further writings or leases which may be necessary in order to carry out the said purpose.

It is further agreed as a part of the consideration hereof that the Lessor will sell and convey to the Lessee or to its successors or assigns all of said land and premises at any time during the first two years of said lease for and upon the payment of the sum of $150,000. cash to it, the said Lessor, and thereafter, and until the expiration of this lease or any renewal hereof, for the sum of $250,000.

Provided always and these presents are upon this condition:

That if the Lessee, its successors or assigns, shall neglect or fail to perform and observe any covenant herein contained, which on the Lessee's part is to be performed, or if its leasehold estate shall be taken on execution, or if the Lessee shall be declared bankrupt or insolvent according to law, or shall make an assignment for the benefit of its creditors, then and in any such case the Lessor or those having its estate in the premises lawfully may, immediately or at any time thereafter, and without notice or demand, enter into and upon the demised premises or any part thereof in the name of the whole and repossess the same as of their former estate, and expel the Lessee and those claiming under it and remove their effects forceably if necessary without being taken or deemed to be guilty of any manner of trespass, and thereupon this demise shall absolutely determine but without prejudice to any

limitation which might otherwise be accepted by the Lessor for arrears of rent or any breach of the Lessee's covenants herein contained.

In Witness Whereof the parties hereto have caused these presents to be signed by their respective officers thereunto duly authorized the day and year first above written.

Signed, Sealed and Delivered in the presence of }

Recreation Development Corporation

By Joseph W. Donaldson
President.
(Seal)

Attest:
Herbert A. Blanchet,
Secretary.

Ferncliffe Golf and Country Club, Inc.,

By Joseph W. Donaldson
President.
(Seal)

Attest:
Herbert A. Blanchet,
Secretary.

Exhibit C-9.

Certified check of M. Tanenbaum for $7,000.00 to the order of Recreation Development Co., dated New York, Jan. 2, 1926, endorsed "Pay to the order of Robert W. Cromley, Attorney for W. H. and R. S. Francisco; Recreation Development Co., J. W. Donaldson, Pres.; Robert W. Cromley, Attorney for W. H. and R. S. Francisco", paid January 6, 1926.

Exhibit C-10.

Check of M. Tanenbaum for $200.00 to the order of Recreation Development Co., dated New York, March 2nd, 1926, endorsed "Pay to the order of Smith & Slingerland, Recreation Development Co., J. W. Donaldson, Pres." and paid March 5, 1926.

Exhibit C-11.

Check of M. Tanenbaum for $300.00 to the order of Recreation Development Co., dated New York, March 2nd, 1926, endorsed "Pay to the order of M. Tanenbaum, Recreation Development Co., J. W. Donaldson, Pres., M. Tanenbaum", paid March 4, 1926.

Exhibit C-12.

ROBERT W. CROMLEY,
Attorney & Counsellor at Law.
176 Broadway.

Telephone 8800 Cortlandt.

New York, January 28th, 1926

Re: Ferncliffe Golf & Country Club

Smith & Slingerland
765 Broad St.
Newark, N. J.

Gentlemen:

In reply to yours of the 27th instant I would say that I know nothing about the bill of the New York Telephone Company. The Stumpp & Walter Company bill I understood would wait until the property was sold, at least that is what Mr. Donaldson told me. I have paid out all the money which I had and am enclosing a list of the payments.

I think you had better communicate at once with Mr. Donaldson whose address is, Hotel Gaston, Newburn, North Carolina.

I think you should examine the judgment docket and see whether there are any judgments against either the Ferncliffe Golf & Country Club or the Recreation Development Company. If there are any judgments we must see to having them satisfied. So far as I know no judgments have been docketed in the County Clerk's Office. Some were obtained in the District Court but I think they were settled there.

Very truly yours,

ROBT. W. CROMLEY

RWC*KMB

Exhibit C-13.

Statement of Account of Robert W. Cromley of Receipts and Disbursements on Account of the Recreation Development Corporation and the Ferncliffe Golf and Country Club.

Received		7,000.00
Paid:		
Joseph Fischman, Constable, claim judgments and costs of Hansen	$ 357.84	
Claim, Progress Engraving Co.	220.99	
Taxes, Francisco farm 1925	1,329.00	
Louise Allen, rent of Donaldson apartment	235.00	
Rent, Montclair Office, December 1925 and January 1926	70.00	
J. W. Donaldson	300.00	
F. R. Cook, claim, interests and costs	57.86	
Bogart & Hansen, claim, interests and costs	542.09	
Singac Auto Supply Co.	140.28	
Claim, Edward Madison Co., judgment, interests and costs	318.60	
Robert W. Cromley on account of bill against Recreation Development Corporation	200.00	
Robert M. Boyd, bill	143.90	
A. V. Hedin, claim, interests and costs	194.80	
John O'Connor, wages	75.00	
Philip C. Blauvelt, bill	84.00	
Crane & Milligan, claim, judgment, interests and costs	274.06	
Essex Fells Plumbing & Heating Co. claim	769.13	
Albert Wrensch, bill	13.80	
John A. Hines, safe	30.00	5,356.35
Balance		$1,643.65
Deposited in the Caldwell National Bank to the credit of W. H. & R. S. Francisco		$1,643.65

Exhibit C-14.

December
fourteen
1 9 2 5

Mr. Joseph F. Ebert,
c/o Westinghouse Lamp Co.
Bloomfield, N. J.

Dear Sir:—

This letter is written to confirm our conversation respecting the Ferncliffe Golf & Country Club, Inc. matter.

I have told you, on behalf of the Recreation Development Corporation and Ferncliffe Golf & Country Club, Inc., that I would much rather turn this proposition over to the members even though it meant a sacrifice of a considerable sum to me. The companies have had under consideration for some time back, after it developed that the income was not sufficient to maintain the property and after it appeared that some re-organization would be necessary, and after I was convinced that most of the members of the Club were very apathetic upon the subject of re-organization, a proposition which can be immediately closed, which will mean a net return of twice as much as the amount suggested to you in our conference the other day.

Notwithstanding this, I am willing to say, on behalf of these companies, that if the obligations of both companies are paid in full, and by obligations I mean all of the debts which have been incurred in connection with this project and which I can assure you will not exceed $30,000, the companies will accept $15,000. above this sum in settlement of their interest in the whole matter. This will leave the Recreation Development Corpora-

tion and Ferncliffe Golf & Country Club, Inc., in the position of owning the property subject to the present lease from Recreation to Ferncliffe and subject only to a $70,000. mortgage which will be given back to the original owners.

As a condition I would require that $6000. be paid to me not later than December 28th so that payments on account of the purchase of the property and other obligations could be settled before January 1st.

If this could be worked out, I can arrange to have the title transferred and all of the stock of both companies turned over to such committee as you may designate. I do not wish, however, to leave these bills which the companies owe and put the creditors in the position of being compelled to accept such amount as the Club may care to pay, nor do I wish to hold out indefinitely against the offers which have come to these companies to sell the proposition subject to the rights of the Club, and any proposition that may be entered into with your committee after Wednesday, Dec. 16th, the date upon which the rights under the agreement with the Essex Title Guaranty & Trust Company expire, will have to be promptly settled because if there is not enough interest among the membership to close up the matter now under discussion between us, I do not feel that there is any obligation upon either of the companies to hold it any longer. I think that any arrangement which may be made between the companies and the members should be fully completed before December 30th.

Yours very truly,

Exhibit C-15.

To the Members of the
Ferncliffe Golf and Country Club:

After careful study and analysis, your Committee has formulated the following plan and are of the firm belief that an equitable scheme has been worked out whereby the rights or privileges of *all* members will be preserved, whether or not they subscribe for stock, believing, however, that the best possible plan is that every member subscribe.

At the outset it should be stated that the printed form of agreement submitted by Mr. Donaldson has been disregarded inasmuch as he has indicated to the Committee his willingness to accept a modified plan or proposal. By this modified offer, the members will obtain full ownership and control of the property herein involved upon the following basis: Payment in cash to Mr. Donaldson, $60,000.00, mortgage $70,000.00, total cost to club $130,000.00.

In order to insure the successful acquisition of this property, the Committee proposes that at least 400 members subscribe for stock at $300.00 (three hundred dollars) a share, amounting to a total of $120,000.00.

(Plan A) These subscriptions to be made on a cash basis.

(Plan B) For the accommodation of those members who may find the former plan an inconvenience, but who desire to participate, a deferred payment plan is suggested, such as an initial payment of $150.00 for each share, balance in six monthly payments of $25.00 cash.

Exhibit C-15.

It will be seen from the above that if *all* the 400 members take advantage of the deferred payment plan, this will give us *only* the $60,000 necessary to purchase the property and leave nothing in the treasury.

Provided the members purchase the property under Mr. Donaldson's modified offer made to your Committee, the proposition would look as follows:

Cost of property	$ 60,000.00
First mortgage	70,000.00
Total	$130,000.00

for which we get one hundred and fifty-seven (157) acres more or less, on which there are eighteen holes practically completed. Mr. Donaldson will have received for this property the following:

Subscription fees (approx.)	$75,000.00	
Cash	60,000.00	
Mortgage	70,000.00	
		$205,000.00

The total expenditures incurred in promoting and developing the property are:

Organization and promotion	$28,828.00	
Furnishings and equipment	5,754.00	
Ground improvement (est. cost)	50,000.00	$ 84,582.00
Net cost		$120,418.00

This net cost for one hundred and fifty-seven (157) acres figures approximately $765.00 per acre.

The modified offer of $130,000.00 figures approximately $825 per acre, which is considered by your Committee reasonable for land so improved.

IF THE MODIFIED PLAN IS ACCEPTED

The expenses which would be incurred in the operation of the course are:

Interest on mortgage	$ 4,200.00	
Taxes (estimated)	1,500.00	
Cost of operation (estimated)	10,000.00	
		$15,700.00
The possible receipts are:		
Green fees (estimated)	$15,000.00	
Annual dues 500 non-stock subscribing members at $10.00	5,000.00	
		$20,000.00

It is appreciated that many details will have to be worked out before the proposed plan can become effective if approved generally by the members, but such matters will be discussed at the contemplated meeting, the date for which the Committee has tentatively set for November 24th. However, further notice as to the exact time and place of this meeting will be mailed in due course to each member.

The Committee is desirous of getting YOUR reaction immediately to the above suggested plan of purchase, since it appears to the Committee as the most effective plan to salvage our present in-

vestment in this proposition. For this purpose a simple questionnaire is attached herewith, which should be filled out by *every* member and returned immediately.

Respectfully, your Committee,

J. F. Ebert,
A. P. Dickinson,
D. W. Dryden,
H. S. Amer,
J. B. Banister.

Tear Off Here

1. Do you approve of the above recommendation? .....

2. If so, how many shares at $300.00 each will you purchase? .....

3. Which plan of payment do you prefer? (Plan A. or Plan B.) .....

4. Have you any criticism or suggestions? .....

Replies should be mailed to J. F. Ebert, 123 Midland Avenue, Glen Ridge, N. J.

Exhibit C-16.

To the Members of the
Ferncliffe Golf and Country Club:

Your Committee was extremely disappointed at the exceedingly small number of replies received in response to the questionnaire attached to the printed plan or proposal submitted for your con-

sideration. This would seem to indicate that the matter is of little consequence to a vast majority of the members, in which event the Committee wishes to be relieved of any further responsibility.

On the other hand, if the interest thus far shown is not a real criterion of the attitude of the members toward the proposal, but merely is indicative of indecision or procrastination, you are earnestly urged to attend a general meeting of the members, hereby called to be held Tuesday evening, December 8, 1925, at 8 o'clock, in Fullerton Hall, No. 2 South Fullerton Ave., cor. Bloomfield Ave., Montclair, N. J.

At that time the matter will be settled as to what action shall be taken with respect to saving your present investment in the Ferncliffe Golf & Country Club. If you fail to attend this meeting and find yourself without facilities to play golf next season, do not try to pass the blame therefor on to anyone else. An opportunity of expressing yourself will be afforded at this meeting, and if you fail to attend the same, you cannot kick if some action is taken not to your liking.

Remember, the Committee has nothing to sell you. Its interest in this proposition is no greater than yours. You will not be canvassed any further. If you fail to respond to this notice, you may be doomed to disappointment. *Consequently, arrange to be present at the next and perhaps last meeting.*

Respectfully, your Committee,

J. F. Ebert,
A. P. Dickinson,
D. W. Dryden,
H. S. Amer,
J. B. Banister.

Exhibit C-17.

To the Members of the
Ferncliffe Golf and Country Club:

Your Committee is pleased to announce that a decree favorable to the Members has been rendered by the Court of Chancery. It is felt that this decision may make it possible for the Members to acquire title to the property. In order to formulate a definite plan whereby this may be effected, a meeting of the Members is hereby called for Wednesday night, May 12th, at 8 o'clock sharp: This meeting will be held in the hall of the Roseville Athletic Association, corner of 7th Ave. and 7th St. Newark (one block from the Roseville station of the Lackawanna Railroad).

It is very important that we have a large attendance in order to insure the success of the plans the Committee has to present for your consideration. At that time a general report as to the present status of the affairs of the Ferncliffe Golf and Country Club will be made. Get this information direct and not through your neighbor.

As a matter of information it may be added that the Committee has authorized Mr. Jack O'Conner, the Professional of the Club, to collect green fees and turn them into the treasury. This money will be used in an effort to rehabilitate the course and make it possible for you to play golf. Work has already been started in this direction.

At present we urge the Members to use the course as only the "green fees" will be used for the upkeep of the course. Therefore, get busy—the more green fees the better the course.

Every Member is again reminded of the importance of this next meeting, as the ultimate result

of Wednesday's meeting may mean success (we won't say—or failure).

Respectfully, your Committee.

J. F. Ebert
A. P. Dickinson
D. W. Dryden
H. S. Amer
J. B. Banister

Exhibit D-1.

This consists of a contract, copy of which is attached to the bill of complaint under the caption "Schedule A".

Exhibit D-2.

Certificate of Incorporation

of

Ferncliffe Golf and Country Club, Inc.

This is to certify that we, the undersigned, Russell G. Conover, Norman R. Lemcke and Marguerite E. Rogers, do hereby associate ourselves into a corporation under and by virtue of the provisions of an act of the Legislature of the State of New Jersey, entitle "An Act Concerning Corporations (Revision of 1896"," and the several supplements thereto and acts amendatory thereof, and do severally agree to take the number of shares of capital stock set opposite our respective names:

Exhibit D-2.

I. The name of the corporation is Ferncliffe Golf and Country Club, Inc.

II. The location of the principal office in this state is at #765 Broad Street, in the City of Newark, County of Essex.

The name of the statutory agent therein and in charge thereof, upon whom process against this corporation may be served, is Frederic W. Smith.

III. The objects for which this corporation is formed are:

(a). To establish, maintain and conduct an association of members as a golf and country club and to that end to solicit and sell subscriptions to the membership of such association upon such terms and under such conditions and subject to such dues, penalties, privileges, obligations and restrictions ad may be set forth and prescribed in the by-laws of the corporation or the rules and regulations of such association.

(b) to acquire, lease, rent, construct, own, operate and dispose of property of any class or description, either real, personal or mixed or any easements, leases, interests, rights or privileges relating or appertaining thereto, and especially lands, grounds, buildings, houses, garages and other structures, to be used as places of amusement, entertainment, meeting, sport or pleasure; and to provide and operate any and all such grounds or buildings for the purpose of carrying on therein or thereon a sporting or pleasure association or club for the use of the members thereof in playing golf, tennis, baseball, football, bowling, pool, billards and any and all other

indoor and outdoor sports; to provide, maintain and operate dining rooms, restaurants, lunch-rooms, reading or writing rooms, libraries, baths, laundrys and dressing rooms and any and all other rooms or conveniences which may or might be useful, necessary or desirable in connection with the maintenance of a golf or country club.

(c) to purchase, lease, or otherwise acquire, and to hold, own, use, develop, mortgage, lease or sell, or otherwise dispose of, all real or personal property necessary or convenient for use as a golf or country club. To manage, as principals or agents, amusement halls or buildings, athletic fields, golf courses or other lands or premises, and any business in connection therewith.

(d) To acquire the good-will, business, rights, property and assets and to assume or undertake the whole or any part of the liability of any persons, firm, association or corporation, and to pay for the same in cash, stock, bonds, debentures or other securities of this corporation, or otherwise as the directors may determine. To hold or in any manner dispose of the whole or any part of the property so purchased. To conduct in any lawful manner the whole or any part of the business so acquired and to exercise all of the powers necessary or convenient in and about the conduct and management of such business.

(e) To purchase, hold, sell, assign and transfer, mortgage, or otherwise dispose of the shares of the capital stock of, or any bonds, securities or evidences of indebtedness created by any other corporation or corporations of this state, or of any other state, country, nation or government, and while owner of said stock or secur-

ities to exercise all of the rights, powers and privileges of ownership, including the right to vote thereon to the same extent as natural persons might or could do.

(f) To enter into, make and perform contracts of every kind, with any person, firm, association or corporation, municipality or state without limit as to amount and to undertake any business undertaking transaction or operation commonly undertaken or carried on by capitalists, financiers, contractors, merchants, commission men and agents and in the course of such business to draw, make, accept, endorse, discount, execute and issue promissory notes, drafts, bills of exchange, warrants, bonds, debentures and other negotiable or transferrable instruments and evidences of indebtedness, whether secured by mortgage or otherwise.

(g) To conduct its business and have one or more offices and unlimitedly and without restriction to hold, possess, lease, mortgage and convey real and personal property in or out of this state and in such place and places in the several states of the United States and in foreign countries as shall from time to time be found necessary and convenient for the purpose of the company's business.

(h) To do all and everything necessary, suitable, convenient or proper for the accomplishment of any of the purposes or attainment of any one or more of the objects herein enumerated, or incidental to the power herein named, or which shall at any time appear conducive or expedient for the protection or benefit of the corporation, either as holders of or interested in any property or otherwise, with all the powers now or

hereafter conferred by the laws of New Jersey upon corporations under the act hereinbefore referred to.

(i) To do any and all of the things in this certificate set forth as objects, purposes, powers or otherwise, to the same extent and as fully as natural persons might or could do, and in any part of the world, as principal agents, contractors, trustees or otherwise.

IV. The total authorized capital stock of this corporation shall be divided into one thousand shares, all of which shall be without nominal or par value. Said shares may be issued and sold from time to time by the corporation for such consideration and upon such terms as may be fixed from time to time by the board of directors without action by the stockholders and any and all such shares so issued, when the consideration therefor fixed by the board of directors has been fully paid or delivered, shall be full paid stock and shall not be liable to any further call or assessment thereon.

V. The names and post office addresses of the incorporators and the number of shares subscribed for by each, the aggregate of which is fifty shares, and the amount of capital stock with which this company will commence business is as follows:

Name	Address	No. Shares
Russell G. Conover,	765 Broad Street,	10
Norman R. Lemcke,	"	10
Marguerite E. Rogers,	"	30

Exhibit D-2.

VI. The period of existence of this corporation is to be perpetual.

VII. The board of directors shall have power to act by resolution in writing signed by all of the members of the board of directors to the effect therein expressed with the same force and effect as if the same had been duly passed by the same vote at a duly called meeting of such bodies respectively and it shall be the duty of the secretary of the company to place such resolution so signed in the minute book of the company under its proper date.

In Witness Whereof, we have hereunto set our hands and seals this twenty-sixth day of August, 1924.

Russell G. Conover (LS)
Norman R. Lemcke (LS)
Marguerite E. Rogers (LS)

Signed, Sealed and Delivered
in the presence of

John D. Masterton

State of New Jersey }
County of Essex } ss.

Be it remembered, that on this 26th day of August, A. D. 1924, before, me, the subscriber, a Notary Public of New Jersey, personally appeared Russell G. Conover, Norman R. Lemcke and Marguerite E. Rogers, who I am satisfied are the persons named in and who executed the foregoing certificate, and I having first made known to them the contents thereof, they did each ac-

knowledge that they signed, sealed and delivered the same as their voluntary act and deed.

JOHN D. MASTERTON,
A Notary Public of New Jersey

ENDORSED

Received in the Clerk's Office of the County of Essex on the 27th Day of August A/D. 1924 and recorded in book 91 of Inc. Buss. Co's for said county page

JOHN H. SCOTT Clerk
Per SMITH

Filed and Recorded Aug. 28, 1924
THOMAS F. MARTIN, Secretary of State.

STATE OF NEW JERSEY
Department of State.

I, THOMAS F. MARTIN, Secretary of State of the State of New Jersey, DO HEREBY CERTIFY that the foregoing is a true copy of the Certificate of Incorporation of Ferncliffe Golf and Country Club, Inc., and the endorsements thereon, as the same is taken from and compared with the original filed in my office on the Twenty-eighth day of August A. D. 1924, and now remaining on file and of record therein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my [SEAL] Official Seal at Trenton, this Fourth day of December A. D. 1925.

THOMAS F. MARTIN
Secretary of State

Exhibit D-3.

THIS IS TO CERTIFY that we, the undersigned, do hereby associate ourselves into a corporation under and by virtue of the provisions of an act of the Legislature of the State of New Jersey, entitled "An Act Concerning Corporations (Revision of 1896)" and the several supplements thereto and acts amendatory thereof, and do severally agree to take the number of shares of capital stock set opposite our respective names, and to that end, we do, by this certificate set forth:

FIRST: The name of the corporation is:

"RECREATION DEVELOPMENT CORPORATION"

SECOND: The location of the principal office in this state is at 152 Market Street, Paterson, New Jersey.

The name of the statutory agent therein and in charge thereof, upon whom process against this corporation may be served is Frances Zeliff.

THIRD: The objects for which this corporation is formed are:—

To build, erect, construct, manage and occupy buildings for the purposes of a country club, dwelling houses, apartment houses, and public or private buildings or places of amusements; to buy, own, operate, lease and occupy lands and buildings for golf links, tennis courts or for other amusements, sports, games and entertainment, and for apartment houses, dwelling houses and business structures of all kinds for the accomodation of the public and of individuals; to keep, manage, conduct and carry on buildings for the purposes of a country club, apartment houses, dwelling houses, restaurants, and places of amusement, entertainment, and for the accomo-

dation of the public and of individuals, and to purchase, sell, lease and mortgage buildings, structures, lands and real and personal property of every description.

To survey, sub-divide, plot, improve and develop lands for the purposes of sale or otherwise, and to demand and perform all things needful and lawful for the development and improvement of the same for residence, trade and business.

To acquire by purchase, lease, exchange, hire or otherwise, lands or any interest therein; to erect and construct houses, buildings or works of every description on any land of the company, or upon any other lands, and to rebuild, enlarge, alter and improve existing buildings, houses or works therein to convert and appropriate any such land into and for roads, streets and other conveniences, and generally to deal with and improve the property of the company; to sell, lease, let, mortgage or otherwise dispose of the lands, houses, buildings and other property of the company; to undertake or direct the management and sale of the property, buildings and lands; to transact on commissions the business of real estate agents.

To take, enter into, perform and carry out contracts for constructing, altering, decorating, maintaining, furnishing, fitting up and improving buildings of every sort and kind; to advance money to and enter into contracts and arrangements of all kinds with builders, property owners and others; to carry on in all their respective branches the business of builders, contractors, decorators, deal in stone, brick, timber, hardware and other building materials or requisites, and generally to deal in, sell, lease, exchange or otherwise deal with lands, buildings and any other property whether real or personal.

Exhibit D-3.

To manufacture, buy, sell and trade in any and every kind of wood, lumber, brick, stone, metal, cement, lime and other building materials and supplies.

To buy, sell, manufacture, trade and deal in goods and merchandise of any and every description; to maintain and operate places of business for such buying, selling, trading and dealing and manufacturing; to provide, maintain and operate means of transportation, trucks and other vehicles for transporting said goods and merchandise; to purchase and own real estate necessary and deemed advisable for use in connection with the purchase and sale, manufacture and dealing in said goods and merchandise; and to buy, convey and mortgage said real estate or any part thereof, and to issue bonds for any indebtedness incurred in the purchase or improvement thereof.

To acquire by purchase or otherwise, to hold, own, manage, lease, operate and control, to lease, sell and dispose of for such price or prices and on such terms as may seem disirable, water water rights, power privileges and appropriations, for milling, domestic and agricultural uses and purposes; and to develop, control, grant and dispose of at such price or prices and on such terms as may seem advantageous, desirable and proper, power for the generation, distribution and supply of electricity for light, heat and power, and for any other uses and purposes to which the same may be adapted.

To carry on any other lawful business which may seem to the Company to be of a character which may be advantageously carried on in connection with any of the branches of the Company's business, excepting that of a moneyed corporation, or a corporation provided for by the

Banking, the Insurance, the Railroad, and the Transportation Corporation Laws, it being declared that no such business is to be undertaken by this corporation as principal, and the corporation expressly disclaims any banking powers.

The corporation shall have power to conduct the business in all its branches, have one or more offices, and unlimitedly to hold, purchase, mortgage and convey real and personal property in the State of New Jersey, and as well in all other States, and in all foreign countries, and generally to purchase, take on lease or in exchange, hire or otherwise, acquire any real or personal property, and any rights and privileges which the company may think necessary or conveniet for the purposes of its business.

To issue bonds, debentures or obligations of the company, from time to time, for any of the objects or purposes of the company, and to secure the same by mortgage or mortgages, or deed or deeds of trust, or pledge, or lien on any or all of the real and personal property, rights, privileges and franchises of the company whersoever situated, acquired and to be acquired, and to sell or otherwise dispose of any or all of the same, all in such manner and upon such terms as the board of directors may deem proper.

To do any or all of the things in this certificate set forth as objects, purposes, powers or otherwise, to the same extent and as fully as natural persons might or could do, and in any part of the world, as principals, agents, contractors, trustees or otherwise.

To do all and everything necessary, suitable, convenient or proper for the accomplishment of any of the purposes, or the attainment of any one or more of the objects herein enumerated, or

incidental to the powers herein named, or which shall at any time appear conducive or expedient for the protection or benefit of the company, either as holders of or interested in any property or otherwise, with all the powers now or hereafter conferred by the laws of this State upon corporations under the act herein referred to.

FOURTH: The number of shares of capital stock authorized to be issued are as follows: preferred stock of the value of Ten ($10.00) Dollars per share, twenty-five hundred (2500) shares; common stock without any nominal or par value, one thousand (1,000) shares.

The rights, privileges and conditions following shall attach to the shares aforesaid; that is to say:

1. The common stock shall be subordinate to the rights of the preferred stock except that the common stock only shall have voting powers.

2. The preferred shares shall carry a fixed cumulative preferential dividend at the rate of, but never exceeding seven (7%) per centum per annum, on the par value thereof, and such dividend shall be declared accordingly on the first Monday of March, June, September and December in each year, or at such other times as the Board of Directors shall determine.

If in any year dividends amounting to seven per centum (7%) per anum shall not be paid on such preferred stock, the deficiency shall be a charge on the net profits and be payable but without interest, before any interest shall be paid upon or set apart for the common shares without par value.

Exhibit D-3.

3. The balance of the net profits of the corporation after the payment of said cumulative dividend at the rate of seven per centum (7%) per anum to the holders of the preferred stock may be distributed as dividends among the holders of the common stock without par value, as and when the Board of Directors shall in their discretion determine.

4. In the event of liquidation or dissolution of the corporation the surplus assets and funds thereof shall be applied in the first place in repaying to the holders of the aforesaid cumulative preference shares the full amount of the principal thereof and the accrued dividends, oif any, charged before any amount shall be paid upon the common stock, and after such payment in full to the holders of said cumulative preference shares, the surplus assets and funds shall belong to and be divided among the holders of the other stock.

From time to time the preferred and common stock may be issued in such amounts and proportion as shall be determined by the Board of Directors, in accordance with the laws of the State of New Jersey.

5. After five years, upon not less than sixty days notice in in writing given by mail to the holders of the preferred stock to be redeemed, the corporation may, by such method as shall be provided from time to time by resolution of the Board of Directors and at such time and place as shall be specified in such notice, redeem the whole or any part of the preferred stock at 110% of the par value thereof plus accrued unpaid dividends.

Exhibit D-3.

FIFTH: The names and post office addresses of the incorporators, and the number of shares subscribed for by each, the aggregate of such subscriptions being the sum of One Thousand Dollars, with which the company will commence business, are as follows:

Name	*Address*	*No. of Shares*	
Katherine Larkin	238 Gregory Ave. Passaic, N. J.	preferred common	30 300
Frances Zeliff	122 Totowa Rd. Borough of Totowa, N.J	preferred common	40 400
Florence Eathorne	Hillburn, N. Y.	preferred common	30 300

SIXTH: The duration of the Company is to be for an unlimited period of time.

IN WITNESS WHEREOF, the said parties have hereunto set their hands and seals the 11th day of June, Nineteen Hundred and Twenty-four.

KATHERINE LARKIN (LS)
FRANCES ZELIFF (LS)
FLORENCE EATHORNE (LS)

Signed, sealed and delivered in the presence of
WALTER R. HUDSON

Exhibit D-3.

STATE OF NEW JERSEY }
COUNTY OF PASSAIC } ss.

BE IT REMEMBERED that on this eleventh day of June, 1924, before me, the subscriber, personally appeared Katherine Larkin, Frances Zeliff and Florence Eathorne, who I am satisfied are the persons named in and who executed the foregoing certificate of incorporation 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.

WALTER R. HUDSON....Master in Chancery of New Jersey

ENDORSED

Received in the Clerk's Office of the County of Passaic, on the 11th day of June A. D., 1924 at 2.20 o'clock, in the afternoon, and recorded in book D-2 of Certificate Of Incorporation for said County, on page

JOHN MCCUTCHEON....Clerk

Filed and Recorded Jun. 13, 1924....

THOMAS F. MARTIN, Secretary of State.

STATE OF NEW JERSEY

(Seal)

DEPARTMENT OF STATE.

I, THOMAS F. MARTIN, Secretary of State of the State of New Jersey, DO HEREBY CERTIFY that the foregoing is a true copy of the Certificate of Incorporation of "RECREATION DEVELOPMENT CORPORATION", and the endorsements thereon, as the

same is taken from and compared with the original filed in my office on the Thirteenth day of June A. D. 1924, and now remaining on file and of record therein.

In Testimony Whereof, I have hereunto set my hand and affixed my Official (Seal) Seal at Trenton, this Fourth day of December A. D. 1925.

Thomas F. Martin
Secretary of State

Exhibit D-4.

Check of A. J. Pitney to the order of The Ferncliffe Golf & Country Club for $55.00, dated August 12th, 1924, and endorsed by stamp "Pay to the order of North Ward National Bank, Newark, N. J., The Ferncliffe Golf & Country Club" and paid.

Exhibit D-5.

Ferncliffe Golf and Country Club, Inc.
incorporated under the laws of the
state of new jersey

Membership Certificate

This certifies that Andrew J. Pitney has subscribed to the Association of Members of the Ferncliffe Golf and Country Club, Inc. and that he has paid in full his said subscription and that in consideration of such payment he is entitled during

his lifetime, without further payment on such subscription, to use the Country Club property, golf courses, buildings and equipment at West Caldwall, Essex County, New Jersey, subject to the provisions of the by-laws and the rules and regulations of the corporation or of the Association of members, as the same now are or as they may at any time hereafter be changed, altered or amended.

No legal obligation for any future assessment nor for any debt of said association or corporation is assumed by this subscription or the acceptance of this certificate and no charges may hereafter be made upon said subscriber by reason hereof except the daily fees or charges for the use of the property, golf courses and equipment of said corporation.

In Witness Whereof, Ferncliffe Golf and Country Club, Inc. has caused this certificate to be signed by its officers thereunto duly authorized this 31st day of October, 1924.

J. W. Donaldson
President

Herbert A. Blanchet,
Secretary

[corporate seal]

Exhibit D-6.

BY-LAWS

OF

FERNCLIFFE GOLF & COUNTRY CLUB

WEST CALDWELL

NEW JERSEY

PREAMBLE

WHEREAS, Ferncliffe Golf and Country Club, Inc., has been incorporated under the Laws of New Jersey for the purpose of establishing and conducting an association of members as a Golf and Country Club, which will entitle the members to use the golf courses, tennis courts, buildings, grounds and equipment of the said Corporation under such terms and conditions and subject to such rules, obligations and restrictions as may be prescribed by said Corporation or said Association of members, and

WHEREAS, all matters pertaining to the management of said Corporation and its property is vested in the officers and Board of Directors of said Corporation and other matters pertaining to the social relationship of the members with each other may be directed by the association of said members through their respective officers and governors.

To this end therefore the following by-laws, to regulate the business affairs of said Corporation and also separate by-laws to regulate the affairs of the said members of said club are hereby adopted.

Exhibit D-6.

By-Laws

of

Ferncliffe Golf and Country Club, Inc.

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1. All meetings of stockholders shall be held at the principal office of the company in the State of New Jersey.

2. Stockholders shall be entitled to vote at meetings either in person or by proxy and each stockholder shall be entitled to one vote for each share of stock registered in his name on the books of the company.

3. A majority of the stock issued and outstanding represented by the holders thereof either in person or by proxy shall be a quorum at all meetings of stockholders.

4. If less than a quorum shall be present at the time for which the meeting shall have been called, the meeting may be adjourned from time to time to a day certain until a quorum shall attend.

5. The annual meeting of stockholders for the election of directors and the transaction of other business shall be held on the first Wednesday of September in each year, after 1924, at twelve o'clock noon. At each annual meeting the stockholders shall, by plurality vote, by ballot, elect a board of directors.

Special meetings of the stockholders for any purpose shall be called by the secretary upon the request or direction of the president.

Written notice, stating the place and time of the meeting, and of the business to be considered shall be mailed by the secretary to each stockholder at

his last known postoffice address, at least four days before the annual meeting and six days before a special meeting.

6. The business and affairs of the company shall be managed and controlled by a board of three directors, which number may be altered from time to time, by amendment of these by-laws.

7. Meetings of the Board of Directors shall be at such time, upon such notice, and at such places as the board of directors may determine.

8. In case of any vacancy among the directors the remaining directors, by affirmative vote of a majority thereof, may elect a successor to hold office for the unexpired term and until the election of his successor.

9. A majority of the directors shall constitute a quorum for the transaction of business.

10. The Board of Directors shall, except as otherwise provided by law, have power to act in the following manner: A resolution in writing, signed by all of the members of the Board of Directors, shall be deemed to be action by such board, to the effect therein expressed, with the same force and effect as if the same had been duly passed by the same vote at a duly convened meeting, and it shall be the duty of the secretary of the company to record such resolution in the minute book of the company under its proper date.

11. The Board of Directors shall fix the sum to be charged for membership in the Ferncliffe Golf and Country Club until the entire quota of members shall be filled. Said quota shall not exceed one thousand regular members with such limited or special memberships, to be extended

to ladies, as the Board shall deem to be consistent with the facilities of the Corporation. Such limited or special membership shall not entitle the member to use the golf courses or tennis courts on Saturdays, Sundays or Holidays. After the payment of the sum fixed by said Board, there shall be no further charges or assessments against such members except the daily cash charges to such member for the use of the golf courses and tennis courts.

12. The Board of Directors shall have power to terminate the membership of any subscriber for any of the following reasons:

a. Voluntary resignation in writing tendered by a member in good standing.

b. For any cause, action or misconduct which the Board may deem sufficient after a written complaint preferring charges against such member has been referred to said Board and after a hearing has been held thereon at which said member may be present.

13. At the first meeting after the annual election of directors, when there shall be a quorum, the Board of Directors shall appoint a president and vice-president from their own number who shall hold office for one year and until their successors are appointed and qualify.

14. The Board shall also annually choose a secretary and a treasurer (or one person to act as both secretary and treasurer), who need not be members of the Board, who shall hold office for one year, subject to removal by the Board at any time, with or without cause. The Board may also appoint and remove such other officers and agents as they deem proper.

Exhibit D-6.

15. The duties of the president, vice-president, secretary and treasurer shall be such as are usually imposed upon such officials of corporations and as are required by law and such as may be assigned to them respectively by the Board of Directors from time to time. The Treasurer may be required to give such bond as may be approved by the Board of Directors.

16. If the office of any director, or of the president, vice-president, secretary or treasurer becomes vacant the remaining directors, by a majority vote, may elect a successor or successors, who shall hold office for the unexpired term.

17. In case of the absence of an officer of the company, or for any other reason that may seem sufficient to the board, the Board of Directors may delegate his powers and duties for the time being to any other officer, or to any director.

18. The Board of Directors may fix a sum which may be set aside or reserved, over and above the company's capital stock paid in, as a working capital for the company, and from time to time they may increase, diminish and vary the same in their absolute judgment and discretion.

19. Any notice required to be given under these by-laws may be waived by the person entitled thereto.

20. These by-laws may be altered or amended at any time or by a vote of the majority of the board at a meeting held for that purpose, five days' notice have been given in writing either by mail or personal service to each member of the Board by the president or secretary.

Exhibit D-6.

By-Laws

OF

The Association of Members

OF

Ferncliffe Golf and Country Club

1. This association shall be known as the Ferncliffe Golf and Country Club.

2. The purpose of this association shall be to organize the subscribing members of Ferncliffe Golf and Country Club, Inc., for their mutual benefit and advantage and to enable them to advance the interests of the said club and the members thereof and to promote social intercourse among each other.

3. Every person admitted by Ferncliffe Golf and Country Club, Inc., as a regular subscriber to its membership and entitled to the use of its golf courses, tennis courts, grounds and equipment shall be a member of this club.

4. The government and affairs of the club shall be vested in a board of nine governors, six of whom shall be elected by the members of the club. At the first meeting two governors shall be elected for three years, two for two years and two for one year and at each annual meeting thereafter two governors shall be elected for a term of three years. The remaining three members of said Board of Governors shall consist of three of the directors of Ferncliffe Golf and Country Club, Inc., and shall be elected annually by the Board of Directors of said corporation.

Exhibit D-6.

5. The officers of said club shall be elected by the Board of Governors from the members thereof and shall consist of a chairman, a vice-chairman, a treasurer and a secretary and such subordinate officers as may from time to time be elected or appointed by the Board of Governors. Such officers shall be elected for a term of one year and until their successors are elected and shall have qualified.

a. The chairman shall preside at all meetings of the club and of the Board of Governors; he shall enforce the rules and regulations of the Board of Governors; call all meetings of the association and the Board of Governors; appoint all committees not otherwise provided for and shall be ex-officio a member of all committees. He shall perform such other duties as shall be imposed upon him from time to time by the Board of Governors.

b. In the absence of the Chairman, the Vice-Chairman shall perform his duties. In the event of the death or disability of the Chairman the Vice-Chairman shall act until the Board of Governors shall fill the office. Should neither be present at any meeting a temporary chairman shall be chosen by vote.

c. The secretary shall keep the minutes and other official reports of the club. He shall conduct the official correspondence of the club and shall keep all records, books, documents and papers relating to the club in such place as shall be designated by the Board of Governors. He shall perform such other duties as may be assigned to him by the Board of Governors.

d. The treasurer shall receive and disburse all monies of the club, keeping an accurate account of

and depositing the same in such depository as shall be designated by the Board of Governors.

6. The Board of Governors shall have the following powers consistent with the certificate of incorporation of Ferncliffe Golf and Country Club, Inc., and its by-laws and with the provisions of these by-laws.

a. To fill vacancies arising among the officers of the association by a vote of the majority of those present at any meeting of the board and the person so appointed shall hold office until the next meeting of the association or until his successor is elected.

b. To appoint such committees as may be desirable or necessary.

c. To appoint delegates to any association of which the club may be a member or for the purpose of conferring with any other association or club.

d. To make, alter and amend rules for the conduct of the members of the club and to enforce or remit penalties for offences against such rules.

e. To consider and act upon any and all matters, suggestions or complaints which may be to the interest of the club or its members.

f. To prefer written charges of acts or misconduct which may be deemed sufficient cause for the suspension or expulsion of any member and transmit such charges to the Board of Directors of Ferncliffe Golf and Country Club, Inc., with recommendation of action to be taken thereon.

7. The annual meeting of the association shall be held on the second Saturday of October of each year at three o'clock P. M. for the purpose of

electing members of the Board of Governors and for the transaction of such other business as may be brought before it. Special meetings of the association may be called by the President whenever in his judgment such meetings may be necessary or whenever he is so directed by a vote of the Board of Governors or by a request in writing signed by at least twenty members.

Twenty members shall constitute a quorum for the transaction of business. If no quorum be present at any of the meetings of the club, the presiding officer may adjourn the meeting to any other date within two weeks.

8. The Board of Governors shall hold such meetings as they shall find necessary and advisable and shall fix the time and place of such meetings and prescribe the notice to be given thereof.

9. Amendments to the by-laws may be made at the annual meeting or at a special meeting called for that purpose by a two-thirds vote of all the members present provided that written notice of the proposed amendment shall be approved by a majority vote of the Board of Governors and provided further that notice of the proposed amendment shall be given to all members by the secretary and posted in a conspicuous place in the club house at least ten days before the day of the meeting.

Exhibit D-7.

Membership card of Wm. J. Sury. This card is similar to the membership card of Herbert A. Blanchet which is Exhibit D-25.

Exhibit D-8.

ANNOUNCING

A Special Opportunity

For the Members of Ferncliffe Golf & Country Club

Many of the members of the Ferncliffe Golf and Country Club have expressed a desire to obtain a financial interest in the Club in order that they may have a voice in the management of same.

Therefore with the interest of the members foremost in mind and with the closing of our membership enrollment at hand, the present Board of Directors of the Recreation Development Corporation (the holding Company) and the Ferncliffe Golf and Country Club, Inc. have, after due consideration, voted favorably on the question of amalgamation to enable the members to become part owners and to participate in the earnings. This arrangement, as you will readily see, will also help toward the rapid completion of the construction program as originally planned.

By virtue of this consolidation, 1000 shares of no par value voting stock shall be offered for subscription first to the members at $300.00 per share and then to public subscription subject to the exercise or waiver of the option of each member of record. This subscription shall be by pledge and

Exhibit D-8.

shall be payable either in full or in twelve monthly payments of $25.00 each.

Acceptance of this privilege of ownership is not compulsory and your waiver in no sense will affect the status of the membership of each member.

Funds realized by this subscription will be turned over to a finance committee selected from the members, who will create a trust fund for the financing of the enclosed outlined program of construction.

We are enclosing a card and return envelope and would request that after careful consideration you give us your disposition in the matter.

Very truly yours,

RECREATION DEVELOPMENT CORPORATION.
FERNCLIFFE GOLF & COUNTRY CLUB, INC.
By J. W. DONALDSON,
President.

Exhibit D-8.

PROPOSED MERGER

Recreation Development Corp.....1000 shares no par
Ferncliffe Golf & Country Club, Inc.....1000 shares no par
Consolidation.....1000 shares no par

To be offered to members for subscription one share to each at $300.00 per share	$300,000.00
This sum dispersed as follows:	
Trust fund to be deposited with Bank for future building program. 33⅓% of money collected. On total issue	$100,000.00 { Club House Furnishings; Bl'd'g of second nine; Swimming Pool; Work'g Cap.
To pay off present indebtedness on purchase of property	72,500.00
6% on the investment will be guaranteed by the present management for a period of two years, provided the present management remains in control during that period at a salary of $10,000 per year. And 50% of said salary will be pledged by the present management to insure that no deficit will be incurred while in control	36,000.00
Organization campaign, legal, sales and all other expenses, 12% of capital	36,000.00
Original stockholders and all other liabilities	55,500.00
	$300,000.00

Combined Assets

Cash Trust fund for building	$100,000.00
Property Valuation 157 Acres	157,000.00
Equipment, Buildings & Improvements	73,000.00
Good-Will	20,000.00
	$350,000.00

These figures are based upon the sale of the entire issue of shares offered. In the event the entire issue is not sold, the sums collected will be divided pro-rata according to the above statement and plan of expenditures.

Exhibit D-8.

CONSERVATIVE ESTIMATE FOR 1926

OF THE

FERNCLIFFE GOLF AND COUNTRY CLUB, INC.

Golf fees for Members..... .50 week days
$1.00 Saturdays, Sundays and holidays

Golf fees for Guests.....$1.00 week days
$2.00 Saturdays, Sundays and holidays

Estimate Income from Golf, Tennis, Lockers, Restaurant & Swimming Pool for 1926	$42,576.00
Maintenance and Upkeep for 1926	$17,500.00
Estimated Total Net Earnings	$25,076.00

The above estimate shows better than 8% net on the total capitalization and is a fair comparison with the following statistics taken from The American Annual Golf Guide of 1924.

City	Name of Club	No. of Holes	Charges per Day	Charges per Yr	Players During 1922	Upkeep & Operating Expense
Philadelphia	Cobbs Creek	18	50c	$10	80,045	$12,000
Los Angeles	Griffith	18	50c	$10	100,288	2,000 Mo.
San Francisco	Lincoln	18	50c	$7	85,800	22,000
Seattle	Jefferson	18	50c	$10	73,442	15,000
Des Moines	Grandview	18	50c	$5	40,000	5,000
Indianapolis	Riverside	18	75c		65,120	11,500
West Caldwell	Ferncliffe	18	50c 1.00 2.00		*32,000	17,500

* Low estimate for 1926

FERNCLIFFE PROGRESS

THE NEW ROAD AND CLUB HOUSE

The new concrete (Clinton Road) leading to Ferncliffe will be completed about September 15th. In the meantime, the ballast that are being taken from the old macadam road are being used to build a twenty foot road leading from Clinton Road up to the proposed new club house. Upon completion of this road, work will be started on the new club house so that by June 1, 1926, Ferncliffe may have completed its beautiful new home and an eighteen hole championship course.

Exhibit D-8.

THE SECOND NINE HOLES

Work is progressing rapidly on the second nine holes, six of which are completed, and the full eighteen holes will be finished by about September 10th. It is expected that fifteen holes will be playable by October 1st.

LOCKERS AND SHOWERS

The lockers are now installed in the basement of the new pavilion, this being the temporary locker room. Showers with hot and cold water provided. If you have not reserved a locker, do it now—just a few more to be had.

EXTENSIVE DEVELOPMENTS PLANNED FOR WEST CALDWELL

The property adjoining Ferncliffe across Clinton Road from the temporary club house has been sold for development purposes and is to be called Ferncliffe Gardens. From reliable information, this property was sold on a basis of approximately $2500 per acre which would mean that the grounds of Ferncliffe would show along with improvements assets about twice the amount of the capitalization.

Greens Nos. 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 14, 15, 16, 17, and 18 are finished.

Ferncliffe Golf and Country Club
460 Bloomfield Avenue

Phone Montclair 8040 Montclair, N. J.

Exhibit D-9.

(*Opposite*) ☞

...sell and rent hoisting and other equipment to the Stillman-Pelehanty-Ferris Company, general contractor on the Perth Amboy bridge job.

...men ... month paid them. He said he had been informed that is the first time they ever had trouble with Murdock.

...and ... vicinity. She will be buried in Powhattan.

...but the name ... deciphered.

...sequence."

...engineers ... plans ... gene... a perma...

Announcing The Ferncliffe Golf and Country Club

Comprising 157 Acres of Rare Beauty in West Caldwell, N. J.

No Dues—Pay When You Play—No Dues

Here is an opportunity for people of moderate means to join a magnificent golf and country club in one of the most beautiful and healthful parts of the country—a place where you can rest, play, drive and enjoy yourself to the utmost. The Ferncliffe Golf and Country Club means enjoyment for every member of your family. It is a semi-exclusive club, and the membership committee has been instructed to exercise great care in selecting the members. You will meet here the kind of people you like to associate with. It will provide all the conveniences of a luxurious club, without the excessive cost that is usually associated with establishments of this nature. Mail the coupon below for detailed information

$50 *only*

NO ANNUAL DUES

Golfers and Tennis Players Read This

If you are a golf or tennis player these facts will interest you:

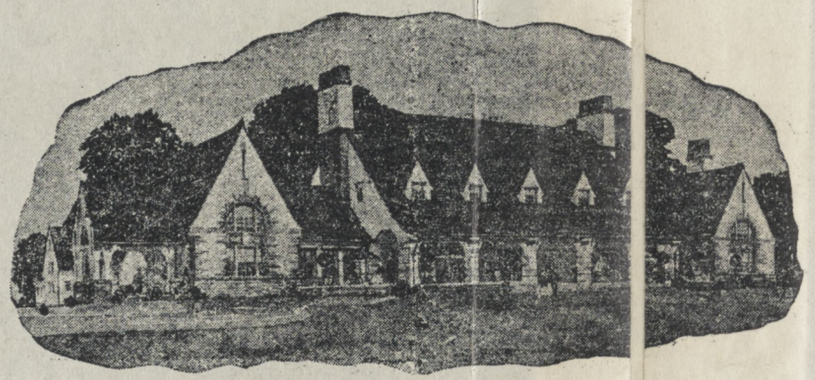
1. No dues to pay. The only charge to members will be a fixed fee of 50c for each day's actual play.
2. No stock or bonds to buy to become a member, and no assessments for deficits.
3. A 6400-yard championship course will give every variety of golf.
4. The easy rolling nature of the terrain will make play thoroughly enjoyable. No arduous climbing.
5. Easy access to grounds, as it is located 300 yards from Bloomfield Avenue and other improved main roads.
6. The fairness of having the people who play most, pay the most charges will appeal to all.
7. First class sport with the greatest economy possible will be the guiding policy.
8. There will be a battery of first class tennis courts for devotees of this popular and beneficial game.
9. There will be hand-ball courts, besides bowling on the green and many other sports when you desire a change from golf or tennis.
10. Social diversions of all kinds will be in the hands of committees of members.
11. Each member will be entitled to vote on all matters except financial affairs.
12. The atmosphere of the club will at all times be such that all members will feel glad to welcome their friends to Ferncliffe.
13. It is the intention of the management to provide every facility and convenience that a country club should provide.
14. If you only get time to play an occasional game then you need a membership in Ferncliffe most of all.

PAY AS YOU PLAY

Few members of golf clubs ever get the full value of the excessive dues they pay. The Ferncliffe Golf and Country Club will be quite different. Only a very moderate membership fee—$50 plus 10% tax—will be charged. Thereafter you pay 50c a day only when you play, so that those who play most pay most. This is in accordance with the plan adopted by the most successful European clubs. Where else in the world can you obtain so many advantages at so small a cost? And remember this—after the first 300 memberships the fee will be advanced to $100. When the new club house and 18-hole golf course are finished the membership fee will be increased to $200.

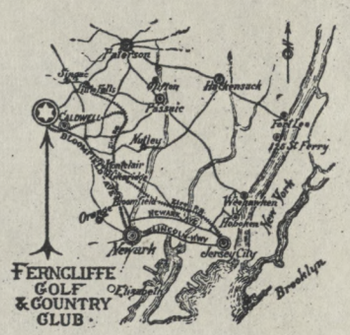
A SCENIC WONDERLAND

The 157 acres that constitute the Ferncliffe Golf and Country Club are situated in a locality long famous for its healthy air and beautiful surroundings. It is absolutely ideal in that it combines unsurpassed natural beauty—mountains, streams, forests and flowering fields—with great accessibility, for Caldwell is only a short distance from the Metropolitan District. Come here for health and pleasure in boundless measure.



C. C. Wendehack of Montclair, Architect of Club House

Seymour Dunn of Lake Placid, N. Y., Golf Course Architect



Holes	Yards	Par	Holes	Yards	Par
1	500	5	10	480	5
2	330	4	11	360	4
3	375	4	12	140	3
4	430	4	13	420	4
5	320	4	14	450	4
6	385	4	15	180	3
7	120	3	16	385	4
8	315	4	17	400	4
9	445	4	18	420	4
	3220	36		3235	35
				3220	36
				6455	71

Only 300 Life Memberships at $50

LIFE MEMBERSHIPS OPEN TO BOTH MEN AND WOMEN

Free Golf and Tennis Lessons to Members

$50 *only*

NO ANNUAL DUES

Non-Golfers and Non-Tennis Players Read This

If you are not a golf or tennis player these fourteen points will appeal to you:

1. You will have the use of the club house and grounds for social purposes.
2. You will find every opportunity for learning these games.
3. Your friends will belong. You will meet them here and learn to play with them.
4. Expert professional teachers will be at your service.
5. You will eventually take up one game or the other. Why not now, at a very nominal cost?
6. When you have joined the increasing army of golf and tennis players your health will be greatly benefited.
7. For the same amount of money there is no greater enjoyment to be purchased.
8. A ride into the country will really mean something to you; a place to dine, dance, play, and otherwise enjoy yourself.
9. There will be many other sports besides golf and tennis.
10. Ferncliffe is located in one of the healthiest localities in the United States.
11. Ferncliffe is situated in a spot long famous for its magnificent and splendid views. It combines mountain, river, forest and field in harmony.
12. Ideal locations for golf courses within reasonable distances will become rarer each year, so your cost for joining a country club will become proportionately greater.
13. Country club life and enjoyments are fast becoming appreciated in the cities of the United States, and are becoming more popular each year.
14. No dues or assessments to pay. Your only expenses after becoming a member will be for services rendered.

MANY OTHER SPORTS AND DIVERSIONS

At this splendid club every member of the family can find endless diversion. Besides the 36-hole golf course and numerous tennis courts, there will be facilities for hand ball, clock golf, bowling on the green, swimming, horseback riding and dancing. Life will be at its best amid these magnificent surroundings.

CUT OUT THIS COUPON AND MAIL TO US

Ferncliffe Golf & Country Club
450 Broad Street, Newark, N. J.

Gentlemen: Kindly send me full particulars about membership in the Ferncliffe Golf and Country Club.

Name .....

Address .....

City .....

Exhibit D-10.

Consists of a folder handsomely printed showing plans and elevations of the clubhouse, bearing the name C. C. Wendehack, Architect, N. Y. C., showing the location of the proposed swimming-pool, locker rooms and other appurtenances.

Exhibit D-11.

This is a printed map of the proposed 18 hole golf course, showing location of swimming-pool, clubhouse, bridle path, tennis courts and other appurtenances, bearing the designation "Architect Seymour Dun, Lake Placid, N. Y."

Exhibit D-12.

Check of Ernst W. Heilig to the order of Ferncliffe Golf & Country Club for $55.00, dated October 3, 1924, endorsed stamped "Pay to the order of North Ward National Bank, Newark, N. J., The Ferncliffe Golf & Country Club," and paid October 6, 1924.

Exhibit D-13.

Phone Humboldt 0436

FERNCLIFFE
GOLF & COUNTRY CLUB
450 Broad Street
Newark, N. J.

October 3, 1924.

Mr. Ernest W. Heilig,
95 Haddon Place,
Upper Montclair, N. J.

Dear Sir:

We gratefully acknowledge receipt of your check in the sum of $55.00, being full payment of the balance due on your own and Mrs. Harriet M. Heilig's membership subscription.

Thanking you for your prompt remittance, we beg to remain,

Yours very truly,

FERNCLIFFE GOLF & COUNTRY CLUB
HERBERT A. BLANCHET
Treasurer.

HAB:S

Exhibit D-14.

Check of Ernest W. Heilig to the order of Ferncliffe Golf & Country Club for $55.00, dated August 19, 1924, endorsed "In full for one-half life membership in Ferncliffe Golf and Country Club at West Caldwell, N. J. for Ernest W. and Harriet M. Heilig including tax in full", endorsed stamped "Pay to the order of North Ward National Bank, Newark, N. J., The Ferncliffe Golf & Country Club", and paid August 22, 1924.

Exhibit D-15.

FERNCLIFFE GOLF AND COUNTRY CLUB
Executive Offices
Newark, N. J.

Date Aug 19 1924

$55 00

Received from Mr & Mrs Ernest W Heilig Fifty-five #.....Dollars in full payment of one Life Membership in the Ferncliffe Golf and Country Club. The Committee on Membership reserves the right to reject any applicant in which case money will be refunded.

Representative JOHN L BENJAMIN

Make all checks payable to Ferncliffe Golf and Country Club

Balance $55.00
payable
Oct 1st 1924

Exhibit D-16.

'Phone Humboldt 0436

FERNCLIFFE GOLF AND COUNTRY CLUB
Executive Offices
450 Broad Street
Newark, N. J.

September 3, 1924.

Mr. Ernest W. Heilig,
80 Park Place,
Newark, N. J.

Dear Sir:

We take pleasure in being able to notify you of your acceptance as a life member in the Ferncliffe Golf and Country Club, and that as such you are entitled to the full enjoyment of all the privileges attached to a regular membership in this organization.

We are enclosing herewith your membership card of admission, and will forward your Membership Certificate and Copy of the By-laws as soon as they are available from the printers.

The temporary club house will be decorated and furnished in a week or two and we invite you to the enjoyment of its accommodations. The blank form enclosed will enable us to enroll additional members of the caliber you will like to associate with and if you will return same to us, we will give the names thereon our prompt attention.

With sincere appreciation for the co-operation and support you have given us, and trusting you will watch developments closely and freely offer suggestions for the guidance of your Club, we beg to remain,

Yours very truly,
FERNCLIFFE GOLF AND COUNTRY CLUB
HERBERT A BLANCHET
Secretary

Exhibit D-17.

Membership card of Ernest W. Heilig. This is similar to the membership card of Herbert A. Blanchet, which is Exhibit D-25.

10

Exhibit D-18.

Membership certificate of Ernest W. Heilig. This is similar to membership certificate of Andrew Pitney, which is Exhibit D-5.

20

Exhibit D-19.

Consists of a printed schedule of 300 names and addresses entitled "Ferncliffe Golf and Country Club, 450 Broad Street, Newark, N. J. Organization Enrollment."

30

40

Exhibit D-20.

Humboldt 0436

APPLICATION FOR LIFE MEMBERSHIP

To be used only by.....

.....1924

To Ferncliffe Golf and Country Club
450 Broad Street
Newark, N. J.

I hereby make application to be admitted to the Ferncliffe Golf and Country Club as a member, and if elected I will conform to and abide by its by-laws, rules and regulations.

It is understood that I shall be entitled to all golf, tennis and club privileges, and that there are no annual dues or assessments. However, following the most successful foreign courses, a nominal green fee or court fee will be charged, only when I play.

Cost of Life Membership at this time	$100.00
Tax, ten per cent	10.00
Total Cost	110.00

Name .....
Address .....
City ..... Telephone .....
Occupation .....

References:

Name..... Address.....
Name..... Address.....

Proposer C. GLENN BOWKER

Exhibit D-20.

The Membership Committee reserves the right to reject any applicant. In such cases money will be returned. In the event of quota being oversubscribed time of Post-Office stamp will be used to decide priority. The cost of life membership will be raised from time to time with the development of the property.

Make all checks payable to Ferncliffe Golf and Country Club.

Remarks: .....

.....

.....

It is expressly understood that no other statement or representation of any kind shall be binding upon the Ferncliffe Golf & Country Club Inc., other than those embodied within the company's printed literature.

Exhibit D-21.

Humboldt 0436

LADIES APPLICATION FOR LIFE MEMBERSHIP

To be used only by.....

.....1924

To Ferncliffe Golf and Country Club
450 Broad Street
Newark, N. J.

I hereby make application to be admitted to the Ferncliffe Golf and Country Club as a member, and if elected I will conform to and abide by its by-laws, rules and regulations.

Exhibit D-21.

It is understood that I shall be entitled to all golf, tennis and club privileges of this class of membership, and that there are no annual dues or assessments. However, following the most successful foreign courses, a nominal green fee or court fee will be charged, only when I play.

Cost of Life Membership at this time	$50.00
Tax, ten per cent	5.00
Total Cost	55.00

Name .....
Address .....
City ..... Telephone .....
Occupation .....

References:

Name..... Address.....
Name..... Address.....

Proposer C. Glenn Bowker

The Membership Committee reserves the right to reject any applicant. In such cases money will be returned. In the event of quota being over-subscribed time of Post-Office stamp will be used to decide priority.

Make all checks payable to Ferncliffe Golf and Country Club.

Remarks: .....
.....
.....

It is expressly understood that no other statement or representation of any kind shall be binding upon the Ferncliffe Golf & Country Club Inc., other than those embodied within the company's printed literature.

Exhibit D-22.

Check of John H. Strigner to the order of Ferncliffe Golf & Country Club for $55.00, dated Oct. 4, 1924, endorsed stamped "Pay to the order of North Ward National Bank, Newark, N. J. The Ferncliffe Golf & Country Club," paid.

Exhibit D-23.

Phone Humboldt 0436

FERNCLIFFE
GOLF & COUNTRY CLUB
450 Broad Street
Newark, N. J.

October 8th, 1924.

Mr. John H. Strigner,
76 Nairn Place,
Newark, N. J.

Dear Sir:

We gratefully acknowledge receipt of your membership application and the fee attached thereto.

The membership committee will act as promptly as possible on these applications and we will notify you further in due course.

Thanking you for your favorable consideration, we are,

Yours very truly,

FERNCLIFFE GOLF AND COUNTRY CLUB
HERBERT A BLANCHET
Secretary

HAB:S

Exhibit D-24.

Check of John H. Strigner to the order of Ferncliffe Golf & Country Club for $55.00, dated Nov. 5, 1924, endorsed stamped "Pay to the order of North Ward National Bank, Newark, N. J. The Ferncliffe Golf & Country Club," and paid.

Exhibit D-25.

F
G & C
C

MEMBERSHIP CARD

FERNCLIFFE GOLF AND COUNTRY CLUB

THIS IS TO CERTIFY THAT

Mr. John H. Strigner is a life member of the Ferncliffe Golf and Country Club, and is entitled to all golf, tennis and club privileges, as provided by the by-laws.

COMMITTEE ON MEMBERSHIP
HERBERT A BLANCHET
Secretary

Date 11-7-24

(This card is not transferable)

Exhibit D-26.

(*Opposite*) ☞

AN ANNOUNCEMENT!

What I Know About the "Ferncliffe" Golf Club

By JOSEPH E. HANSON

There is nothing so refreshing as frankness in this world—and there is so little of that!

If, instead of assuming things, people would only ask a downright plain question you could answer them frankly.

We are all inclined to put too much "Blah" into everything we do—even to the extent of reflecting upon our very honesty of purpose, by the decorative "Blah" with which we surround our assertions!

Say what you mean—and say it outright.

Many men have asked me about the "Ferncliffe" Golf and Country Club—possibly because we are advertising counsellors for the Club and should know something about it.

But a great many men assume they know all about the club. They don't!

I want to tell you here just what I DO know about "Ferncliffe"—for it's an interesting story.

I want to talk about it in short little punches—from the shoulder to the jaw—your jaw!

Last year in July—Mr. Donaldson, who conceived the idea of the "Ferncliffe" Club, ran an advertisement telling us about the proposed club and offering memberships—life memberships—for $50.00.

That was all—just $50.00—no dues, no bonds, no stocks, no assessments; just $50.00.

A lot of smart golfers shined up their clubs, went off to play on the public links and said "Blah"—just like that—and forgot all about the $50.00.

Another lot of smart fellows paid the $50.00 and became members! They asked frank questions—they didn't assume that it couldn't be done—and out came their check books!

Mr. Donaldson said: "When I have 300 members I will close the books on the $50.00 price, and it will cost $100.00 to join—won't some more of you come in before we raise the price?"

A great many golfers did!

A great, great many did not!

And on the appointed day the price went up to $100.00.

Score 1—for Mr. Donaldson. Now remember that incident!

Right away the "Ferncliffe" Golf Club received a great many special delivery letters with $50.00 bills from those who wanted to get in at the low price!

But the checks were all returned—and the fine part of it was that they all came back with an extra $50.00—making the new $100.00 membership!

Apparently Mr. Donaldson was sincere about his Club and his price!

He told me at the time: "I am going to build the finest Golf Club I know how to build! I am going to have it ready for next summer's play. I am going to remodel the old house into a club house temporarily—with a real dining room in charge of a real chef!"

And I believed that Mr. Donaldson would—because he is sincere and frank, and he has a sort of go-getting way about him that makes people like him.

going to build a new, beautiful club
a hill overlooking the course.

tis courts are ready—and they are
them.

A picturesque bridle path will eventually roam in and out about the edge of the course.

The plans contemplate a swimming pool that will be a thing of real beauty and a blessing on a hot summer's day!

The practice putting green is going to be one of the finest I have ever seen.

But to get down to the present.

At "Ferncliffe" the job was tackled in the fall. Seymour Dunn, the great golf architect, laid out the course. You couldn't find a better man.

The first greens were seeded in September. From there on the work went fast!

Ahead of Mr. Donaldson were the long, drab months of winter—enough to discourage any man—with their snows and rains and thaws.

But the work went on—the fairways were leveled, the hollows filled, the natural hazards made more hazardous, the greens formed.

With spring came the little shoots of green grass—and the warm sun coaxed them up into sizable blades.

The course began to take shape—to look like something fine. From the club house the fairways stretched as far as the eye could see, rolling gently off into the wooded hills.

Rough men who loved golf came and looked and said—"Damn fine course"—and paid their hundred dollars in.

Members brought their wives and came to dine on fat roasted chickens and dance in the club. It's a homey place!

And all the time the course took on a new appearance! The ninth green looked so inviting from the club house! You could almost picture the little white balls rolling, rolling into the cup.

And meadowlarks, flying over the fairways in the distance, brilliant in the sunlight, looked like "Silver Kings" soaring outward in search of a sand trap!

The spirit of golf is in the air at "Ferncliffe" now. Everything is in readiness—and yet Donaldson holds back just a little to make sure that nothing is amiss, and that when the players come in a few short days they will find the course at its best!

The other day Donaldson said to me:

"We ought to run a big ad and tell them all about it—show them pictures of the place."

"And the price?"—I asked.

"I will keep it at $100.00 until July 1st and then we'll boost it up to $200.00. I've got to do it! We'll have to limit the membership now at $100.00. After July 1st we'll ask $200.00 and begin to think about closing the membership lists."

Tomorrow we will publish the "big page ad" that Donaldson wants, but today I thought I would tell you frankly what I knew about it.

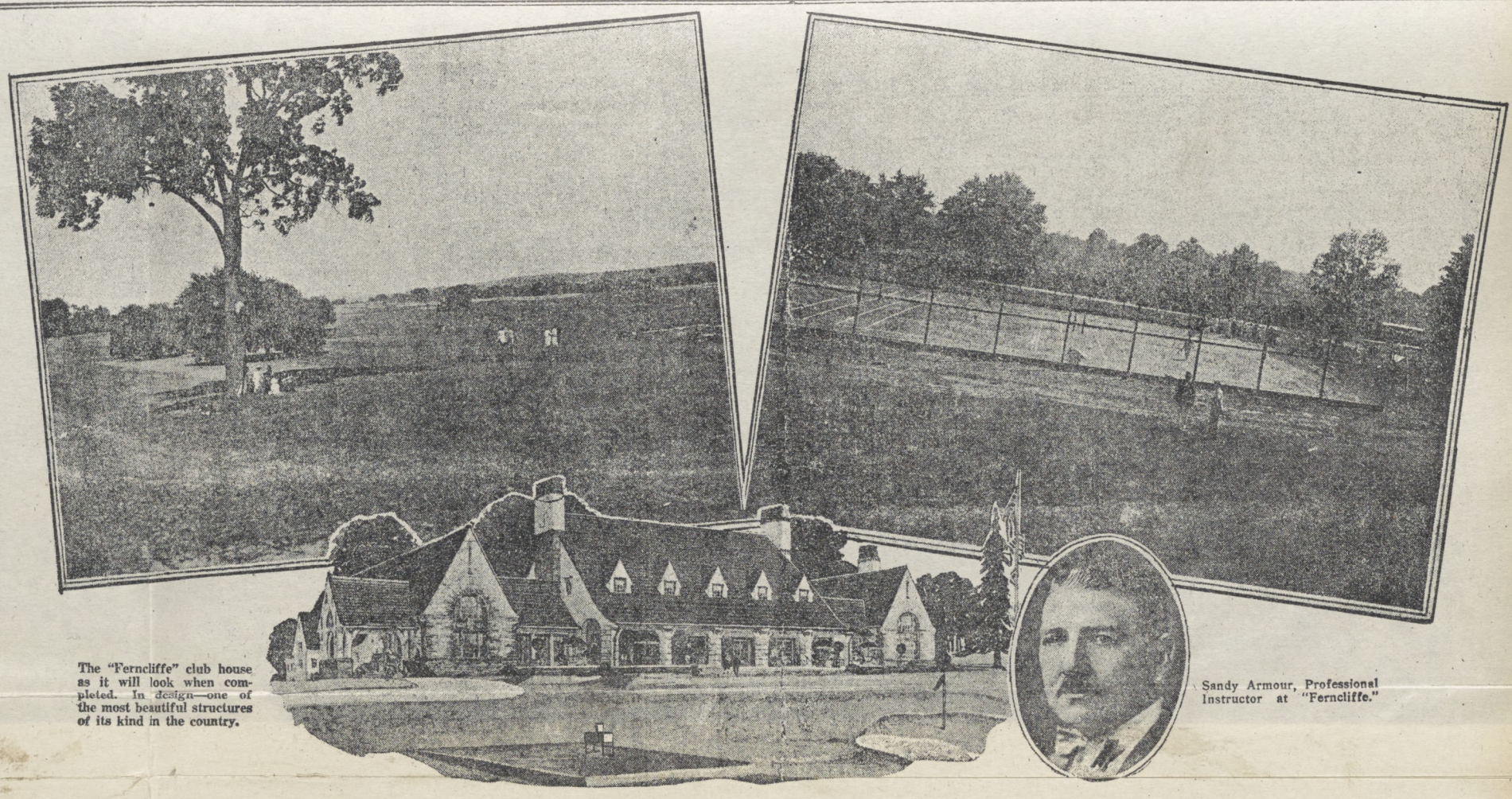
And if you believe Donaldson after what I've told you, as I believe him, you will get in under the bar at $100.00—and be glad you did!

But be frank with yourself, and if you don't know all about it that you want to know call up Donaldson at Montclair 8040 or drive out and see the course and stop into the "Ferncliffe" office at 460 Bloomfield Avenue, Montclair.

There are only a few days left before July 1st—just eight days between you and another $100.00! That's worth thinking about!

Exhibit D-27.

(*Opposite*) ☞



The "Ferncliffe" club house as it will look when completed. In design—one of the most beautiful structures of its kind in the country.

Sandy Armour, Professional Instructor at "Ferncliffe."

A Final Opportunity to Join this Exclusive Club for $100

"Ferncliffe" in West Caldwell is one of New Jersey's greatest and most beautiful golf clubs. Your life membership will only cost you $100.00 if you join now. *No dues! No bonds! No stocks to buy! No assessments!* This is one of the greatest golf club membership buys in the world! (After July 1st a membership will cost $200.00.)

"Ferncliffe" is ready! Its beautiful fairways stretch out as far as the eye can see. Nine sporty holes of 3,683 yards in length await the golfer who can make the round in par!

And you can become a member in one of America's most beautiful golf clubs now and enjoy all its privileges and pleasures for only $100.00. No dues! No stocks! No bonds! No assessments!

What man, who is far-sighted enough to see the future that lies ahead of "Ferncliffe," can resist this last offer of a membership for $100.00---and a life membership, at that?

And Sandy Armour is our "pro"---famed in all the land of golfers as the ex-champion of Scotland, England, Ireland and France---and now the guiding spirit of the "Ferncliffe" staff!

The membership price goes up to $200.00 on July 1. A few more days remain for you to get under the wire. No need to hand us your check in full now---simply sign and reserve your membership before the advance price date!

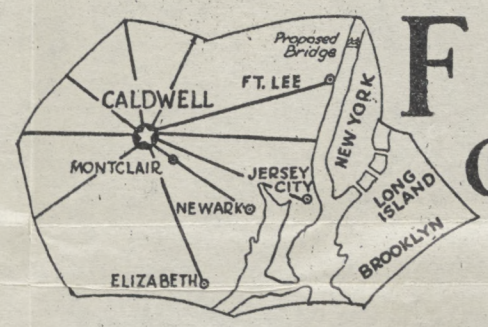
At "Ferncliffe" there is not only golf, but there is tennis as well. And here, when completed, will be a swimming pool, a bridle path, a billiard room, dancing, dining, and all the country club pleasures and excitements that men are often willing to pay thousands to obtain.

Yours—if you act quickly and make reservation now—for $100.00. Mail the coupon, or phone your reservation in!

JOIN NOW!

After July 1st a membership in "Ferncliffe" will cost you $200.00.

Send in your application today! Mail coupon!

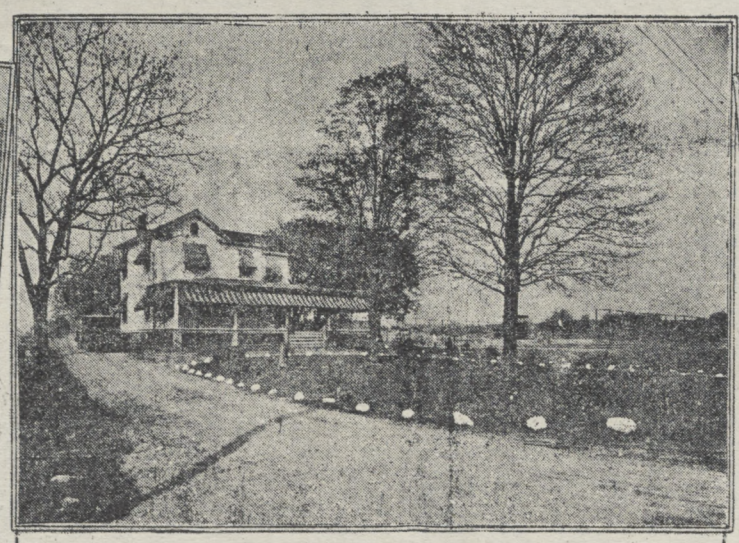


FERNCLIFFE
Golf and Country Club

460 Bloomfield Avenue Montclair, N. J.
Telephone Montclair 8040

Located in West Caldwell, N. J., in Essex County, Easily reached by motor, train or trolley! In the heart of a beautiful rolling country! We're ready for you! Come in and join our exclusive membership!

Some photographs taken the other day at "Ferncliffe"



"Ferncliffe" Golf and Country Club
460 Bloomfield Avenue, Montclair, N. J.

☐ Reserve a membership for me at $100.00.

☐ Send me more data, with maps, and pictures of "Ferncliffe"

Name .....

Address .....

(It would be wiser to phone your reservation in today! Montclair 8040)

MAIL IT NOW!

Ecuador 1:100 000

Mapa vial

Edición continua

Incluye: Quito, Cotopaxi, Tungurahua, Chimborazo, Bolívar, Los Ríos, Guayas, Cañar, Azuay, El Oro, Loja, Zamora Chinchipe, Morona Santiago, Pastaza, Napo, Orellana, Sucumbíos, Esmeraldas, Manabí, Santo Domingo de los Tsáchilas, Imbabura, Carchi

Incluye: Galápagos

Incluye: Quito, Cotopaxi, Tungurahua, Chimborazo, Bolívar, Los Ríos, Guayas, Cañar, Azuay, El Oro, Loja, Zamora Chinchipe, Morona Santiago, Pastaza, Napo, Orellana, Sucumbíos, Esmeraldas, Manabí, Santo Domingo de los Tsáchilas, Imbabura, Carchi

Exhibit D-28.

Consists of a typewritten list of 920 names and addresses of enrolled life members of the Ferncliffe Golf & Country Club.

Exhibit D-29.

Law Offices
Joseph B. Bloom
128 Market Street
Newark, N. J.

Telephone Mitchell 0361

December 18th, 1925.

Mr. J. W. Donaldson,
c/o Smith and Slingerland,
763 Broad Street,
Newark, N. J.

Dear Sir:

On behalf of the Reorganization Committee of the Ferncliffe Golf & Country Club, I beg to acknowledge receipt of your letter of December 14th. Inasmuch as it does not conform to the terms suggested by the committee and acquiesced in by you, we are constrained to disregard it.

At a meeting of the committee held last night, however, a new proposition was formulated and is herewith submitted to you. We are inspired by a desire both to do justice to our fellow members and to be fair with you and to that end, we have gone thoroughly into every phase of the matter. We have considered your acknowledged

revenue from membership subscriptions of $75000. and from "green fees" of about $5000. We are convinced, and in this conviction we are backed by the opinions of golf course architects whom I personally have interviewed, that this sum of $80000. has been more than sufficient to reimburse you for any outlay to which you may have been put for promotion, construction of course and equipment; in fact, we are of the opinion that you have taken a greater profit from this source alone than is commensurate with the effort and time expended by you. Having arrived at this conclusion, we were tempted to demand that your turn over the property to us, the membership, at a price at which you have contracted to buy it from the Messrs. Francisco.

Disregarding our personal opinions, however, we have concluded to make the following offer, subject to the approval of the membership, and will urge its adoption:

1. We will take an assignment of the contract with Messrs. Francisco and will undertake to carry out its terms, provided said contract provides that the purchase price of the grounds upon which the golf course and club house are located is not more than $75000. and provides for the payment of at least $55000. of the purchase price by the acceptance of a purchase money mortgage.

2. We will pay to you any sum which you have paid on account of the purchase price of said land by executing to you a mortgage to mature in three years, payable one-third at the expiration of each year, said mortgage to be second in priority to the aforementioned purchase money mortgage.

Exhibit D-29.

3. We will pay you in addition $25000. in cash in thirty, sixty and ninety days.

4. Acceptance of this offer must be made by December 28, 1925, and if accepted, settlement to be made by us no later than January 20, 1926.

Please understand that we do not contemplate taking over any of your corporations but if the proposition is consummated, title will be taken in the name of a new corporation now in the process of formation.

May I say in passing that there is a portion of the membership which sees in the situation confronting the club an element of fraud and deception and misrepresentation. This sentiment was vociferously expressed at the last meeting and has taken the form, we are informed, of a contemplated action against you which, whether successful or not, will not place you in a very favorable public light. Deploring such action, the committee has prevailed upon them to defer action until such time as our negotiations fail.

Awaiting then, your favorable disposition, I beg to remain,

Very truly yours,

JOSEPH B. BLOOM

Exhibit D-30.

Full Life Men $100.	*Full Life Ladies $100.*	*Full Life Men $50.*	*Full Life Ladies $50.*
421	20	282	40
$42,100.	$2,000.00	$14,100.00	$2,000.00

Restricted Ladies $50.	*Non-resident 5-Year Ladies $50.*	*Non-resident Men $50.*	*Non-resident 5-Year Family $100.*
115	1	6	4
$5,750.00	$50.	$300.00	$400.00

	Members
42,100.	421
2,000.	20
14,100.	282
2,000.	40
5,750.	115
50.	1
300.	6
400.	4
$66,700.	889

Exhibit D-31.

COMBINED STATEMENT AS OF AUGUST 25, 1925

—of the—

RECREATION DEVELOPMENT CORPORATION AND FERNCLIFFE GOLF AND COUNTRY CLUB, INC.

Organization and Promotion		$ 28,828.08
Land & Ground Improvement		195,000.00
Buildings		35,000.00
Furnishing & Equipment		5,754.21
Accounts Receivable		4,772.25
Cash & Deposits		1,460.35
		$270,814.89
Business done on golf course—to date		4,409.00
Amount due on memberships—to date (52)		3,121.00

New Jersey Court of Errors and Appeals

Between

American Plaster Drill Company,
Complainant-Appellant,

and

William H. Francisco, *et als.*,
Defendants-Appellants,

and

Recreation Development
Corporation,
Defendant-Appellant.

On Appeals of complainant, American Plaster Drill Co. and defendants the Franciscos and the players, from Court of Chancery.

Bigelow, V.-C.

(Italics, etc., ours, except where otherwise noted.)

Brief of Complainant-Appellant, American Plaster Drill Company, and Reply to Brief for William H. Francisco, *et als.* and D. W. Dryden, *et als.*, Defendants-Appellants.

Statement of the Case.

The bill (p. 13) was for specific performance of an agreement made June 11, 1924, between defendants Franciscos and defendant Recreation Development Corporation for the sale of lands (p. 26). Complainant's right arose from a written contract between Recreation Development Corporation, the vendee, and complainant (p. 36), which provided that Recreation Development Corporation would sell the lands and premises to American Plaster Drill Company, and an assignment (p. 45) from Recreation Development Corporation to American Plaster Drill Company, the complainant, assigning all of its rights under the

contract between the Franciscos and Recreation Development Corporation (p. 45).

The issue tried was that made by the answer of the Franciscos (p. 46) and that of D. W. Dryden and others similarly situated (p. 52).

The Franciscos denied (par. 1, p. 46) that the contract had been signed by defendants, Mary F. Francisco and Mary A. Francisco, the wives of the owners. They persisted in this defense even after the contract had been received in evidence bearing the signatures of the wives (p. 81). They insisted upon strict proof of the signatures of the wives (pp. 82, 84; Exhibit C-2). They persisted in offering a contract not signed by the wives which was in their possession (pp. 94, 95).

The contract signed by the wives was proven and there is no point *now* in the case with respect to *that* matter.

They next set up that the assignment by Recreation Development Corporation, the vendee (Exhibit E, p. 45), was conditional "and they deny that the conditions have been fulfilled, and insist that said paper writing could not and has not amounted to an assignment of the rights of the Recreation Development Corporation" in the contract between themselves and Recreation Development Corporation, and they *now* insist (Point IV, p. 43 of their brief) that, as sub-vendee under the contract between Recreation Development Corporation and American Plaster Drill Company, complainant (Schedule D, p. 36) cannot have relief because there is no privity between complainant and the Franciscos and the statute of frauds applies and that it can have no relief as an assignee under the assignment (Schedule E, p. 45) because that assignment never became effective.

This contention is based upon the language of the assignment (p. 45) reading as follows:

> "It being understood that this assignment is to be delivered to the American Plaster Drill Company only in the event of the failure of the said Recreation Development Company to carry out its agreement with the said American Plaster Drill Company, bearing date January 2, 1926, and upon payment to the said Recreation Development Company, or its attorneys, of the balance of the purchase price due to it from said American Plaster Drill Company, under said contract."

The contention of the Franciscos below and here (p. 44 of their brief) is that Recreation Development Corporation was not guilty of any breach of its contract with complainant (p. 36), under the terms of which Recreation Development Corporation agreed to sell to complainant. They further state that complainant did not claim that it "ever made a tender to the Recreation Development Corporation or ever asked it for a conveyance".

Under the contract between Recreation Development Corporation and complainant (p. 36) Recreation Development Corporation was obliged to convey the property to complainant, American Plaster Drill Company "on or before the first of March, 1926". To be able to make the conveyance Recreation Development Corporation had to obtain title from the Franciscos on or before that date. It did not do so. It, therefore, breached its contract with complainant (p. 36) and complainant was excused from making any tender to Recreation Development Corporation in the light of the fact that tender would be wholly ineffective. The claim that the assignment did not become effective does not lie in the mouth of the Franciscos but in that of Recreation Development Corporation and, although in its answer (p. 63), Recreation Development Corporation made the same contention with respect to this assignment

as did the Franciscos (paragraph 4, p. 66), it coupled that contention with what was, in effect, a joinder with complainant in requesting specific performance from the Franciscos, stating (p. 67) —"this defendant avers that such conveyance should be decreed only upon the condition that the balance of the purchase price due to this defendant from the complainant under its said contract be paid by the complainant to this defendant".

The position of Recreation Development Corporation that the assignment never became effective was abandoned in the course of the proceedings and in its memorandum submitted to the court below, it made no such point, but, on the contrary, *joined in the prayer of complainant for specific performance.*

And the effect of the appeal of Recreation Development Corporation (p. 5) is a joinder of that corporation with complainant in its application for relief.

This claim of the Franciscos was decided adversely to them in the court below. That decision *necessarily* followed when it appeared that the Franciscos knew of the assignment and received benefit from the $7,000, which was paid by complainant as the first payment on account of its contract with Recreation Development Corporation (p. 39). In their answer the Franciscos said (p. 47):

> "These defendants admit that they *knew* of the making of said assignment, *but deny that they consented thereto.* They admit that the complainant paid the Recreation Development Corporation the sum of Seven Thousand ($7,000) Dollars, in cash, on or about January 2, 1926, and they admit that the said sum of Seven Thousand ($7,000) Dollars was used by the said Recreation Development Corporation to pay off encumbrances upon

> the land which, under the agreement marked Schedule 'A' the Recreation Development Corporation was in duty bound to do, *and that a small balance remaining of said sum of Seven thousand ($7,000) dollars was paid to the defendants William H. Francisco and Richard S. Francisco as part payment of the purchase price pursuant to the contract Schedule 'A'. They admit that the said Robert W. Cromley acted as attorney for the said William H. Francisco and Richard S. Francisco in this matter,* and say that he also acted as attorney for the Recreation Development Corporation."

In the course of the trial it appeared that this payment of $7,000 was made by complainant by check of complainant, American Plaster Drill Company, dated January 2nd, 1926, to the order of Recreation Development Corporation, and endorsed by that company to Robert W. Cromley, *attorney for William H. Francisco and Richard S. Francisco* (p. 93; Exhibit C-9, p. 173).

Notwithstanding their admission in their answer that at least a small balance of the $7,000 was paid to them "as part payment of the purchase price pursuant to the contract Schedule A" (p. 47), they attempted to contend below, and they still contend, "that no part of this money was received by the Franciscos on account of payments due on their contract C. 1, nor was it intended to be so paid" (p. 10 of their Brief).

The testimony showed that the check for this $7,000 was immediately endorsed over to the attorney for the Franciscos and that he disbursed it upon their directions (p. 95). It appeared that the money was used to pay taxes upon the property, amounting to in the neighborhood of $1,300 (p. 96), which the Franciscos would have been obliged to pay and also bills of mechanics who might have lien claims and that there was a *bal-*

ance of $1,643.65 (p. 97; Exhibit C-13, p. 175). This last exhibit is an account of how the $7,000 was expended, and at the bottom of the account are the words "Deposited in the Caldwell National Bank *to the credit of W. H. & R. S. Francisco, $1,643.65*". True it is that Mr. Cromley, on re-direct by counsel for the Franciscos, said (p. 97):

> "Q. Didn't Francisco's bill against the Recreation Development Company, outside of the amounts owed on the contract, exceed the sum of $1,643.65? A. Yes."

and that the Court declined to strike out the answer (p. 98). But this is *all* the proof. The Franciscos did not take the stand nor was any attempt made to actually *prove* that this $1,643.65 was due from Recreation Development Corporation to the Franciscos upon any other account than the contract.

However that may be, the fact is that the Franciscos knew all about the interest which was being acquired by American Plaster Drill Company, complainant, and they took the $7,000, which was paid by the American Plaster Drill Company, complainant, as the down payment on its contract with Recreation Development Corporation, and *that* money was disbursed for their benefit and at their direction, and it does not lie in their mouth now to question the right of complainant, they having received the benefit of this down payment.

This claim on the part of the Franciscos did not influence the court below.

Lastly the Franciscos claimed that complainant had declined to take title because a *lis pendens* had been filed in a suit instituted by D. W. A. Dryden alleging that he and others similarly situated had been fraudulently induced by Recreation Development Corporation and its agents to become members of a golf club known as the

Ferncliffe Golf and Country Club, Inc., and that, by reason of such fraudulent representations, he, and the others similarly situated, had acquired an interest in the land, and that complainant was not entitled to take the position which it did for the reason that, in the contract between Recreation Development Corporation and complainant (par. 6, p. 41), the following language is contained:

> "6. The conveyance shall be by deed of warranty free of encumbrances, but subject to the lease hereinbefore referred to and to the rights of the members of the Ferncliffe Golf and Country Club, Inc., to use said premises under their said memberships, as provided and set forth in their certificate of membership and the by-laws of said company, and subject to such state of facts as an accurate survey of said premises will show."

and likewise for the reason that the *lis pendens* was void because no subpoena had ever been issued upon the bill. The claim was that, by reason of adjournments, time had become of the essence.

This claim made no impression upon the court below because, we assume, time was never made of the essence and because, while it was true that complainant was under contract to take from Recreation Development Corporation, subject to the right of the players, it was *not* under a contract to take from the *Franciscos* subject to any rights of the players which the Franciscos might have elected in the interim to confer upon the players.

The contention of the Franciscos now is that they never conferred any rights upon the players and that as to them the players have no rights and the players agree to this.

But the Franciscos were parties defendants to this suit instituted by the players and complain-

ant was entitled to a clearing up of any claim that the *Franciscos* had created any rights.

Time was never made of the essence of the contract. The Franciscos never attempted to put complainant in default. The case is not within *Barry* v. *Ruskin,* 99 N. J. E. 730, affirmed 100 N. J. E. 557, mentioned on page 42 of the brief of the Franciscos, but *is* like *Nass* v. *Munzing,* 100 N. J. E. 421, affirmed 138 Atl. 922, 101 N. J. E. 798; *Schultz* v. *Pollock,* 139 Atl. 902, 102 N. J. E. 157.

The effect of the decision below was to decide all of the matters raised by the answer of the Franciscos against them.

The bill herein was filed on August 9, 1926 (p. 13). The contract between the Franciscos and Recreation Development Corporation for the sale of the property was made June 11, 1924, to close June 11th, 1926 (p. 29). Certain payments were to be made in the interim (p. 28), the time for the making of which was extended by written agreements (Schedule "B", p. 32; Schedule "C", p. 34). The agreement between Recreation Development Corporation and American Plaster Drill Company was dated January 2nd, 1926 (p. 36), to close March 1, 1926 (p. 38).

The petition, which should have been a bill, of the players, which resulted in the filing of the *lis pendens,* was filed about February 2nd, 1926, and the decision of Vice-Chancellor Bentley declining to strike that petition or bill was filed on April 28, 1926, quoted in full on page 11 of the brief of the Franciscos. Although the Vice-Chancellor declined to strike the bill or petition no order was entered and no further steps were taken in the cause.

When the case now here opened on March 28, 1927, before Vice-Chancellor Bentley (p. 80) there was nothing in the record save the bill of com-

plainant, the answers of the Franciscos and of the Recreation Development Corporation. As we have already stated, *all* of the issues raised by *these* pleadings were decided in the Court below adversely to the Franciscos. Counsel for the players were present in Court however. Nothing was done on their behalf until February 21st, 1928 (p 101), when counsel for the players said (p. 102):

> "Judge Butler. Before we start I want to say to your Honor that the interests of the Players in this case and the Franciscos are common interests, and we have agreed that Mr. Herr shall act as counsel and will handle the case."

The colloquy on page 104 would seem to indicate that the Court made no ruling upon the application of the players to be joined but permitted testimony to be taken upon the issue sought to be raised by them. This was over the objection of complainant which offered to take the property *subject to rights of the players* as stated in its contract (Par. 6, p. 41). The Court, apparently, granted an order to admit the players (pp. 107, 108). It is not printed. A copy of the proposed answer was apparently before the Court on February 21st, 1928 (p. 108), but was not filed. All of the testimony as to the players' rights was taken over objection. The proposed answer was not exhibited to counsel for complainant until page 122. From this point on the case apparently ceased to be one for specific performance but continued as one to settle the rights of the players as against complainant as and when it should take title. But complainant had agreed to take the property subject to rights of the players and what the rights of the players were was of no concern to the Franciscos, who, with the assignor of complainant, *i. e.*, the Recreation Development Com-

pany, were the only proper parties respondent to a bill for specific performance.

Bacot v. *Wetmore,* 17 N. J. E. 250;
Brisbane v. *Sullivan,* 93 N. J. E. 578.

The last hearing in the case before Vice-Chancellor Bentley was on February 21, 1928.

The answer of the players raising the issues which were decided by the Court below, *partly* in favor of the Franciscos and the players, does not appear to have been actually filed until June 30, 1930 (p. 52), the date of the filing of the final decree (p. 77).

In the course of the trial, it appeared that the Franciscos, pending the litigation, had made a contract with the players under the terms of which, *in the event the Franciscos are successful in this litigation,* they were to convey the property to the players for $150,000, taking $25,000 in cash, a purchase money mortgage of $100,000 for five years and a second mortgage for $25,000, payable at the rate of $5,000 a year (pp. 161, 162). Under the terms of the contract by which the Franciscos agreed to convey to Recreation Development Corporation the purchase price was $75,000. Under the agreement between the Franciscos and the players the Franciscos are *now* to receive double, to wit, $150,000. Naively the Franciscos express great concern for the rights of the players (pp. 32, 33 of their brief) and the Franciscos and the players say in their brief (p. 33):

> "It was entirely proper for the players and the Franciscos after this suit was commenced, to make any agreement they pleased relative to the land, its conveyance, the financing of the reorganized club, compensation to the Franciscos for use of the land since 1924, and all incidental matters, such agreement

to take effect in the event of the dismissal of the complainant's bill."

And again (p. 33):

"Why is it improper for the defendants to combine in order to defeat such a claim, and in doing so to agree peacefully among themselves for the working out of their mutual interests after the claim is disposed of? Surely, if there were any differences between these defendants, the court should encourage their friendly settlement out of court. Any such settlement, whether by agreement or by the judgment of a Court on proper issues framed, is irrelevant to the present issue."

But the agreement reached between the Franciscos and the players was of *great* importance here. If complainant was entitled to specific performance of the contract against the Franciscos, the owners of the property, then the Franciscos had been holding the legal title for complainant in trust.

Huffman vs. *Hummer,* 17 N. J. Eq. 263.

The complainant was obliged, by virtue of its contract with Recreation Development Corporation, to take the property subject to rights of the players. *If the trustee of the legal title for it has arrived at an agreement with the players to liquidate those rights, complainant is entitled to the benefit of this liquidation.*

The making of this agreement between the Franciscos and the players indicates that the concern of the Franciscos was *not* the protection of the rights of the players but to get for themselves, the Franciscos, the benefit of the increased value of the property, and that the real question in this case is—who is to receive the increment in value, *i. e.,* the $75,000? This aspect of the case was

ignored by the Vice Chancellor in his memorandum (p. 68).

The Vice Chancellor permitted the injection into this specific performance case, which should be strictly between the vendor and the vendee, of a determination of the rights of third parties in the property, the players, subject to which rights complainant had to take, and he proceeded to determine those rights but, in such determination, he did not take into consideration the fact that the Franciscos, the owners of the property holding title in trust for complainant under the Vice-Chancellor's theory of the case (for he decrees specific performance against the Franciscos), have arrived at an agreement with the players for the liquidation of their rights, to the benefit of which liquidation complainant, as the *cestui que trust* of the Franciscos, is entitled, and he did not give complainant the option to take the property subject to the agreement between the Franciscos and the players for the liquidation of their rights, by which agreement, if the Franciscos are successful in this suit, they receive double the price at which they agreed to sell the property to Recreation Development Corporation.

The final decree was entered June 30, 1930 (p. 77). From that decree complainant appeals (notice of appeal, p. 4; petition of appeal, p. 1). Recreation Development Corporation appeals (notice of appeal, p. 8; petition of appeal, p. 5). Complainant and Recreation Development Corporation are in accord. The Franciscos and the players appeal (notice of appeal, p. 9; petition of appeal, p. 11).

The Franciscos now, acting under the cloak of the players, attempt to get such a decree as will permit them to receive the increased value of this property which has been liquidated at $75,000 for themselves although it belongs to their vendee.

ARGUMENT.

POINT I.

And reply in part to Points 1, 2 and 3 of the brief of the Franciscos.

There should have been a decree for specific performance. The alleged rights of the players should not have been determined. Complainant, at least, should have been given the option to take the property subject to its carrying out the agreement between the Franciscos and the players, which agreement liquidated the rights of the players.

It will be apparent from the statement of the case that this specific performance suit has been used as a vehicle for the determination of the rights of the players which determination is not at all necessary to an adjudication as to whether complainant is entitled to a decree for specific performance against the Franciscos.

The right of complainant rests on the contract made by the Franciscos to sell to Recreation Development Corporation at a price, the right of the Recreation Development Corporation under that contract coming to complainant by virtue of the contract between the Recreation Development Corporation and complainant (p. 36) and the assignment (p. 45), which right was recognized by the Franciscos when they took the $7,000 down payment made by complainant under its contract with Recreation Development Corporation (p. 36). The bill was a common bill for specific performance.

In *Bacot* v. *Wetmore,* 17 N. J. E. 250 a bill was filed for specific performance, the title of the vendor resting upon a deed from executors hold-

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ing the property in trust and the contention was that the executors had no power to make the deed. Involved in this were the rights of the *cestuis qui trustent* and it was insisted that they should be parties. The Court said (p. 255):

> "There is no necessity or propriety in making the devisees of John Tonnele, parties to this suit. To a common bill for the specific performance of a contract of sale, the parties to the contract are the only proper parties. Robertson *v.* The Great Western R. Co., 10 Simons, 314; Wood *v.* White, 4 Mylne & Craig, 460; Fry on Spec. Perf., sec. 79."

In *Brisbane* v. *Sullivan,* 93 N. J. E. 578, in a specific performance suit, Vice-Chancellor Griffin, at p. 581, said:

> "The first point to be considered is whether, in a bill for specific performance, the complainant may make defendants persons who were not parties or privies to the contract.
>
> In Bacot *v.* Wetmore, 17 N. J. E. 250, Chancellor Green held, 'To a common bill for the specific performance of a contract of sale, the parties to the contract are the only proper parties.' Citing Robertson *v.* Great Western Railway Co., 10 Sim. 314; Wood *v.* White, 4 Myl. & Cr. 460; Fry Spec. Perf., sec. 79, to which I may add Tasker *v.* Small, 3 Myl. & Cr. 63; 40 Eng. Rep. 848; Willard *v.* Tayloe, 8 Wall. 571; Pom. Cont., sec. 483, p. 557 (bottom of page).
>
> In Tasker *v.* Small, *supra,* Lord Chancellor Cottenham said (at p. 68): 'It is not disputed that, generally, to a bill for specific performance of a contract of sale *the parties to the contract only are the proper parties;* and when the ground of the jurisdiction of courts of equity in suits of that kind is considered it could not properly be otherwise. The court assumes jurisdiction in such cases because a court of law, giving damages only for the non-performance of the contract, in many cases

does not afford an adequate remedy. But, in equity, as well as at law, the contract constitutes the right, and regulates the liabilities of the parties; and the *object of both proceedings is to place the party complaining as nearly as possible in the same situation as the defendant had agreed that he should be placed in.* It is obvious that persons strangers to the contract, and therefore neither entitled to the right, nor subject to the liabilities which arise out of it, *are as much strangers to a proceeding to enforce the execution of it as they are to a proceeding to recover damages for the breach of it.* And so is the admitted practice of this court.'

But it is contended that the language in the opinion of Mr. Justice Bergen lastly above quoted, touching the want of parties, indicates that the court of errors and appeals were of opinion that the parties referred to were proper parties. I do not read the opinion in this light. At most, as I see it, it was an illustration of why the decree in this court was erroneous, and in no sense was intended to indicate that the persons omitted were proper parties to this suit.''

There was no possible necessity that the players should be before the Court in this strictly specific performance case that their rights should be protected.

Under the contract between Recreation Development Company and complainant, complainant agreed to take the property ''subject to the lease hereinbefore referred to and to the rights of the members of the Ferncliffe Golf and Country Club, Inc. to use said premises under their said memberships, as provided and set forth in their certificate of membership and the by-laws of said company * * *'' and it offered to take subject to such rights.

Under Points 1, 2 and 3 of their brief the Franciscos and the players seek to show that, by rea-

son of the conduct of Recreation Development Company, the players acquired an interest in the property which in effect required the Recreation Development Corporation to continue *ad infinitum* or at least for the life of the oldest survivor of some 900 members of the Club, to operate the property as a golf club and they insist that a conveyance from the Franciscos would be in violation of the trust.

But if their premise be correct this by no means follows. It is not, and cannot be contended that the players were entitled to the *legal fee* to this property from the Franciscos nor can it be contended that they would be entitled to the continuance of the golf course if they did not perform their obligations. Recreation Development Corporation had made a lease to the Ferncliffe Golf and Country Club, Inc., which purported to set forth the obligations between Recreation Development Corporation, as the prospective owner of the land, and the Ferncliffe Golf and Country Club and its members, which lease provided for a term of twenty years and a yearly rent of $15,000 (Exhibit C-8, pp. 168, 169). True, the Court below in *this specific performance case* has held that this lease did not bind the members of the Club and that their rights were greater than as indicated in the lease.

However that may be, complainant agreed to take the property, and, indeed, irrespective of the agreement, would have been obliged to take the property subject not only to this lease but to other rights of the players. If the position taken by the players were correct Recreation Development Corporation could never part with the legal estate which it would have received from the Franciscos had it performed its contract, although the players claim no interest in the legal estate.

To effectuate the rights of the players, if the position of the Franciscos be correct, the Franciscos would be barred from transferring the legal estate except to Recreation Development Corporation but Recreation Development Corporation did not, and could not, perform its contract with the Franciscos.

Recreation Development Corporation had the absolute right, assuming all of the contentions of the Franciscos as to the rights of the players to be correct, to transfer its interest in the legal estate to complainant and this it did, and, upon the transfer of that interest in the legal estate to complainant, the Franciscos had the right, and were in duty bound, to transfer the legal estate to complainant and complainant would take that legal estate subject to whatever rights the players might have.

But, it is respectfully submitted that this specific performance case is not a suit in which those rights should be determined, particularly in view of the fact that these players did not seek to intervene until the hearing, and of the fact that the intervention of the players has resulted in no benefit to the players, but *only in benefit to the Franciscos.*

Whatever the rights of the players may have been they were subject to compromise.

The Franciscos have made a contract with the players under which the players are to pay, if the Franciscos are successful in this litigation, $150,000 for land which the Franciscos agreed to sell to Recreation Development Corporation for $75,000. *Complainant is entitled to the benefit of this contract.*

After a contract for sale, the vendee becomes the equitable owner of the land and the vendor is the trustee of the legal title for the benefit of the vendee.

Huffman v. *Hummer,* 17 N. J. E. 263.

The Franciscos, holding the legal title to this land *in trust for complainant,* which is in the position of vendee, made a contract under which they have agreed to sell the land for twice the amount for which they agreed to sell to Recreation Development Corporation, complainant's assignor, and *to the advantage of which contract complainant is entitled.*

Throughout the trial the Franciscos attempted to induce the Court below to believe that they were intensely interested in the players and were quite solicitous as to their rights. They did their utmost however to prevent the Court being informed that the fact was that they had entered into an agreement with the members of the Club which meant $75,000 to them. Note the objections of counsel for the Franciscos when this testimony was offered (pp. 160, etc.).

It would seem that a *friendly* interest in the players would have required that the Franciscos at least sell the property to the players upon the same terms and conditions which in 1924 they had agreed to sell to Recreation Development Corporation, which they *now* say is a trustee for the players.

The Franciscos cannot complain of being held to the bargain which they made with their eyes open in 1924 to sell this property for $75,000.

The above disposes of the argument of the Franciscos and the players under points 1, 2 and 3 of their brief.

None of the cases cited have any application to that at bar. All of the propositions of law mentioned may be conceded without affecting the issue here. We do not intend to examine each case cited specifically.

We look at one, *Herder* v. *Garman,* 106 N. J. E. 13, page 28 of their brief, and we find that there is nothing whatever in it which has any reference to the statement of law under which it is cited.

Of course, equity will not enforce a contract where to enforce it would be to compel a breach of a trust.

The position taken by the Franciscos and the players is indicated by the excerpt from their brief, p. 31:

> "Donaldson's agreement to convey to the complainant was in violation of the trust and for the purpose of making a profit in fraud of the players. Had the conveyance been made, the players could have set it aside. *A priori,* not having been made, the Court should not have made a decree by which the title might become vested in complainant."

The difficulty is that the conveyance from the Franciscos to complainant would *not be in breach of any trust* for, as we have so often repeated, there is no contention that the players obtained any legal right in the lands nor is it contended that Recreation Development Corporation entered into an agreement which forbade it disposing of whatever rights it had in the land, and certainly the Franciscos, according to the contention of the Franciscos themselves and the players, who have united in their brief in this Court, are under no obligations whatever to the players and they could not be prevented from transferring the *legal* title to the land to complainant upon performance by complainant of the contract which the Franciscos had made with Recreation Development Corporation. There would have been no violation of the players' rights until complainant did something which would result in depriving them of their equitable rights, if any existed.

Assuming that equitable rights existed in the players, then we concur with the Franciscos in their statement on page 27 of their brief as follows:

> "Had complainant's contract been executed and title become vested in it, the players might have enforced the trust upon the complainant even though it had paid full value for the land, because it would have taken with notice."
>
> Perry, Sec. 212.

The Franciscos would restrain the alienation of this property for a period as long as one of the 920 members of the Club should survive.

POINT II.

It is not inequitable that specific performance should be decreed at the suit of complainant nor does the rule that specific performance rests in the sound discretion of the court have any application.

This matter has already been argued in part. The defense does not lie in the mouths of the Franciscos.

The Franciscos and the players cite cases in which they say it has been held that where the performance of a contract will cause injury to innocent third parties the court will not, under certain circumstances, compel performance (p. 28 of their brief). But reference to these cases will not disclose a single one in which the facts have been at all analogous to those at bar. They have been cases where the making of the contract, *as such,* was a breach of a fiduciary relation or injuriously affected beneficiaries of trustees, being disadvantageous to their trust estates, or cases in which the public interest has been so affected as that to enforce the contracts would be against public policy, or cases in which the parties called upon to perform would, by performance, violate obligations.

There is nothing of this kind involved in the case at bar. Whatever rights the players have, so far as the land is concerned, arise, as against the land, only because of the contract between the Franciscos, the owners of the land, and the Recreation Development Corporation. Complainant is the assignee of *that* contract and it is *that* contract which the Court is asked to specifically enforce. It is claimed in the brief of the Franciscos and the players, and has been claimed by them throughout the case, that the Franciscos did not participate in the transaction in any way as to make them liable to the players. If this be so, then the players would be put in a *better* position by a transfer by the Franciscos to complainant than if the Franciscos do not transfer for, if they do not transfer, the Franciscos hold the lands *free of any rights of the players,* whereas, if the Franciscos transfer the land to complainant as the assignee of the contract between the Franciscos and the Recreation Development Corporation by the express terms of the contract under which complainant acquires its rights and also because complainant has knowledge of the players' rights, complainant takes subject to rights of the players. The *transfer* creates the rights of the players and yet the Franciscos and the players unite in an attempt to prevent that transfer.

The Franciscos and the players assert that specific performance is a discretionary remedy (p. 30 of their Brief). So it has been stated, but this Court, in *Page* v. *Martin,* 46 N. J. E. 585, said, at p. 589:

> "The attitude of courts of equity upon application of this character (specific performance) may be summarized in two propositions—first, that the relief invoked is not a matter *ex debito justicio,* but rests in the sound discretion of the court, and, second,

that where a contract is certain in all its parts and for a fair consideration, and where the party seeking its enforcement is not himself in default, it is as much a matter of course for courts of equity to decree the performance of the contract, as it is for courts of law to give damages for the breach of it. That relief rests not upon what the court must do, but rather upon what, in view of all the circumstances, it ought to do, *is a distinction which is of little or no practical moment.* In every case of this character the court is chiefly concerned with the equities of the parties before it."

And in *Law* v. *Smith,* 68 N. J. E. 81, Vice-Chancellor Pitney said, at p. 90:

"This meets the only other point made by the defendant, viz., that this is a hard bargain, and one which the court, in the exercise of its discretion, ought not to enforce.

It is undoubtedly true that the granting of specific performance is a matter of discretion, but it must be observed that it is a *judicial* discretion, the character of which I attempted to explain and describe in the case of Hennessy *v.* Carmony, 50 N. J. E. (5 Dick.) 616 (at p. 625), in which I ventured to say that by judicial discretion was meant 'that the judge must be discreet, and must act with discretion and discriminate and take into consideration and give weight to each circumstance in the case in accordance with its actual value in a court of equity.'

This judicial discretion is clearly distinguished from the personal discretion of the individual."

POINT III.

The players have no equitable rights in the land, and certainly not those adjudged by the Court in its decree (p. 77, at p. 78).

We submit that it is unnecessary to determine this point because it should not be attempted in this specific performance case.

If complainant, after taking the property subject to rights of the players, should disregard any such supposed rights, the remedy of the players is *then* to enforce those rights against complainant. We will say a word, however, upon the subject. The equitable rights of the players is sought to be spelled out from representations which were made by Donaldson, the guiding genius of Recreation Development Corporation and the Ferncliffe Golf and Country Club, to prospective players to induce them to join the club, which representations were said to be false. It is claimed that the conduct of Donaldson was so fraudulent as that the lease which was made between Recreation Development Corporation, July 25, 1924, and the Golf Club, which purported to set out the rights of the club and its players in the land, to wit, as a leasing for a period of twenty years, upon the agreement to pay $15,000 per year, is not effective as defining the rights of the players. By its decree the Court below has defined the rights of the players (and there are 920 of them), as the right to have complainant, if it becomes the owner of the land "deliver to a corporation to be formed, in which said members shall have equal rights, or to trustees for said members, or to such other designated person or persons as the Court may select, a lease of all of the lands and premises described in the pleadings

for the term of the joint lives of the said members, approximately nine hundred twenty (920) in number, upon payment by way of rental *of reasonable greens fees and like charges for the use of the facilities that may be provided at complainant's expense or which may have been provided upon said premises* (this Court to settle from time to time what shall be considered reasonable greens fees and like charges), which said greens fees and like charges shall be applied first to the payment of interest on any mortgage or mortgages upon said premises, taxes thereon and upkeep of the property, any excess of said sum after the payment of such charges to be paid over to the lessor or its assigns, and upon terms providing that the said complainant shall provide upon said premises such facilities from time to time for the use of such members as the Court shall determine."

This means that the land is to be devoted, for the life of the longest liver of 920 members, to a golf course, and that all that those persons are to pay for the privilege of having this land continued as a golf course for that period of time are "reasonable greens fees and like charges for the use of the facilities that may be provided at complainant's expense or which may have been provided upon said premises", the Court reserving the right to, from time to time, fix reasonable greens fees and like charges. In other words, the owner of the land must look for all revenue upon his investment, the investment to be tied up for a period of time equal to the life of the longest liver of 920 persons, "to reasonable greens fees and like charges."

It is submitted that any such rights could not have been contemplated by any person becoming a member of the Club because of its unreasonableness. The Court in effect recognizes its unreasonableness (pp. 75, 76).

In the Court below Recreation Development Corporation filed a brief, and we will assume a brief will be filed for it here, indicating that there was no proof of fraud sufficient to support the claim that the equitable rights of the players were as indicated by the decree of the Court, and we do not desire to duplicate. We will, however, consider the testimony of certain witnesses. The matter is considered under point 1 of the brief of the Franciscos and the players page 17 *et sequi.*

Fraud is never presumed but must be proven by clear, cogent, convincing evidence.

> *Guerber Eng. Co.* v. *Stafford,* 96 N. J. L. 280, and
> *Summerill* v. *Summerill,* 83 N. J. Eq. 3; affirmed 83 N. J. Eq. 350.

Sury, a witness on behalf of the Franciscos and the players, testified under cross-examination (p. 120) that he knew that enough members had not yet been obtained when he paid his membership dues to produce sufficient money to buy the land and yet he says that the representative of the club stated that the club, meaning the Ferncliff Golf and Country Club, *owned* the land. He lived near the place and made his own personal investigation.

Heilig testified on cross-examination (pp. 129 and 130) that he was quite an accountant and had figured up the total amount necessary to purchase the land, and that he knew at the time he made his deposit for membership that less than fifteen thousand ($15,000) dollars had been collected from the members, although he had figured that it would require about $135,000, $24,000 of which would pay for the first year's operation and that all the money would have to come from the thousand members *if* they were obtained, and that there was not anything sure about getting

that number of members. He showed a keen business insight and that he had made a very careful examination of the project. For example, he had carefully figured out that a thousand members, playing on an average of fifty per cent. of the time, would bring in about a thousand dollars a month, and he thought, to quote from his own testimony, that "no business venture is certain". He is a secretary of the Welfare Committee of the Public Service Corporation and an intelligent person. He even made inquiries of an architect, and after all these inquiries and investigations he made his payment. He also admitted, on page 135, that, if the title was in the club, it was subject to *heavy incumbrances,* and, notwithstanding that fact, he had thought it was a feasible scheme.

Under cross-examination (p. 144) the witness Stringer testified:

> "Q. You made quite an investment, didn't you? A. Yes, and I was very careful about it, too."

He was asked whether or not he thought that the club had paid for the land, and he was unable to answer. He understood that it owned the land, but he did not know how it had been paid for.

He admitted, however, that, when he joined, he was *not* told that the club owned the land, and he admitted that the members of the club were *not supposed to own the land; they were merely to get the privileges of playing golf.*

Stringer testified, on page 145:

> "Q. *They were to get the privileges by using land owned by somebody else?* A. Yes."

He likewise had figured out how the land was to be paid for if and when they had obtained a thousand members.

He testified (p. 146):

"Q. I am trying to get back before you made your first instalment; at that time how did you understand that the land was to be paid for? A. I asked who owned it and they said the Ferncliff Golf & Country Club.

Q. But did you understand how in the world the Club could pay for it when it only had $15,000, approximately? A. They were paying for the property out of subscriptions. These subscriptions would amount to $110,000, and then it would be $220 for each member up to the 1,000, and they were to have the money from the first 500 memberships for the land and the rest of it was to pay off the cost of the course and the club house, and the green fees would sustain the whole property. I asked who owned the property and they said the Ferncliff Colf & County Club, and they owned it outright.

Q. *Did you understand that that meant this Club, of which you were becoming a member, owned it?* A. *No.*

Q. Then I don't understand you at all, because you told me a moment ago that you didn't discover the two organizations until after you paid the second installment. Now I am talking about it back of that before you paid your first check. A. I didn't know there was a dual organization when I paid my first check.

Q. Who did you think owned it then? A. The Ferncliffe Golf & Club.

Q. Of which you were becoming a member? A. Yes.

Q. Did you ask how this Club was to pay for it? A. I understood that with the proper financial activity that the Club would pay for it.

Q. *You understood fully that the land was not to be owned by you?* A. *Exactly.*

Q. How was it to be paid for and where was the profit to come to the person owning the land? A. I asked the agent Bowke, and it was verified by Lancaster, that Donaldson

and his associates owned the land. I asked him, 'Do they really own it?' and he said they did.

Q. They weren't making a present of it to the Ferncliff Golf & Country Club? A. They weren't making a present of it to the Club when the Club owned it.

Q. *The whole success of this club depended upon two things, didn't it; first, that the membership would be filled up and the people would play as contemplated?* A. *That's it.*

Q. *And, secondly, that your calculations, and those calculations which were told you, were accurate?* A. *I wouldn't say they were accurate; they were approximate.*

Q. Well, approximately accurate? A. *Yes.*

Q. You knew a great deal of money had to be paid and considerable expense had to be met at that time in promotion expenses? A. Well, it would depend on how fast they were going."

He said, in answer to a question by the Court (p. 149):

"A. Yes. *All I was to get was the privilege of the Club, no financial equity in the property,* so I didn't go there and find out how much they had paid, and all that sort of thing. If a business man was going into it to take stock as an investment he might get all the particulars; but I was satisfied to get the privileges to play on all of these premises. That is, the use of the club house, and the privilege to play on the tennis court and all that; and he particularly stressed the point that they were going to raise the fees from 50¢ to $1., and I thought it would exclude a lot of members that they took in, and they wouldn't pay that. It would militate against their financial success, I thought."

The Club failed. A receiver was appointed in May or June, 1927 (p. 148).

The testimony of the witness Ebert, the guiding spirit of the committee of players, is illuminating.

He was a hostile witness on cross-examination, but it seems to us that he finally told just what had happened. He admitted a meeting of the Club Members and Donaldson, of the Recreation Development Corporation, prior to the making of the agreement by Recreation Development Corporation with complainant, and that, in sending out some of the committee's literature they had *exaggerated* the present conditions, in one instance even to the extent of advising the members that in the present litigation *"the Court of Chancery had decided in our favor"*. He admitted that, in response to this letter, the members began to have a lot of confidence in the committee. It is this witness who testified, as above set forth, after much effort, that the players have an agreement with the Franciscos to be effective in the event of the failure of complainant in this litigation.

There is no proof in this case, we submit, of any right of the players, *so far as the land is concerned,* extending beyond the written lease. There may have been glowing accounts sent out but there were no misrepresentations made. It was at no time represented that the Golf Club *owned* the land. No obligation was assumed except by the Golf Club *as such.* It was fully understood, and common sense required that it should be understood and the witnesses produced by the players indicated that it was understood, that the success of the project depended upon the getting in of sufficient members of the club and the raising of sufficient money. The project failed. A receiver has been appointed. But the failure of the project and the appointment of a receiver is no legal ground for extending the rights of the players beyond that indicated by the written lease. And, so far as the Recreation Development Corporation is concerned, *the rights of the players are limited by that lease.*

The testimony of Ebert from page 155 to page 163 indicates that it was the fault of the club members that the project was unsuccessful and also indicates that it cannot be made successful.

POINT IV.

The players are entitled to no relief because of their misrepresentation of a decision of the Court of Chancery.

The players, through their accredited committee, deliberately misrepresented a decision of the Court of Chancery and by that misrepresentation have induced members to come in and contribute money (p. 160).

Upon well settled principles, the players should not be permitted to intervene and file an answer.

Little v. *Cunningham,* (Mo.) 92 S. W. 734;
Bearman v. *Dux Oil Co.,* 166 Pac. 199;
Clickner v. *Clickner,* 95 N. J. E. 479;
Gluck v. *Rynda Development Co.,* 99 N. J. E. 788; affirmed 100 N. J. E. 554, 135 Atl. 917;
Pfender v. *Pfender,* 7 N. J. Adv. R. 142, 144 Atl. Rep. 333, affirmed 105 N. J. Eq. 247, 147 Atl. 911.

POINT V.

Answer to Point III of the brief of the Franciscos and the players (p. 35 of their brief).

The *lis pendens* furnished an adequate reason for complainant not taking title, but it is immaterial if it did not.

Under the contract between the Franciscos and Recreation Development Corporation, Exhibit C-1, pages 164, 26, the Franciscos agreed to con-

vey "the fee simple of said premises *free and clear of all encumbrances* except as above stated."

Complainant was the holder of an assignment of this contract, and as such holder, *as against the Franciscos, was* and is entitled, so far as the Franciscos are concerned, to a conveyance free and clear of *all* encumbrances.

The suit in which the *lis pendens* was filed was brought on February 2, 1926, by one of the players asking for an accounting, etc. The Franciscos were parties defendant and, in the bill, they were charged with:

> "*conspiring* with said J. W. Donaldson in disposing of said option with the intention of having your petitioner and other members in ignorance of this set of facts, and that such knowledge was only obtained by your petitioners by accident."

Where the word "option" is used, the contract C. 1 (pp. 164, 26), is intended to be identified.

An injunction was asked against the Franciscos "from proceeding in any way towards the disposition or sale of land now occupied by them upon which said Golf Club is constructed."

It is quite true that, under the agreement between Recreation Development Corporation and complainant (p. 41), the property was to be transferred by Recreation Development Corporation subject "to the lease hereinbefore referred to and to the rights of members of the Forncliffe Golf and Country Club, Inc., to use said premises under their said membership as provided and set forth under their certificate of membership and the by-laws of said company. . . ."

But complainant was also the holder of an absolute assignment made by Recreation Development Company of its Contract, Exhibit C-1, with the Franciscos. As the holder of those contracts, it stood in the shoes of Recreation Development

Corporation, and, as against the Franciscos, it was entitled to a conveyance in accordance with the terms of the contract between the Franciscos and Recreation Development Corporation, *i. e.*, free and clear of *all* encumbrances.

It is quite true that it may be that, either by virtue of the contract between Recreation Development Corporation and complainant, or by virtue of its knowledge of certain facts, it took subject to certain rights of the players, but it is equally true that it was not obliged, as to the Franciscos, to take title from *them* subject to *any rights of the players which might be based upon a conspiracy to which the Franciscos were a party.* That *lis pendens* was filed on February 5, 1926.

The argument made by the Franciscos and the players in their brief (p. 36) that "By this contract (the contract between Recreation Development Corporation and complainant, Exhibit C-3, pp. 165, 36) and by the overt use of the property as a golf course, the complainant was put on notice of whatever the rights of the players may have been", is, we submit, beside the mark.

The argument of the Franciscos and the players (p. 36) that "Now the notice of *lis pendens* was notice of a suit brought by the players, or one of them, for the purpose of enforcing those rights * * * "; is not, we submit, a correct statement of the fact. It was notice *not only of the rights which the players had by reason of their contract of membership, but also notice of rights enlarged by the participation in a conspiracy of the owners of the property, i. e., the Franciscos.*

The Franciscos and the players argue that complainant "was not injured by the existence of the notice of *lis pendens* * * *. Hence the notice did not create any greater encumbrance on the land than already existed thereon by virtue of the contract itself."

This does not follow for the rights *in the land,* which were evidenced by the *lease* between Recreation Development Corporation and the Golf Club, and any equitable rights which the players might have by reason of the relations between the players, the Golf Club and Recreation Development Corporation might have been enlarged *by the participation of the Franciscos in a conspiracy.*

At least, it cannot be said that it is certain that they would not be enlarged.

But, wholly aside from the matter of injury, complainant was entitled, *as against the Franciscos,* to a free and clear title and this *lis pendens, making the Franciscos parties,* was a defect in the title.

The Franciscos and the players next argue (p. 37 of their brief) that complainant's demand * * * "that the notice of *lis pendens* be removed from the record before it would take title was tantamount to an insistence that the Dryden suit be dismissed," and they say,—"But the dismissal of the Dryden bill would have enabled the complainant to secure the land free from the very rights it had agreed to respect and preserve."

That is not, we submit, the result for complainant expressly agreed with their assignor, the Recreation Development Corporation, that it would take subject to the rights of the players (as set forth in the contract between Recreation Development Corporation and complainant (p. 41)) and moreover the matter was no concern of the Franciscos, who, by *their* contract, were obliged to convey free and clear of encumbrance.

Defendants Francisco and the players argue that it was the *intent* of complainant to disregard the rights of the players.

Again, this was no concern of the Franciscos and they, apparently, were gratuitously making

themselves *ostensibly* the champion of the players to later obtain a contract from the players, under the terms of which they are to get twice for the property what they were to get from Recreation Development Company.

Defendants Francisco do not argue that they could not secure a discharge of the *lis pendens.* On the contrary, they deliberately refused to make any move. Mr. Cromley, attorney for the Franciscos, testified (p. 88):

> "Q. And at that time we offered to take title from your clients, the Franciscos, providing you released the *lis pendens* in the Dryden suit? Is that right; yes or no. A. In January the Dryden suit hadn't been started.
>
> Q. I didn't ask you that: I said, when you came to my office we offered to take title from your clients provided the *lis pendens* were removed? A. At one time, you did, yes.
>
> Q. And you refused to give us title except we settled with the members; is that right? A. No.
>
> Q. You were always anxious about the members' rights, and you said you couldn't give us title without taking care of the members; isn't that what you said? A. I said, if you were going to take title subject to the rights of the members I didn't see that the *lis pendens* in their suit was any objection to the title, so far as you were concerned.
>
> Q. I call your attention to the fact that the *lis pendens* were against the Franciscos, and their agreement with the corporation was free and clear of the *lis pendens,* didn't I? A. Yes.
>
> Q. *And you said you wouldn't make any effort to clear the lis pendens of the record, didn't you?* A. *I did.*"

Mr. Cromley, although called by complainant, was a most unwilling witness, and until he was shown the Exhibits C-12 and C-13 (pp. 174, 175),

refused to admit that any of the $7,000 paid by complainant on the Recreation Development Corporation contract went to the Franciscos, notwithstanding the fact that he was present at the time the contract was closed between Recreation Development Corporation and complainant and saw to it that *he* got the deposit money and disbursed it.

It is next argued that the notice of *lis pendens* (p. 38 of the brief) was null and void in any event because no subpoena had been issued upon the bill. That may be so, but nevertheless the *lis pendens* was of record *as against the Franciscos* and they deliberately refused to make any move whatever to discharge it of record.

But all of this is immaterial because time was not of the essence of the contract, nor was it made of the essence and, under such circumstances, even if complainant had insisted upon something to which it was not entitled, it is not barred from seeking specific performance.

Nass v. *Munzing* ,100 N. J. E. 421; affirmed 138 Atl. 922, 101 N. J. E. 798;
Schultz v. *Pollock,* 139 Atl. 902, 102 N. J. E. 157.

POINT VI.

Answer to Point IV of the brief of the Franciscos and the players.

There is no point in the insistence of the Franciscos and the players that complainant cannot have specific performance because of the statute of frauds.

Complainant May Bring This Suit as Sub-Vendee.

The cases cited on page 42 of the brief of Franciscos and the players do not, we submit, support their contention.

Wirtz v. *Guthrie,* 81 N. J. E. 271, and *Vogt* v. *Mullen,* 82 N. J. E. 452, have no application to the case at bar. This is *not* a bill to reform and then enforce.

In *Mechanic* v. *Duschaneck,* 99 N. J. E. 86, the bill was stricken *because the original vendee was not made a party.* What the Vice-Chancellor said was, p. 87:

> "But the complainant ought not to be put out of court. He may have an equity which he is entitled to enforce. *There is authority for maintaining a suit by a sub-vendee against the owner to compel him to perform his contract with his dendee, and in the same suit to compel the complainant's vendor to specifically perform his contract.* 25 R. C. L. 327; Fry Spec. Perf. 73, 74."

In the very next report, Vice-Chancellor Backes had before him the case of *B. & B. Investment Company* v. *Kaufman,* 100 N. J. E. 411. The complainant had contracted in writing to convey to the defendant Kaufman. Kaufman assigned his contract to his company, the defendant Franklin Holding Corporation. The Franklin Holding Corporation contracted with the defendant Wallace to sell the property to him. The Vice-Chancellor said (p. 412):

> "Wallace now moves to dismiss the counterclaim against him. No serious objection could be offered to the joining of Wallace by counterclaim if the defendants Kaufman and the Franklin corporation were seeking a performance of both their contracts, and it appeared that Wallace's contract had been made with notice of his vendor's purchase and incomplete title, and upon the understanding that it should be executed contemporaneously with, and to facilitate, performance of his vendor's contract. Fry Spec. Perf. (6th ed.) 80, 81; Mechanick *v.* Duschaneck, 99 N. J. Eq. 86. Rule 23 of this court countenances the practice."

The general rule is stated in 25 Ruling Case Law, title "Specific Performance", section 145, p. 327, which is mentioned by Vice-Chancellor Backes in *Mechanick* v. *Duschaneck,* 99 N. J. E., p. 86, at p. 87.

Defendants Francisco and the players (p. 43 of their brief) seem to consider that, when Vice-Chancellor Backes used the word "equity" in the sentence in Mechanick *v.* Duschaneck, 99 N. J. E. 87, "He (the sub-vendee) may have an *equity* which he is entitled to enforce", the Vice-Chancellor intended to refer to some *special* equity, that is, an equity arising out of fraud, misrepresentation and the like. The Vice-Chancellor did not, we submit, mean any such thing. He referred to the *equitable right* of subrogation. Complainant, upon obtaining the contract from Recreation Development Corporation, paid $7,000, which monies were actually received by defendants Franciscos as a result of the contract between defendants Francisco and the Recreation Development Corporation.

The statute of frauds plays no part. Defendants Franciscos are asked to perform the contract in writing which *they* have made.

The error into which the complainant in *Mechanick* v. *Duschaneck,* 99 N. J. E. 86, fell was not repeated in this case. The original vendee, the Recreation Development Corporation *is* made a party and it unites in asking specific performance.

Complainant May Bring the Suit as Assignee.

Defendants Franciscos and the players seek to avoid the effect of the assignment by insisting that it never became operative because Recreation Development Corporation was not guilty of

a breach of its contract, C-3 (pp. 165, 36), with complainant and that its assignment was not delivered (p. 44 of their brief).

The fact is that the assignment *was delivered.* Whether properly delivered or no is a matter between the Recreation Development Corporation and complainant. Recreation Development Corporation can speak for itself, and its counsel said in its brief below, "The assignment of the Franciscos' contract *thereupon became effective and the complainant was entitled, under that assignment, to a conveyance direct from the Franciscos upon its paying to the Recreation Development Company or its attorneys, the balance of the purchase price* due to it under its agreement with the complainant, and this suit is brought to compel the specific performance of the Francisco contract under and by virtue of the said assignment."

POINT VII.

Notwithstanding any rights of the players which must arise, if at all, from the conduct of Recreation Development Corporation, the Franciscos may be given precisely the same kind of a mortgage to which they are entitled under the contract between them and Recreation Development Corporation and the Franciscos are estopped from questioning the right of complainant to relief either as subvendee or as assignee.

The Franciscos and the players argue (p. 45 of their brief):

> "If they (the Franciscos) had conveyed subject to the players' rights, the mortgage taken back by them would also have been *necessarily* subject thereto, so that instead of a mortgage which would have been a first lien

> on unencumbered land, the mortgage would have been subject to the rights of the players to the same extent as the title itself. The Franciscos were entitled to have a mortgage exactly in accordance with the contract C-1, and could not be forced to take any other sort of a mortgage.''

There are several *non sequiturs* in this statement and the argument is, we submit, specious.

Barring some inequitable conduct of the *Franciscos* towards the players, the Franciscos could be obliged only to perform their part of the contract (between them and Recreation Development Corporation (p. 26)), and would be entitled to have a mortgage in accordance with that contract. Whether, in view of the fact that the Franciscos knew the purpose for which the land was to be used, they could enforce that mortgage as against the players' equitable rights, if any they have, is another matter and not important here, for there is no difficulty whatever in subjecting complainant's title to the property to whatever equitable rights the players may have and still giving to the Franciscos, if they are entitled thereto, a mortgage upon the property which will *not* be subject in any wise to the players' rights.

A court of equity is not so impotent as that it cannot frame a decree which will accomplish such a result through proper instruments.

The Franciscos seem to think that, because the title may come to complainant charged with whatever equitable rights the players may have, a mortgage given by complainant, so taking title charged with the players' rights, will necessarily also be subject to the players' rights. That is, of course, not so. A deed may be given conveying title to complainant with a provision in it which will subject the title held by the complainant to the players' rights and yet provide for a mortgage which will be free of the players' rights.

The matter can be handled in another way. The Franciscos may convey to Recreation Development Corporation free and clear, as by their contract they were obliged to convey, and take back the mortgage to which they were entitled. And, thereupon, the Recreation Development Corporation may convey to complainant the title charged with the equitable rights of the players, if any there be.

The assignment is of the whole fee and complainant is entitled to the whole fee. That fee, when conveyed, will be subject to whatever equitable rights there may be in the players, but the *whole fee* goes to complainant.

The mortgage to be given to the Franciscos is to be a purchase money mortgage. The momentary seizen necessary in complainant to create the purchase money mortgage is not sufficient to attach as against the mortgagee, the vendor, any rights created either by Recreation Development Corporation or complainant. This is fundamental.

> *Clark* v. *Butler,* 32 N. J. Eq. 664;
> *41 C. J. Title Mortgages,* sec. 470, page 528.

The result is that the Franciscos would get a purchase money mortgage free and clear of any rights of the players precisely, what they are entitled to under their contract with Recreation Development Corporation, without any decree of the Court other than a decree directing them to convey and complainant to give a *purchase money mortgage.* Of course, as above stated, if the Franciscos have, by their conduct, created any rights in the players as against them, they may not be able to enforce that mortgage against the players, but that would be no fault of complainant. And the players by their brief in this court

admit that they have no rights as against the Franciscos.

The Franciscos and the players are mistaken when they say (page 46 of their brief), that Recreation Development Corporation did not, in the court below seek specific performance. It is immaterial whether it is a complainant or defendant. It is a party to the suit. And the first headnote of its brief below was:

> "The prayer of the complainant's bill for the specific performance of the Francisco contract should be granted upon its making payment to the defendant, Recreation Development Company, of the balance of the purchase price called for by the contract between the complainant and the Recreation Development Company."

But defendants Franciscos are not, as heretofore stated, in any position to question the rights of complainant either as sub-vendee or as assignee, for they not only *knew* of the contract made by Recreation Development Corporation with complainant and of the assignment, but they accepted the benefit of the $7,000 paid by complainant *in reliance upon that contract and assignment,* and, having accepted that benefit, they cannot now say, as they did in their answer (p. 47), that, while they knew of the assignment, they did not *consent* thereto (par. 4 of their answer).

The statement contained in the brief of defendants Franciscos and the players (p. 10), that: "No part of this money was received by the Franciscos on account of payments due on their contract, C-1, nor was it intended to be so applied," is in conflict with *another* statement contained in their answer (paragraph 6) which we overlooked (p. 48): "They deny that *after the application of the $7,000 as aforesaid,* the said William H. Francisco and Richard S. Francisco had received a

total of $12,000 on account of the purchase price of said land, and say, on the contrary, that the *amount received was about $9,000''*; in this figure they gave a *credit* of $1,500 out of the $7,000 *as paid on account of the contract C-1.*

Point VIII and Conclusion.

The decree should have been for specific performance and no settlement of the players' rights should have been made or at least, if the Court determined to fix the players' rights, complainant should have been permitted to step into the shoes of the Franciscos under the contract which the Franciscos made with the players liquidating those rights.

The Court below decreed specific performance. It held, however, that it was proper to determine the players' rights. It granted specifice performance upon condition that complainant would exercise one of two options set forth in the decree (p. 77), the first option being to pay the players $75,000 "for the purpose of refunding to the members of the unincorporated association known as the Ferncliffe Golf & Country Club, the respective amounts paid by such members as consideration for life memberships purchased by them as set forth in the pleadings herein (the complainant to be subsequently repaid any portion of said sum of seventy-five thousand ($75,000.00) dollars which may prove to be in excess of the requirements aforesaid * * *", and the second option that it execute a lease to a corporation to be formed, the net effect of which would grant to the players the right to play upon the payment of reasonable greens fees and like charges for the use of the facilities for a length of time measured by the life of the longest liver of 920 members.

The Court ignored the fact that while the Franciscos were holding this legal title in trust for complainant they made a contract with the players under the terms of which the Franciscos agreed to, if they were successful in the litigation, convey to the players at a price of $150,000, or $75,000 more than they were to receive under the contract with Recreation Development Corporation. Upon what principle of law can complainant be denied the benefit of the contract so made by its trustee?

The least complainant is entitled to is a third option (if the rights of the players could be properly fixed in this case, which we deny); that is to say, to adopt the contract between the Franciscos and the players.

It is respectfully submitted that the decree below should be reversed and the record remitted to the Court of Chancery with directions to enter an order striking the players from the record as defendants, and the pleadings filed by them, and granting a decree for specific performance, leaving the determination of the rights of the players to be settled between the players and complainant in appropriate litigation if they cannot agree, or if this Court should determine that the Court below could properly settle the rights of the players in this litigation, a decree granting specific performance giving to complainant the option to adopt the contract made between the Franciscos and the players.

Respectfully submitted,

LIONEL KRISTELLER,
MERRITT LANE,
Of Counsel for Complainant-Appellant
American Plaster Drill Company.

(6763) Pandick Press, Inc., 22 Thames St., New York, U. S. A.

New Jersey Court of Errors and Appeals

Between

American Plaster Drill Company,
a corporation,
Complainant-Respondent,

and

William H. Francisco, *et als.*,
Defendants-Appellants,

and

Recreation Development Company,
a corporation,
Defendant-Respondent.

On Appeal From Court of Chancery.

BRIEF FOR WILLIAM H. FRANCISCO, *ET UX.*, RICHARD S. FRANCISCO, *ET UX.*, AND D. W. DRYDEN AND OTHERS SIMILARLY SITUATED, APPELLANTS.

This is one of three appeals pending from the same decree of the Court of Chancery.

The suit was instituted by a bill (p. 13) for the specific performance of a contract for the sale of real property, filed by the vendor's assignee, under which the prosecution of an ejectment action brought in the Supreme Court by the vendors was enjoined *pendente lite.*

The vendors are William H. Francisco and Richard S. Francisco, brothers, and their wives, who contracted to sell to the defendant Recreation Development Corporation, the contract having been assigned to the complainant, American Plas-

ter Drill Company. Intervening equities were urged in favor of a large group of persons who acquired rights to play golf, etc., upon the lands, and who were impleaded as defendants under the designation "D. W. Dryden and others similarly situated". The Francisco brothers and the group of persons having equitable rights in the land combined their forces below, in opposing the effort of the complainant to secure the specific performance of the contract, and appear jointly in this Court to oppose the modification of that portion of the final decree which dismisses the bill (as to which the other parties are appealing) and to ask for the reversal and setting aside of that portion of the final decree which provides conditions under which it will operate as a decree for specific performance (which is the subject matter of this appeal).

The decree (p. 77) provided for the dismissal of the bill, but only in the event that complainant should fail within thirty (30) days (not twenty (20) days, as erroneously printed in the transcript of the decree) to exercise one of two options created by the terms of the decree, viz: the repayment to the Dryden group of moneys invested by them to the approximate amount of $75,000.00, or the leasing to them of the lands for the period of the lifetime of the last survivor at a nominal rental as a golf links. These appellants contend that the Court of Chancery should not have interposed any conditions upon the dismissal of the bill, and that the options are for divers reasons inequitable and unjust.

The case was fully tried before the late Vice Chancellor Bentley. The record of testimony and written briefs were submitted to him, and he heard oral argument, but died before announcing his decision.

The case was then referred to Vice Chancellor Bigelow, who (counsel consenting) determined the issues upon the records and briefs already submitted, without hearing further evidence or argument.

Statement of Facts.

On June 11, 1924, the Recreation Development Corporation was chartered under the General Corporation Act (Ex. D-3; pp. 107, 191). On the same day a contract in writing was made between that corporation and the Francisco brothers (Ex. C-1; pp. 85, 26) by which the Franciscos undertook to convey to the corporation lands described in the bill and owned by the Francisco brothers

> *"for the purpose of constructing golf links, tennis courts, and the erection of a club house thereon"* (italics ours).

The agreed price was $75,000.00, to be paid $500.00 down, $2,000.00 on December 11, 1924, $2,500.00 on June 11, 1925, $5,000.00 on December 11, 1925, $10,000.00 on June 11, 1926 (at which time title was to pass), and the balance by purchase money bond and mortgage for $55,000.00 to run for five years at six (6%) per cent. The purchaser agreed to pay interest on unpaid balances of the purchase price from April 1, 1925.

The contract provided that

> *"if default be made in the payment of the several sums aggregating Twenty Thousand ($20,000.00) Dollars as above provided, then this contract, at the option of the parties of the first part (the sellers) is to be null and void, and the parties of the first part may retain all the sums paid on account of said purchase price as liquidated damages"* (italics ours).

One J. W. Donaldson was the negotiator in this transaction, and owned and controlled the Recreation Development Corporation, as well as a corporation known as "Ferncliffe Golf and Country Club, Inc." chartered by him on August 26, 1924 (Ex. D-2; pp. 107, 184) under the General Corporation Act.

On July 25, 1924 (Note: this is the date shown by the testimony, p. 92, although it may be in error because the Ferncliffe Golf and Country Club, Inc., had not then been incorporated), a paper purporting to be a lease of this same property, from the Recreation Development Corporation to the Ferncliffe Golf and Country Club, Inc., was executed by Donaldson as president of both corporations (Ex. C-8; pp. 87, 168) by which the latter corporation agreed to pay the taxes and rental of $15,000.00 a year for the property upon pain of forfeiture of the term, which was ten years.

By-laws adopted by the Ferncliffe Golf and Country Club, Inc., provided for the organization of an Association of members of the Club, that is to say, persons who might purchase the life memberships hereafter referred to, which organization was to be purely social in character. All corporate powers were reserved to the directors, who were of course Donaldson's creatures (Ex. D-6, pp. 116, 201).

Approximately 920 of these life memberships were sold by Donaldson and his agents under circumstances which the Court below properly determined to have been a fraud upon the holders of life memberships. The existence of the lease was never disclosed to them; they were never told that a rental of $15,000.00 a year had to be paid but on the contrary were assured that there would never be any annual dues or assessments, but only the greens fees of nominal amount as and when each member actually used the links; they were

assured that the Ferncliffe Golf and Country Club, Inc., had title to the land; that the sale of 1,000 memberships would raise ample funds with which to build the proposed clubhouse, tennis courts, swimming pool, stable and bridle paths, and to extend the existing 9 hole golf course into a fine 18 hole links; and that the greens fees would be sufficient for the upkeep of the whole. The Court determined that these assurances were false and were relied upon by the purchasers of life memberships in making their purchases.

During the summer of 1924, a large number of life memberships was issued. By September, 1924, 300 memberships at $50.00 each had been sold and Donaldson was engaged in selling the next 100 memberships at $100.00 each (Test., p. 136). Yet up to this time he had paid nothing to the Franciscos beyond the initial deposit of $500.00. It was not until December 11, 1924, that he paid the Franciscos the first installment of $2,000.00 (Ex. C-2; pp. 85, 32), and that is the total extent of his payments at any time: the Franciscos have received a total amount of only $2,500.00 on account of their contract (Ex. C-2; pp. 85, 32, 33).

The membership certificates signed by Donaldson certified that the subscriber was

> "entitled (italics ours) *during his lifetime* without further payment on his subscription, to use the *Country Club propery, golf courses, buildings and equipment at West Caldwell,* New Jersey, subject to the by-laws and the rules and regulations of the corporation or of the association of members as the same now are or as they may at any time hereafter be changed, altered or amended."
>
> *"No legal obligation for any future assessment nor for any debt of said association or corporation is assumed by this subscription or the acceptance of this certificate and no charges may hereafter be made upon said subscriber by reason hereof except the daily fees*

or charges for the use of the property, golf courses and equipment of said corporation" (Ex. D-5; pp. 111, 199). (Italics ours.)

Donaldson, through his agents, sold approximately 920 of these life memberships (p. 153; l. 40), falsely representing through his agents and his advertising:

That the Ferncliffe Golf and Country Club, Inc., owned the land outright, and that it was completely paid for.

Testimony of Pitney (p. 114, ll. 1-3):

"He (Donaldson's agent, Lancaster), said that the Ferncliffe Golf and Country Club owned the property. And I asked him if there were other interests, and he said absolutely none."

Testimony of Sury (p. 119, l. 30):

"He (Donaldson's agent, Pike), told me that it (the land) was owned by the Ferncliffe Golf and Country Club and that it was all paid for; it strictly belonged to the Ferncliffe Golf and Country Club."

Cross (p. 120, ll. 21-24):

"Q. And yet he said that the land was all of it paid for? A. Yes, he told me that the Ferncliffe Golf and Country Club owned the land."

Testimony of Heilig (p. 127, l. 25):

"I asked him (Donaldson's agent, Benjamin) who owned it—whose name the title was in—and he said it belonged to the club; that Mr. Donaldson was the President and the organizer and the title of the property was in the name of the Club."

Cross (p. 130, l. 30):

> "Mr. Benjamin's representations to me were that he (Donaldson) was capable of handling it, and that the land was paid for by the 298 members' fees."

Testimony of Strigner (p. 139, l. 12):

> "I says, 'Who owns the property?' He (Lancaster) says, 'The Ferncliffe Golf and Country Club.'"

Cross (p. 146, ll. 15, 28; p. 147, l. 13):

> "I asked who owned the property and they said the Ferncliffe Golf and Country Club, and they owned it outright." * * * "I asked the agent, Bowke, and it was verified by Lancaster, that Donaldson and his associates owned the land. I asked him, 'Do they really own it?' and he said they did."

The membership certificates (Ex. D-18; pp. 127, 220) speak of "the Country Club property, golf courses, buildings and equipment at West Caldwell," language which certainly imports ownership, in the absence of other representations. Mr. Heilig says (p. 134, l. 40) that this is the inference he made from it.

The same inference is the only logical one to be placed upon the advertising. For instance, Exhibit D-9 (pp. 123, 214), a newspaper advertisement is headed, "ANNOUNCING THE FERNCLIFFE GOLF AND COUNTRY CLUB, comprising 157 acres of rare beauty in West Caldwell, N. J.—No DUES—PAY WHEN YOU PLAY, ETC." Under the subheading "A SCENIC WONDERLAND" this advertisement states:

> "The 157 acres that constitute the Ferncliffe Golf and Country Club are situated, etc."

The Franciscos extended the time of payment of the second installment of $2,500.00 with interest and subsequent installments at first until September 11, 1925, then to January 2, 1926, then to March 1, 1926, then to April 1, 1926, and finally to April 20, 1926 (Ex. C-2, pp. 85, 164, 32-36).

Meantime the persons who had purchased life memberships from Donaldson, discovering late in 1925 that all was not as represented, carried on negotiations with Donaldson, which came to nothing (Test. Ebert, pp. 155-157), in an effort to secure title to the property from him. These negotiations came to a head at about Christmas time of 1925. The life members refused to accede to Donaldson's demands for terms which would have yielded him a large profit, whereupon Donaldson, as the Recreation Development Corporation, on January 2, 1926, without notice to the holders of the life memberships, contracted to convey the land to the complainant for $130,000.00, payable $7,000.00 down (which was paid), $23,000.00 in cash on delivery of deed, $70,000.00 by taking subject to a mortgage for that amount, and $30,000.00 by purchase money bond and second mortgage. This contract (Ex. C-3, pp. 86, 165, 36-44) recites (italics ours):

> "Whereas the vendor has had possession of said premises under an agreement of sale *and has leased the same to the Ferncliffe Golf and Country Club, Inc., a corporation of New Jersey, the terms of which lease are known to the party of the second part.*
>
> And whereas a portion of said premises has been laid out and improved by the Ferncliffe Golf and Country Club, Inc., as a golf course, and *said Ferncliffe Golf and Country Club, Inc., has sold to certain persons the right to use said course, subject to daily charges therefor,* and
>
> Whereas by agreement dated September 19, 1925, made by the vendor and said Ferncliffe

> Golf and Country Club, Inc., with Essex Title Guarantee and Trust Company and J. W. Donaldson, *the stock of the vendor and said Ferncliffe Golf and Country Club, Inc., were offered to the persons to whom the privilege of playing golf on said golf course had been granted and sold,* the terms of which agreement are known to the party of the second part, and
>
> *Whereas said members have failed to exercise their rights under said agreement.''*

The conveyance was agreed to be made *subject ''to the lease hereinbefore referred to and to the rights of members of the Ferncliffe Golf and Country Club, Inc., to use said premises under their said memberships as provided and set forth in their certificate of membership and the by-laws of said company.''*

The contract further provided that the purchase money mortgage to be given should contain a release clause, allowing for the release of land fronting on Clinton Road at $5.00 per foot, and of the balance at $500.00 an acre.

The title was to be by warranty deed free from all encumbrances, ''but *subject to the lease hereinbefore referred to and the rights of the members of the Ferncliffe Golf and Country Club, Inc., to use said premises under their said memberships, as provided and set forth in their certificate of membership and the by-laws of said company.''*

On the same date (Jan. 2, 1926), the Recreation Development Corporation executed a so-called ''Assignment'' of the Francisco contract (C-3), which was put in evidence as Exhibit C-4 (pp. 86, 165, 45), and which is as follows:

> ''For value received, the Recreation Development Company does hereby sell, assign, transfer and set over unto American Plaster Drill Company, its successors and assigns, all its right, title and interest of, in and to a cer-

tain contract made between William H. Francisco and Richard S. Francisco, and the said Recreation Development Company, bearing date June 11, 1924.

It being understood that this assignment is to be delivered to the American Plaster Drill Company only in the event of the failure of the said Recreation Development Company to carry out its agreement with the said American Plaster Drill Company, bearing date January 2, 1926, and upon payment to the said Recreation Development Company or its attorneys of the balance of the purchase price due to it from said American Plaster Drill Company, under said contract" (italics ours).

The $7,000.00 deposit paid by the American Plaster Drill Co. at the time this assignment was delivered was in the form of a check to the Recreation Development Corporation, which was endorsed over by the payee to "Robert W. Cromley, attorney for W. H. Francisco" (Ex. C-9, pp. 92, 173). Mr. Cromley disbursed it in the payment of debts incurred by Donaldson (that is, by the Recreation Development Corporation), including unpaid bills for labor and materials on the property in connection with the golf course and unpaid taxes which the company was under obligation to pay by the contract C-1, leaving a balance of $1,600.00, which was paid to the Franciscos on account of a labor bill (Test., p. 95 *et seq.*). No part of this money was received by the Franciscos on account of payments due on their contract C-1, nor was it intended to be so paid.

The owners of life memberships, having failed in their negotiations with Donaldson, and becoming aware of his attempt to sell the land, acting through D. W. Dryden, one of their number (who is also one of these appellants) filed a bill in Chancery (called a petition) in which he set forth

that he was fraudulently induced to purchase a life membership in the club and prayed for an accounting from Donaldson and his two corporations. An order to show cause was made in that suit on the advice of Vice Chancellor Bentley on February 2nd, 1926, returnable February 15, 1926, why a receiver should not be appointed for the affairs of the Ferncliffe Golf & Country Club, Inc., and of the Recreation Development Corporation. On the return of the order to show cause a motion was made to strike the bill, and Vice Chancellor Bentley filed the following memorandum of opinion:

"IN CHANCERY OF NEW JERSEY.

Between
D. W. DRYDEN,
Complainant,
and
JOSEPH W. DONALDSON, *et als.*,
Defendants.

On Motion to Strike
(Not for Print)

April 28, 1926.

Messrs. BUTLER & BUTLER, for the Complainant.

Messrs. SMITH & SLINGERLAND, for the Defendants.

(This memorandum is not to be published in the official or unofficial reports.)

Memorandum of Opinion.

BENTLEY, V. C.

On motion to strike.

A bill of complaint was filed which is denominated a petition, and, in many respects, is inartificially drawn. It is apparently intended as a bill for an accounting, praying also for auxiliary relief by way of injunction and for a receiver. The facts alleged are, that one of the defendants, Donaldson, promoted the Ferncliffe Golf and Country Club, upon a plan of selling memberships therein, for the lives of the respective holders, for the sum of $100 each, whereby the member would become entitled during the term of his life to use of the club facilities, such as the golf course, swimming pool, and others upon the additional payment of a small fee for each occasion upon which the privilege was exercised. That the complainant purchased such a membership, and that many hundreds of other members were secured who have paid in the aggregate therefor $75,000.00. It also is said that representations were made to prospective purchasers that the company would complete a thirty-six hole golf course, construct a swimming pool, a new clubhouse, and such other features as would be necessary to transform it into a modern well-equipped country club. That very little of this promise has been kept.

It is further made to appear that the club, so far as it is operated, is upon leased lands, demised by the defendants, Franciscos, with an option to purchase in favor of the Recreation Development Corporation, another defendant, by whom apparently the land was sublet to the golf company. It is also said that the Recreation Development Corporation has entered into an agreement

with some person other than the golf company to assign such option. There then appear charges of debts and liabilities that have been permitted to accumulate against the golf company, including one judgment that had gone to execution and sale of some of the chattels, but it appears that the chattels had been redeemed before the argument of this motion. Then some charges of fraud and other matters which are not statements of fact but rather arguments which the complainant would have the Court draw from the foregoing allegations, and finally prayers, as indicated above. It is not said in the bill that the complainant sues on behalf of all others similarly situated, but that was unquestionably his intention, and the omission was clearly due to inadvertence. If necessary, an order will be made permitting an amendment to that effect.

Upon the filing of the foregoing, an order was made upon the defendants, requiring them to show cause why they should not be restrained from the further conduct of the two companies named, and why a receiver should not be appointed. Upon the return of the foregoing, an affidavit was submitted which had to be sworn to by the defendant Donaldson. In that, the membership of the complainant was admitted, subject, however, to the provisions of the by-laws of the golf club, but in what way the by-laws are pertinent no attempt has been made to show. It is denied, however, that any fraud had been practiced, and it is virtually admitted that Donaldson controls the destiny of the golf club. It is admitted that the Recreation Development Corporation has sublet to the golf club and has recently entered into a contract to convey to a third party, but it is said, expressly subject to the lease held by the golf club, 'and to the rights of the members of the Association of Members, whatever such rights may be'. The affi-

davit then admits that some debts have accumulated, and that there has been an execution sale which has subsequently been adjusted. The affiant further says that he has no knowledge of any other judgments against the golf club, 'But it is possible that judgment may have been entered by the New York Telephone Company on a small claim which is held against the corporation, and this will be taken care of shortly. There are two or three other debts of the Ferncliffe Golf and Country Club still unpaid, but these will be taken care of shortly'.

It is denied that the complainant is either a creditor or stockholder of either of the defendant corporations, and excepting for a denial of certain allegations of fact in an affidavit annexed to the bill by one Zwern, the rest of the affidavit deals mostly with protestations of innocence and arguments, which should not be there.

I shall refuse to strike out the bill, loosely drawn as it is. I think that the above facts are sufficiently pleaded and spell out a case, if they are true, which calls for the rendering of its assistance by this court. Here is the typical promoter of a scheme acquiring real estate for its consummation, operating upon land held only under a lease, the term of which is not stated, the familiar concomitant of the promoter keeping within his grasp a destiny of the venture to be financed by the money of subscribers, the receipt of a very large sum of money from the public, the failure to carry out the promises made to those whose funds were solicited, and finally such conduct upon the part of the *Deus ex Machina* that his creation appears to be seriously, if not fatally, engulfed in indebtedness. These all appear to me to be badges of a hopeless situation, founded perhaps upon an over-sanguine view which are remediable only if at all by the processes of this court. A failure

to grant relief can only result in the complainant and his associates having swept from them those rights for which they have parted with their money. I consider as trivial and ridiculous the expedient above referred to, namely, that the assignment of the option is to be subject to the rights of the members and consider it to be illuminative of the defendant Donaldson's state of mind when he says—'whatever such rights may be.' He was far more explicit in explaining those rights when he solicited members upon a cash consideration.

It may be that the complainant is neither a creditor nor a stockholder, in the sense of being entitled to demand, under ordinary circumstances, any sum of money from the golf club, but I am not so sure that he is not a creditor in the sense of which Vice Chancellor Stevenson spoke in Hoopes *v.* Basic Company (69 N. J. Eq. 679). At any rate, he has a stake in the venture, and there is every appearance of its being swept away unless relief is afforded. Furthermore, I do not think that this is a proper suit for a statutory receiver, but one for the appointment of an agent of the court under its inherent equity jurisdiction, to hold the subject matter intact until the final decision of this cause, which may result in an opportunity for the members to organize for the purpose of saving the said subject matter and determining whether the company is insolvent or not.

This memorandum has been very hastily dictated and if the defendants, or any of them, take an appeal, I wish to be notified so that I may then file a formal opinion."

No order was entered following the memorandum of the Vice-Chancellor. No process was ever issued in the suit, and no further step was taken in it.

On February 5, 1926, a notice of *lis pendens* was filed in the Clerk's Office of Essex County, purporting to be a notice of the pendency of the last mentioned suit, brought by D. W. Dryden. This notice of *lis pendens* was discovered by counsel for the American Plaster Drill Company some time prior to April 1st, 1926, in searching the title to the premises in question in preparation for the carrying out of the contract of purchase and assignment thereof (See Ex. C-6, p. 166; Ex. C-7, p. 168).

The American Plaster Drill Company refused to perform its contract of purchase unless the notice of *lis pendens* was removed and the Chancery suit brought by D. W. Dryden disposed of (See complainant's bill of complaint, p. 17, and Exs. C-5, C-6 and C-7, pp. 165, 166, 167). The Franciscos refused to make any effort to remove the *lis pendens* and dispose of the Dryden suit, taking the position that since the American Plaster Drill Company had agreed in the contract (C-3) to take the property subject to whatever rights the players might have, and since the Dryden suit was brought to assert rights which he claimed to have as one of the players, the American Plaster Drill Company could not object either to the fact that suit was brought or to the fact that a *lis pendens* was filed; and upon the further ground that since no process had ever issued in the Dryden suit, it was not a pending suit within the meaning of the *lis pendens* act and the notice of the *lis pendens* was therefore a nullity and could be disregarded (See testimony, p. 88).

As a matter of fact, as already stated, although the Dryden suit is still pending, no process has ever been issued therein, even up to the present time.

The negotiations between the American Plaster Drill Company and the Franciscos became dead-

locked on the issue of the *lis pendens,* the American Plaster Drill Company having definitely refused to take title unless the *lis pendens* was first removed and the Dryden suit dismissed. The Franciscos, after waiting for over three months, on July 24, 1926, brought an ejectment action in the Supreme Court to recover the possession of the land, which action is still pending in the Supreme Court, enjoined by a preliminary order made in this suit.

POINT I.

The determination of the Vice Chancellor that Donaldson was guilty of fraud in the sale of the life memberships, that the Recreation Development Corporation and the Ferncliffe Golf & Country Club, Inc., were mere *alter egos* of Donaldson, and that the American Plaster Drill Company stands in the shoes of Donaldson and his two corporations, was fully justified by the facts.

The statements made orally by Donaldson and his agents that the Club owned the property, are supplemented by the printed advertising matter, already referred to, which while not directly asserting such ownership, naturally imply it.

The truth or falsity of representations of ownership by this printed matter and advertising is to be judged in the light of the meaning which the purchasers would reasonably attach to them under the existing circumstances, that is to say, in this case, their natural and ordinary meaning.

Commonwealth Fuel Co. v. *McNeil,* 130 Atl. Rep. 794—103 Conn. 390;
Moncion v. *Bertrand,* 127 Atl. Rep. 371—98 Vt. 332.

Now these representations of ownership were wholly false. The legal title to the property was in the Franciscos. Donaldson's company, the Recreation Development Corporation, had a contract to purchase the property for $75,000.00, upon which there had been paid only $500.00. The second payment of $2,000.00 was not made until December 11, 1924, and the sum of these two amounts, $2,500.00, was all that has ever been paid to the Franciscos on account of the contract. Donaldson, in the person of the Recreation Development Corporation, executed a so-called "lease" of the property to himself, in the person of the Ferncliffe Golf and Country Club, dated July 26, 1924 (Ex. C-8, pp. 87, 168), by which the latter corporation pretended to rent the property from the former at $15,000.00 a year and taxes. This paper was never recorded. None of the purchasers of life memberships had ever heard of it. Its existence was not disclosed in any of the advertising or literature issued by Donaldson, and it was kept secret until its existence was disclosed to the American Plaster Drill Co. (but to no one else) by the reference to it contained in the contract with the complainant upon which this suit is brought. This lease was very apparently made for the purpose of enabling Donaldson, as owner of all of the stock of the Recreation Development Corporation, to secure a large income at the expense of the members, and is a material link in the chain of fraud.

Donaldson was of course bound by the misrepresentations thus made by his agents.

Howard v. *West Jersey & S. S. R. Co.*,
102 N. J. E. 517, aff'd 7 A. R. 294.

The promises made by Donaldson through his agents for the development of the property were false representations.

Glowing accounts were given in the advertising of what was to be done. There was to be a very elaborate club house. There were to be private baths, a stable, bridle paths, tennis courts, a swimming pool, an 18 hole golf course. All these were to come in a short time (Test., p. 114, l. 18).

But none of these things ever materialized. Donaldson knew perfectly well, at the time the promises were made, that they never would materialize, because he (and he alone) was cognizant of all of the facts which are now disclosed by the evidence in this case, and which are such as to demonstrate to any reasonable person the utter impossibility of realization of the promises which Donaldson made. He never intended that the money he took in from the sale of memberships should be used for the purpose of constructing such improvements. Knowing that only $500.00 had been paid on account of the Francisco contract, leaving $74,500.00 to be paid, he knew that the promised improvements could not possibly be paid for from the sale of 1000 memberships.

Nor did he intend to apply any of the money to that purpose. When the contract C-3 was made in January, 1926, he had sold all of the approximately 920 memberships, and there was nothing left but debt. All of the deposit money paid by the complainant went toward paying debts of Donaldson. Is it not perfectly clear that Donaldson was putting into his own pocket, from the beginning, money which he had promised to apply to the building of the club house, and the making of the other promised improvements?

A false promise to do a thing in future with the existing intention not to do it amounts to the fraudulent misrepresentation of an existing fact.

Zuckerman v. *Geller,* 142 Atl. Rep. 344, 6 A. R. 1218.

It is no excuse to say that the players themselves might have investigated further than they did, and so found out the impossibility of performance of the promises made. For one thing, the facts were peculiarly within Donaldson's knowledge, and he was under a corresponding duty to disclose them; and instead of doing so, he misrepresented them.

Perry: *Trusts,* 3rd Ed., Sec. 175.

Moreover, the players were entitled to rely upon the representations of ownership made, and they did rely upon them. They did not know that the property had not been paid for, and they had a right to rely on Donaldson's assurance that it had, and on his promise to apply all the money he got from the sale of memberships in constructing the proposed improvements. If he had so applied the money, and it had been insufficient for the purpose, perhaps he might have been regarded as a visionary, without intent to deceive; but where it is proved, as in this case, that the money was not applied and was never intended to be applied for the purposes for which it was promised to be applied, it amounts to the grossest sort of fraud.

To show that the hoodwinked victim was careless is no inducement for securing the aid of equity in a suit by the fraud doer, or his assignee with notice. Even had the misrepresentations been innocently made, the doctrine of *caveat emptor* cannot be applied, for it is the assignee of the wrongdoer, bound by all the equities against the wrongdoer, who is seeking the aid of this Court. Coming in as it does, in the alleged right of its assignor, it comes with unclean hands.

Baron v. *Buermann,* 142 Atl. Rep. 248,
6 A. R. 1097;
Herder v. *Garman,* 106 N. J. E. 13.

The by-laws devised by Donaldson for the Ferncliffe Golf and Country Club, Inc., were carefully calculated to keep the members from having any voice in the management of the finances, and he was careful not to disclose these by-laws to the members until after they had subscribed.

That the various misrepresentations of Donaldson were actually relied upon by the purchasers of membership certificates, see the testimony of the witnesses (p. 115, l. 19; p. 138, etc., and Exhibits D-9 and D-11 and D-10). As to the representations of Donaldson regarding his ability to construct the proposed improvements with the money to come from the sale of memberships, see Mr. Strigner's testimony (p. 139, etc.), as well as other witnesses, to the effect that these calculations seemed reasonable to them in the way they were proposed by Donaldson's agents. The sale of 920 memberships should have produced enough money, according to the representations made to Strigner. The first 500 memberships would pay for the land, and the second 500 memberships at $200.00 each would pay for the buildings, etc. That is, there would be about $100,000.00 for that purpose. It was represented to him by Donaldson's agent that Donaldson was well qualified to judge the future of the enterprise because of his wide previous experience in similar enterprises, and that his judgment was that the greens fees would amount to a great deal of money (p. 148, ll. 10, 20, etc.). Donaldson did not render any account (although he was asked for it) except the very insufficient account marked in evidence D-31. On his own statement he contracted debts of approximately $30,000.00 (p. 157, l. 1), which were not paid.

The case made is one both of actual and constructive fraud.

> *National Mfgrs. Co.* v. *Bird,* 97 N. J. E. 242, 247.
>
> "Fraud in the sense of a court of equity properly includes all acts, omissions and concealments which involve a breach of legal or equitable duty, trust or confidence, justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another."
>
> *1 Story Eq. Jur.,* Sec. 187;
> *Howard* v. *West Jersey & S. S. R. Co.,* 102 N. J. E. 517, aff'd 7 A. R. 294.

If Donaldson had been selling stock in the Ferncliffe Golf and Country Club, Inc., as a promoter of that corporation, and had made the same representations as he made to the purchasers of life memberships, a court of equity would not have hesitated to hold him as a constructive trustee on the ground of fraud.

> *14 C. J.* 277.

Fraud in the sale of membership certificates by a promoter cannot be distinguished on principle from fraud in the sale of capital stock.

The Court below was amply justified in deciding, as it did, that the Recreation Development Corporation and the Ferncliffe Golf and Country Club, Inc., were mere *alter egos* of Donaldson, and that they were engaged in a scheme to defraud the members (p. 74).

And the Court of Chancery was right in holding that "any title or interest which the Development Corporation (*i. e.,* the Recreation Development Corporation) has in the property is held in trust for the members to the extent that may be necessary to make good the representations

which induced the members to join the club", including "the duty to acquire the land and construct the golf course and other facilities", and that "the members, in equity, have the entire title and interest of the Development Corporation for the term of their joint lives" (pp. 74, 75).

POINT II.

This determination should have led the Court of Chancery to dismiss the bill without conditions.

The Court having held that the complainant stands in the shoes of the Recreation Development Corporation and the Ferncliffe Golf and Country Club, Inc., which corporations were *alter egos* of Donaldson, and that Donaldson was guilty of the frauds charged, it follows, as the Court held (p. 74) that "any title or interest which the Development Corporation has in the property is held in trust for the members to the extent that may be necessary to make good the representations which induced the members to join the Club".

This conclusion necessarily results for the following reasons:

1. The Recreation Development Corporation held the Francisco Contract C-1 upon a constructive trust for the benefit of the players.

While merely a vendee under the contract C-1, Donaldson organized the Ferncliffe Golf and Country Club, Inc., made the pretended lease, and sold the life memberships under the circumstances above detailed, which amounted to a gross fraud upon the players.

Whatever rights Donaldson or his companies had under the contract with the Franciscos, such

contract being assignable, constituted property which is properly the subject matter of a trust.

> "Every kind of valuable property, both real and personal, that can be assigned at law may be the subject matter of a trust. Every kind of vested right which the law recognizes as valuable may be transferred in trust, as a receipt for a medicine, the copyright of a book, a patent right, a trade secret, or growing crops.
>
> "At common law no possibility, right, title, nor chose in action could be granted or assigned to strangers. But in equity the rule is different, and choses in action, expectances, contingent interests, and even possibilities may be assigned, and a valid trust created in them. Equitable reversionary interests stand upon the same ground. Property now owned by the assignor at the time, and not even in *esse,* may be assigned in equity; and a valid trust may be created in a naked power or authority."

Perry: Trusts, 3rd Ed., Secs. 67, 68.

Donaldson took the Francisco contract in the name of the Recreation Development Company, paying only $500.00 down. This $500.00, together with the $2,000.00 subsequently paid by him on account of the purchase price of the land, was repaid to him many times over, from the sale of memberships, a very substantial part of which went to the unjust enrichment of Donaldson. In a very real sense, therefore, it may be said that the players' money went into the land, that the consideration for the contract was in reality paid by them, so that equity will hold Donaldson as a constructive trustee of the contract for their benefit,

> "as where an estate has been purchased and the consideration money paid, but the deed is not taken, equity will raise a trust by construction for the purchaser."

Perry: Trusts, 3rd Ed., Sec. 168.

"Although courts of equity have not made general definitions stating what is fraud and what is not, they have not hesitated to lay down broad and comprehensive principles of remedial justice, and to apply these principles in favor of innocent parties suffering from the fraud of others. These principles, though firm and inflexible, are yet so plastic, that they can be applied to every case of fraud as it occurs, however new it may be in its circumstances. The leading principle of this remedial justice is by way of equitable construction to convert the fraudulent holder of property into a trustee, and to preserve the property itself as a fund for the purpose of recompense."

Perry: Trusts, 3rd Ed., Sec. 170.

If Donaldson had actually taken title to the land, in his own name, it could scarcely be contended that he could have held it free from the trusts which his fraudulent procuring of the money created in those he had duped. He would have been regarded in equity as a constructive trustee.

Pomeroy: *Eq. Jur.,* 3rd Ed., Sec. 1044 *et seq.*

A priori, any interest in the property less than the freehold acquired by Donaldson is held subject to the equities of the players. These equities are comprehended in the general right, enforceable in equity, to have the property or whatever estate or interest therein is owned or controlled by Donaldson subjected to the uses and purposes to which Donaldson falsely represented that it was and would be subjected, so as to place the players as nearly as possible in the situation they would be in if the representations and promises had been true.

Donaldson falsely represented that the land would be available for a golf links during the joint lives of 920 players. Any interest in the land

which Donaldson acquired should accordingly be disposed of so as to assure this continued use.

2. Donaldson's contract with the complainant, C-3, was in fraud of this trust.

Complainant's demand that the notice of *lis pendens* be removed from the record before it would take title was tantamount to an insistment that the Dryden suit be dismissed. In no other way could the *lis pendens* have been removed. But the dismissal of the Dryden bill would have enabled the complainant to secure the land free from the very rights it had agreed to respect and preserve. Indeed, this is what the complainant really wished to have accomplished, because it is apparent from the record that the complainant never had the slightest intention of respecting the players' rights. The contract (C-3) shows on its face, because of the provisions for release of portions of the property from the mortgage to be given, that the purpose of the complainant was to develop the property, and not to maintain it for a golf course any longer than it was obliged to do. Complainant's attitude is shown also by its attorney's declaration (p. 90, l. 30) that if the members did not pay the $15,000.00 a year rent he would put them out, and that they (the complainant) would have to take the risk of having the Court declare the lease invalid, and if they were beaten it was their hard luck. It is shown also by its attorney's suggestion that (p. 106, l. 21) "there is no equitable estate here". "Get it out of Francisco, and then let us fight out these players' rights", and by the question which the complainant's attorney asked of the witness Cromley (p. 91, l. 25), "Now is it not a fact that you conducted yourself throughout this litigation as you have on the stand, in a decisive determination

always to protect the players and never offering me one chance to get the property or to decline it?" Complainant's insistment that the *lis pendens* be removed was clearly intended as a move to force the termination of the players' rights, so that in effect the complainant would take the property [redacted] from those rights. Complainant could not have afforded to buy unless it expected to disregard those rights.

The complainant intends if it gets the land to hold it hostilely to the interests of the players. It is ready to pay a large sum of money for it, hardly so that the players may freely use it for the rest of their lives. Donaldson's intention was to pocket the profit, just as he pocketed the membership fees.

Complainant was on inquiry as to the rights of the players by the recitals of the contract itself. Had complainant's contract been executed and title become vested in it, the players might have enforced the trust upon the complainant even though it had paid full value for the land, because it would have taken with notice.

Perry, Sec. 212.

The only way in which the trust can be adequately executed so far as the property is concerned, is to have it held free and clear for the players' use, and this the Court would have decreed against the complainant at the suit of the players, although it might have paid full value and might be innocent of wrong, because it was on notice.

Perry, Sec. 211, and cases cited.

3. Equity will not enforce the contract, because to do so would be a breach of the trust.

Perry, Secs. 787, 212, and cases cited;
Pomeroy, Specific Performance, Secs. 180, 181A, 447;
Baron v. *Buermann,* 142 Atl. Rep. 248—6 A. R. 1097;
Herder vs. *Garman,* 106 N. J. E. 13.

The whole scheme of Donaldson was fraudulent from the beginning. He purchased the property on long term payments, with a deposit of only $500.00, sold hundreds of life memberships without paying anything further on the contract although he was getting money in from the sale of the memberships, and apparently paying nothing out, for the evidence is that the Seven Thousand ($7,000.00) Dollars deposit money paid by the complainant went to pay debts of Donaldson's companies. It was not until December, 1925, that he paid the first installment to the Franciscos, and all they ever got was $2,500.00, including the $500.00 deposit. Donaldson did not disclose the lease when he sold these memberships. The lease was part and parcel of the scheme. It was executed before any of the memberships were sold; indeed, apparently even before the incorporation of the Ferncliffe Golf and Country Club, Inc. It was not recorded. Its existence was not disclosed to anybody. It called for the payment of taxes and rent of $15,000.00 a year by the Ferncliffe Golf and Country Club, Inc., as lessee to the Recreation Development Corporation as lessor. The Recreation Development Corporation not only had no title to the property but merely held it on a shoestring contract. The stock of the Recreation Development Corporation was entirely owned by Donaldson. In other words, the $15,000.00 a year clear rent would have come to

Donaldson, personally. None of this was disclosed. On the contrary, when he sold the memberships, he assured the players that there were to be no assessments or annual dues, and that the only payments they would be called upon to make were the payments of greens fees, and that these were to be applied to the maintenance of the buildings and golf links, saying nothing whatever about the large rental which he had taken care to provide for himself, and saying nothing about the lease, or the fact that if valid it was made for a ten-year term only, after which time by its terms the possession reverted to the Recreation Development Corporation. What was to become of the right of the members to play *for life* after the expiration of the ten-year term? In order to preserve this right the players would have been obliged to raise money to exercise the option to purchase, contained in the lease, at a large profit to the Recreation Development Corporation, which would have gone to Donaldson by reason of his ownership of all the stock of that company. When the players found out something of what Donaldson was doing, and taxed him with it, he made them an offer which was unsatisfactory to them, because by its terms he would have received a large profit, and the players did not consider that he was entitled thereto. He refers to this in the contract, C-3, by setting forth that he has made an offer and that the players have not seen fit to avail themselves of it, the implication being that he thereby considers himself absolved from any further duty toward the players, and is free to go ahead and sell the property for development purposes, keeping all profits for himself. Donaldson's execution of the contract, C-3, was a fraud on the players, and a part and parcel of the whole fraudulent scheme, the effect of which has been to deprive approximately 920 people of sums

of money aggregating a great many thousands of dollars, no account of which was ever rendered by Donaldson, although the players endeavored to secure an accounting from him.

Donaldson having been guilty of the frauds charged, it follows that to decree performance of the contract, C-3, would be to work a hardship upon the players and indeed would be to lend the aid of the Court toward the carrying out of a fraudulent scheme.

> *Johnson* v. *Hubbell,* 10 N. J. E. 332, 340;
> *Tillotson* v. *Gesner,* 33 N. J. E. 313.

The remedy of specific performance lies within the sound discretion of the Court. The Court is not obliged to grant the relief asked for in any case. The question always is what ought the Court to do, if anything, in the interests of justice.

> *Plummer* v. *Keppler,* 26 N. J. Eq. 481;
> *Johnson* v. *Somerville,* 33 N. J. E. 152;
> *Kutschinski* v. *Thompson,* 101 N. J. E. 649;
> *Degheri* v. *Carobine,* 6 A. R. 290 (Court of Errors and Appeals).

"The remedy of specific performance is not a matter of strict right, but of sound judicial discretion, and will be granted or denied as the justice and right of the particular case shall seem to the Court, on full consideration of the rights and equities of the parties, to require."

> Van Fleet, V. C. in *Ten Eyck* v. *Manning,* 52 N. J. E. 47, approved in *Degheri* v. *Carobine* by our Court of Errors and Appeals, in [redacted], 6 A. R. 290.

And see

> *Baron* v. *Buermann,* 142 Atl. Rep. 248; 6 A. R. 1097.

"Hence we again state what is and always should be fundamental, that no one, however innocent he may be, will be permitted to benefit by the wrongdoing of another, if the result will be to make effective the injury to the person wronged, and it is equitably possible to prevent such a result."

Simpson, J., in *Cameron* v. *Carnegie Trust Co.* in Sup. Ct. of Pa. (Jan. 23, 1928), 292 Pa. 114; 140 Atl. Rep. 768.

Donaldson could not have maintained a suit in this Court contrary to the interests of the players, because he would not be in with clean hands.

Pendleton v. *Goudolf,* 85 N. J. E. 308;
Gluck v. *Rynda Development Co.,* 99 N. J. E. 788, aff'd 100 N. J. E. 554.

The complainant stands in Donaldson's shoes, because it was on inquiry as to the players' rights, and hence it should not be permitted to maintain this suit against the interests of the players.

Condit v. *Bigelow,* 64 N. J. E. 504.

Donaldson's agreement to convey to the complainant was in violation of the trust and for the purpose of making a profit in fraud of the players. Had the conveyance been made, the players could have set it aside. *A priori,* not having been made, the Court should not have made a decree by which the title might become vested in complainant.

Walsh v. *Preston,* 109 U. S. 297; 4 A. L. R. 73;
25 R. C. L., 224, 240, 239;
Perry, Sec. 212;
1 Story Eq. Jur., Secs. 350-381;
Pomeroy, Sp. Perf., Secs. 180, 181a, 447.

To decree performance in this case of the contract, C-1, as modified would be violative of the

whole spirit of the contract. The contract, C-1, called for a conveyance for the express purpose of erecting and maintaining a golf links, club house, etc. The contract, C-3, was made clearly for the purpose of securing the title for development purposes.

Specific performance should not be decreed where to do so would violate the spirit and true intent of the parties to the contract.

> *25 R. C. L.*, 224;
> *Perry, Trusts,* Sec. 30.
> *Parker's Executors* v. *Moore,* 25 N. J. E. 228.

The complainant argued below that because the Franciscos and the players, pending the suit, came to an agreement respecting the property and its use as a golf links in the event of the dismissal of the bill, there must have been some over-reaching or unconscionable conduct on the part of the Franciscos, although the agreement was not arrived at until two years after the suit was started.

That the Franciscos, after they learned of the fraud, were always in sympathy with the players is evident from the testimony of Mr. Cromley (pp. 88-92).

Judge Butler announced (p. 102) at the hearing of February 21, 1928, that the interests of the players and the Franciscos are common interests, and that it was agreed between them that one person should act as counsel for both. The witness Ebert testified that there had been negotiations between them, and an agreement arrived at which had been reduced to writing but not signed. At the last hearing, he testified that in the meantime it had been signed by the Franciscos but not by the players, as that was not considered of any importance. The purpose of it is evident; that is, to protect the players. It was only to take effect

in case of the dismissal of the bill, which would otherwise leave the Franciscos holders of the fee without legal obligation to the players. The Franciscos were not parties to the fraud. The players do not seek any relief against them in the suit. It was entirely proper for the players and the Franciscos after this suit was commenced, to make any agreement they pleased relative to the land, its conveyance, the financing of the reorganized club, compensation to the Franciscos for use of the land since 1924, and all incidental matters, such agreement to take effect in the event of the dismissal of the complainant's bill.

It cannot lie in the complainant's mouth to criticize any such arrangement, freely arrived at by parties free to contract with each other. The doctrine of clean hands applies to the complainant. It is the complainant's suit.

Baron v. *Buermann,* 142 Atl. Rep., 248—6 A. R. 1097;
Gluck v. *Rynda Devel. Co.,* 99 N. J. E. 788, affd. 100 N. J. E. 554.

The complainant is asking the Court of Equity to do something to aid it, and the thing it is after is an unconscionable thing. In effect, it is asking the Court to take property which has been appropriated for the use of a golf club, and to let the complainant take it in order to develop it for a profit, in utter disregard of the rights and interests of the members of the club.

Why is it improper for the defendants to combine in order to defeat such a claim, and in doing so to agree peacefully among themselves for the working out of their mutual interests after the claim is disposed of? Surely, if there were any differences between these defendants, the Court should encourage their friendly settlement out of court. Any such settlement, whether by agreement

or by the judgment of a Court on proper issues framed, is irrelevant to the present issue.

4. If the decree is to stand as a conditional decree for specific performance, the options should be modified to express the trusts above pointed out and should particularly specify the trusts.

Based upon the fraudulent representations, if the players could be placed *in statu quo,* their rights would include the following:

1. The right to play on the whole of the property, for life, without cost other than nominal greens fees.

2. The right to have the whole of the purchase money (other than what is paid to the Franciscos) applied toward the construction of the 36 hole course, club house, swimming pool, etc.

3. The right to have the so-called "lease" decreed to be void.

4. The right to have the greens fees applied to the upkeep of the property.

5. The right to require the complainant to furnish such further moneys as may be necessary to construct the improvements promised by Donaldson, and to maintain them.

6. The right to require that the property be kept unencumbered, taxes paid, and links maintained in good playing condition.

These rights the players have as against Donaldson and therefore as against his assignee or grantee with notice.

The mere recital demonstrates the impossibility of preserving these rights, even approximately, except by dismissing the bill without conditions or options, and allowing the players and the Fran-

ciscos to work out the salvation of the Club between them, as they want to do.

The Vice Chancellor, after working out the option idea in his memorandum, remarks (p. 76):

> "I apprehend that the solution of this controversy above outlined does not do exact justice to the members. The beautiful club house, the swimming pool, etc., promised them are all forgotten. But I cannot devise a practical plan which will more nearly secure their rights."

But why? Their rights will be best subserved by simply dismissing the bill. This is what they want. It is all they ask. It is all the Franciscos ask. It is the only practical, just and equitable solution.

POINT III.

The bill should have been unconditionally dismissed because the notice of *lis pendens* in the Dryden suit did not constitute a valid objection to the title on the part of the Ameriman Plaster Drill Company.

This defense was originally raised by the Franciscos and was not considered by the Vice Chancellor, because, as he remarks in his memorandum (p. 73, l. 37):

> "The Franciscos are anxious only that the rights of the members be protected and, if the decree of the Court accomplishes this end, they are willing, I understand, to waive such defenses as they have to specific performance. They have even instructed their counsel in this cause to appear for the members and they have demonstrated the unity of interest among them."

In making this statement the Vice Chancellor labored under a misapprehension, for while there was in fact the unity of interest between the Franciscos and the players, it was to secure the dismissal of the bill of complaint by the use of all defenses which either of them could equitably urge. There was no intent on the part of either or any of these appellants to waive any defenses, and they should have been considered in their relation to the option provisions of the decree.

1. The complainant by its contract (C-3) agreed to take the title subject *"to the rights of members of the Ferncliffe Golf and Country Club, Inc., to use said premises under their said memberships as provided and set forth in their certificate of membership and the by-laws of said Company"*, the agreement having recited that the privilege of using the land had been sold to certain persons, that an opportunity had been offered to these persons to purchase the stock of the two corporations, and that they had failed to exercise the privileges so extended. By the recitals in this contract, and by the overt use of the property by the players as a golf course, the complainant was put on notice of whatever the rights of the players may have been. There is a conclusive presumption that complainant had actual knowledge of every claim the players might make.

N. J. Title Guarantee & Trust Co. vs. *J. Coll. R. Co.,* 110 Atl. 108; 90 N. J. E. 615;
39 Cyc. 1709, 1710;
Wigmore, Sec. 608;
Atlantic City v. *Pier Co.,* 63 N. J. E. 644;
Schwoebel v. *Storrie,* 76 N. J. E. 466;
Johns v. *Norris,* 27 N. J. E. 485.

Now the notice of *lis pendens* was notice of a suit brought by the players, or one of them, for

the purpose of enforcing those rights; and one of the rights which the players had and subject to which the complainant agreed to take was the remedial right to sue in this Court to enforce whatever substantive rights they might have and to file a notice of *lis pendens* in aid of such suit.

The notice of *lis pendens* was as to the complainant of no other or greater effect on the title than was the complainant's agreement to take subject to the players' rights. It was merely constructive notice to all the world of facts of which the complainant was already expressly on notice. The complainant never was entitled to a deed free and clear of those rights. If it had taken a deed the existence of the rights would have been expressly set forth therein as an encumbrance on the title. Such a deed would have given the complainant no better title if there had been no notice of *lis pendens* that it would have given the complainant with the notice of *lis pendens* in existence.

The complainant was not injured by the existence of the notice of *lis pendens,* because it had in effect agreed to take title subject to the players' right to file it. Hence the notice did not create any greater encumbrance on the land, so far as complainant is concerned, than already existed thereon by virtue of the contract itself.

2. Complainant's demand that the notice of *lis pendens* be removed from the record before it would take title was tantamount to an insistment that the Dryden suit be dismissed. In no other way could the *lis pendens* have been removed (Comp. Stat. 3176, Sec. 7). But the dismissal of the Dryden bill would have enabled the complainant to secure the land free from the very rights it had agreed to respect and preserve. Indeed it is evident that this is what the complainant really sought, because the record shows that the complainant never had the slightest intention of re-

specting the players' rights. It pleads in its bill of complaint that it has a right as against the players to exact a rental of $15,000 a year, together with all of the greens fees (pars. 13, 15) and to require the players to pay all carrying charges and taxes in addition (par. 13) and that these are very valuable rights which constitute the value of complainant's bargain (par. 14). But by the contract C-3, complainant agreed to take subject to the players' rights "to use said premises under their said memberships as provided and set forth in their certificate of membership and the by-laws of said company", that is, to use the property for life on payment of a nominal sum only for greens fees, to be used for the upkeep of the course, and without assessments, and without paying rent or any other expense.

3. The notice of *lis pendens* was null and void as a matter of law, because no process had ever been issued in the Dryden suit, and the Dryden suit therefore never was "pending" within the meaning of the statute.

Haughwout vs. *Murphy,* 21 N. J. E. 118;
aff'd. 22 N. J. E., 545;
White vs. *White,* 61 N. J. E. 629, 634.

4. Regarded as a sub-vendee of the Recreation Development Corporation, complainant had no right to require the removal of the *lis pendens* by the Franciscos, because there was no privity between them.

Vogt v. *Mullen,* 82 N. J. E. 452;
Mechanic v. *Duschaneck,* 99 N. J. E. 86.

Regarded as an assignee of the contract C-1 (assuming that the assignment became operative) complainant still could not require the Franciscos to remove the *lis pendens,* because by the assignment it took only the rights of its assignor, and

subject to all defenses which might be urged against its assignor. It was not an innocent purchaser for value without notice, but took subject to all equities to which the Recreation Development Corporation was subject.

The rights of the players, which the Dryden suit was brought to enforce, are rights created by Donaldson and his two corporations. If there had been no assignment of the contract, C-1, and if there had been no contract, C-3, and if the Recreation Development Corporation had brought suit for specific performance of the contract, C-1, against the Franciscos, it could not have been heard to object to the title because of the existence of the players' rights, or because of a *lis pendens* filed in a suit brought by the players to assert those rights, because the rights arose from the acts of the Recreation Development Corporation.

Strater vs. *Flynn,* 91 Atl. Rep. 591.

It is fundamental that a party to a contract cannot object to a change in the subject matter which has been brought about by his own act. The complainant stands in no better position than its assignor. It is bound by the acts of its assignor, especially where, as in this case, it had actual express notice thereof.

Pomeroy: Sp. Perf. Sec. 487 N.

The complainant argues that while it would have had to take the title subject to the *lis pendens* if the Franciscos had not been parties to the Dryden suit, it is excused from taking the title subject to the *lis pendens* because the Franciscos were made parties defendant. It is hard to grasp the distinction thus sought to be made. We can see that if the players had filed a suit impleading the Franciscos, and had set forth matters therein which had nothing to do with the acts of Donald-

son or his corporations, but which constituted a separate cause of action as against the Franciscos, based upon alleged fraud or unconscionable conduct on the part of the Franciscos, as distinguished from Donaldson, there might be a distinction. But all of the facts set up in the Dryden bill or petition concern the acts of Donaldson and his corporations. There are no facts pleaded in the Dryden bill tending to prove that the Franciscos were guilty of any fraud or unconscionable conduct, such as would give rise to any rights in the players with respect to the land, or as against the Franciscos. The suit was directed against Donaldson and his corporations for an accounting, and the auxiliary relief prayed for (injunction and receiver) was in aid of the accounting suit. The rights set up by the bill were based solely upon the fraud of Donaldson and his corporations. But these were in all respects the same rights as to which the complainant was on notice by the recitals of the contract, C-3. Therefore, the fact that the Franciscos are impleaded in the Donaldson suit is entirely immaterial in considering the effect of the *lis pendens*.

Since the complainant for the reasons above given had no legal right to require the removal of the *lis pendens* as a condition to taking title, it placed itself in the position, by announcing that it would not take the title unless the *lis pendens* were removed, of defaulting upon its contract of purchase. No tender on the part of the Franciscos was necessary.

Ritz Realty Corp. v. *Eypper & Beckmann,* 101 N. J. E. 403, aff'd. 6 A. R. 1023;
Shinn v. *Roberts,* 20 N. J. L. 435;
Brown v. *Norcross,* 59 N. J. E. 427;
Oakey v. *Cook,* 41 N. J. E. 350;
Maxwell v. *Pittinger,* 3 N. J. E. 156.

Since this suit is for the specific performance of the contracts, no rescission was required to be made by the Franciscos.

Baron v. *Buermann,* 142 Atl. Rep. 248, 6 A. R. 1097.

But in fact the Franciscos did rescind, after waiting for upwards of three months, on the ground of the breach of the contract by complainant. The election to rescind was exercised by the institution of the ejectment action on July 24, 1926.

The institution of this action amounted to the legal exercise of their election to rescind, and was, of course, sufficient notice of that election.

Black: *Rec. and Canc.,* Par. 576.

The Recreation Development Corporation defaulted in the ejectment suit. It has never claimed, and does not now claim, that the Franciscos were not entitled to rescind. On the contrary, its answer admits that it defaulted on the contract, having been forced to do so by complainant's default on the contract C-3.

Now this admission by the Recreation Development Company binds the complainant, if it be regarded as a sub-vendee, for the privity was between the Recreation Development Corporation and the Franciscos. And the admission is significant also if the complainant be regarded as an assignee of the contract C-1, because the admitted default by the Recreation Development Corporation was caused by complainant's default on the contract C-3. The complainant cannot take advantage of its wrong to assert that the condition of the assignment was satisfied by the default of the Recreation Development Corporation.

Having defaulted on its contract of purchase, the complainant cannot have specific performance.

Thommessen v. *Absecon Land Co.,* 98 N. J. E. 696.

Complainant at all times prior to the hearing insisted that it was entitled to the removal of the *lis pendens* as a condition of its accepting title (Bill, par. 9; Exhibits C-5, 6, 7). But the position taken by it at the hearing was that it ought to be allowed to have the title subject to the *lis pendens,* and this is the effect of the decree if either option be exercised. But this reversal of front came too late; time became of the essence of the agreement when the final date for closing was fixed for April 20, 1926, following several earlier extensions.

Barry v. *Ruskin,* 99 N. J. E. 730, affd. 100 N. J. E. 557.

Still the Franciscos did not take immediate advantage of this situation, but waited more than three months before bringing ejectment. During all that time the complainant made no move. It did not show itself "desirous, prompt and eager to perform." It maintained the arbitrary stand that it was entitled to the land free from the *lis pendens.* At the final hearing it should have been forced to stand or fall in that position, for to twist the case at that late date into one for the conveyance of the land *subject* to the *lis pendens* was to admit that on the day fixed for closing and for more than a reasonable time thereafter the complainant was *unwilling,* though able, to perform.

Cohen v. *Miller,* 97 N. J. E. 440;
Barry v. *Ruskin,* 99 N. J. E. 730, affd. 100 N. J. E. 557.

In order to entitle the complainant to a decree of specific performance, it must have been "ready, desirous, prompt and eager to perform" on the day fixed, which is "always an indispensable condition to invoking equity's extraordinary jurisdiction of specific performance".

B. & B. Inv. Co. v. *Kaufmann*, 100 N. J. E. 411.

"Specific performance may be ordered if the grantor can give good title at the time of the decree; but this grace is not granted to one who was able but unwilling to perform at the time fixed by the contract."

Kobrin v. *Drazin*, 97 N. J. E. 400.

POINT IV.

The complainant's bill should have been dismissed because of the statute of frauds.

The complainant does not by its bill clearly indicate whether it seeks relief on the theory that it is a sub-vendee, or on the theory that it is an assignee.

Regarded as a sub-vendee, there is no privity between the complainant and the Franciscos, and therefore it cannot directly enforce the original contract.

Mechanic v. *Duschaneck*, 99 N. J. E. 86;
Wirtz v. *Guthrie*, 81 N. J. E. 271;
Vogt v. *Mullen*, 82 N. J. E. 452.

It is suggested by the Vice Chancellor in *Mechanic* v. *Duschaneck*, that a sub-vendee may sometimes succeed to the rights of his sub-vendor, as against the owner, if the sub-vendee has an equity which he is entitled to enforce. There can be no serious contention in this case that there are any equities in favor of the complainant, such as would enable it to maintain that it should be placed in the shoes of its sub-vendor. It was not defrauded by any act or misrepresentation of its sub-vendor. It has not been imposed upon in any wise by the Franciscos.

If the complainant relies upon the so-called assignment, there are two difficulties which it cannot overcome. In the first place, that assignment was conditional. By its terms it was not to be delivered until two conditions were fulfilled.

The first condition was that the assignment should not be delivered until and unless the Recreation Development Company should be guilty of a breach of its contract, C-3, with the complainant. It is not contended that the Recreation Development Corporation was guilty of a breach of this contract. The complainant does not claim that it ever made a tender to the Recreation Development Corporation, or ever asked it for a conveyance. At the best, the complainant can claim that it was entitled to a conveyance from the Recreation Development Corporation only on the theory that the complainant had a legal right to have the *lis pendens* removed, and that the Recreation Development Corporation refused to remove it. There is no proof in the case of any such demand or refusal, but assuming that such a demand was made, then for the reasons above stated, it was properly refused by the Recreation Development Corporation, for it was not the legal duty of that corporation to remove the *lis pendens* any more than it was the legal duty of the Franciscos to remove it.

The second condition to be performed before the assignment should take effect in delivery, was that the advance in price between the two contracts, C-1 and C-3, should be first paid to the Recreation Development Corporation. This, of course, was never done. The money was not even tendered. The express terms of the contract are that it shall not be delivered until and unless the two conditions are complied with. Hence it is submitted that the assignment never became operative and that the complainant cannot rest upon

the theory that it is an assignee of the contract, C-1.

The so-called assignment in this case is not a valid assignment in writing, not only because it never took effect as above shown, but because if it had taken effect, it would not in equity have entitled the complainant to a conveyance of the title free and clear of any of the players' rights; but by the contract, C-1, the Franciscos were obligated to convey the title free and clear, and not subject to any rights. In other words, the obligation of the Franciscos cannot be reconciled with any conceivable right of the complainant. This is important because under the contract, C-1, the Franciscos were to take back in part payment a purchase money mortgage. If they had conveyed subject to the players' rights, the mortgage taken back by them would also have been necessarily subject thereto, so that instead of a mortgage which would have been a lien on unencumbered land, the mortgage would have been subject to the rights of the players to the same extent as the title itself. The Franciscos were entitled to have a mortgage exactly in accordance with the contract, C-1, and could not be forced to take any other sort of a mortgage.

Kutschinski v. *Thompson,* 101 N. J. E. 649.

If the so-called assignment can be considered a valid instrument, it does not operate as an assignment of the whole fee because the complainant is on its own showing not entitled to the whole estate. It can only operate, if at all, as an assignment of a naked legal title to the land, reserving to the players the whole beneficial estate. As assignee, under an assignment of a partial interest in the lands, T cannot sue alone for the enforcement of the contract, because a contract

for land cannot be enforced piece-meal. Neither the players nor the Recreation Development Corporation sought in this suit to enforce the Francisco contract. The complainant cannot do so alone.

McCotter v. *Lawrence,* 4 Hun 107; 6 Thomps. & C. 392;
Lord v. *Underdunk,* 1 Sanf. Ch. 46;
36 Cyc. 760, 1667.

What complainant seeks in effect to do is to have this Court modify the terms of the original Francisco contract C-1 to conform to the complainant's contract C-3, and then to enforce the contract as thus reformed. This it cannot accomplish because of the Statute of Frauds.

Wirtz v. *Guthrie,* 81 N. J. E. 271;
Vogt v. *Mullen,* 82 N. J. E. 452.

The decree should be reversed so far as the options are concerned, and affirmed as an unconditional decree dismissing the bill.

Ten Eyck v. *Manning,* 52 N. J. E. 47.

Respectfully submitted,

DOUGAL HERR,
Of counsel with William H. Francisco, *et ux.,* Richard S. Francisco, *et ux.,* and D. W. Dryden and others similarly situated.

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Petition on Appeal.

(Filed July 23, 1930.)

New Jersey Court of Errors and Appeals

Between: AMERICAN PLASTER DRILL COMPANY, a corporation, Complainant-Appellant, *and* WILLIAM H. FRANCISCO, *et al.*, Defendants-Respondents.	On Appeal from the Court of Chancery. Petition on Appeal.

To the Honorable the Court of Errors and Appeals in the Last Resort in All Causes:

The petition of the American Plaster Drill Company, the complainant-appellant in the above entitled cause, respectfully for its petition on appeal, shows:

1. The appellant finds itself aggrieved by a final decree made in the Court of Chancery of New Jersey by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, on the advice of the Honorable John O. Bigelow, one of the Vice-Chancellors, bearing date the thirtieth day of June, Nineteen Hundred and Thirty, in a certain cause in said court pending wherein the American Plaster Drill Company, a corporation, is complainant, and William H. Francisco, *et al.*, are defendants; in that, said decree adjudges that the bill of complaint filed in the Court below be dismissed, unless within thirty days after the thirtieth day of June, Nineteen Hundred and Thirty, the complainant file a written consent or election accepting either one or the other of the following options and agreeing to abide by and

perform the respective conditions attached thereto, to wit:

"1. If the complainant shall agree to pay in cash within a time to be fixed by the Court, to a Master to be designated by the Court, the sum of Seventy-five Thousand ($75,000.00) Dollars, for the purpose of refunding to the members of the unincorporated association known as the Ferncliffe Golf & Country Club, the respective amounts paid by such members as consideration for life memberships purchased by them, as set forth in the pleadings herein (the complainant to be subsequently repaid any portion of said sum of Seventy-five Thousand ($75,000.00) Dollars which may prove to be in excess of the requirements aforesaid), and will agree to comply with the requirements of the contract of sale between the defendants, Franciscos, and the defendant, Recreation Development Corporation, and the subsequent assignment thereof and the new contract of sale between the Recreation Development Corporation and Complainant, then this decree, so far as it orders a dismissal of the bill, shall be without force and effect, and a decree may be entered in lieu thereof, on notice, decreeing specific performance of the said contracts upon the conditions hereinabove mentioned.

2. If the said complainant will agree to comply with the requirements of said contract and assignment and to execute and deliver to a corporation to be formed, in which said members shall have equal rights, or to trustees for said members, or to such other designated person or persons as the Court may select, a lease of all of the lands and premises described in the pleadings for the term of the joint lives of the said members, approximately nine hundred twenty (920) in number, upon payment by way of rental of reasonable greens fees and like charges for the use of the facilities that may be provided at complainant's expense upon said premises (this Court to settle from time to time what

shall be considered reasonable greens fees and like charges), which said greens fees and like charges shall be applied first to the payment of interest on any mortgage or mortgages upon said premises, taxes thereon and upkeep of the property, any excess of said sum after the payment of such charges to be paid over to the lessor or its assigns, and upon terms providing that the said complainant shall provide upon said premises such facilities from time to time for the use of such members as the Court shall determine, then this decree so far as it orders the dismissal of the bill of complaint, shall be without force and effect, and a decree may be entered in lieu thereof, on notice, decreeing specific performance of the said contracts upon the conditions hereinabove mentioned."

Petitioner appeals from the aforesaid decree on the ground that the same is erroneous, in that:

(a) It adjudges that the complainant is not entitled to the relief prayed for, but dismisses the bill of complaint, unless the said one or the other of the aforesaid options are accepted by the complainant,

(b) That the contract in question should have been specifically enforced by a decree of the Court of Chancery.

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

Dated, July 22, 1930.

LIONEL P. KRISTELLER,
Solicitor of Appellant.

MERRITT LANE,
Of Counsel.

A True Copy
JOSEPH F. S. FITZPATRICK
Clerk

Notice of Appeal.

(Filed July 3, 1930.)

IN CHANCERY OF NEW JERSEY.

61-499.

Between

AMERICAN PLASTER DRILL COMPANY, a corporation,
Complainant,

and

WILLIAM H. FRANCISCO, *et al.*,
Defendants.

On Bill, Etc.
Notice of Appeal.

To William H. Francisco, et al., Defendants.

Sirs:

The complainant, American Plaster Drill Company, hereby appeals from the Final Decree made in the above entitled cause on June 30th, 1930, and from the whole and every part thereof to the Court of Errors and Appeals, and the last resort in all causes. The aforesaid decree was made by the Chancellor, on the advice of Vice-Chancellor Bigelow.

Dated: July 2, 1930.

Yours, etc.,

LIONEL P. KRISTELLER,
Solicitor for and of counsel
with Complainant.

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

MERRITT LANE,
Of counsel with Complainant.

Petition of Appeal.

(Filed July 24, 1930.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between AMERICAN PLASTER DRILL COMPANY, a corporation, Complainant-Appellee, *and* WILLIAM H. FRANCISCO, *et al.*, Defendants-Appellees, *and* RECREATION DEVELOPMENT COMPANY, a corporation, Defendant-Appellant.	On Appeal from the Court of Chancery. Petition of Appeal.

To the Honorable the Court of Errors and Appeals in the Last Resort in All Causes:

The petition of Recreation Development Company, the defendant-appellant in the above entitled cause, respectfully shows that your petitioner finds itself aggrieved by a final decree made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, on the advice of the Honorable John O. Bigelow, one of the Vice-Chancellors, bearing date June 30, 1930, in a certain cause in said Court pending wherein the American Plaster Drill Company, a corporation, was complainant and William H. Francisco and others were defendants, in that said decree adjudges that the bill of complaint filed in the Court below be dismissed, unless

within thirty days after June 30, 1930, the complainant should file a written consent or election accepting either one or the other of the two options provided for in said decree.

Petitioner appeals from the said decree on the ground that the same is erroneous in that:

(a) It adjudges that the complainant is not entitled to the relief prayed for, but dismisses the bill of complaint unless one or the other of the aforesaid options are accepted by the plaintiff.

(b) That the contract in question should have been specifically enforced in accordance with its terms upon the complainant complying with the terms of said contract and with the terms of the assignment thereof made by your petitioner to the complainant, by a decree of the Court of Chancery.

(c) While the decree appealed from does not specifically adjudge your petitioner guilty of fraud, yet as it was based upon the memorandum of the learned Vice-Chancellor filed in said suit in which he found as follows: "I find that the Development Corporation and the Golf Company were mere *alter egos* of Davidson, and that with him they engaged in a scheme to defraud the members," your petitioner appeals from the whole and every part of said final decree on the ground that such finding of the said Court was erroneous and was contrary to the evidence and the law.

(d) That said decree was based upon the memorandum of the learned Vice-Chancellor filed in said suit in which he found as follows: "Any title or interest which the Development Corporation has in the property is held in trust for the

members to the extent that may be necessary to make good the representations which induced the members to join the Club:" and also "The practical effect of the foregoing is that the members, in equity, have the entire title and interest of the Development Corporation for the term of their joint lives." Your petitioner appeals from the whole and every part of said final decree on the ground that such findings of the said Court were erroneous and were contrary to the evidence and the law.

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

Dated July 24, 1930.

SMITH & SLINGERLAND,
Solicitors of Recreation Development
Company, Defendant-Appellant.

Notice of Appeal.

(Filed July , 1930.)

IN CHANCERY OF NEW JERSEY.

Between

AMERICAN PLASTER DRILL COMPANY,
Complainant,

and

WILLIAM H. FRANCISCO, *et als.*,
Defendants.

On Bill, &c.
Notice of Appeal.

The defendant, Recreation Development Company, hereby appeals from the final decree made by the Chancellor on the advice of Vice-Chancellor John O. Bigelow in the above entitled cause on June 30, 1930, and from the whole and every part thereof to the Court of Errors and Appeals in the Last Resort in All Causes.

Dated, July 3, 1930.

SMITH & SLINGERLAND,
Solicitors for and of Counsel with defendant, Recreation Development Company.

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

ARCHIBALD F. SLINGERLAND,
Of Counsel with Defendant, Recreation Development Company.

Notice of Appeal.

(Filed July 10, 1930.)

IN CHANCERY OF NEW JERSEY.

61-499.

Between

AMERICAN PLASTER DRILL COMPANY, a corporation, Complainant,

and

WILLIAM H. FRANCISCO, *et als.*, Defendants.

On Bill, Etc.
Notice of Appeal.

To American Plaster Drill Company, a corporation, complainant; and to Recreation Development Corporation, a corporation, defendant.

Sirs:

The defendants, William H. Francisco, Mary F. Francisco, his wife, Richard S. Francisco, Mary A. Francisco, his wife, and D. W. Dryden and others similarly situated, hereby appeal from that part of the final decree made in the above entitled cause on June 30th, 1930, which provides that that portion of said decree which dismisses the bill of complaint shall be without force and effect in the event that the complainant shall exercise either one of the options provided for in said decree, and from that portion of said decree which provides certain options in favor of the complainant, to the Court of Errors & Appeals of the last resort in all causes; the aforesaid de-

cree having been made by the Chancellor on the advice of Vice-Chancellor Bigelow.

Dated: July 10, 1930.

Yours, etc.

DOUGAL HERR,
Solicitor for and of counsel with defendants, William H. Francisco, Mary F. Francisco, his wife, Richard S. Francisco, Mary A. Francisco, his wife, and D. W. Dryden and others similarly situated.

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

DOUGAL HERR,
Of Counsel with defendants, William H. Francisco, Mary F. Francisco, his wife, Richard S. Francisco, Mary A. Francisco, his wife, and D. W. Dryden and others similarly situated.

Petition of Appeal.

(Filed July 23, 1930.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

AMERICAN PLASTER DRILL COMPANY, a corporation,
Complainant-Appellee,

and

WILLIAM H. FRANCISCO, MARY F. FRANCISCO, his wife, RICHARD S. FRANCISCO, MARY A. FRANCISCO, his wife, and D. W. DRYDEN and others similarly situated,
Defendants-Appellants,

and

RECREATION DEVELOPMENT CORPORATION, a corporation,
Defendant-Appellee.

On Appeal from the Court of Chancery.

Petition of Appeal.

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

The petition of William H. Francisco, Mary F. Francisco, his wife, Richard S. Francisco, Mary A. Francisco, his wife, and D. W. Dryden and others similarly situated, the appellants in the above entitled cause, respectfully shows that your petitioners find themselves aggrieved by a final

decree made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date the 30th day of June, 1930, in a certain cause in said Court of Chancery wherein the said American Plaster Drill Company, a corporation, was complainant, and the said William H. Francisco, Mary F. Francisco, his wife, Richard S. Francisco, Mary A. Francisco, his wife, D. W. Dryden and others similarly situated, and Recreation Development Corporation, were defendants, in this respect, to wit, that the said decree adjudges and decrees that that portion of said final decree which dismisses the bill of complaint shall be without force and effect in the event that the complainant shall exercise either one of the two options provided for in said decree.

And petitioners appeal from the final decree of the Chancellor which decrees aforesaid, upon the ground that same is erroneous because the said decree should have dismissed the bill of complaint without condition, and because it should not have provided any options whatsoever in favor of the complainant, and on the ground that the option first decreed, to wit, the payment of the sum of Seventy-five thousand ($75,000.00) Dollars to a Master to be designated by the Court, is not equitable and just to these appellants, nor justified by the facts or the law, and that the second option decreed in said final decree is likewise unjust and inequitable to the appellants, and is not justified by the facts or the law.

Petitioners therefore pray that the said decree of the said Chancellor may be, in the particulars aforesaid, reversed, set aside and for nothing holden, and that insofar as the said final decree adjudges and decrees the dismissal of the bill of

complaint, the same is agreeable to equity and should be affirmed by this Court; and that petitioners may have such other relief in the premises as to this Honorable Court shall seem proper.

DOUGAL HERR,
Solicitor for and of Counsel with Appellants.

Bill of Complaint.

(Filed August 9, 1926.)

IN CHANCERY OF NEW JERSEY.

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

The complaint of the American Plaster Drill Company, a corporation of the State of New York, having its principal place of business in the Borough of Brooklyn, County of Kings, State of New York, complaining of the defendants, says:

1. That heretofore on the eleventh day of June, 1924, the defendants, William H. Francisco, Mary F. Francisco, his wife, Richard S. Francisco, and Mary A. Francisco, his wife, entered into a written agreement with the Recreation Development Corporation, a New Jersey corporation, for the sale of certain lands and premises in the Borough of West Caldwell, in the County of Essex, in accordance with a written agreement, a copy of which is hereto annexed, marked Schedule A, and hereby expressly referred to as if the same were herein set forth fully and at length.

2. That under and by virtue of said agreement, in consideration of Recreation Development Corporation agreeing to pay to the defendants, William H. Francisco, Mary F. Francisco, his wife, Richard S. Francisco, and Mary A. Francisco, his wife, the sum of $75,000 as set forth in said agreement, said defendants, William H. Francisco, Mary F. Francisco, his wife, Richard S. Francisco, and Mary A. Francisco, his wife, agreed to convey the property by a full covenant and warranty deed conveying to the said Recreation Development Corporation or its assignees the fee simple of said premises free and clear of all encumbrances except as expressly set forth in the said agreement.

3. That thereafter the said Recreation Development Corporation paid or caused to be paid to the said William H. Francisco and Richard S. Francisco the payments agreed to be made under and pursuant to the agreement, Schedule A hereto annexed, and on the eleventh day of June, 1925, the said defendants, William H. Francisco, Mary F. Francisco, his wife, Richard S. Francisco, and Mary A. Francisco, his wife, entered into a further agreement with the said Recreation Development Corporation, a copy of which is hereto annexed and made part hereof, marked Schedule B, and hereby referred to as if herein set forth fully and at length, wherein and whereby the payment due on June 11, 1925, of $2,500 was extended so that said payment might be made on or before September 11, 1925, and reaffirmed all of the agreements contained in the contract attached hereto, marked Schedule A, and said payment was thereafter duly made, so that the said defendants, William H. Francisco and Richard S. Francisco received $2,500 and interest on account

of the $20,000 in cash agreed to be paid under and pursuant to said agreement.

4. That thereafter and on the second day of January, 1926, the said Recreation Development Company entered into an agreement with the complainant wherein and whereby the said defendant, Recreation Development Corporation, sold, transferred, and assigned all of its rights in and to the aforesaid contract of June 11, 1924, to the complainant, and the said William H. Francisco and Richard S. Francisco approved and consented to the said assignment and sale of said agreement, and the said complainant did, on the second day of January, 1926, pay to the Recreation Development Corporation the sum of $7,000 in cash, to be paid on account of the purchase price of the lands mentioned in the said agreement, marked Schedule A, and which said deposit of $7,000 was immediately endorsed, transferred and signed over and delivered to Robert W. Cromley, who was present and appeared with the said defendants, William H. Francisco and Richard S. Francisco, at the making and execution of said assignment and the agreement hereinafter referred to, and acted as attorney for the said Franciscos at the time of the sale and transfer of the agreement marked Schedule A.

5. On the same day the said Recreation Development Corporation entered into two agreements with the complainant, in one of which agreements said Recreation Development Corporation agreed in writing to convey to the complainant, the premises described in the exhibit marked Schedule A in consideration of the complainant agreeing to pay to the Recreation Development Corporation the sum of $130,000, a copy of which

agreement is hereto annexed, marked Schedule D, and herein referred to as if set forth fully and at length. The other agreement entered into between the said complainant and the defendant, Recreation Development Corporation was an actual assignment of said contract marked Schedule A, a copy of which assignment is hereto annexed and marked Schedule E, and herein referred to as if set forth fully and at length.

6. That at the time the said defendants, William H. Francisco, and Richard S. Francisco, received by endorsement the $7,000 in cash paid by the complainant on account of the purchase price of the lands and premises herein set forth, making a total of $12,000 on account of the contract marked Schedule A, the said Franciscos, in consideration of the payment of the said deposit of $7,000 by the complainant to the Recreation Development Corporation and the payment of said deposit of $7,000 to them as a further payment on account of the purchase price, entered into an agreement with the said Recreation Development Corporation, a copy of which is hereto annexed and marked Schedule C and herein referred to as if set forth fully and at length, wherein and whereby the said Franciscos extended the time for the payment of the third payment required to be made to them under and pursuant to the agreement dated June 11, 1924, Schedule A hereto annexed, to the first day of March, 1926, at which time title was to pass and the original agreement (Schedule A) was modified so that the amount of the purchase money mortgage to be accepted by the defendants, Franciscos, at the passing of title was to be $70,000 instead of $55,000.

7. That thereafter the complainant caused a search of the property to be made by the Fidelity Union Title Mortgage and Guaranty Company of the City of Newark, which search disclosed that on February 5, 1926, a *lis pendens* was filed against the said property, giving notice of suit then pending between C. W. Dryden, complainant, and Joseph W. Donaldson, *et al.*, defendants, and that the said Richard S. and William H. Francisco were defendants in said suit, and that said suit related to the title of the property mentioned in Schedule A hereto annexed.

8. That prior to the time set for the passing of title, to wit, on March 1, 1926, the agreement annexed hereto and marked Schedule C, extending the time of closing to March 1, 1926, was further extended by the defendants Franciscos to the first day of April, 1926, and on said day, the said *lis pendens* not having been removed and all of the said defendants having been advised that said *lis pendens* was a lien against the said property, the said defendants, Franciscos, consented and assented in writing that the time of closing was further extended to April 20, 1926.

9. That on the said 20th day of April, 1926, and at all times thereafter, the complainant was ready, able, and willing to carry out the terms of all the agreements hereto annexed, but the said defendants Franciscos were and still are unable to convey the said lands and premises by a full warranty deed because of the said *lis pendens* upon the said property, and said *lis pendens* has not been removed from the record to the date of the filing of this bill.

10. That the complainant has often requested said defendants William H. Francisco, Richard

S. Francisco, and The Recreation Development Corporation, to deliver their and its deed in accordance with the terms of said contracts, and the said defendants have utterly failed and refused so to do, although the said complainant has in all respects fulfilled its part of said contract on its part to be performed.

11. That thereafter and on or about the twenty-fourth day of July, 1926, the defendants William H. Francisco and Richard S. Francisco commenced an action in the New Jersey Supreme Court, Essex County, by which the plaintiffs therein seek to eject the said Recreation Development Corporation and the Ferncliffe Golf & Country Club, Inc., from the lands herein described and now under contract of sale to this complainant.

12. That your complainant has agreed (see Schedule D) to take a deed to the said lands and premises subject to the lease of the Ferncliffe Golf & Country Club, Inc., and subject to the rights of its members, and in the event that said ejectment suit is permitted to be continued to the entry of judgment therein, the said lands and premises will be vacated and there will be no tenants upon the said premises, and the complainant will be deprived of a large annual income therefrom and the value of the property will be materially decreased.

13. That the said lands and premises consist of 157 acres of uncultivated ground which the said tenant, the Ferncliffe Golf & Country Club, has improved by the building of a large and beautiful golf course and the said lease provides that the said tenant shall maintain the said ground as a golf course and shall pay all the taxes upon

the property, and in addition thereto shall pay an annual rental of $15,000 a year.

14. That your complainant alleges that if the said suit at law is permitted to continue, it will suffer irreparable loss and damage in that said lands will not be improved and protected and the said lands cannot be readily rented, and the income thereon amounting to $15,000 a year, will terminate.

15. That said golf club is used by a large number of persons every week day and on Sundays and the income received for the use of said course by the players thereon amounts to a very large sum per week, and the complainant alleges that the ejectment suit heretofore referred to has been commenced and is being continued for the purpose of preventing your complainant obtaining the title to said property, and depreciating the value of said land so that the complainant will be defeated and deprived of its bargain and the rights under its contract.

16. That your complainant alleges that it is absolutely necessary that the entire property be preserved during the pendency of this litigation so that in the event that the complaint is successful, and a decree of specific performance is entered in this cause, it will receive a deed for the premises in the same condition in which they were contracted for; together with the valuable lease-hold and also the rents, issues, and profits derived therefrom, and that in order that the lands and premises may be preserved, a receiver or receivers of this Court should be appointed to collect the rent, issues, and profits therefrom and maintain the property during the pendency of this suit.

YOUR COMPLAINANT IS WITHOUT ADEQUATE REMEDY IN THE COURTS OF LAW, AND THEREFORE PRAYS:

1. That the defendants William H. Francisco, Mary F. Francisco, his wife, Richard S. Francisco, and Mary A. Francisco, his wife, The Recreation Development Corporation, may answer this bill of complaint and each and every statement therein made.

2. That the said defendants and each of them be compelled and decreed to convey the said lands and premises to the complainant therein and to specifically perform each and every the terms and conditions of the agreements and contracts herein referred to and hereto annexed, or, in the alternative, that the said complainant be decreed to have a lien upon the said premises for the amount paid on the said contract on account of the purchase price of the said lands and premises and for its costs and disbursements in that behalf and that the said defendant be decreed to pay said lien or, upon their failure to do so, that the said lands and premises be sold to pay and satisfy the said lien.

3. That a receiver or receivers be appointed to collect the rents, issues, and profits of the said lands and premises pending final hearing of this Court, and that the said receiver or receivers be authorized to protect and preserve the subject matter of this litigation.

4. That the suit or proceeding now pending in the New Jersey Supreme Court wherein William H. Francisco, *et al.*, are plaintiffs and Recreation Development Corporation, *et al.*, are defendants be perpetually stayed and enjoined and the parties thereto restrained and enjoined from taking any further proceedings therein.

5. That a writ or writs of subpoena may issue out of this Court commanding the said defendants William H. Francisco, Mary F. Francisco, his wife, Richard S. Francisco, and Mary A. Francisco, his wife, and the Recreation Development Corporation, to answer the bill of complaint and to abide by and perform the said order or decree as the Chancellor may think just and proper in the premises.

And your complainant will ever pray.

LIONEL P. KRISTILLER,
Solicitor for and of Counsel
with Complainant.

Dated, August 9, 1926.

Affidavit of Michael Tannenbaum.

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

MICHAEL TANNENBAUM, being duly sworn according to law, deposes and says that he is the President of the American Plaster Drill Company, the complainant in this cause; that he has read the foregoing bill of complaint and knows the contents thereof, and that the same is true according to the best of his knowledge and belief.

1. That on the eleventh day of June, 1924, William H. Francisco and his wife and Richard S. Francisco and his wife made a written agreement with the Recreation Development Corporation to sell to them certain lands and premises in the Borough of West Caldwell, in the County of

Essex, as more particularly described in Schedule A hereto annexed.

2. That the purchase price for the said lands was $75,000 and the property was to be conveyed by a full covenant and warranty deed conveying to the Recreation Development Corporation or its assigns the fee simple to said premises free and clear of all encumbrances except those expressly set forth in the agreement.

3. That the Recreation Development Corporation paid or caused to be paid the payments due to the said Franciscos and on June 11, 1925, the said Franciscos and their wives made a further agreement with the Recreation Development Corporation, a copy of which is annexed to the bill of complaint and marked Schedule B, and in that agreement extended the time of payment of $2,500 from June 11, 1925, to September 11, 1925, and reaffirmed all of the conditions of the agreement marked Schedule A, and the Franciscos received thereafter $2,500 on account of the cash consideration for the conveyance of said land.

4. That on January 2, 1926, the Recreation Development Corporation made an agreement to sell the same lands to the complainant and assigned all of its rights in and to the contract marked Schedule A to the complainant, and the complainant paid $7,000 in cash, which $7,000 was paid pursuant to an agreement to which the said Franciscos and their attorney consented and at the making of which agreement they were all present, and the $7,000 was thereafter immediately paid to the said Franciscos and accepted by them on account of the purchase price of the property mentioned in Schedule A.

5. Two agreements were entered into on January 2, 1926, by the complainant and the defendant, Recreation Development Corporation, one of which was an assignment of the contract marked Schedule A and which is annexed to the complaint and marked Schedule E. Another was a contract of sale to purchase the said land from the Recreation Development Corporation for the consideration of $30,000, although the Recreation Development Corporation agreed to pay only $75,000 to the defendants Francisco.

6. That when the defendants Franciscos received the $7,000 in cash, which was paid by the complainant on account of the purchase price of the said lands, the Franciscos had received $12,000 on account of the contract marked Schedule A, and at the time the Franciscos extended the time of making the third payment under their contract Schedule A to March 1, 1926, and modified their original agreement so that they were to accept a $70,000 first mortgage upon the land instead of the $55,000 first mortgage, which mortgage was to be made a purchase money mortgage at the time title passed.

7. On behalf of the complainant I caused a search to be made of the property by the Fidelity Union Title Mortgage and Guaranty Company. That search disclosed that a *lis pendens* was filed against this property on February 5, 1926, giving notice of a suit then pending between C. W. Dryden, complainant, and Joseph W. Donaldson, and others, defendants, among which defendants were the said Richard S. Francisco and William H. Francisco and that the suit related to the title of the property in this cause.

8. That prior to March 1, 1926, the defendants Franciscos not being able to remove the *lis pendens* from the property, consented and assented in writing that the time of closing be further continued to April 20, 1926.

9. That on said day and at all other times the complainant has been ready, able and willing to carry out all the terms of its agreement, but the defendants and all of them have been and are still unable to give to our complainant a full warranty deed because the *lis pendens* above mentioned still remains on the property.

10. That I have on behalf of the complainant often requested the defendants William H. Francisco and Richard S. Francisco to have the said *lis pendens* removed so that the complainant might receive a good warranty deed for the premises; that the defendants have utterly failed and refused to carry out their agreement and to have the *lis pendens* removed from the title, although the complainant has always been and still is ready to fulfill its part of the contract.

11. That on the twenty-fourth day of July, 1926, the defendants William H. Francisco and Richard S. Francisco commenced an action in ejectment in the New Jersey Supreme Court, in which suit they are endeavoring to regain possession from the Recreation Development Corporation and its tenant, the Ferncliffe Golf & Country Club, Inc.

12. That the complainant has agreed as set forth in Schedule D to accept a deed to the said lands and premises subject to the lease of the golf club and in the event that judgment is to be entered into that ejectment suit, the lands will

be vacant and there will be no tenants and the complainant will be deprived of a large annual income under the terms of that lease and the value of the property will be materially decreased.

13. The lands in question consist of 157 acres of uncultivated ground upon which the tenant, the Ferncliffe Golf & Country Club, has built a large and beautiful gold course, and among the terms of the lease of the golf club the golf club pays an addition to the rental of $15,000 a year all the taxes upon the property.

14. If the suit at law is permitted to continue the complainant will suffer irreparable loss and damage inasmuch as the lands will not be improved and the present improvements will not be protected and the lands cannot be readily rendered and the income in excess of $15,000 a year will cease and terminate.

15. The golf course is used by a large number of persons every day of the week and large sums are received for the privilege of playing thereon, and the ejectment suit hereinbefore referred to has been commenced and is being continued by these defendants for the purpose of preventing complainant from obtaining title to the said lands and preventing the complainant from obtaining the benefit of this bargain.

16. It is absolutely necessary that a receiver be appointed to protect the property and reserve it until the final hearing of this cause, so that the leasehold and the rents, issues and profits may be collected and used to maintain the property until the final hearing of this suit.

The complainant in this case is a corporation, and the verification is made by me as the Presi-

dent thereof, and I have full knowledge and information concerning the facts stated in this affidavit.

WHEREFORE, I respectfully pray for the granting of the relief requested in the bill of complaint.

MICHAEL TANNENBAUM.

Sworn and subscribed to before me this 9th day of August, 1926.

SAUL J. ZUCKER,
An Attorney at Law of N. J.

Schedule A.

ARTICLES OF AGREEMENT made the Eleventh day of June, 1924, between WILLIAM H. FRANCISCO and RICHARD S. FRANCISCO, of Caldwell, New Jersey, parties of the first part and RECREATION DEVELOPMENT CORPORATION, a domestic corporation organized under the Laws of the State of New Jersey and having its principal office in the City of Paterson, State of New Jersey, party of the second part.

WITNESSETH, that the parties of the first part agree to sell and convey and the party of the second part agrees to purchase,

ALL that tract or parcel of land and premises situate, lying and being in the Borough of West Caldwell, in the County of Essex and State of New Jersey, comprising one hundred fifty-seven and twenty-seven one hundredths (157.27) acres and being the land and premises shown on a map entitled "Map of Part of Farm owned by Francisco Brothers, West Caldwell, Essex County, N. J." dated May 29, 1924, George E. Jenkins, Esq. Dover, N. J.

Schedule A, Annexed to Affidavit of Michael Tannenbaum.

Said premises are intended to include a large cow barn, a well located near the cow barn and also a house and barn on the westerly end of the premises, AND IT IS FURTHER AGREED:—

The premises are sold to the party of the second part for the purpose of constructing golf links, tennis courts and the erection of a club house thereon, and the use of said premises by the party of the second part is limited to such purposes until the deed thereof is given as hereinafter provided.

The property is to be conveyed also subject to the right of the parties of the first part to use the well above mentioned for the purpose of supplying water to their houses, outbuildings, and property located on Clinton Road free of any charge therefor for a period of twenty-five years from the date hereof, and this agreement is to survive the deed and a covenant to that effect is to be inserted in the deed.

The parties of the first part are to pay the taxes on said land and premises for the year 1924 and thereafter the taxes are to be paid by the party of the second part.

The parties of the first part are to have the right to use said premises for farming purposes in 1924, but the party of the second part is to have the right to proceed with the development of said lands and premises for golf links, tennis courts and the erection of a club house, and the party of the second part is to have possession of the house and barn located at the westerly end of the premises as shown on said map herein referred to immediately upon the signing of this agreement.

Schedule A, Annexed to Affidavit of Michael Tannenbaum.

The purchase price is SEVENTY-FIVE THOUSAND DOLLARS ($75,000) payable as follows:

$500.....FIVE HUNDRED DOLLARS thereof on the execution and delivery of this agreement, the receipt whereof is hereby acknowledged;

$2,000.....TWO THOUSAND DOLLARS thereof on the 11th day of December, 1924;

$2,500.....TWENTY-FIVE HUNDRED DOLLARS thereof on the 11th day of June, 1925;

$5,000.....FIVE THOUSAND DOLLARS thereof on the 11th day of December, 1925;

$10,000.....TEN THOUSAND DOLLARS thereof on the 11th day of June, 1926;

$55,000.....FIFTY-FIVE THOUSAND DOLLARS thereof by the execution and delivery of a bond of the party of the second part secured by a purchase money mortgage on the premises contracted to be conveyed hereby which shall be dated the 11th day of June, 1926 and shall run for five years with interest payable semi-annually at six (6%) per cent., which shall contain the usual interest, tax, assessment, insurance and default clause, 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, and shall contain the privilege to the mortgagors to pay all or any portion of said principal at any time during said five years, which bond and mortgage shall be drawn by the counsel for the parties of the first part and the expenses thereof, and all fees and revenue stamps in connection with the giving and recording of said mortgage and the giving of said bond shall be paid by the party of the second part.

Schedule A, Annexed to Affidavit of Michael Tannenbaum.

The deed shall be a full covenant and warranty deed so as to convey to the purchaser the fee simple of said premises free and clear of all encumbrances except as above stated and shall be delivered at the residence of said William H. Francisco, Clinton Road, Caldwell, New Jersey, on the 11th day of June, 1926, between the hours of twelve o'clock noon and nine o'clock P. M., provided the said sums aggregating TWENTY THOUSAND ($20,000) DOLLARS have been paid on account of the purchase price of said premises as hereinabove agreed.

If default be made in the payment of the several sums aggregating Twenty Thousand ($20,000) Dollars as above provided then this contract at the option of the parties of the first part is to be null and void and the parties of the first part may retain all sums paid on account of said purchase price as liquidated damages.

Any of the payments above set forth may be anticipated and the party of the second part shall be entitled to a deed prior to the 11th day of June, 1926, provided the sum of Twenty Thousand ($20,000) Dollars has been paid upon account of the purchase price of said premises.

The party of the second part is to pay interest upon the balance of the purchase price remaining unpaid at the rate of six (6%) per cent. per annum from April 1, 1925, such interest to be paid semi-annually on the 11th days of June and December.

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

The stipulations, covenants and agreements hereinabove contained are to apply to, bind and

New Jersey State Library

enure to the benefit of the heirs, executors and administrators, successors and assigns of the respective parties hereto.

In Witness Whereof the parties of the first part have hereunto set their hands and seals and the party of the second part has caused its corporate seal to be hereto affixed and these presents signed by its proper officers, the day and year first above written.

Witness as to
William H. Francisco
Richard S. Francisco
Robert H. Cromley

William H. Francisco (LS)

.....

Mary F. Francisco (LS)

.....

Richard S. Francisco (LS)

.....

Mary A. Francisco (LS)

Recreation Development Corporation
By J. W. Donaldson
Pres.

Attest:
John F. Cullen, Secretary.

Schedule A, Annexed to Affidavit of Michael Tannenbaum.

STATE OF NEW JERSEY }
COUNTY OF ESSEX } ss.:

On the 17th day of June, 1924, before me personally came WILLIAM H. FRANCISCO and RICHARD S. FRANCISCO to me known and known to me to be the individuals described in and who executed the foregoing instrument, and they duly acknowledged to me that they executed the same.

ROBERT W. CROMLEY, (L. S.)
Attorney of the Supreme Court
of New Jersey.

STATE OF NEW JERSEY }
COUNTY OF ESSEX } ss.:

BE IT REMEMBERED, that on this 17th day of June, 1924, before me personally appeared John F. Cullen, who being by me duly sworn on his oath says he is the Secretary of the RECREATION DEVELOPMENT CORPORATION, the grantor named in the foregoing instrument, that the seal affixed to said instrument is the corporate seal of said corporation; that the said seal was so affixed and the said instrument signed and delivered by J. W. Donaldson, who was, at the date thereof, the president of said corporation, in the presence of this deponent, the said President at the same time acknowledged that he signed, sealed and delivered the same as his voluntary act and deed, and as the voluntary act and deed of said corporation, and that deponent, at the same time, subscribed his name to said instrument as an attesting witness to the execution thereof.

ROBERT W. CROMLEY, (L. S.)
Attorney of the Supreme Court
of New Jersey.

Schedule A, Annexed to Affidavit of Michael Tannenbaum.

December 6, 1924.

Received from Recreation Development Corporation $2000. in payment of the second installment of the consideration for the conveyance of premises in the Borough of West Caldwell, Essex County, New Jersey, to be conveyed to the said Recreation Development Corporation by William H. Francisco and Richard S. Francisco according to articles of agreement dated June 11, 1924.

Wm. H. Francisco (L. S.)
R. S. Francisco (L. S.)
Mary A. Francisco (L. S.)
Mary F. Francisco (L. S.)

Paid 6-11-24	$500.00
Paid 12-11-24	2000.00
	2500.00
Due 6-11-25	2500.00

Schedule B.

Agreement made this 11th day of June, 1925 between William H. Francisco and Richard S. Francisco of Caldwell, New Jersey, parties of the first part and Recreation Development Corporation, a domestic corporation organized under the laws of the State of New Jersey, party of the second part,

Witnesseth, whereas, by agreement dated June 11, 1924, the parties of the first part hereto agreed to sell to the party of the second part, and the party of the second part agreed to purchase from the parties of the first part a tract of land in the Borough of West Caldwell, County of Essex and

Schedule B, Annexed to Affidavit of Michael Tannenbaum.

State of New Jersey, containing 157.27 acres of land, and

WHEREAS, by the terms of said agreement an installment on account of the purchase price thereof amounting to $2500 was due on June 11, 1925, and also interest on the unpaid purchase price from April 1, 1925, amounting to $737 and

WHEREAS, the parties hereto wish to extend the time of payment of said instalment of principal and interest.

NOW, THEREFORE, it is mutually agreed between the parties hereto that the time for the payment of said installment of $2500 due on the 11th day of June, 1925, and of said interest due on June 11, 1925, be and the same hereby is extended so that said installment of principal of $2500 and said interest shall become due and payable on September 11, 1925, and except as hereby modified said agreement of June 11, 1924, is hereby ratified and confirmed.

IN WITNESS WHEREOF the parties of the first part have hereunto set their hands and seals, and the party of the second part has caused its corporate seal to be hereto affixed and these presents signed by its proper officers the day and year first above written.

WILLIAM H. FRANCISCO (L. S.)
MARY F. FRANCISCO (L. S.)
RICHARD S. FRANCISCO (L. S.)
MARY A. FRANCISCO (L. S.)

RECREATION DEVELOPMENT CORPORATION,

By J. W. DONALDSON,
President.

Attest:
HERBERT A. BLANCHET
Secretary.

Schedule C.

AGREEMENT made this 2nd day of January, 1926, between WILLIAM H. FRANCISCO and RICHARD S. FRANCISCO, parties of the first part, and RECREATION DEVELOPMENT CORPORATION, party of the second part, witnesseth,

WHEREAS by agreement dated June 11, 1924, the parties of the first part agreed to sell and convey to the party of the second part certain premises in the Borough of West Caldwell, Essex County, New Jersey, upon the terms and conditions therein mentioned.

AND WHEREAS the said agreement provided for certain cash payments on account of the purchase price on dates set forth in said agreement,

AND WHEREAS the first two payments required by said contract were duly made and the time for the payment of the third and fourth payments required by the said contract was extended by the parties of the first part until January 2, 1926,

AND WHEREAS the parties of the first part have agreed to accept the sum of $2,500, being the third payment required by said contract with interest upon the unpaid purchase price and have agreed to accept payment of the balance of said purchase price amounting to $70,000 by the execution and delivery of a purchase money bond and mortgage as hereinafter provided;

NOW THEREFORE in consideration of the premises and of the sum of One dollar each to the other in hand paid the receipt whereof is hereby acknowledged, the parties hereby agree as follows:

Schedule C, Annexed to Affidavit of Michael Tannenbaum.

1. The parties of the first part hereby extend the time for the payment of the third payment required by said agreement of June 11, 1924 (the first two payments required by said contract having been heretofore made), together with interest upon the unpaid purchase price, amounting to the sum of $3,262.50 until March 1, 1926.

2. The parties of the second part agree to pay said third payment and said interest on or before March 1, 1926, and the parties of the first part agree to accept the balance of said purchase price, amounting to $70,000 by the execution and delivery to them of a bond of the party of the second part, secured by a purchase money mortgage on the premises agreed to be conveyed by said agreement of June 11, 1924, which mortgage shall be dated March 1, 1926, on or before which date the deed is to be delivered, and shall run for nine years with interest payable semi-annually at six per cent. per annum, and which mortgage shall contain the 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 and shall contain the privilege to the mortgagors to pay said mortgage at any time upon giving sixty days previous notice in writing, and also to contain the privilege of paying $5,000 or more of the principal of said mortgage on any interest date. In all other respects the said agreement of June 11, 1924, is to remain in full force and effect.

In Witness Whereof, the parties of the first part have hereunto set their hands and seals and the party of the second part has caused its corpo-

rate seal to be hereto affixed and these presents to be signed by its proper officers the day and year first above written.

WILLIAM H. FRANCISCO (L. S.)
by ROBT. W. CROMLEY, Atty.
RICHARD S. FRANCISCO (L. S.)

RECREATION DEVELOPMENT CORPORATION.
By
President.

Attest:
Secretary.

The time to make the third payment under the contract of June 11, 1924, above mentioned and to close title is hereby extended to April 1st, 1926.

WILLIAM H. FRANCISCO (L. S.)
and R. S. FRANCISCO "
by ROBT. W. CROMLEY, Atty.

Further continued to April 20, 1926.

W. H. & R. S. FRANCISCO,
by ROBT. W. CROMLEY, Atty.

Schedule D.

RECREATION DEVELOPMENT CORP.

AND

AMERICAN PLASTER DRILL CO.

ARTICLES OF AGREEMENT made this second day of January, 1926, between Recreation Development Corporation, a corporation of New Jersey, of the first part, (hereafter for convenience

called the Vendor) and American Plaster Drill Co., a corporation of New York, of the second part, (hereafter for convenience called the Purchaser).

WHEREAS the Vendor has purchased and is about to have conveyed to it the premises hereinafter described, consisting of 157 acres in the Borough of West Caldwell, in the County of Essex and State of New Jersey, subject to a purchase money mortgage for $70,000., payable in nine years with interest at the rate of six per cent per annum, payable semi-annually, and

WHEREAS the Vendor has had possession of said premises under an agreement of sale and has leased the same to the Ferncliffe Golf and County Club, Inc., a corporation of New Jersey, the terms of which lease are known to the party of the second part,

AND, WHEREAS, a portion of said premises has been laid out and improved by the Ferncliffe Golf and County Club, Inc., as a golf course, and said Ferncliffe Golf and Country Club, Inc., has sold to certain persons the right to use said course, subjct to daily charges therefor, and

WHEREAS, by agreement dated September 19, 1925, made by the Vendor and said Ferncliffe Golf and Country Club, Inc., with Essex Title Guaranty and Trust Company and J. W. Donaldson, the stock of the Vendor and said Ferncliffe Golf and Country Club, Inc., were offered to the persons to whom the privilege of playing golf on said golf course had been granted and sold, the terms of which agreement are known to the party of the second part, and

Schedule D, Annexed to Affidavit of Michael Tannenbaum.

WHEREAS said members have failed to exercise their rights under said agreement,

NOW, THEREFORE, the said Vendor, in consideration of the sum of $130,000. to be paid and satisfied as hereinafter mentioned, and also in consideration of the covenants and agreements herein contained, made and entered into by the Purchaser, doth agree to and with the said Purchaser, that it will well and sufficiently convey to the Purchaser, its successors or assigns, by deed of warranty free from all encumbrances except as herein set forth, on or before the 1st day of March, 1926, ALL that tract or parcel of land and premises situate, lying and being in the Borough of West Caldwell, in the County of Essex and State of New Jersey, comprising one hundred and fifty-seven and twenty-seven one hundredths (157.27) acres and being the land and premises shown on a map entitled, "Map of Part of Farm owned by Francisco Brothers, West Caldwell, Essex County, N. J." dated May 29, 1924, George E. Jenkins, C. E. Dover, N. J.

The premises are to be conveyed subject as follows:

a. Subject to the right of William H. —— and Richard S. Francisco, their heirs and assigns, to use the well located near the large barn on said premises, for the purpose of supplying water to their houses, outbuildings and property located on Clinton Road, free of any charge therefor for a period of twenty-five years from June 11, 1924.

b. To the lease hereinbefore referred to and to the rights of members of the Ferncliffe Golf & Country Club, Inc., to use said premises under

their said memberships as provided and set forth in their certificate of membership and the by-laws of said company, and to such state of facts as an accurate survey of said premises would show.

c. To an easement given by William H. —— and Richard S. Francisco to one William A. Harris to the right of way to lay, maintain and operate pipe lines for the transportation of oil, and erect, maintain and operate a telegraph line if the same shall be found necessary, said easement being recorded in Book V 32 of Deeds for Essex County, Page 339.

And the said Purchaser and its successors, doth covenant, promise and agree to and with the Vendor, its successors and assigns, that it, the said Purchaser, will pay and satisfy, or cause to be paid and satisfied, unto the Vendor, the said sum of $130,000 as and for the purchase money of the foregoing described land and premises, in the following manner, that is to say:

1. On the execution of this agreement the sum of $7,000 cash, the receipt whereof is hereby acknowledged.

2. Upon the delivery of the said deed of conveyance this sum of $23,000 in cash.

3. By accepting said premises subject to a mortgage for $70,000 payable in nine years from the date thereof, bearing interest at six per cent per annum, payable semi-annually, containing the usual interest, tax, assessment and insurance default clauses. Said mortgage also to contain the privilege to any owner of the land covered thereby to pay said mortgage at any time upon giving

sixty days previous notice in writing, and also to contain the privilege of paying $5,000 or more of the principal of said mortgage on any interest day.

4. By the execution and delivery of a purchase money mortgage by the Purchaser to the Vendor, or its assigns, in the principal sum of $30,000 payable in semi-annual installments of $3,000. each with interest at the rate of six per cent payable semi-annually, the full principal sum of said mortgage to be due and payable in three years from the date thereof. Said second mortgage shall contain a release clause providing for the execution of releases at the expense of the owner of said premises according to the schedule substantially as follows:

a. Payment on account of the principal of said mortgage of the sum of $5 per foot on land fronting on Clinton Road to a depth of 200 feet.

b. Payment on account of the principal of said mortgage at the rate of $500 per acre of land at a greater distance than 200 feet from said Clinton Road.

c. Payment of the sum of $5,000 for the release of the house and barn and the land surrounding the same not to exceed one and one-half acres.

The said release clause shall provide that for each foot of land released on said Clinton Road, the mortgagor will pay for the release an equal proportion of the land at a distance greater than 200 feet from said road, to the end that the ratio between the land fronting on said road and the land greater than a distance of 200 feet therefrom

remaining subject to the lien of said mortgage, shall at all times be equitably preserved.

The said mortgage shall contain an agreement on the part of the mortgagee to subordinate the lien of the said mortgage to that of any mortgage which may be placed upon said premises to take the place of the said first mortgage of $70,000. provided the said new mortgage shall not exceed in amount the balance then remaining due upon the said first mortgage plus the sum of $5,000.

5. It is further agreed that the taxes, insurance premiums and other carrying charges shall be adjusted between the parties as of the date of the delivery of said deed.

6. The conveyance shall be by deed of warranty free of encumbrances, but subject to the lease hereinbefore referred to and to the rights of the members of the Ferncliffe Golf and Country Club, Inc. to use said premises under their said memberships, as provided and set forth in their certificate of membership and the by-laws of said company, and subject to such state of facts as an accurate survey of said premises will show.

7. The vendor agrees to assign to the purchaser all its right, title and interest of, in and to the lease entered into between it and the Ferncliffe Golf and Country Club, Inc., hereinabove mentioned, upon the delivery of the deed as herein provided for.

8. The purchaser may, at its option, pay the entire purchase price over and above the said first mortgage of $70,000 in cash at the time of the delivery of the deed as herein mentioned, in

which event the purchase price is to be $120,000 instead of $130,000.

9. Thomas Booth is recognized as the agent affecting the sale of the said premises on behalf of the vendor and the vendor agrees to pay to the said Booth the sum of $5,000. in full payment of all commissions or compensation to which the said Booth may be entitled as agent or broker; and in case the purchaser shall exercise the option of paying all cash at the time of closing title, the vendor agrees to pay the said sum in full upon receipt of the purchase price from the purchaser; but in the event that the purchaser shall not exercise such option, then the said Booth agrees to accept payment of the said $5,000 by the payment of $2,000 in cash on the date of closing title, $2,000 in six months from the said date out of the first payments on account of the second mortgage received by the vendor, and the balance of $1,000. in one year from said date out of the payments on account of said second mortgage, received by said vendor. This agreement with respect to the payment of commissions is to be incorporated as one of the provisions of the said second mortgage.

10. Said deed shall be received and delivered at the office of Smith & Slingerland, 765 Broad Street, Newark, New Jersey, on the first day of March, 1926, between the hours of ten o'clock in the forenoon and four o'clock in the afternoon, or at such other place as the parties hereto may agree.

And it is agreed that the purchaser may enter into and upon said land and premises on the date of the delivery of said deed.

Schedule D, Annexed to Affidavit of Michael Tannenbaum.

In Witness Whereof, the parties hereto have caused there presents to be signed by their officers thereunto duly authorized.

Recreation Development
Corporation,
By J. W. Donaldson
President.

Attest:
Norman R. Lemcke
Secretary.

(Corporate Seal
in ink.)
No impression.

State of New Jersey, }
County of Essex. } ss.:

Be it remembered, That on this 4th day of January, in the year of our Lord One Thousand Nine Hundred and Twenty six, before me the subscriber, a Master in Chancery of New Jersey, personally appeared Norman R. Lemcke, who being by me duly sworn on his oath says that he is the secretary of the Recreation Development Corporation *Company,* the grantor named in the within Instrument; that J. W. Donaldson is the president of said corporation; that deponent well knows the corporate seal of said corporation; and the seal affixed to said Instrument is such corporate seal and was thereto affixed, and said Instrument signed and delivered by said president, as and for his voluntary act and deed and as and for the voluntary act and deed of said corpo-

ration, in presence of deponent, who thereupon subscribed his name thereto as witness.

NORMAN R. LEMCKE.

Sworn and subscribed before me, at
Newark N. J., the date aforesaid,
Archibald F. Slingerland, Master
in Chancery of New Jersey.

The time for closing title under agreement between Recreation Development *Company* and American Plaster Drill Corporation, dated January 2, 1926, is hereby extended until April 1st, 1926, at the same time and place.

Dated: March 1, 1926.

RECREATION DEVELOPMENT *Company,*

By J. W. Donaldson
President.

AMERICAN PLASTER DRILL CORPORATION,

By Michael Tanenbaum

Schedule E.

For value received, the Recreation Development Company does hereby sell, assign, transfer and set over unto American Plaster Drill Company, its successors or assigns, all its right, title and interest of, in and to a certain contract made between William H. Francisco and Richard S. Francisco, and the said Recreation Development Company, bearing date June 11, 1924.

It being understood that this assignment is to be delivered to the American Plaster Drill Company only in the event of the failure of the said Recreation Development Company to carry out its agreement with the said American Plaster Drill Company, bearing date January 2, 1926, and upon payment to the said Recreation Development Company, or its attorneys, of the balance of the purchase price due to it from said American Plaster Drill Company, under said contract.

In Witness Whereof the said Recreation Development Company has caused these presents to be signed by its president, and its corporate seal to be hereto affixed, attested by its secretary this 4th day of January, 1926.

Recreation Development Company

By J. W. Donaldson
President.

Attest:

By Norman R. Lemke
Secretary

Answer.

(Filed September 16, 1926.)

IN CHANCERY OF NEW JERSEY

Answer of the defendants William H. Francisco and Mary F. Francisco, his wife, and Richard S. Francisco and Mary A. Francisco, his wife, to the bill of complaint of the complainant herein:

These defendants answering say:

1. They admit that on June 11, 1924, the defendants William H. Francisco and Richard S. Francisco entered into the written agreement set forth in the first paragraph of the bill, but they deny that the defendants Mary F. Francisco and Mary A. Francisco entered into said agreement.

2. They admit that under and by virtue of the said agreement, in consideration of Recreation Development Corporation agreeing to pay to the defendants William H. Francisco and Richard S. Francisco the sum of Seventy-five Thousand ($75,000) Dollars, that they, the said William H. Francisco and Richard S. Francisco, would convey as set forth in paragraph two of the bill of complaint, but they deny that it was agreed that the said Mary F. Francisco and Mary A. Francisco were to join in making the said conveyance.

3. Answering the allegations of the third paragraph of the bill of complaint, they deny that the Recreation Development Corporation paid or caused to be paid to them, or any of them the payments agreed to be made under and pursuant to the said agreement, but they admit that certain payments were made, as follows:

On June 11, 1924	$ 500.00
On December 11, 1924	2000.00

and they admit that an agreement was made on or about June 11, 1925, in the form attached to the bill of complaint, Schedule "B", extending the time of payment of the installment of Twenty-five Hundred ($2500) Dollars due June 11, 1925, to September 11, 1925.

4. Answering the allegations of the fourth paragraph of the bill, they admit that the Recreation Development Corporation entered into a certain agreement with the complainant in the form set forth in the copy thereof attached to the bill of complaint, but they call attention to the fact that the so-called assignment was conditional, and they deny that the conditions have been fulfilled, and insist that said paper writing could not and has not amounted to an assignment of the rights of the Recreation Development Corporation in and to the contract marked Schedule "A", and that without proof of the fulfillment of said conditions these defendants could not safely convey to the complainant in accordance with said agreement. These defendants admit that they knew of the making of said assignment, but deny that they consented thereto. They admit that the complainant paid the Recreation Development Corporation the sum of Seven Thousand ($7000) Dollars, in cash, on or about January 2, 1926, and they admit that the said sum of Seven Thousand ($7000) Dollars was used by the said Recreation Development Corporation to pay off encumbrances upon the land which, under the agreement marked Schedule "A" the Recreation Development Corporation was in duty bound to do, and that a small balance remaining of said sum of Seven Thousand ($7000) Dollars was paid to the defendants William H. Francisco and Richard S. Francisco as part payment of the purchase price

pursuant to the contract Schedule "A". They admit that the said Robert W. Cromley acted as attorney for the said William H. Francisco and Richard S. Francisco in this matter, and say that he also acted as attorney for the Recreation Development Corporation.

5. They admit that the Recreation Development Corporation entered into the two agreements with complainant, mentioned in the fifth paragraph, except that they deny that one of said two agreements, marked Schedule "E", was an actual assignment.

6. They deny that after the application of the Seven Thousand ($7000) Dollars as aforesaid, the said William H. Francisco and Richard S. Francisco had received a total of Twelve Thousand ($12,000) Dollars on account of the purchase price of said land, and say, on the contrary, that the amount received was about Nine Thousand ($9000) Dollars. They admit that they further extended the time for the payment of the third payment required to be made, substantially in accordance with the allegations of the sixth paragraph.

7. These defendants are without knowledge as to when complainant caused a search of the property to be made, but say that upon the discovery that a *Lis Pendens* was filed against said property, the complainant announced to the defendants William H. Francisco and Richard S. Francisco and the Recreation Development Corporation that they would not accept title to said premises unless said notice of *Lis Pendens* was removed. The subsequent extensions were granted in order that the same might, if possible, be removed. These defendants insist that the existence of the *Lis Pendens* did not constitute a valid,

legal objection to the title available to the complainant, for the reason that the complainant had contracted to take title subject to the rights of members of the Ferncliffe Golf and Country Club, Inc., to use said premises under their membership, as provided and set forth in their certificates of membership and the by-laws of said corporation, and that the Lis Pendens above referred to was and is notice of a suit brought by members of the Ferncliffe Golf and Country Club, Inc., in this Court to assert such rights, and for the further reason that said notice of *Lis Pendens* is and always has been null and void for the reason that the said suit by the members of the Ferncliffe Golf and Country Club, Inc., has never been instituted or pending within the meaning of the *Lis Pendens* Act. The complainant never tendered to these defendants, nor so far as these defendants know, did the complainant ever tender to the Recreation Development Corporation the moneys which, under their contract with the Recreation Development Corporation, they were under obligation to pay, nor did they demand a deed except free and clear of the said *Lis Pendens*. These defendants insist that it was the complainant's duty, so far as the Recreation Development Corporation was concerned, to make such tender, and to accept a deed if delivered, notwithstanding the said notice of *Lis Pendens,* and that so far as these defendants were concerned, it was the complainant's duty to have carried out and performed the conditions set forth in the alleged assignment.

8. These defendants say that by virtue of the premises and of the circumstances surrounding the granting of the last two extensions, time became of the essence of the complainant's agreement, and that it would be inequitable to hold these

defendants and the Recreation Development Corporation, if they or either of them has at any time been under obligation to convey said lands to the complainant, indefinitely under such obligation, and that because of the lapse of time and the other facts hereinabove set forth the complainant is in the position of having committed a breach of said agreement because of its failure to act with reasonable promptness and because of its announcing that it would refuse under any circumstances to take said title unless the said notice of *Lis Pendens* was first removed.

9. They deny the allegations of the ninth paragraph of the bill.

10. They deny the allegations of the tenth paragraph of the bill, except as hereinabove admitted.

11. They admit the allegations of the eleventh paragraph of the bill.

12. They admit the allegations of the twelfth paragraph of the bill, except that they deny that the complainant will be deprived of any considerable revenue from the property.

13. They are without any knowledge as to the alleged lease of the golf course mentioned in the thirteenth paragraph, except that they understand that if any lease was made it was made in fraud of the rights of the life members of the Ferncliffe Golf and Country Club, Inc., and subsequent to the accrual of such rights, and was made by and between two corporations, to wit: the Ferncliffe Golf and Country Club, Inc., and the Recreation Development Corporation, the entire stock of each of which was owned by one Donaldson, and that in effect, therefore, said lease was made by the said Donaldson with himself, and in equity the same is

void and of no effect as against the rights of the members of the Ferncliffe Golf and Country Club, Inc.

14. They deny the allegations of the fourteenth paragraph.

15. They are without knowledge as to the allegations of the fifteenth paragraph, except that they admit that the purpose of the ejectment suit was to terminate any alleged rights which the complainant might have in said lands.

16. They deny the allegations of the sixteenth paragraph.

17. Complainant has refused to accept the repayment to it of the said deposit and expenses, and has insisted upon receiving a deed free and clear of the said notice of *Lis Pendens.*

HOPKINS & HERR,
Solicitors of Defendants William H. Francisco and Richard S. Francisco, Mary F. Francisco and Mary A. Francisco.

Replication by Complainant to the Answer of Franciscos.

(Filed September 22nd, 1926.)

The complainant joins issue with the Answer filed by the defendants, WILLIAM H. FRANCISCO and MARY F. FRANCISCO, his wife, and RICHARD S. FRANCISCO and MARY A. FRANCISCO his wife.

Dated: September 20, 1926.

LIONEL P. KRISTELLER,
Solicitor of Complainant.

Answer of D. W. Dryden and Others Similarly Situated.

(Filed June 30th, 1930.)

The answer of D. W. Dryden and others similarly situated, intervening as defendants in the above entitled matter, shows:

1. Defendants are members of the Ferncliffe Golf and Country Club, a voluntary and unorganized association of approximately nine hundred twenty (920) persons, holders of life memberships hereinafter described, entitling them for the term of their joint lives to use as a golf course the lands and premises described in the bill of complaint herein, and these defendants intervene herein and file this answer for the purpose of protecting the rights of the members of said association in the said lands and premises.

2. They admit the allegations of the 1st paragraph of the bill of complaint.

3. They admit the allegations of the 2nd paragraph of the bill of complaint.

4. They are without knowledge of the allegations of the 3rd paragraph of the bill of complaint, and therefore neither admit nor deny the same.

5. Answering the allegations of the 4th paragraph of the bill of complaint, they admit that the Recreation Development Corporation entered into a certain agreement with the complainant in the form set forth in the copy thereof attached to the bill of complaint, but they call attention to the fact that the so-called assignment was conditional, and they deny that the conditions have been fulfilled, and insist that said paper writing

could not amount and has not amounted to an assignment of the rights of the Recreation Development Corporation in and to the contract marked Schedule "A", and that without proof of the fulfillment of said conditions these defendants could not safely convey to the complainant in accordance with said agreement. These defendants are without knowledge as to the further facts alleged in paragraph 4 of the bill of complaint, and therefore neither admit nor deny the same.

6. They admit that the Recreation Development Corporation entered into the two agreements with complainant, mentioned in the 5th paragraph, except that they deny that one of said two agreements, marked Schedule "E", was an actual assignment.

7. They are without knowledge as to the allegations of the 6th paragraph of the bill of complaint, and neither admit nor deny the same.

8. They are without knowledge as to the allegations of the 7th and 8th paragraphs of the bill of complaint, and neither admit nor deny the same.

9. They deny the allegations of the 9th paragraph of the bill of complaint.

10. They deny the allegations of the 10th paragraph of the bill of complaint.

11. They admit the allegations of the 11th paragraph of the bill of complaint.

12. They admit the allegations of the 12th paragraph of the bill of complaint, except that they deny that the complainant will be deprived of any considerable revenue from the property.

Answer of D. W. Dryden and Others Similarly Situated.

13. As to the allegations of the 13th paragraph of the bill of complaint, these defendants say that very little improvement was made to the ground so as to render it suitable for playing golf thereon, only nine holes having been opened up. These defendants have never seen the alleged lease mentioned in the 13th paragraph of the bill of complaint, but admit that a lease was made as hereinafter set forth, which among other provisions included those mentioned in the 13th paragraph of the bill of complaint. These defendants further say that said lease was made in fraud of the rights of these defendants and other members of said association, and subsequent to the accrual of such rights, and was made by and between two corporations, the entire stock of each of which was owned by one Joseph W. Donaldson, and that in effect, therefore, said lease was made by the said Donaldson with himself, and in equity the same is void and of no effect as against these defendants.

14. They deny the allegations of the 14th paragraph of the bill of complaint.

15. They are without knowledge as to the actual amounts of money which may have been received for the use of said golf course by the players, since said money was taken in by the said Donaldson or one or the other of the said two corporations and never accounted for to these defendants. They deny the other allegations of paragraph 15 of the bill, except that they admit that the purpose of the ejection suit was to terminate any alleged rights which the complainant might have in said lands.

16. They deny the allegations of the 16th paragraph of the bill of complaint.

Answer of D. W. Dryden and Others Similarly Situated.

17. Defendants further say that some time in the year 1924, two corporations were organized under the laws of the State of New Jersey, known as the Recreation Development Corporation and the Ferncliffe Golf and Country Club, Inc.; that these corporations were organized and owned by Joseph W. Donaldson, and were organized by said Donaldson only for the purpose of perpetrating the frauds hereinafter set forth; and all the stock was issued and at all times owned by the said Joseph W. Donaldson in both corporations, except qualifying shares.

18. On the 11th day of June, 1924, the Recreation Development Corporation entered into a contract with the defendants William H. Francisco, Mary F. Francisco, his wife, Richard S. Francisco and Mary A. Francisco, his wife, for the sale of certain lands and premises in the Borough of West Caldwell, in the County of Essex, described in the bill of complaint, which agreement is attached to the Bill of Complaint in the above entitled matter and marked Schedule "A".

19. Your defendants further show that after making said contract the Recreation Development Corporation then entered into a lease with the Ferncliffe Golf and Country Club, Inc., whereby said lands were leased to said Ferncliffe Golf and Country Club, Inc., for the sum of Fifteen thousand ($15,000.00) dollars yearly, said lease being given although the Recreation Development Corporation was not the owner of lands at this time, nor had any right to issue said lease, and defendants further show that said lease was not recorded but was kept secret throughout the transactions hereinafter described.

20. Defendants further show that subsequent to the transactions above set forth the said Joseph W. Donaldson, through his creature, Ferncliffe Golf and Country Club, Inc., made preparations, or pretended to make preparations, for the construction of a golf course to be built upon the lands aforementioned, and some grading work and other small work on the lands was actually done, and issued certain certificates of membership in said Ferncliffe Golf and Country Club, Inc., which he later caused to be sold to defendants and other members of the Ferncliffe Golf and Country Club.

21. Defendants further show that said Joseph W. Donaldson and authorized agents of Joseph W. Donaldson and the Ferncliffe Golf and Country Club, Inc., in order to induce the sale of said certificates to defendants, made the following representations upon which defendants and other members of the Ferncliffe Golf and Country Club relied:

(a) That said Ferncliffe Golf and Country Club was the owner of land upon which the golf club was constructed.

(b) That all moneys received as green fees and for membership fees would be used in improving and completing the golf course;

which said representations defendants now know were false. Defendants were further informed that the receipt of one hundred ($100.00) dollars, which sum was paid by each of defendants, entitled defendants and other members who paid said fee, to a life membership and interest in said golf course, which could never be disturbed. Said Joseph W. Donaldson or the Ferncliffe Golf and

Country Club, Inc., and his or its agents, further concealed from defendants and the other members of the Ferncliffe Golf and Country Club the existence of the Recreation Development Corporation and the fact that the lease above referred to from said corporation to the Ferncliffe Golf and Country Club had been entered into.

22. Defendants further show that said Joseph W. Donaldson and the Ferncliffe Golf and Country Club, Inc., further represented to defendants and other prospective purchasers of membership certificates in said Club the following inducements:

(a) That the said Golf Company was organized for developing the land and building said golf course, after which it would turn the management of said club into the hands of the members of said corporation.

(b) That the Golf Company would make numerous improvements on said grounds, to wit, build a swimming pool, build a new club house, build tennis courts, and add other features which would make the golf club a first-class and up-to-date country club, the use of which features defendants were entitled to upon payment of certain fees, and the use of such privileges and features during their lifetime was guaranteed defendants by the Golf Company.

23. Defendants further show that as president and manager of said Golf Club, Joseph W. Donaldson has received in membership fees alone the sum of seventy-five thousand ($75,000.00) dollars,

and in green fees during the years 1924 and 1925 approximately ten thousand ($10,000.00) dollars.

24. Defendants further show that in spite of receiving such moneys, neither the Ferncliffe Golf and Country Club nor Donaldson have done anything toward improving said golf course, as guaranteed in representations to defendants and others.

25. Defendants charge that because of the facts set forth as aforesaid, said Joseph W. Donaldson, and/or Recreation Development Corporation, and/or Ferncliffe Golf and Country Club, Inc., held such interests in said lands as vested in them as trustees for the holders of the life membership certificates in the Ferncliffe Golf and Country Club as aforesaid, and further, that it was and is the right of said members to have such interests in said lands held in trust for them by a friendly trustee, and a trustee of their own choosing. Defendants object to the transfer of any interests in said land to the complainant herein, even though such transfer may be made expressly in trust for the benefit of the players, because they believe and charge that the complainant is hostile to them, and intended and intends, if it succeeds in securing the lands, to use every effort to defeat the rights of the players and to oust them from possession, and defendants charge that the act of Recreation Development Corporation in entering into said contract with the complainant and again assigning, or attempting to assign, to complainant the contract which the Recreation Development Corporation had with the defendants William H. Francisco and Richard S. Francisco, was and is a fraud on the rights of the players.

26. These defendants do not ask for any affirmative relief herein, but pray that the bill of complaint in the above entitled cause be dismissed.

BUTLER & BUTLER,
Solicitors for Intervening defendants, D. W. Dryden and others similarly situated.

DOUGAL HERR,
Of Counsel.

Replication to Answer of D. W. Dryden and Others.

(Filed .)

In reply to the defenses stated in the answer of the intervening defendants, D. W. Dryden and others similarly situated and not anticipated in the bill of complaint, complainant says:

1. Answering paragraph 2 complainant says that it has no knowledge as to whether said D. W. Dryden is a member of a committee appointed by the members of the Ferncliffe Golf and Country Club or no, and says that if he was he has no right to appear herein, and that the said Ferncliffe Golf and Country Club and its members are not in any wise concerned with the controversy, the subject matter of this suit.

2. They deny the statements contained in paragraph 5 of the answer and say that the statements are immaterial.

3. It admits the statements contained in paragraph 6.

Replication to Answer of D. W. Dryden and Others.

4. It has no knowledge or information sufficient to form a belief as to the statements contained in paragraph 7 and therefore denies the same, and further says that the statements contained in said paragraph are wholly immaterial to the determination of the subject matter of this litigation.

5. It has no knowledge or information sufficient to form a belief as to the statements contained in paragraphs 8, 9, 10, 11 and 12 of the answer, and further says that all the statements therein contained are wholly immaterial to the determination of the controversy involved in this litigation.

6. It denies the statements contained in paragraph 13.

Further replying the complainant says:

7. That the said answering defendants are guilty of gross laches in that the said members represented by the said answering defendants have known of the sale of said property to this complainant for over a year, and have made no move or effort to question the bona fides of the sale until the present suit.

8. That the said answering defendants associates held several meetings with the owners of the contract of the property and others, for the purpose of completing the purchase under the agreement first mentioned in the bill of complaint, but that said committee and their associates refused to have anything to do with the matter, and made no effort, and commenced no proceedings to ques-

tion the title of complainant to said contract and option, and complainant was permitted by the answering defendants and their associates to advance the cash consideration for the purchase of said contract; because of the conduct of the said answering defendants and their associates and relying upon their refusal to negotiate for the carrying out of the purchase of the said property, complainant entered into the contract for the property set out in the bill of complaint.

9. That said answering defendants by their conduct, have permitted complainant to change its status, advance cash money on account of the said contract, and to interfere with the purchase by complainant of the lands and premises mentioned in the bill of complaint, will cause complainant irreparable injury and damage.

10. That these said answering defendants and those whom they represent are estopped by their conduct from attacking the validity of the agreement between complainant and the defendant, The Recreation Development Company.

11. That said answering defendants are improperly admitted as parties defendants herein; that they have no right to be heard in the controversy which is the subject matter of this litigation and they have no interest therein nor have they any interest in the lands and premises, the subject matter of this suit; that this court has no jurisdiction to determine the rights and interests of the said answering defendants and those whom they represent, whatever rights and interests they have being determinable at law.

12. That the said answering defendants and those whom they represent are not bona fide

seeking to protect their own interests but that they have made some agreement, the details of which complainant does not know, with the owners of the said land, the said William H. Francisco, Mary F. Francisco, his wife, Richard S. Francisco and Mary A. Francisco, his wife, under the terms and conditions whereof the said defendants aforesaid, the owners of said land will reap a large profit and the supposed interest of the said answering defendants and those whom they represent is being used in this litigation purely for the benefit of the said owners of said lands and for the purpose of defeating the right of the complainant to specific performance, and to secure a conveyance of said lands and the rights of the said Franciscos heretofore mentioned therein, and that the said Franciscos and the said answering defendants and those whom they represent are parties to a conspiracy to deprive complainant of that to which it is legally and equitably entitled.

13. Complainant further answering says that the said answering defendants and those whom they represent have lost any interest which they have had in said lands and premises and have abandoned and surrendered such interest.

14. With respect to the other matters and things it joins issue.

LIONEL P. KRISTELLER,
Solicitor for Complainant.

Answer of Defendant, Recreation Development Company.

(Filed March 3rd, 1927.)

Answer of the defendant, Recreation Development Company, to the bill of complaint of the complainant herein:

This defendant, answering said bill, says:

1. It admits the allegations of paragraph one.

2. It admits the allegations of paragraph two.

3. It admits the allegations of paragraph three.

4. It admits the allegations of paragraph four, but refers to the assignment therein referred to and annexed to said bill and marked Schedule E, for the complete terms thereof.

5. It admits the allegations of paragraph five.

6. Answering paragraph six, it admits that the defendants, William H. Francisco and Richard S. Francisco, received by endorsement $7,000. paid by the complainant on account of the purchase price, agreed to be paid under the agreement made between the complainant and this defendant, but it has no knowledge as to what portion of said sum was received by the said defendants, William H. Francisco and Richard S. Francisco, on account of the purchase price agreed to be paid under the agreement between them and this defendant; and it denies that the sum of $12,000. has been paid to the said defendants, William H. Francisco and Richard S. Francisco, on account of the contract between them and this defendant.

7. It has no knowledge or information sufficient to form a belief as to the allegations of paragraph seven and leaves the complainant to its proof.

Answer of Defendant, Recreation Development Company.

8. It admits the allegations of paragraph eight.

9. It denies the allegations of paragraph nine.

10. It denies the allegations of paragraph ten.

11. It admits the allegations of paragraph eleven.

12. It admits that the complainant, by its agreement referred to in paragraph 12, agreed to accept a deed from this defendant for the said lands and premises, subject to the lease of the Ferncliffe Golf and Country Club, Inc., and subject to the rights of its members. It has no knowledge or information sufficient to form a belief respecting the other allegations of paragraph 12.

13. It admits the allegations of paragraph thirteen.

14. It has no knowledge or information sufficient to form a belief as to the allegations of paragraph fourteen.

15. It has no knowledge or information sufficient to form a belief as to the allegations of paragraph fifteen.

16. It has no knowledge or information sufficient to form a belief as to the allegations of paragraph sixteen.

Further answering said bill, this defendant says:

1. On or about January 2, 1926, this defendant entered into an agreement with the complainant, (a copy of which agreement is annexed to the bill of complaint and marked Schedule D) wherein and whereby this defendant agreed to sell and

convey unto the complainant the lands and premises referred to in the bill of complaint and described in the agreement marked Schedule A, annexed to said bill; that by the terms of said agreement, the title to said premises was to close on or before March 1, 1826 at which time the consideration of $130,000, mentioned in said agreement was to be paid to this defendant; that the time for closing the agreement between the defendants, William H. Francisco and Richard S. Francisco, and this defendant, was, on or about said January 2, 1926, extended until March 1, 1926, by agreement between the said Franciscos and this defendant, a copy of which agreement is annexed to said bill and marked Schedule C; that if the complainant had duly performed its said agreement with this defendant by paying to this defendant the consideration money of $130,000., this defendant at the same time would have been able to have completed its contract with the said Franciscos, but because of the failure of the complainant to carry out and perform the terms of its said agreement with this defendant, this defendant was unable to carry out its contract with the said Franciscos.

2. That the reason given by the complainant for its refusal to carry out its agreement with this defendant, namely the existence upon the record of a lis pendens in a suit pending between C. W. Dryden, complainant, and Joseph W. Donaldson, et als, defendants did not constitute a valid and sufficient reason for the complainant's failure to carry out and perform its said agreement with this defendant, inasmuch as the said lis pendens was filed in a suit instituted for the

purpose of determining the rights of the members of the Ferncliffe Golf and Country Club, and this defendant's agreement with the complainant expressly provided that a conveyance of said lands and premises by this defendant to the complainant was to be made subject to the lease to the said Ferncliffe Golf and Country Club, and subject to the rights of the members of the said Ferncliffe Golf and Country Club.

3. This defendant was ready and willing on said March 1, 1926, and upon the dates to which the closing of title was thereafter adjourned as alleged in the bill of complaint, to convey the said lands and premises to the complainant, subject to the lease of the said Ferncliffe Golf and Country Club, and subject to the rights of the members of the said Ferncliffe Golf and Country Club, and but for the failure of the complainant to carry out and perform its contract with this defendant, would have been on said dates able to make said conveyance in accordance with its said agreement, because it could, but for such failure on the part of the complainant, have carried out its agreement with the said Franciscos and could have obtained title to the said premises; and this defendant avers that because of the failure of the complainant to carry out and perform its said agreement with this defendant, this defendant was unable to perform its contract with the said William H. Francisco and Richard S. Francisco.

4. It avers that on said January 2, 1926, it did assign to the complainant all its right, title and interest of, in and to the said contract made between the said William H. Francisco and Richard S. Francisco and this defendant

bearing date June 11, 1924, but said assignment was to be delivered to the complainant only in the event of the failure of this defendant to carry out its agreement with the said complainant bearing date January 2, 1926, and upon payment to this defendant, or its attorneys, of the balance of the purchase price due to it from the said complainant under said contract. This defendant avers that its failure to carry out its agreement with the complainant was due to the complainant's own failure to carry out its part of said agreement; and if a decree be made in this cause for the conveyance of said premises to the complainant, this defendant avers that such conveyance should be decreed only upon the condition that the balance of the purchase price due to this defendant from the complainant under its said contract be paid by the complainant to this defendant.

SMITH & SLINGERLAND,
Solicitors for Defendant,
Recreation Development Co.

Memorandum.

IN CHANCERY OF NEW JERSEY.

Between
AMERICAN PLASTER DRILL COMPANY, a corporation,
Complainant,

and

WILLIAM H. FRANCISCO, *et al.*,
Defendants.

(Not for print.)
On Bill, etc.
Memorandum.

May 12, 1930.

MERRITT LANE, Esq., and LIONEL P. KRISTELLER, Esq., for the Complainant.

SMITH & SLINGERLAND, Esquires, for Defendant, RECREATION DEVELOPMENT COMPANY.

DUGAL HERR, Esq., for Defendants, FRANCISCO, and Defendants, DRYDEN, and others similarly situated.

BIGELOW, V. C.:

This is a bill for specific performance of a contract for the sale of land.

The complainant is the assignee of the defendant, Recreation Development Corporation, the vendee named in the contract. The defendants, William H. Francisco, Richard Francisco, and their wives, are the vendors. Defendant, Dryden "and others similarly situated" have been admitted as defendants by order of the Court, but decision on their application for leave to file an

answer was reserved until final hearing. Dryden and his associates are referred to herein as the members.

Prior to June 11, 1924, the Franciscos, were the owner of a tract of 157 acres in the Borough of West Caldwell, in Essex County. On that day they agreed to sell this tract to the Development Corporation, for $75,000.00, of which $500.00 was paid upon the execution of the agreement; $2,000.00 was payable in six months; $2,500.00, in one year; $5,000.00 in eighteen months; $10,000.00 in two years; and the balance, $55,000.00, by a purchase money mortgage to run for five years. The deed was to be delivered when $20,000.00 had been paid, that is, in two years after the date of the contract, if the payments were made as therein provided.

The contract gave the vendee the right to immediate possession of the premises for the purpose of developing the lands for golf links, tennis courts, and the erection of a club house, and for no other purpose. The vendee immediately entered, and it (or some persons claiming under it) has since remained in possession. Nine holes of the golf course are completed, and in use.

The certificate of incorporation of the Development Corporation was executed the very day on which the contract was made and was filed with the Secretary of State two days later. One Joseph W. Donaldson was the negotiator of the transaction, and the sole stockholder in the Development Corporation. On July 25, 1924, the corporation leased the premises to the Ferncliffe Golf and Country Club, Inc. (hereinafter called the Golf Company), for the term of 20 years, at a yearly rent of $15,000.00. The lease is signed on behalf of both corporations, by Donaldson, as

President, and by one Herbert A. Blanchet, as Secretary. It should be here noted that the Golf Company was not actually incorporated until one month after the date of the lease, namely, August 28, 1924, when it was chartered under "An Act Concerning Corporations" (Revision of 1896). Donaldson appears to have been substantially the sole stockholder of this corporation. Apparently the only asset of either corporation was the $500.00 paid to the Franciscos at the time of executing the contract.

The certificate of incorporation of the Golf Company included among the objects for which the corporation was formed, "To establish, maintain, and conduct an association of members as a golf and country club, and to that end to solicit and sell subscriptions to the membership of such association upon such terms and under such conditions, and subject to such dues, penalties, privileges, obligations and restrictions as may be set forth and prescribed in the by-laws of the corporation or the rules and regulations of such association". It is unnecessary to inquire whether the Corporation Act of 1896 authorizes the formation of a corporation for this purpose. The Golf Company adopted by-laws for itself and for "the association of members of Ferncliffe Golf and Country Club". The first section of the by-laws of the association reads: "This association shall be known as the Ferncliffe Golf and Country Club." Thus Donaldson laid the foundation for the creation of an unincorporated association, with name exactly the same as one of the corporations which he had formed, except for the abbreviation "Inc."

Immediately the lease was signed, or perhaps earlier, Donaldson inaugurated a drive to acquire

members for his voluntary association. It might be more accurately termed a campaign to swindle the unwary. On July 30, 1924, appeared a half-page announcement in one of the newspapers of Newark "Announcing the Ferncliffe Golf and Country Club, comprising 157 acres of rare beauty in West Caldwell, N. J." It set forth that by the payment of $50.00 life membership in the Club might be obtained, although "the membership committee has been instructed to exercise great care in selecting the members." There would be no annual dues, no stocks or bonds to buy, and no assessments for deficits. The only charge to members would be a greens fee for actual play. "This is in accordance with the plan adopted by the most successful European Clubs."

The campaign was pressed not only by advertisement, but by booklets and solicitors. It was successful. The membership fee was increased, first to $100.00, and then to $200.00 plus 10 per cent. for the Federal tax on dues. In all, 920 persons joined the association, and paid for the privilege about $75,000.00. The Club was held out to be the owner of the land; the 157 acres is referred to as the property of the Club. There was no suggestion of the agreement of sale, or the lease, or the $70,000.00, still payable for the land, or the $15,000.00 rental; there was no hint of the existence even of either stock company. Dryden and his associates who joined the association were intentionally led to believe that the association was the owner of the land on which would be developed a golf course. If they gave a thought to financing, they naturally concluded that their initiation fees, plus probably a mortgage, were paying for the land and the development. In fact, so far as the purchase price was paid and so far

as a golf course was developed, they did provide the money. If they wondered whether their club was incorporated or not, they could properly assume that it was incorporated under "An Act to incorporate associations not for pecuniary profit" or some similar statute, because the Corporation Act of 1896 does not authorize membership corporations.

The bad news was divulged September 19, 1925, when the Development Corporation and the Golf Company offered to sell to the members all their capital stock for $300,000.00, and agreed, in case the offer was accepted, that title to the land would be vested in the Development Corporation subject only to mortgages of $70,000.00, and that all other debts of both companies would have been paid. If this offer had been accepted by the members, they would have found themselves, upon payment of approximately $300.00 apiece, the owners of a tract of land on which $5,000.00 of the purchase price had been paid, and nine holes of a golf course had been completed. Naturally, the offer was not accepted.

On January 2, 1926, the Development Corporation agreed to sell the premises to the complainant for $130,000.00, subject to the lease of the Golf Company, and subject "to the rights of members of the Ferncliffe Golf and Country Club, Inc., to use said premises under their said membership as provided and set forth in their certificate of membership and the by-laws of said company." The same day, the Development Corporation also assigned to complainant its contract with the Franciscos.

About January 24, 1926, Dryden filed in this Court a bill of complaint against Donaldson, the Development Company, the Golf Company, and

the Franciscos, asking for the appointment of a receiver for the two companies, and an accounting of the moneys received and expenses by them, and for an injunction restraining the Franciscos from disposing of the property. A *lis pendens* was filed in that suit. That suit has been dormant ever since.

April 20, 1926, was fixed by complainant, and the Franciscos as the day for passing title. Complainant was then ready to purchase the property, provided the Franciscos would cause the *lis pendens* in the Dryden suit to be cancelled; but the Franciscos were unwilling or unable so to do. On July 24, 1926, the Franciscos commenced an action in ejectment against the Development Corporation and the Golf Company to recover possession of the premises. The bill of complaint in the present cause was filed August 6, 1926, and the ejectment proceeding was stayed and a receiver of the premises appointed *pendente lite*. He is, I am informed, collecting the greens fees of the members and applying them to the upkeep of the property.

Complainant tenders itself willing to accept title, subject to the rights of the members; but it asks the Court to leave those rights unsettled. The members, or their representatives, have been made parties to this suit. The facts have been fully developed. Their rights should be now established and not left to future litigation. The instant case is the third suit in this controversy; it should be the last. The Development Corporation joins in the prayer of complainant.

The Franciscos are anxious only that the rights of the members be protected and, if the decree of the Court accomplishes this end, they are willing, I understand, to waive such defenses as they have

to specific performance. They have even instructed their counsel in this cause to appear for the members and thus they have demonstrated the unity of interest among them.

The complainant stands in the shoes of the Development Corporation. So it is necessary, first, to determine the position of that company. I find that the Development Corporation, and the Golf Company were mere *alter egos* of Davidson, and that with him they engaged in a scheme to defraud the members. The complainant, or the Development Corporation, should be permitted to discharge all equities of the members by refunding the amount paid by the members and, in such case, complainant can have a decree for specific performance in the ordinary form. If this is to be done, a special master can be designated to receive and disburse the fund, or other machinery to that end may be devised. Assuming that complainant and Development Corporation elect not to discharge the rights of the members, I proceed.

Any title or interest which the Development Corporation has in the property is held in trust for the members to the extent that may be necessary to make good the representations which induced the members to join the Club. First, is the right of a membership of not more than 1,000 to use the tract of 157 acres, in the ordinary manner that a country club property is used, during the joint lives of the members. Second, this right is dependent on the payment only of reasonable greens fees and like charges for the use of the facilities that may be provided. The advertisement mentions greens fees of 50 cents, but I think it must have been understood that if conditions changed, or these greens fees proved inadequate for the upkeep of the property, then larger fees would be charged. Third, the company is under

a duty to acquire the land and construct the golf course and other facilities.

The practical effect of the foregoing is that the members, in equity, have the entire title and interest of the Development Corporation for the term of their joint lives. With a membership limited to 1,000 greens fees of $1.00 instead of 50 cents, would not produce a gross annual income of more than $25,000.00, and even this amount could not be obtained until 18 or 27 holes were built and opened for play. This amount would be no more than sufficient to pay interest on the mortgage, taxes, and upkeep of the property. Golf is an expensive game.

Just how to take care of this situation is a practical question of some difficulty. Counsel have not argued this phase of the matter. Hence, they may regard the following as more or less tentative rather than indicative of a fixed conclusion on my part.

An unorganized group of 920 men and women, as are the members, is almost impossible to deal with satisfactorily. It appears that they, or some of them, have appointed a committee to protect their interest. I suggest that Mr. Dryden and the members of the committee immediately incorporate a club in such manner that all the 920 shall have the right to join it on equal terms. If they do so and the new club asks to be admitted as a party to this suit, I will advise an order permitting it and recognize it as the successor to the rights of the members. If that course should prove inadvisable, I will appoint three trustees to hold title for the members. The Development Corporation, which is now trustee by operation of law, has forfeited by its conduct the right to continue as trustee.

Memorandum.

I incline to advise a decree for specific performance on these terms: the complainant shall satisfy to the Franciscos the balance of the purchase price and shall satisfy to the Development Corporation the balance of the consideration for the sub-sale and assignment, and shall at the same time execute a lease to the new club, or to the trustees, for the term of the joint lives of the members. The lessee shall agree to discharge (up to the amount of income) taxes, interest on the mortgage, a reasonable amount for the upkeep of the property, and to pay any surplus income annually to complainant.

I realize that it is most unlikely that complainant will care to take the property upon the terms above stipulated. In that event, the new club or the trustees to be appointed, will be subrogated to all the rights of complainant and a decree will be made directing a conveyance to it, or them, upon the same payments to the Franciscos that the complainant would have made.

I apprehend that the solution of this controversy above outlined does not do exact justice to the members. The beautiful club house, the swimming pool, etc., promised them, are all forgotten. But I cannot devise a practical plan which will more nearly secure their rights. That the Court cannot do exact justice, is no reason for declining to do approximate equity. The other parties cannot well complain. The Franciscos get the price they bargained for; the Development Corporation is relieved of the expense of making the improvements it promised; the complainant receives all that its assignor could give and may have the property subject to the rights of the members.

There remain many details to be settled. The first step would seem to be to put complainant

and Development Corporation to an election whether or not to refund the membership fees of the members. I would ask counsel for the members to bring the matter before the Court, on notice, at an early day.

Final Decree.

(Filed June 30, 1930.)

This matter coming on to be heard at final hearing on bill, answers and replications, and the Court having heard the testimony of witnesses and other proofs taken in open court on behalf of each of the parties hereto, and having heard counsel for each of said parties and being of opinion that the bill of complaint herein should be dismissed unless the complainant shall within the time hereinafter limited avail itself of either one of the two options hereinafter mentioned;

IT IS THEREUPON, on this 30th day of June, 1930, in the presence of Merritt Lane and Lionel P. Kristeller, Esquires, of counsel with the complainant, Smith & Slingerland, Esquires, of counsel with the defendant Recreation Development Corporation, Dougal Herr, Esq., of counsel for the defendants, William H. Francisco, Mary F. Francisco, his wife, Richard S. Francisco, Mary A. Francisco, his wife, and D. W. Dryden and others similarly situated, and Butler & Butler, solicitors of the said D. W. Dryden and others similarly situated, ORDERED, ADJUDGED AND DECREED that the bill of complaint herein be and the same is hereby dismissed, unless within twenty (20) days from and after the date of this decree the complainant shall file herein a written consent or election accepting

either one or the other of the following options, and agreeing to abide by and perform the respective conditions attached thereto, to wit:

1. If the complainant shall agree to pay in cash within a time to be fixed by the Court, to a Master to be designated by the Court, the sum of Seventy-five thousand ($75,000.00) Dollars, for the purpose of refunding to the members of the unincorporated association known as the Ferncliffe Golf & Country Club, the respective amounts paid by such members as consideration for life memberships purchased by them, as set forth in the pleadings herein (the complainant to be subsequently repaid any portion of said sum of Seventy-five thousand ($75,000.00) Dollars which may prove to be in excess of the requirements aforesaid, and will agree to comply with the requirements of the contract of sale between the defendants, Franciscos, and the defendant Recreation Development Corporation, and the subsequent assignment thereof and the new contract of sale between the Recreation Development Corporation and complainant, then this decree, so far as it orders a dismissal of the bill, shall be without force and effect, and a decree may be entered in lieu thereof, on notice, decreeing specific performance of the said contracts upon the conditions hereinabove mentioned.

2. If the said complainant will agree to comply with the requirements of said contract and assignment and to execute and deliver to a corporation to be formed, in which said members shall have equal rights, or to trustees for said members, or to such other designated person or persons as the Court may select, a lease of all of the lands and premises described in the plead-

ings for the term of the joint lives of the said members, approximately nine hundred twenty (920) in number, upon payment by way of rental of reasonable greens fees and like charges for the use of the facilities that may be provided at complainant's expense or which may have been provided upon said premises (this Court to settle from time to time what shall be considered reasonable greens fees and like charges), which said greens fees and like charges shall be applied first to the payment of interest on any mortgage or mortgages upon said premises, taxes thereon and upkeep of the property, any excess of said sum after the payment of such charges to be paid over to the lessor or its assigns, and upon terms providing that the said complainant shall provide upon said premises such facilities from time to time for the use of such members as the Court shall determine, then this decree, so far as it orders the dismissal of the bill of complaint, shall be without force and effect, and a decree may be entered in lieu thereof, on notice, decreeing specific performance of the said contracts upon the conditions hereinabove mentioned.

And all further equity (including the discharge and compensation of the receiver, counsel fees, and all other incidental matters) is reserved until the time shall elapse within which the complainant is to exercise its said election as aforesaid.

Respectfully advised:

V. C.

Testimony.

(Taken Mar. 28th, 1927, and Feb. 21, 1928.)

IN CHANCERY OF NEW JERSEY.

Between
AMERICAN PLASTER DRILL COMPANY, a corporation,
Complainant,

and

WILLIAM H. FRANCISCO, *et al.*,
Defendants.

Transcript.
On Bill, &c.

Transcript of the testimony taken in the above-stated cause, on final hearing, at the Chancery Chambers in Jersey City, on Monday, March 28, 1927, at 10 o'clock in the forenoon, before His Honor JOHN BENTLEY, Vice-Chancellor.

Appearances:

LIONEL P. KRISTELLER, Esq., for the Complainant;

Messrs. HOPKINS & HERR, Solicitors; DOUGAL HERR, Esq., of Counsel, for Defendants Francisco;

Messrs. SMITH & SLINGERLAND, Solicitors; A. C. SLINGERLAND, Esq., of Counsel, for Defendant Recreation Development Co.;

Messrs. BUTLER & BUTLER, Solicitors; JAMES A. BUTLER, Esq., of Counsel; HARVEY G. STEVENSON, Esq., of Counsel, for Country Club.

ARCHIBALD F. SLINGERLAND, sworn on behalf of the complainant, testified as follows:

Direct examination by Mr. Kristeller:

Q. You are an attorney and counsellor at law in New Jersey? A. I am.

Q. Of the firm of Smith & Slingerland? A. I am.

Q. I show you a paper signed and executed by William H. Francisco, Mary F. Francisco, Richard S. Francisco, and Mary A. Francisco, and ask you whether this is a contract which was delivered to you by Mr. Donaldson for the property in Caldwell? A. It is.

Mr. Kristeller: I offer it in evidence.

Mr. Herr: I must object to it, because the copy of the contract I have doesn't bear any signatures of the wives, only of the husbands.

The Court: Well, let me see the contract a moment. What do you mean, that there are no subscribing witnesses?

Mr. Herr: No, sir; I mean that the wives haven't executed the original contract, and I think we ought to require strict proof.

Mr. Kristeller: That is our copy.

The Court: I don't understand what you mean by strict proof.

Mr. Herr: Well, the witness isn't the subscribing witness who took the acknowledgment.

The Witness: I am not.

Mr. Herr: Well, I object to the offer. I don't understand that an acknowledged paper can be offered without proof of the subscribing witness.

The Court: Who is this man Cromley?

Mr. Herr: He is here in court, sir.

Mr. Kristeller: I can prove it by him, and if part of it is admissible the rest of it will be. Do you object to it now?

Mr. Herr: Yes, I object to it.

Mr. Kristeller: Then I will withdraw Mr. Kristeller and put Mr. Cromley on.

(Witness steps aside.)

Robert W. Cromley, sworn on behalf of the complainant, testified as follows:

Direct examination by Mr. Kristeller:

Q. Mr. Cromley, what is your address? A. Essex Fells, N. J.

Q. Are you a member of the bar of the State of New Jersey? A. I am an attorney of the Supreme Court of New Jersey.

Q. Are you the subscribing witness to this agreement I show you? A. I am one witness.

The Court: Sole subscribing witness.

Mr. Kristeller: I now offer the contract.

Mr. Herr: I would like to ask a few questions, if I may.

By Mr. Herr:

Q. Did you take the acknowledgment of the wives of the two Franciscos mentioned in that contract? A. I did not. They did not sign then.

Mr. Herr: I object to it.

Mr. Kristeller: Yes, sir; I offer the contract in evidence.

The Court: Mr. Kristeller, there is nothing here to show that these married women ever did acknowledge it.

Mr. Kristeller: Yes, on the last two pages. It seems that the women both re-acknowledged it and this is one of them, at the top there.

The Court: Did you see these acknowledgments, Mr. Herr?

Mr. Herr: No, sir; I didn't.

The Court: I didn't either until Mr. Kristeller pointed out where they were.

(Mr. Herr examines paper.)

A. They are not in the body of it.

Mr. Herr: Apparently what happened was, they acknowledged before some other officer.

Mr. Kristeller: What exactly happened was, when this contract was shown to Smith & Slingerland they said that the contract wasn't any good. I don't suppose that Mr. Donaldson wanted to give them a bad contract and they went up and had it acknowledged.

The Court: Now, I suppose strictly, Mr. Kristeller, there isn't any proof by anybody of the signatures of those two women.

Mr. Kristeller: If one part of it goes in the rest will go in. There is no dispute that it isn't their signature.

The Court: I understand Mr. Herr insists upon strict proof.

Mr. Kristeller: If he insists upon strict proof, my understanding is when I prove one signature by the subscribing witness I don't have to prove every signature.

The Court: You have not offered any evidence that the signatures are those of the two women.

Mr. Kristeller: All right; then I will ask for an adjournment and I will subpoena them. In view of the opening statement I don't think that they wanted to give us a bad contract.

By the Court:

Q. Mr. Cromley, were you present when that agreement was executed by the parties? A. I was. The women didn't sign then. They are not named in there. I will tell you all about it, Judge.

Q. Well, I don't know; you are in Mr. Kristeller's hands.

The Court: I don't know what you are going to do.

Mr. Kristeller: I will ask for an adjournment. I was always under the impression when I proved an agreement the agreement goes in.

Mr. Herr: I don't want to be captious at all, but I don't know whether they signed it or not. I understood they didn't.

A. They didn't sign it in my presence.

By Mr. Kristeller:

Q. Do you know their signatures? A. Well, I couldn't say.

Q. Did you deliver this paper to anybody? A. No.

Q. Do you know whether that is signed by the women (handing paper to the witness)? A. I don't know.

Mr. Kristeller: All right; if they want me to subpoena the women I will have to ask for an adjournment, although I think, under the law, that is not necessary.

Mr. Herr: My understanding is, if the document is recorded then it may be proved without the subscribing witnesses. However, mightn't the matter be left this way: I will consent to have it go in, subject later to a motion to exclude it if I find upon investigation that they did not sign.

Mr. Kristeller: Oh, that is all right.

The Court: They are now to be marked by consent, being a paper purporting to be a contract for the sale of land by William H. Francisco and his wife, and Richard S. Francisco and his wife, subject to the right of counsel for the Franciscos to move to strike out the agreement if it is determined later that it was never signed by either of the women.

(The same is marked Exhibit C-1.)

Mr. Kristeller: I also offer in evidence a receipt, dated December 6, 1924, for $2,000, signed by William H. and Richard S. Francisco and their wives.

Mr. Herr: Let it go in under the same condition.

Mr. Kristeller: Yes, I have no objection.

Mr. Herr: I mean, I will not object to it going in provided I have an opportunity to strike it out later, if I find that the wives did not sign it.

(The same is marked Exhibit C-2.)

Mr. Kristeller: I now offer in evidence a contract between The Recreation Development Corporation and the American Plaster Drill Corporation, recorded in the office of the Register of Essex County, Book L-74 of deeds, page 494, together with the copies of the extension agreement, a copy of the agreement dated Jan. 2d, 1926, between William H. Francisco, by Robert M. Cromley, his attorney, and Richard S. Francisco, extending the time of payment to March 6, 1926, on their original agreement; and the extension signed by Mr. Cromley, attorney, extending the time to April 1, 1926.

Mr. Herr: No objection.

(The same is marked Exhibit C-3.)

Mr. Kristeller: I now offer in evidence the assignment from the Recreation Development Co. to the American Plaster Drill Company, of the agreement dated June 11, 1924.

Mr. Herr: No objection.

(The same is marked Exhibit C-4.)

Archibald F. Slingerland, resuming the stand, testified as follows:

Direct examination by Mr. Kristeller (continued):

Q. Mr. Slingerland, did you have charge of this title during the time that the thing was examined? A. Just when do you mean?

Q. I mean February and March, 1926. A. I think I took charge of it in connection with the

preparation of a contract, and so on, about that time.

Q. I show you a letter from me, dated February 27, 1926, in regard to the title; did you receive that letter? A. Yes, sir.

Mr. Kristeller: I offer that letter in evidence.

Mr. Herr: No objection.

(The same is marked Exhibit C-5.)

Q. I show you a letter, dated March 22, 1926, calling your attention to the *lis pendens* filed in the Dryden suit, and ask you if you received that letter? A. I did.

Mr. Kristeller: I offer the letter in evidence.

Mr. Herr: No objection.

(The same is marked Exhibit C-6.)

Q. I show you a letter dated July 2d, and ask you if you received that letter? A. I did.

Mr. Kristeller: I offer that in evidence.

(Admitted and marked Exhibit C-7.)

Q. Has the *lis pendens,* up to the present time, been removed? A. Not to my knowledge.

Q. Has the Recreation Development Co. been able to obtain a deed from the Franciscos for that land without the *lis pendens?* A. I understand that the *lis pendens* has been on file during all of this period and still is, so far as I know.

(No cross-examination.)

ROBERT W. CROMLEY, recalled on behalf of the complainant, testified as follows:

Direct examination by Mr. Kristeller:

Q. You were at my office on several occasions between January 1st, 1926, and the date of the filing of the present bill of complaint, weren't you? A. I was.

Q. And at that time we offered to take title from your clients, the Franciscos, providing you released the *lis pendens* in the Dryden suit? Is that right; yes or no? A. In January the Dryden suit hadn't been started.

Q. I didn't ask you that; I said, when you came to my office we offered to take title from your clients provided the *lis pendens* were removed? A. At one time, you did, yes.

Q. And you refused to give us title except we settled with the members; is that right? A. No.

Q. You were always anxious about the members' rights, and you said you couldn't give us title without taking care of the members; isn't that what you said? A. I said, if you were going to take title subject to the rights of the members I didn't see that the *lis pendens* in their suit was any objection to the title, so far as you were concerned.

Q. I called your attention to the fact that the *lis pendens* was against the Franciscos, and their agreement with the corporation was free and clear of the *lis pendens,* didn't I? A. Yes.

Q. And you said you wouldn't make any effort to clear the *lis pendens* off the record, didn't you? A. I did.

Cross-examination by Mr. Herr:

Q. Mr. Cromley, on the occasion of that conversation was anything further said about the players' rights?

Mr. Kristeller: That is not proper cross-examination at this time.

Mr. Herr: You brought that out yourself, the conversation about the rights of the players.

Mr. Kristeller: All right; I will withdraw the objection.

Q. That conversation was largely about the rights of the players, wasn't it A. Yes, we discussed their rights to some extent.

Q. And at that time did you show Mr. Kristeller a copy of one of these certificates of membership that was issued to the members? A. I did.

Q. Did he say that that is the first he had known of it? A. He said that was the first he had ever seen one—the first time.

Q. Did you show him a copy of the by-laws of the Ferncliffe Golf and Country Club, Inc.? A. Yes.

Q. Did you, on behalf of the Franciscos, offer him the $7,000 deposit back, together with a reasonable search fee, and say "All right, if you will agree to take it back and call the contract off"?

Mr. Kristeller: I object to that question. It puts me in an embarrassing position of having to take the stand. If he had any offer it should have been made in the proper manner to my client or by letter. I don't want to take the stand and testify in a case that I am trying.

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The Court: I will overrule the objection and let the question be answered.

Mr. Slingerland: I object, on behalf of the Recreation Development Co., as not binding upon us at all, because whatever offer he made to Mr. Kristeller wouldn't affect our rights under the assignment. Of of course, it would not be binding upon us.

The Court: It would not, but that doesn't alter the fact of its being admissible.

A. Yes, we agreed to give him the deposit back and a reasonable fee for examination of the title, and cancel the contract.

Q. What did he say to that suggestion? A. He said, no, he wouldn't do it.

Q. Did he say why? A. Before there was anything more said, as I remember it, the discussion came up as to what the property was to be used for, and I said that I understood he didn't buy it to retain a golf course, and in view of these certificates that had been issued to members it seemed to me to be questionable whether he could use it for development purposes, and he replied there was a lease on there for $15,000 a year rent and if the members didn't pay the $15,000 he would put them out.

Q. Did you tell him that there was any question about the validity of that lease as regards the members? A. I told him that the members had told me—or some of them had—that they never heard of the lease when they paid the money and that there might be some question as to the validity of it against them; and he replied that they would have to take that risk and if they were beaten it was their hard luck.

Re-direct examination by Mr. Kristeller:

Q. When was that conversation, Mr. Cromley? A. I haven't the date in my mind.

Q. Well, approximately when? A. Well, I should say last November.

Q. That was long after this litigation had started? A. Oh, yes.

Q. Did you ever have any talk with me before the litigation started? A. I'm not sure about that.

Q. How many times did you come to my office? Once, twice, three times or four times? A. I think I was in your office on three occasions.

Q. And on which occasion was this conversation in which you offered me the down money back? A. I think the last one.

Q. Sure about that? A. I am quite positive about it, yes.

Q. Quite positive you offered me a sum of money? A. Yes.

Q. Now, isn't it a fact that you conducted yourself throughout this litigation as you have on the stand, in a decisive determination always to protect the players and never offering me one chance to get the property or to decline it?

Mr. Herr: I object to the form of the question. This is not cross-examination.

Mr. Kristeller: I think he is a hostile witness and I have a right to use cross-examination.

The Court: Unquestionably he is a hostile witness. I will overrule the objection.

A. No, that is not so.

Q. Did you, on any one of the three occasions that you came to my office, ever talk about anything except protecting these players' rights? A. Yes, I did.

Q. When? A. I think every occasion I was there I talked about protecting our own rights.

Q. And didn't we try to get a state of facts for the purposes of this trial, and didn't you then say that you wouldn't consent to any statements of facts because you were going to protect these players? A. No, I don't recollect anything like that.

Mr. Kristeller: It is admitted, isn't it, Mr. Herr, that the property consists of 157 acres in Caldwell, and that a suit was instituted by your clients, the Franciscos, in ejectment, that brought about this litigation? Is that right?

Mr. Herr: That is correct.

Mr. Kristeller: I now offer in evidence the lease between the corporation, the Recreation Development Corporation, and the Franciscos, dated July 25, 1924.

Mr. Herr: I object to it, on the ground that it cannot bind the other parties to the suit.

Mr. Kristeller: It binds the Recreation Co.

The Court: That corporation is a party. I think it is very important that I should know something about this lease.

Mr. Herr: We haven't seen it.

The Court: Of course, you are entitled to see any paper that is admitted in evidence, if that is what you mean.

(The same is admitted and marked Exhibit C-8.)

Mr. Kristeller: I now offer in evidence, if your Honor please, a certified check, dated January 2, 1926, to the Recreation Development Company, for $7,000, endorsed by the Recreation Development Co., J. W. Donaldson, President, to Robert W. Cromley, attorney for W. H. and R. S. Francisco, and deposited in the Chatham-Phoenix National Bank in New York. That is the down payment.

(Admitted and marked Exhibit C-9.)

Mr. Kristeller: I also offer in evidence two checks, both dated March 2d, 1926, to the Recreation Development Corporation, one in the sum of $200 and another in the sum of $300, being payments on account as set out at our meeting and in the contract. That is not binding, I suppose, on Francisco, but is on the corporation.

(Admitted and the $200 check is marked Exhibit C-10, and the other C-11.)

Mr. Kristeller: It is admitted, isn't it, Mr. Herr, that you haven't conveyed to the Recreation Development Co.?

Mr. Herr: It is.

Mr. Kristeller: And that you have refused?

Mr. Herr: We have refused to convey to the complainant free from the *lis pendens.*

Mr. Kristeller: Complainant rests.

DEFENDANTS FRANCISCOS' CASE.

ROBERT W. CROMLEY, recalled on behalf of defendants Francisco, testified as follows:

Direct examination by Mr. Herr:

Q. Mr. Cromley, I show you what purports to be a contract between William H. Francisco and Richard S. Francisco with the Recreation Development Corporation, dated June 11, 1924, and signed "William H. Francisco and Richard S. Francisco" and acknowledged before you; are you the subscribing witness to those signatures? A. I am, yes.

Q. And those are the signatures of William H. Francisco and Richard S. Francisco? A. Yes.

Q. And the wives did not sign before you at that time or any other time? A. No.

Mr. Herr: I offer this.

Mr. Kristeller: I don't want to be objecting all the time, but we have one contract and you agreed if the wives did sign it you would not object. We don't want two copies of the same contract.

Mr. Herr: This is what we say was signed, and if it turns out later that the wives did not sign then this is in evidence; otherwise it can be ignored.

The Court: The only difficulty would be the expense of printing in the event of appeal. I will overrule the objection and allow this to be marked in evidence. But if there is no proof of forgery of the women's names, if the proofs remain as they are now, I will strike out the one which was

signed by the women so as to avoid duplication in printing.

(The same is marked Exhibit D-1.)

Q. You, as the attorney for the Franciscos, received the $7,000 deposit money that was paid by the complainant, did you? A. I did.

Q. Did you disburse that money? A. Yes.

Q. Will you state, in general, for what items you made those disbursements? What was the character of the payments? A. Payments on debts incurred by the Recreation Development Company and the settlement of some suits that had been started. It was almost entirely used up that way.

Q. Did the Recreation Development Company owe the Franciscos any money for anything outside of the contract to buy the land? A. Oh, yes, they owed them a large sum of money.

Cross-examination by Mr. Kristeller:

Q. Most of this money was spent for improvements made by the Recreation Development Company on the Francisco property; isn't that so? A. Very largely, yes.

Q. And the payment for settlement of these suits was also payment for suits for materials furnished or work performed upon the Francisco property in connection with the golf course? A. Yes, pretty much all of it.

Q. And did you pay some taxes, too? A. Yes.

Q. And practically this entire $7,000 was used for the benefit of the Franciscos, wasn't it? A. Was used in payment——

Q. Don't explain it now; explain it later. Most of it was used for the benefit of the Franciscos? A. No.

Q. You had a bill against the Recreation Development Company for $200, didn't you? A. Yes.

Q. You took that out of that money? A. Yes.

Q. There were taxes on the Francisco farm for 1925 which the Development Company hadn't paid, and which the Franciscos would have had to pay, wouldn't they? A. Yes.

Q. That amounted to thirteen and some hundred dollars. That was paid out of that $7,000? A. It was.

Q. And the Essex Fells Plumbing & Heating Company bill was for some work done on the Francisco farm at that time at the club house, wasn't it? A. I think so; I'm not sure.

Q. So that if the money wasn't paid by the Recreation Development Company there might have been a mechanic's lien against the Francisco property?

Mr. Herr: I object, because it calls for a conclusion.

Mr. Kristeller: He was their solicitor or attorney at the time. I have a right to show that this money went for the benefit of the Franciscos. However, I will withdraw the question to save time.

Q. And of that $7,000 you deposited over $1,600 to the credit of Francisco in the Caldwell National Bank? A. Something like that.

Q. How much of this $7,000 went for things other than for the benefit of Francisco? A. I can't tell you how it was apportioned without the list. I made a list at the time.

Q. You sent a list, didn't you, to Mr. Slingerland, of Smith & Slingerland, at Newark? A. I did, yes.

Q. Is this your letter, and is this the list (handing papers to the witness)? A. Yes, that is my letter.

Mr. Kristeller: The letter and list are produced by Mr. Slingerland, upon notice.

Q. Is that the letter and the list? A. Yes.

Mr. Kristeller: I ask that those be marked for identification.

The Court: They are admitted and might as well go into evidence.

(The letter is marked Exhibit C-12 and the list Exhibit C-13.)

Re-direct examination by Mr. Herr:

Q. Didn't Francisco's bill against the Recreation Development Company, outside of the amounts owed on the contract, exceed the sum of $1,643.65? A. Yes.

Mr. Kristeller: Wait a minute. I object, on the ground that we are not bound by what the Francisos did with the deposit of the down money. They got it.

Mr. Herr: The whole purpose is to show it wasn't taken on account of the contract price. It is set up in the pleadings that the Franciscos got $2,500 on account of the contract price of this property. I don't want it to be understood that this $1,625 in addition was taken on account of the debt.

The Court: I don't understand that yet, Mr. Herr. What about this $1,643? You don't want that to be misunderstood.

Mr. Herr: The testimony is that the Franciscos had money coming to them from

the Recreation Development Company outside of the money due, or which might become due, on this contract of sale, and that they credited this $1,643 on account of the money so due. It had nothing to do with the contract of sale of the land.

Mr. Kristeller: We maintain, on the other hand, that they got $2,500, and then they got $7,000 from the Recreation Development Co., and the $7,000 was paid on our contract. If they saw fit to apportion and pay off other things, that is no concern of ours. We are entitled to the credit of $7,000 as against Francisco.

Mr. Herr: There is no question but what they are entitled to $7,000 against somebody; but I thought it might shape up later so that the question would become material how much was paid on account of this contract with the Franciscos by anybody.

The Court: The question has already been answered. I will allow it to stand.

Mr. Herr: Defendants Francisco rest.

Mr. Slingerland: I don't think it is quite fair to go into the question of fraud in the absence of my client. I think he ought to hear the testimony, because they are going to try to fasten fraud upon Donaldson, and I think he ought to hear it.

The Court: I quite agree with you.

Mr. Kristeller: I want to make this point, if your Honor please: Your Honor ruled against me on the proposition that the members' case might be joined to this.

Surely, it came at a very late date. And as to that, we are not offering any evidence. These fellows have known all this time that they were going to come in here last year. Now, at the last moment, they served the notice, and I said then and I say now that I object to the shortness of notice, because up to last Tuesday I didn't know that they were going on.

Mr. Butler: So far as Mr. Kristeller's objection is concerned, I think when it comes to that it is up to Mr. Slingerland. He knew it. I would be very anxious to have Mr. Donaldson here.

The Court: Now, Mr. Slingerland, I think, in all fairness, you are entitled to know just what you express—to have your client hear the evidence against him. Do you mean that literally?

Mr. Slingerland: I do. I don't want to be in a position to be criticised without the opportunity for him to be here. If I can't get him I will try to.

The Court: All the parties want this expeditiously wound up. How long a time, Mr. Slingerland, do you think this case ought to be continued?

Mr. Slingerland: I should think a couple of weeks ought to be time enough. If I can't get him, or if he refuses to come, I will be free to go head.

The Court: You have means of communicating with him?

Mr. Slingerland: I have his last address. I haven't heard from him in a long time, but I know he must have gotten one of my letters, because it hasn't come back. But all I can do is to try to get him.

Mr. Herr: The report is that he has gone to Australia.

The Court: Do you know any of his affiliations or associations?

Mr. Slingerland: No, I have only one address. I don't want him to come here and say, "Why didn't you let me know?"

Mr. Kristeller: May we then consider that our case is through?

Mr. Herr: It is a part of my case to have their case come in.

Mr. Kristeller: Well, that is news. I didn't realize that; I didn't think that.

Mr. Slingerland: I don't see why the complainant couldn't pay the money into court and let us fight it out.

Mr. Butler: I don't see why. We are fighting for the members, between Mr. Francisco and the Plaster Drill. Now, this gentleman doesn't represent any of the parties except Mr. Donaldson, and I don't see why he is so interested in having the money paid into court.

The Court: I understand he represents the Recreation Development Corporation and they have got to pay $55,000.

Mr. Butler: Yes.

The Court: They claim about $55,000 and interest, the difference between the amount of their contract with Francisco and the amount of their contract with the Plaster Drill Co. Suppose we lay the case over to April 15th, Good Friday.

(On April 15th a further adjournment was had, and it is now set for Tuesday, February 21, 1928, at 10 o'clock in the forenoon, at the Chancery Chambers in Jersey City.)

IN CHANCERY OF NEW JERSEY.

Between AMERICAN PLASTER DRILL CO., a corporation, Complainant, *and* WILLIAM H. FRANCISCO, *et als.*, Defendants.	On Bill, &c. Transcript.

Transcript of testimony taken in the above stated cause, on final hearing, continued from March 28, 1927, at the Chancery Chambers in Jersey City, on Tuesday, February 21, 1928, at 10 o'clock in the forenoon, before his Honor JOHN BENTLEY, Vice-Chancellor.

Appearances:

LIONEL P. KRISTELLER, Esq., Solicitor, Hon. MERRITT LANE, of Counsel, for the Complainant;

Messrs. HOPKINS & HERR, Solicitors, DOUGAL HERR, Esq., of Counsel for Defendants Francisco;

Messrs. SMITH & SLINGERLAND, Solicitors, A. C. SLINGERLAND, Esq., of Counsel for Defendant Recreation Development Co.;

Messrs. BUTLER & BUTLER, Solicitors, JAMES A. BUTLER, Esq., and HARVEY G. STEVENSON, Esq., DOUGAL HERR, Esq., of Counsel for Defendant Country Club.

Judge Butler: Before we start I want to say to your Honor that the interests of the Players in this case and the Franciscos are common interests, and we have agreed that Mr. Herr shall act as counsel and will handle the case.

Mr. Slingerland: If your Honor please, may I at this time press my motion, of which I gave notice, to dismiss the suit of Dryden against the Recreation Development Co., on the ground of lack of prosecution. The bill was filed over two years ago. There was an order to show cause granted; we had an argument upon that, and that is the last step taken in the case. There was never any subpoena issued, no order taken upon the order to show cause. Now, I think it will clarify this present case if we will eliminate that suit, under the rule; and I, therefore, ask that that be dismissed, and the rights of the parties determined in the present suit in which they have asked to intervene as parties. It seems to me it is useless to continue with a suit that has never actually been started and in which no subpoena has been issued at all.

Mr. Kristeller: I oppose that application because, realizing as I will have to sooner or later, that the Francisco affairs are going to be joined with the other defendants, if that suit is dismissed it may change this suit. The *lis pendens* has gone.

We object to taking title, in view of the stipulation as corrected by Mr. Herr that they had refused to convey to us free from that *lis pendens,* and it may be, with that *lis pendens* off, the real meat of our case is disposed of and they will have to convey to someone, whether to us or to the Recreation Development Co., I am not going to make the point now. But here is the situation: We not having a direct contract with the Fran-

ciscos it will create a situation where we will have to take title. With that *lis pendens* off, we say we are entitled to get title from Francisco. And that is what we don't want to do. He has made a contract to convey and we want him to live up to that contract. It was a contract from Francisco to the Recreation Development Co., and the Recreation Development Co. assigned their original contract to us. In the original contract to Francisco there were no exceptions; it was to be free and clear, and the only thing on that title was the *lis pendens*. Now, how is it going to avoid conveying that land? He has got to convey it to someone, certainly. That *lis pendens* ought not to stay if the suit is in the condition that he says it is.

Mr. Butler: I understand notice has been given.

The Court: I understood Mr. Slingerland to say it had.

Mr. Slingerland: Yes, right on top of the bill.

Mr. Butler: There was, sometime ago, a bill which your Honor refused to dismiss. If your Honor will refer to the files you will find that you allowed an amended bill, and after that Mr. Slingerland asked for a chance to hand in an accounting from Mr. Donaldson, and the matter was then adjourned, and Mr. Slingerland gives as a reason for not submitting an accounting that there has been an adjudication and settlement.

The Court: The notice was served on the 25th day of February, 1926.

Mr. Butler: At that time we had a hearing before your Honor and you allowed an amended bill, and Mr. Slingerland said, "We want no receiver; there is nothing wrong; we can give an accounting", and your Honor said, "All right", and Mr. Slingerland left the court room and said he would

have an accounting from Mr. Donaldson. And we have never to this day had it, and that suit was not dismissed at the time, as the records show.

The Court: Well, there is no notice in the file.

Mr. Slingerland: I think the fact is, your Honor, that you decided to hold that motion, along with the rest of the things, until the final hearing.

The Court: Well, that is what I intend to do now. Your motion and Mr. Kristeller's argument on it are noted; but it has been so long since I have had any contact with this case that I think it would be a foolish thing for me to pass upon the motion now, but I will reserve it and deal with it after the proofs are in.

Mr. Butler: "I shall refuse to strike out the bill". That is what your Honor said.

The Court: Well, orders are supposed to be taken and amendments are supposed to be made. Of course, I can allow an amendment at any time.

Mr. Herr: I would like to offer in evidence certified copy of certificate of incorporation of the Ferncliffe Golf & Country Club, Inc.

Mr. Kristeller: I object as not binding on this complainant and not material to the issue of specific performance. Your Honor has permitted some defendants to be joined here. I think that you have to really decide two matters, and probably now a third. One is, whether or not these people have to convey, and if they do have to convey, whether or not any one of us takes subject to any rights. I don't like to have the record show that this has any materiality or any bearing.

Mr. Herr: There are two distinct main defenses to this suit—this bill of Mr. Kristeller's; one is made by the Franciscos and the other is by the Recreation Development Co. The first is, in a word, that the complainant had no legal

right to refuse to take title with the *lis pendens* on it, because under the contracts they agreed to take subject to the rights of the players, whatever those rights may be. Now, this *lis pendens* is filed in a suit by the players to assert those very rights and, therefore, it is not for complainant to say, "you must take that *lis pendens* off". The other one is on behalf of these players. They say that Donaldson and his two concerns, the Ferncliffe Golf & Country Club and the Recreation Development Company, both business corporations of which he owned all the stock—both his creatures—misled them when he sold them membership certificates entitling them to play for the balance of their lives on this particular property; that he represented to them that the property was owned by the Ferncliffe Golf & Country Club, Inc., when, as a matter of fact, it was not owned by that company, and that company never even had a contract to buy it; that he at that time had only a contract with the Franciscos for which he paid a small amount of cash—a shoestring transaction. This was all based upon that $500 payment; that he gave them glowing accounts of what this would be,—a 36-hole golf course, and all kinds of things that they were going to get, when he knew that they couldn't get them. Now, if that be so, as we are prepared to prove, whatever equity Donaldson with his two companies had by virtue of the contract he had with the Franciscos was subject to the equitable estate which, by their fraud, accrued for the benefit of these players. In other words, if the court is dealing with an equitable estate, then it has got to take into consideration the rights of these players, what they would have had if these contracts had not been made with the complainant. If these

contracts had not been made with the complainant, these players would have had a right to the property itself, together with an accounting, as your Honor intimated in the Dryden suit. That is to say, they would have whatever right Donaldson had in the property. Now, then, it is the right that Donalson had in the property that these complainants are trying to reach, and since in their contract they take subject to these rights that were created, it is important to show what those rights were, and the defense is that to enforce this contract will be to enable Donaldson to defraud these players, because the contract was made in fraud of the players' rights.

Mr. Kristeller: Let us convey that property to a trustee, or clerk of the court—anyone to get it out of Francisco, and then let us fight out these players' rights. There is no equitable estate here. There is a legal obligation on the part of Francisco to convey this property, and we hold that by assignment. He has got to convey to the Recreation Development Company. Let him convey it to anybody, but get it out of Francisco and then see what our battle is. Don't let them hide behind the skirts of this so-called agreement. There is no definite agreement by Francisco to convey.

Mr. Herr: This complainant is a third party to the transaction. He has said himself that the contract is between Francisco and the Recreation Development Company. This assignment that he speaks of was a conditional assignment. It was only to take place in case the contract between the players and the Recreation Development Company was not carried out, and it was to take effect so that the difference in price would be paid over to the Development Corporation. What the com-

plainant was entitled to have was not what the Franciscos agreed to give, and, therefore, in order to reach the Franciscos they must deal with the equities and not the law. They are not entitled to the legal estate unless equitably they are entitled to it. I say it was not Donaldson's to give, and they know it. They were on notice.

The Court: For the purpose of saving time, because these arguments consume a great deal of time, I am going to overrule the objection and let it in, and I will deal with it when I come to decide the case.

(Admitted and marked Exhibit D-2.)

Mr. Herr: I offer in evidence certified copy of certificate of incorporation of the Recreation Development Company.

Mr. Kristeller: The same objection.

The Court: Same ruling.

(Admitted and marked Exhibit D-3.)

Andrew J. Pitney, sworn on behalf of the defendant Francisco, testified as follows:

Direct examination by Mr. Herr:

Mr. Kristeller: May I ask your Honor if there has been an order admitting these parties. If so, I have not had a copy of it.

Mr. Herr: There has been an order admitting these parties to defend.

Mr. Kristeller: I don't remember that there was any order, but they are in equity and we want to do equity, and the case has been handled that way.

The Court: Which case is that?

Mr. Herr: American Plaster Drill Co.

Mr. Kristeller: There is no order drawn and no answer filed by these defendants. If we are going to go into the members' case I think the record ought to be straight.

The Court: Is there any objection to filing the answer now and giving copies of it?

Mr. Herr: There is a copy of the order, apparently signed by your Honor.

The Court: The order here is that application is granted to Dryden and they are admitted as parties defendants herein. But what are you going to do about that answer?

Mr. Herr: I will stick to that, and I move that it be filed as within time.

Mr. Kristeller: I object to the filing of the answer. There is sufficient in the answer to show a lot of things that we are not prepared to meet.

Mr. Herr: In this case bear in mind that the agreement which the complainant rests on is an agreement which says on its face that the title is to be taken subject to the rights of these outside parties, whatever those rights may be. Now, that's a little different than the ordinary case to prove a fraud. We are trying to show what these rights are, in equity. In order to show it we have got to show the fraud. It is not a fraud against the complainant; it is a fraud against somebody else entirely.

The Court: I am troubled now by Mr. Kristeller saying that he is in a position where he is surprised if that answer is allowed.

Mr. Herr: If he is in that position, of course I haven't anything further to say. The question in my mind is, whether that amounts to surprise. Under our answer we show that this was a fraudulent lease.

The Court: Do you go further and plead facts?

Mr. Herr: No, sir; not in our answer.

Mr. Kristeller: That brings us right down to what we started out with before, that they thought they had something to hang their hat on, and they pleaded this general fraud. I don't blame my friend Herr at all. They thought that was another chance to get out of this; that the contract hadn't been signed by the wives; but the fact is that it was a good contract. Now, when people take that angle in equity, to my mind they ought not to be given an awful lot of consideration.

* * * * * *

The Court: Well, Mr. Kristeller, if I sustain the objection to the application to file the answer it means that these intervenors can't be heard at all in their defense. I couldn't permit the litigation to go off on any such issues as that.

(At this point Mr. Lane enters the room.)

Now, here is your associate, Mr. Kristeller, for whom you are waiting.

Mr. Lane: I had no idea that you were waiting for me. Mr. Kristeller handled the case before and I thought he was going on with it.

(After argument covering about 20 pages of typewriting the Court made the following ruling:)

The Court: Suppose we go on. We have now spent almost an hour over the offer to file this answer. Suppose you proceed with your proofs and I will have to determine what I will do about the answer. I don't know what I am going to do about it.

Q. Mr. Pitney, are you a member of the association known as the Ferncliffe Golf and Country Club, Inc.? A. I am.

Q. Do you remember about the date that you became a member? A. Yes, about August, 1924.

Q. How did you come to purchase a membership there?

Mr. Lane: I object to that, if the Court please. It is intended to prove interest in land, I suppose, by parol when there is something also in writing.

The Court: I suppose it is to prove fraud. Just what do you mean by that question, Mr. Herr?

Mr. Herr: I mean, under what circumstances did he purchase his membership.

The Court: I am going to overrule the objection. We are getting nowhere.

A. Through one of his representatives, Mr. Lancaster.

Mr. Slingerland: Whose representative?

A. The Ferncliffe Golf & Country Club.

Mr. Slingerland: Now, I object to that. He has no way of telling that this man was a representative of the Ferncliffe Golf & Country Club. It has no binding effect upon our company. He is not qualified to tell that.

The Court: I suppose that is so.

Mr. Slingerland: I move to strike it out.

The Court: It may be stricken out.

Q. Did you pay anything for your membership? A. I did.

Q. What did you pay; how much? A. $50 for a life membership.

Q. To whom did you pay it? A. To the Ferncliffe Golf and Country Club.

Q. How did you pay it? A. By check.

Q. Have you got the check voucher with you? A. I have.

Q. Will you produce it? A. (Witness produces paper.)

Q. I show you cancelled check voucher, drawn to the order of the Ferncliffe Golf & Country Club, under date of August 12, 1924, signed A. J. Pitney, for $55; is that the check with which you paid you club membership? A. Yes, sir.

Mr. Herr: I offer it.

(Admitted and marked Exhibit D-4.)

Q. Did you also receive a membership certificate? A. Yes, I did.

Q. I show you what purports to be a membership certificate in the name of Andrew J. Pitney, signed Ferncliffe Golf & Country Club, Inc., by J. W. Donaldson, President, and Herbert A. Blanchet, Secretary; is that the document you received? A. Yes, sir; it is.

Mr. Herr: I offer that in evidence.

Mr. Lane: I suppose this is subject to my general objection.

(The same is marked Exhibit D-5.)

Q. Prior to sending your check for this life membership, did you have a talk with anybody about it? A. Yes, Mr. Lancaster.

Q. Who is Mr. Lancaster, if you know? A. Why, as far as I know, he represented himself to be a representative of the Ferncliffe Golf & Country Club.

Q. Did you send for him to come and see you? A. I did not.

Q. How did you get in touch with him? A. He came to see me.

Q. At whose request? Was it at your request that he came to see you? A. No, it wasn't.

Q. How, if you know, did he come to call on you? A. Well, I had known Mr. Lancaster quite a long while, and he used to come over to the house once in a while, he living across the street, and by way of conversation he brought up the question of the Ferncliffe Golf & Country Club,

Q. As the result of your conversation with him did you send your check and get this membership? A. I did.

Q. What did Mr. Lancaster say to you about the club?

Mr. Slingerland: I object.

Mr. Lane: I also object. Here is the evidence, the contract between the parties, in writing, and it is an attempt to alter or vary the contents of a written contract by parol evidence, the transaction and parol evidence happening before the contract was made. In the second place, there is no proof of any authority on the part of the principal doing the speaking to bind anybody.

The Court: Is there any more classical exception to the rule of parol evidence

than for the purpose of showing where a written contract is obtained on the ground of fraud? They charge Donaldson and his agents with fraud. Now, as to the second objection, that no authority is shown, it seems to me that there is as a result of the representations made by that agent or individual, that this witness acted upon it, paid his money, and the money was accepted by the person said by the representative to be his principal. I overrule both objections.

Q. The question is, what did Mr. Lancaster say about the club? A. When he called to see me about the membership——

Mr. Slingerland: Pardon me for interrupting, but it seems to me that the defendant in this suit is the Recreation Development Company, and he is now attempting to relate this conversation on behalf of the Ferncliffe Golf & Country Club. It is not binding upon this defendant.

The Court: The complaint of the Players is that the Development Association and the Country Club and Donaldson were all one and the same. There is no jury here. Objection overruled. Now, go ahead and tell us what he said.

A. Mr. Lancaster called to see me at different times and he spoke of this club. I didn't know anything about it. And finally he asked me to drive over and see the club and see how they were developing it, and so on, so far as they had gone, which I did; and then I asked Mr. Lancaster who owned this property. He said that the Ferncliffe

Golf & Country Club owned the property. And I also asked him if there were other interests, and he said absolutely none; and as I had known Lancaster for some little time and thought he was a man of integrity, and on the strength of what he told me about the new club house, swimming pool, tennis courts, bridle-paths, and all those things, I bought the membership.

Q. When you were up to see the club with him, was there any bridle-paths or club house or swimming pools there? A. I didn't see any.

Q. What did he say to you about those things? A. Well, it would only be a matter of a short time when they would all be built.

Q. Did you discuss with Mr. Lancaster the way that this new work was to be financed? A. No, I didn't.

Cross-examination by Mr. Lane:

Q. How did you think it was going to be financed? A. Why, by the dues that were being paid in by the one thousand members.

Q. Did he say how many members he had at that time? A. Yes, he told me that they had about 300, because it was getting pretty well to the end of the $50 initiation, and after they had taken the 300 members the dues were to be advanced to $100 for the next 200 members. So my idea of financing it was that the dues taken from a thousand members would do it nicely.

Q. It was rather an expensive thing that was going to be developed? A. Not so heavily expensive.

Q. When did you discover that anybody had any interest in this property except the club? A. Oh, just here, when this case started in a few months ago, whenever it was. This is the first time I had been to any of the hearings.

Cross-examination by Mr. Slingerland:

Q. Mr. Pitney, do you remember singing any application for membership? A. I do.

Q. Would you remember the appearance of that application if I showed you one, do you think? Look at that and see whether that is the form of application that you signed (handing paper to witness). A. I don't think it is; I wouldn't make an affidavit on that, but I don't think so.

Q. Did you keep a copy of the application which you signed? A. I am pretty careful about those things, but I haven't got it.

Q. I see you have a copy of the by-laws; did Mr. Lancaster give you that? A. No, that was sent to me sometime afterwards.

Q. Now, will you look at this application and tell me in what respect it differs from the one that you signed, if you recall. A. That I couldn't tell you without seeing a duplicate of the one I signed.

By the Court:

Q. I understand your position to be, that you are unable to say whether that is an exact copy? A. No.

Q. You don't say that it isn't? A. I don't say that it isn't or that it is.

By Mr. Slingerland:

Q. It may have been a form like this? A. It may have been but I doubt it.

By the Court:

Q. Why? A. It seems to me that the form that I signed was a different one entirely than that.

Q. Then you think it was not? A. Yes.

By Mr. Slingerland:

Q. In what respect do you think it differs? A. That I am not in a position to say. I see that that says there $100 dues, doesn't it?

Q. It does. Is that the only respect in which it differs? A. That's all I can see at the present time.

Q. Otherwise, you think it is the same? A. I wouldn't say so.

Q. Did you see any of the literature of this country club before you became a member? A. I saw some of it; yes, sir.

Q. In any of that literature that you saw did it state that the club was the owner of this property? A. I never knew of anything connected with the club but the Ferncliffe Golf & Country Club.

Q. Please answer the question. (The question is read by the reporter.) A. I don't know that it did.

Q. When did you first see the by-laws of this club? A. They were sent to me, I couldn't tell you when; sometime after I put in my application.

Q. Shortly after, or was it with your certificate of membership? A. No.

Q. Didn't it come with your certificate of membership? A. No, I don't know.

Q. It may have? A. I don't remember about that.

Q. Did you read the by-laws? A. I have read them since.

Q. Did you read them at the time? A. I possibly did.

Q. Will you let me have the copy of by-laws that you have, Mr. Pitney? A. (Witness hands by-laws to counsel.)

Mr. Slingerland: I offer this copy of by-laws in evidence.

(Admitted and marked Exhibit D-6.)

Recess until 2 P. M.

AFTERNOON SESSION.

WILLIAM J. SURY sworn on behalf of the defendant Francisco, testified as follows:

Direct examination by Mr. Herr:

Q. Mr. Sury, did you purchase a membership in the Ferncliffe Golf & Country Club? A. I did.

Q. About when was that? A. I should say about June, 1924—June or July, somewhere around there.

Q. What did you pay for it? A. $55.

Q. To whom did you pay that money? A. To Mr. Pike.

Q. Did you pay it by check? A. Yes.

Q. Have you got your cancelled voucher? A. I have not.

Q. Did you receive a membership card? A. I did.

Q. Have you that with you? A. I have.

Q. Will you produce it? A. (Witness produces card.)

Q. I show you what purports to be a membership card, dated September 12, 1924, in your name; is that the membership card you received? A. Yes.

Mr. Herr: I offer that.

(Admitted and marked Exhibit D-7.)

Q. Did you also receive a membership certificate? A. I did, but I haven't it with me.

Q. Did you sign an application? A. Why, I imagine I must have, but I don't recall it.

Q. Did you see Mr. Pike? A. Why, he came to me representing the Ferncliffe Golf & Country Club——

Mr. Slingerland: I move that that be stricken out, on the ground that he is not qualified to say that he was representing the Ferncliffe Golf & Country Club.

A. (Continuing) Representing the agent of the Club.

The Court: Well, I suppose it will be shown that, as the result of seeing the solicitor, representations were made by that man which induced him to join, and that the Club accepted the witness's money for such membership.

Mr. Herr: He testified that he paid his money to Pike. He has already said that.

The Court: I will overrule the objection.

Q. Did you have a talk with Mr. Pike about the Club? A. I did, certainly.

Q. Was that prior to your purchase of the membership? A. Yes, sir.

Q. Now, what was the conversation between you and Mr. Pike about it?

Mr. Slingerland: I object, if Your Honor please, on the ground that there is no evidence of any authority on the part of Mr. Pike to represent this club.

The Court: I will overrule it, for the reason just stated.

A. Mr. Pike—I don't know—called two or three times at my place of business, and he pictured the different features of the Ferncliffe Golf & Country Club.

By the Court:

Q. Now, when was this with reference to the time you paid for your admission to the club? A. That was before I paid for it.

Q. All right; proceed.

Direct examination resumed:

A. He pictured the golf club with 36 holes, and a swimming pool and bridle-path, and tennis courts——

Q. What did he say about those things? A. He said that it was the Ferncliffe Golf & Country Club, and he told me that the initiation fee would be $50 for the first 300 members, and thereafter it would be $100 or $110, I am not sure which. So I thought it was a pretty good proposition. I spoke to several other men in town and they said——

Q. Never mind what they said. What else did Mr. Pike say to you about the club before you bought your membership? A. Well, he said so much that I can hardly remember it.

Q. Did he say anything about the ownership of land? A. Oh, yes; certainly.

Q. What did he say about that? A. He told me that it was owned by the Ferncliffe Golf & Country Club and that it was all paid for; it strictly belonged to the Ferncliffe Golf & Country Club.

Q. What did he say to you about bridle-paths and the swimming pool? A. He told me that that was all being fixed up or would be after they had gotten a certain number of members.

Q. Did he say how many members? A. I think it was 500.

Cross-examination by Mr. Lane:

Q. Did he say who had paid for all this? A. No.

Q. Well, you were one of the first 300 members? A. That I don't remember.

Q. Well, that is what you said. A. Yes, after the first 300 he said it would be $100 or $110.

Q. How did he say they were going to get revenue except from the members? A. That I don't know.

Q. You knew that there wasn't any money coming in to this club except what they could get from the members? A. Yes.

Q. And you knew that the membership hadn't yet reached 300? A. Yes.

Q. Did he tell you how many members they had? A. No.

Q. And yet he said that the land was all of it paid for? A. Yes, he told me that the Ferncliffe Golf & Country Club owned the land.

Q. You were the Club, and the Club consisted of only the members of which you were one? A. Yes, after I paid the $50, yes.

Q. Did you know that there wasn't enough money from members to buy that land? A. Of course, I didn't know how they went about it in that way.

Q. You had no idea how or by what process the Club owned and paid for the land? A. No.

Q. You had no explanation of that? A. No.

Q. What is your business? A. Garage.

Cross-examination by Mr. Slingerland:

Q. Did you go and look at the property before you got your membership? A. Why, I lived not very far from it, and I go there very often.

Q. You didn't go and look at it? A. No, I didn't expect to buy a membership.

Q. Mr. Pike didn't tell you that the swimming pool, bridle-paths and tennis courts were there? A. No.

Q. What he told you was that they were contemplated? A. That's it.

Q. Did you see any printed literature of this club before you bought your membership? A. I think he brought some literature around and showed it to me.

Q. You read it over? A. Glanced at it.

Q. Would you recognize any of it if you saw it? A. I think so.

Q. I show you a pamphlet and ask you if that is some of the literature that you saw? A. I don't recall this.

Q. Well, if you don't, you don't; look at this one. Do you recall that? A. I don't recall that.

Q. Do you recall this one (counsel showing witness another paper)? A. Yes, I remember this.

Mr. Slingerland: I would like to have that marked for identification; or, have you any objection to it going right in evidence?

Mr. Herr: No. That may go in as one of my exhibits.

(The same is marked Exhibit D-8.)

Q. You say you think you signed an application for membership? A. Yes, it seems to me I did sign one, but I didn't read it over or anything like that.

Q. You didn't read it over; do you think you would recognize it if I should show you a form? A. I might.

Q. Do you recognize that (showing paper to witness)? A. I can't say that I do, no. I don't remember.

Q. You made an investigation of this proposition before you accepted Mr. Pike's importunities, didn't you? A. I spoke to several other men around town.

Q. And you came to the conclusion that it was a good proposition, didn't you? A. Yes.

Mr. Lane: Your Honor has the proposed answer of the players; I would like to see it.

Mr. Herr: I think it ought to go in. It hasn't been filed yet.

Mr. Lane: I understood it was for the court to decide.

Mr. Herr: Let it go in now (handing paper to counsel). If it isn't in, I am perfectly willing to have it go in.

The Court: Yes, I understand you are quite eager to have it go in.

Mr. Herr: When counsel takes it now as a pleading I think it is in.

Mr. Lane: You have offered it as a proposed pleading; I may have some objections to raise after examining it.

The Court: Don't you think when an adversary is out of time in filing a pleading he is entitled to know what you plead before he consents to your filing of it? I don't know what I am going to do; I wish I did know.

Ernest W. Heilig, sworn on behalf of the defendants Francisco, testified as follows:

Direct examination by Mr. Herr:

Q. Mr. Heilig, did you purchase a membership in the Ferncliffe Golf & Country Club? A. I did.

Q. How did you first hear about the Club? A. I saw an advertisement in the "Sunday Call"—I think it was—"Newark Sunday Call".

Q. Have you a copy of that advertisement here? A. Yes, and I went to the office of the Club in Newark the next morning, by the Lackawanna station, on the other side, and inquired about it, and I was introduced to a man they said was Mr. Donaldson, President of the Ferncliffe Golf & Country Club, and he told me he would send a man to see me.

Mr. Herr: I offer this Sunday Call advertisement in evidence.

Mr. Slingerland: No objection.

(Admitted and marked Exhibit D-9.)

A. (Continuing) And then a man by the name of John L. Benjamin, I think his name was, came to my house in Montclair, and I had quite a discussion with him about the Club and how they were expecting to make it pay, and that sort of thing, and he gave me certain literature, part of which is this picture of the Club, a design. And I then put it up to a personal friend, who wanted to know who drew the design, and I was more interested in it then.

Q. This design or plan of a club house you say he showed you and handed it to you? A. Yes.

Q. What did he say to you? A. He said that was the proposed club house to be built when the

memberships were entirely gotten—the first 300, as I understood it. When they had gotten 300 members at $50 each, which would yield $15,000, 200, as I recall, at $100 each which would yield $20,000 more, and 500 more at $200 each which would give $100,000, that is a total of $135,000, and they calculated their running expenses would be about $24,000 a year, and that would bring, if the 1,000 memberships were sold in the first year, or at any time they were sold, about $111,000 with which I could see they could readily purchase the land. I didn't know the value of land in that section, but it was farm land, and I presumed $100,000 could purchase 157 acres. I inquired about Donaldson, and he said he was in New York, at 160 Broadway, and that he had been successful in syndicating Columbia Park and something else I have forgotten now. On that visit I gave him several names of friends of mine on whom he might call. He asked me for names of my friends, and I gave him a half dozen or so, and later he called and I paid him $50 as one-half of the membership fees for myself and wife, and got his receipt, signed "John L. Benjamin", representative, on the form of the Ferncliffe Golf & Country Club. This was paid on August 19, 1924, and the balance was to be paid on October 1, 1924. Then on October 3d I sent my check, and received a letter signed by the Treasurer of the Ferncliffe Golf & Country Club, Herbert A. Blanchet, Treasurer, acknowledging full payment of the two memberships. I have here the cancelled checks. On the back of the first cancelled check I recall I very carefully wrote "In full of half membership in the Ferncliffe Golf & Country Club at West Caldwell, New Jersey, for Ernest W. Heilig and Emma Heilig, including tax, in full.

He told me there was to be an 18-hole Golf Course. That was in the ad. and also vouched for by Mr. Benjamin, and later I received from the Treasurer again, Herbert A. Blanchet, a letter enclosing a membership card signed by himself for membership in the Ferncliffe Golf & Country Club for life, and the letter stated particularly——

Q. Never mind reading the letter. A. Then, later on, I received this letter stating that a certificate and copy of the by-laws will be forwarded as soon as they are available from the printers. I got that later on—the by-laws and certificate of membership.

And then, later than that, was sent a list of the first 300 names; and I found that my name was among those, and a number of persons whose names I had sent Mr. Benjamin to see, who had also gone into the Club. Here is a list of the first 300 members. I counted them and there are 298 members on it.

Mr. Herr: I offer in evidence the plan of the club house which the witness has spoken of.

(Admitted and marked Exhibit D-10.)

Q. I show you a paper, purporting to be a plan of the Ferncliffe Golf & Country Club; is that one of the papers that Mr. Benjamin handed to you prior to your purchasing your membership? A. Yes, and he signed his name at the bottom. You will find it the same signature as on the receipt.

Q. What did he say to you about that, if anything? A. He told me that the first nine holes would be completed immediately, and the second nine holes would be completed within the next year or some time about then. The whole thing

was to be completed by the following spring, as I understood it.

Mr. Herr: I offer that map.

(Admitted and marked Exhibit D-11.)

Mr. Herr: I offer the cancelled check voucher of Ernest W. Heilig for $55, dated October 3d, 1924.

(Admitted and marked Exhibit D-12.)

Mr. Herr: I offer in evidence the letter to Ernest W. Heilig from the Ferncliffe Golf & Country Club, dated October 3, 1924, and signed "Herbert A. Blanchet, Treasurer."

(Admitted and marked Exhibit D-13.)

Mr. Herr: I offer the check of Ernest W. Heilig for $55, dated August 19, 1924.

(Admitted and marked Exhibit D-14.)

Mr. Herr: I offer the receipt, dated August 19, 1924, of the Ferncliffe Golf & Country Club, to Mr. and Mrs. Ernest W. Heilig, for $55 signed by John L. Benjamin, representative.

(Admitted and marked Exhibit D-15.)

Mr. Herr: I offer the letter of the Ferncliffe Golf & Country Club, Herbert A. Blanchet, Secretary, under date of September 19, 1924, addressed to Mr. and Mrs. Ernst W. Heilig.

(Admitted and marked Exhibit D-16.)

Mr. Herr: I offer the membership card in the name of Mr. Ernest W. Heilig, signed

Herbert A. Blanchet, Secretary, dated September 3, 1924.

(Admitted and marked Exhibit D-17.)

Mr. Herr: I offer the membership certificate in the name of Ernest W. Heilig, dated October 31, 1924, and signed J. W. Donaldson, President, and Herbert A. Blanchet, Secretary.

(Admitted and marked Exhibit D-18.)

Mr. Herr: I offer the list of 298 members entitled "Ferncliffe Golf & Country Club organization enrollment."

(Admitted and marked Exhibit D-19.)

Q. Did you have any talk with Mr. Benjamin about the ownership of the land? A. Why, in the discussion as to how the matter would be financed, and so forth, and how it could possibly be run on a greens fee of 50 cents a day, except Sundays and holidays when it was $1.

I asked him who owned it—whose name the title was in—and he said it belonged to the Club; that Mr. Donaldson was the President and the organizer and the title of the property was in the name of the Club. That satisfied me, because I could see where they could get the money out of a thousand memberships, and I could readily see how it could be done.

Q. Did Mr. Benjamin or anybody else say anything to you before you purchased your certificate about the Recreation Development Company? A. No, I never heard of that until recently—well, not until a year or so ago, I think.

Q. Did Mr. Benjamin or anyone else say to you before you purchased your certificate anything

about a lease of the land? A. No, I understood the land was owned—at least, Benjamin told me it was owned by the Ferncliffe Golf & Country Club.

Q. Did you afterwards have any talk with Mr. Donaldson about where the money had gone to that was paid in for memberships? A. There was a meeting at Fulton Hall in Montclair of the members, and Mr. Donaldson was present. I think that was over a year ago in the fall, as I recall it, the first one of the meetings——

Mr. Lane: I object to this as immaterial. I understand they are trying to prove fraud as an inducement for this member to become a member of the association.

Mr. Herr: I think it is proper to prove the fact that this money that was paid in didn't go into the land, but went somewhere else. It is a part of the fraudulent scheme, and that is the purpose of the question.

Mr. Lane: But they are making charges that representations were made to induce them to become members of the club. Now that happened afterwards. If they say the representation was false, well and good. What happened a year or two afterwards, it seems to me is entirely immaterial.

Mr. Herr: It isn't a question of what happened a year or two afterwards.

The Court: I will overrule the objection.

A. At the meeting I asked Mr. Donaldson particularly what became of all the money collected, and he was very evasive.

Mr. Lane: I move that that be stricken out.

The Court: Yes, the evasion may be stricken out.

A. (continuing) He told me it had all been used in the building of the club.

Q. Anything further said about it at that time? A. I couldn't get Mr. Donaldson to make any further reply on that matter.

Q. Was there any further question asked him? A. Yes, there was a lot of general questions from the floor, and Mr. Ebert asked Mr. Donaldson a number of questions from the platform; he was the Chairman of the meeting, I think; I don't recall particularly.

Q. Do you know what Mr. Ebert asked him about that matter? A. I don't think I can recall now just what he did say, so much talking went on.

Cross-examination by Mr. Lane:

Q. You saw this land, didn't you? A. No, I didn't see the land.

Q. You knew where it was? A. I knew about where it was.

Q. You knew it was valuable land? A. I didn't know the value of it. I presume West Caldwell, this was. I know the section quite well, and it was farm land, and it seemed to me perfectly reasonable that you could have bought it for that amount.

Q. What amount? A. $111,000.

Q. Where did you get the 111? A. They were collected from the thousand members, $135,000, $24,000 for the first year's operation would leave $111,000, wouldn't it?

Q. Yes. A. Well, they had $111,000 with which to buy the land. Now, in the meantime, it is com-

mon knowledge that in purchasing property of that sort it could be held on part payment and mortgage and so forth and could be completely paid off or anything they desired. For $111,000 they could put the title in the hands of the Club, easily.

Q. It could be paid for and a good many things could happen if and when you got a thousand members; but you stated to Mr. Dougal Herr, as I understood it, that the title was in the Club and the land belonged to the Club. A. Yes, Mr. Donaldson was to put some of his own money in.

Q. They could do a good many things; I want to know what was said. A. Mr. Benjamin told me that the ownership of the land was held by the Club.

Q. Yes, you told me that before. A. Yes.

Q. And you didn't make any inquiry to determine how it was that the ownership could be in the Club; and you up to date had money from only these 298 members, and the money collected was less than $15,000? A. Yes.

Q. You knew that wouldn't buy the land? A. Why, it would certainly secure title to the land under some financial arrangement which Mr. Donaldson could make, and Mr. Benjamin's representations to me were that he was capable of handling it and that the land was paid for by the 298 members' fees. I thought Mr. Donaldson, the President of the Club, had some financial scheme by which he had gotten title to the property and was now organizing on the basis of a thousand members and the title then was in the name of the Club.

Q. You didn't expect him to make a present of the property to the Club, did you? A. Mr. Donaldson? No. He was the President of the Club.

Q. And you didn't expect him to give the land to the Club, or anything like that, did you? A. I understood they had it; he didn't have to give it.

Q. You expected the Club would ultimately have to pay for the land, didn't you? A. Yes, ultimately, but in the meanwhile the title could be gotten.

Q. Ultimately, however, all of the money had to come from the Club members? A. Yes.

Q. And you didn't know whether you could complete your thousand members, or couldn't? A. No, for I assisted in getting some additional members myself.

Q. And you read yourself the advertisement, and you saw this building on it, and this Club House? A. Yes.

Q. How much did you think that Club House was going to cost, besides the land? A. I thought that Club House might probably be worth $75,000.

Q. And that was another $75,000 on top of the land and that all had to come from the members, too, didn't it? A. Yes, because the Club House, according to the ad., was to be built from the first 300 members. At least, it didn't say it was to be built from that; the ad. stated after the first 300 members' subscriptions the dues were to be raised to $200, and I think it states in there a Club House would be built. I wasn't assisting in the financial arrangement, of course, but I was told by Mr. Benjamin that, and the Club House was to be a later development.

Q. So that you had to buy the land and do the building, lay out of the golf course, swimming pool and all, from the moneys you were going to get from these thousand members; and if it wasn't to be done with the $135,000 where else was it to come from? A. It might come from the

greens fees which the members had to pay. If we had 1,000 members and 50% of them went out there during the year you could probably calculate on receiving $200 a week for five months out of the year, which would be $1,000 a month, and that would give them $5,000 right there, and further collections from their tennis courts, and from their riding school—and they were going to have horses rented and all that sort of thing, and with the affairs that they would have at the Club House—why it would be possible to pay those things off.

Q. Possible, but not probable. You fully realized that it was all depending upon the happening of certain contingencies? A. Yes, and the interest of the individuals, if everybody worked together.

Q. If everybody worked together? A. Yes.

Q. And if you got the members and they paid in the greens fees, which would yield a certain amount of money, and if everything had turned out as you expected, you were willing to gamble $50 on the result? A. There wouldn't be any gamble about it.

Q. You thought it would be a certainty that this thing was a success? A. No business venture is certain, but if honest people work together it will pull through.

Cross-examination by Mr. Slingerland:

Q. What is your business? A. I am with the Public Service Corporation of New Jersey, Secretary of the Welfare Committee.

Q. Before you made this large investment of $50 you made a pretty thorough investigation of this property? A. Only in discussion with Mr. Benjamin and my talk with Mr. Wenderbeck.

Q. Didn't you check up on any of these statements of Mr. Benjamin? A. In what respect?

Q. To verify them? A. I never checked up on anything Mr. Benjamin told me unless it was I went to New York and saw who Mr. Donaldson was. I took his word that he had an office there.

Q. I want you to tell me if you will what Mr. Benjamin told you that you claim was not true? A. The main thing that he told me wasn't true was that the Club at that time owned the land.

Q. Did you check up on that at all? A. No, I didn't examine the records to see where the title lay.

Q. You could have done that? A. No, I don't know that I am expert enough for that. I would have to employ an attorney for that.

Q. Did you know the architect of the Club House? A. Yes, I know Wenderbeck of Caldwell.

Q. Did you talk with him about the proposition? A. Yes, in this way. I met Wenderbeck one day and I said, "I see you are drawing some plans for the Ferncliffe Golf & Country Club?" and he said "Yes". I said, "Do you know Donaldson"? He said, "I have had business dealings with him". "Did he seem all right?" "He seemed all right to me, but I haven't got any money yet." "I suppose you expect to get paid for it, don't you?" And he said, "Oh yes".

Q. What did you think you were buying when you paid this $50? A. I thought I was buying a life membership in the Ferncliffe Golf & Country Club.

Q. Didn't think you were buying any real estate with it, did you? A. With the $50?

Q. Yes. A. I couldn't buy very much with that.

Q. You read the literature, I think you said? A. I read the ad.

Q. Can you point out to us anywhere in that literature any statement to the effect that the Ferncliffe Golf & Country Club owned this property? A. No, it isn't there.

Re-direct examination by Mr. Herr:

Q. When you said "in the literature of the club there was no reference to the ownership of the land" did you intend to include the membership certificate that you received? A. Well, that wouldn't be literature; that would be the certificate of membership.

Re-cross-examination by Mr. Slingerland:

Q. Can you show me anywhere in this certificate where this property is owned by the Club? A. I would have to examine it. This certificate says, "this certifies"——

Q. I know, we can read it, but just tell us where it says it is owned by the Club. A. It says here, "That he has paid in full his said subscription, and in consideration of such payment he is entitled during his lifetime, without further payment on such subscription to use the club property, golf courses, building and equipment at West Caldwell, Essex County, New Jersey".

Q. That is what you claim was a statement that the Club was the owner of the title of this property? A. Well, it certainly carries——

Q. Just answer my question? A. Yes; it says I have a right to use the Club's property, and if the property didn't belong to the Club how could they give me the right to use it if they didn't own it? That is the inference I would get.

By Mr. Herr:

Q. If you had known that this property was subject to a lease under which it was necessary to pay $15,000 a year rent, plus the taxes, would you have subscribed for the membership?

Mr. Slingerland: I object to what he would or would not have done under certain conditions. The condition of his mind can't be considered as a factor. It is entirely improper what he would or would not have done. He may say now that he doesn't think he would have, but he doesn't know what he would have done at that time.

The Court: Well, I think there is merit to the objection. If you were to ask him what he was told in that respect it might not be so objectionable.

Q. Did Mr. Benjamin or anyone else say anything to you about a lease on the property? A. No, I never heard anything about a lease. I understood the property was owned by the Golf Club. Mr. Benjamin told me so.

By Mr. Lane:

Q. If it was owned by the Club and you knew it was so owned, you knew it must have been subject to heavy indebtedness? A. Probably, but I didn't know of any debt on that property.

By Mr. Slingerland:

Q. But you thought notwithstanding that, the scheme was a feasible one and could be made to pay? A. Oh yes.

JOHN H. STRIGNER, sworn on behalf of defendant Francisco, testified as follows:

Direct examination by Mr. Herr:

Q. Mr. Strigner, you are a member of the Ferncliffe Golf and Country Club? A. Yes.

Q. When did you join? A. October 4, 1924.

Q. How did you come to learn about the Club? A. In August and September, 1924, I was attracted to a very alluring advertisement in a Newark newspaper, particularly the Newark Evening News and the Sunday Call. In September, desiring to play golf, and the Club being limited and the roster filled, I thought it desirable to make inquiry, and I made inquiry at the office of the Ferncliffe Golf & Country Club, which was located at Broad Street in the Berwick Hotel. One or two days after, a telephone message came to my home in New York asking for an appointment. I told my folks I would consent to it, so that on the arrival at the office about 7 o'clock Mr. E. Glenn Bowke called as a representative of the Club, and he told me just what I read in the newspaper ads, and he went on to verify what they had; and I asked him, of course, after receiving all the information which substantiated the advertisement, —I said, "Well, it sounds attractive". I says, "What is it going to cost me?" He says, "$110., $100. for the subscription and $10. for the tax". I says, "You advertise here $50." He says, "The quota is filled with 300 members, and if you don't come in with the next 110 members then that quota will be filled and you will have to pay $200." I says, "I don't work that fast".

He says, "Why don't you fill out this application blank? They are going to do all the things

they say they are''. He showed me some literature that they had.

Q. Did he show you an application card? A. Gave me an application card.

Q. Have you got that? A. He gave me three, trying to get all of the family into it (witness producing cards).

Mr. Herr: I offer the white membership card in evidence.

(Admitted and marked Exhibit D-20.)

Q. Did he also hand you an application on pink paper for ladies' membership? A. Yellow sheet. It was $50 and $50 for membership and $5 for tax.

Mr. Herr: I offer that in evidence.

(Admitted and marked Exhibit D-21.)

I asked Mr. Bowke, I says, ''You make mention here according to the by-laws; I would like to see those by-laws''.

He says, ''They have the by-laws somewhere; I will get you a copy''.

I says, ''Have you got any printed to go along with the applications for membership?''

And he says, ''No''. He never gave me any.

I says, ''Before you get me into it you will have to furnish me a copy of the by-laws so that I will know what I am signing''.

He says, ''They have copies down in the office and I will have copies sent you''.

And I said, ''I don't intend to buy anything until I see what I am going to get''.

He says, ''Why not take a run up and see the property?''

And I says, ''I will, and in the meantime I will give you the application''. So, I delayed going to

see the property. This was the latter part of September, the third week, I believe, in September he called again, and he says: "Why don't you get into this? Have you been up to the property?"

I says, "No, I haven't; where are the by-laws?"

He said, "Why, they are not printed, but we will have them for you all right".

I says, "All right; I will go up and look at this property and see what there is to it". So I went up and saw the property, which was in West Caldwell, and I asked for Mr. Bowke. They told me, "Mr. Bowke is not here".

I says, "Who represents this property here?"

And he says, "Why, there is a salesman by the name of Lancaster who will take care of you".

I says, "Where is this man Donaldson; he is the head of the property, isn't he?"

And he says, "Yes". This happened to be a workman and I didn't ask his name. So a man by the name of Lancaster who happened to be in that temporary club house approached me, and he says: "I can tell you all there is about this property".

I says, "Well, I am investigating it; representations have been made to me about getting so much for $110". I says, "What is your capacity or position here?"

He says, "I am the agent and also golf constructor; that is, constructor of the golf course".

I says, "You have got it here that you are going to have 18 holes eventually; you are going to build more holes; where are they?"

He says, "Here they are. There are 9 holes".

I says, "This man Bowke told me you are going to put up this nice Club House, and bridle-paths, and tennis court, and have a swimming pool; how are you going to do all this on this money?"

He said they intended to have all those from the membership. He said they already had 500.

I says, "Is it true that you intend to have those on completing the first 500?"

He says, "That is the plan".

I says, "How do you plan to support this golf links on the property?"

He says, "Well, on the membership fee".

I says, "Who owns the property?"

He says, "The Ferncliffe Golf & Country Club".

I says, "Do they own all this property and do they intend to do this themselves?"

He says, "Yes".

"Who is the head of it?" I asked.

"Donaldson. You wait here and he will be around. He will be in with his car soon".

I talked with that man for quite some time, and in the course of the conversation I asked him, "Are you going to build this Club House here?"

And he says, "Yes, build it up on the knoll".

"How do you plan to build that Club House on the fees you are going to get in? I understand the capacity is not to exceed 1,000 and you have 500 now?"

And he says, "Yes, we can do that very readily; there's the sand and all these field-stone, and all they have to do is to get a little lumber, and they can build to the second story with clapboards for about 50 or 60 fees".

I says, "Mr. Bowke told me the greens fees would be 50c and $2 holidays".

And he says, "You can figure it out yourself. It may average around a dollar, and you can figure on 25 playing weeks in the year, and they will have an annual income of somewhere in the neighborhood of twenty-five or thirty thousand dollars".

"That sounds plausible, but", I says, "where are your horses going to be kept?"

"Down in the barn".

"Does the barn belong to the property?"

"Yes".

I says, "How many acres is this property?"

And he says, "157".

"Where is the bridle-path going to be?"

"All around the outside of the property; all around the road that goes back of the knoll and comes down here."

I says, "That all sounds pretty good, but", I says, "how am I to know that they are going to do these things?"

"Here you are", he says; "here is the golf course; here is the whole 18 holes; there's where the Club House is going to be, and the swimming pool will be here" (witness referring to an exact duplicate of Exhibit D-11). He said, "On the knoll here; here is the plan", and I readily saw there was a barn that he pointed out, and there was the temporary Club House that was being used and which he spoke about at the time. Then he says, "This is the pavilion there" that they were tearing down and making into a temporary dance pavilion. And then he showed me the 9-holes, and he says, "You see this is all farm land and it costs us very little and the grass grows so very fast and in a very short time, by next spring, it will be so that you can use it, and then we will begin work immediately on the rest of the course, and that will be all sod so that you can use it in the fall of 1925".

I says, "Well, it looks very feasible to me". I says, "Let me see what type of membership you have", and then he handed to me this printed list of members of the first 300 (witness referring to

Exhibit D-19). He had his name stamped on it, "J. E. Lancaster".

So I scrutinized the list of membership carefully, and says, "Have all the members paid?"

"Yes, they got in for $50".

And I says, "I happen to know some of these people", and I says, "This is very attractive so far; it looks pretty good. Do you expect this man Donaldson around here soon?"

And he says, "Yes; very few agents are here on Sunday", and he said, "Wait here and he will be here". And I waited until 5 o'clock and I couldn't wait longer. Then Mr. Bowke came for his answer, and I says, "There are a lot of promises made and I am going to give you one-half of the $110", and I tendered this check of October 4th for $55 and it was endorsed by the Ferncliffe Golf & Country Club.

Mr. Herr: I offer the check signed by him to Ferncliffe Golf & Country Club, dated October 4, 1924, for $55.

(Admitted and marked Exhibit D-22.)

And then I received this acknowledgment of the payment from Herbert A. Blanchet on October 8th.

Mr. Herr: I offer the letter acknowledging the check in evidence.

(Admitted and marked Exhibit D-23.)

Then in thirty days I said I would pay the balance, providing they would show me the by-laws, and I gave them my check on November 5th.

Mr. Herr: I offer the check of Nov. 5, 1924, to the Ferncliffe Golf & Country Club for $55.

(Admitted and marked Exhibit D-24.)

Then I received this card for life membership with all of those privileges.

Mr. Herr: I offer the card in evidence.

(Admitted and marked Exhibit D-25.)

And then to substantiate what he said, that there would not be more than 1,000 members, the by-laws were printed and they were sent to me, which I received the first week in November, 1924. The only thing that didn't suit me about the by-laws was that it mentioned a quota of 1,000 members, but it didn't contract that they would not charge more than 50 cents green fees and $1 on Sundays, Saturdays and holidays. And then a little later on I found that there was a dual organization, the Ferncliffe Golf & Country Club that owned the property, and we were to be what was called an association of members of the Ferncliffe Golf & Country Club.

During that fall, there was nothing going on, and the spring set in, and we went up to see the property, but nobody was permitted to play, and I was a little skeptical, because I thought they should have started in putting in greenswards and putting up the house and bridle-paths and all those features, and the club greens were opened up, the first 9 holes in the later summer. This was about June or July of 1925.

Q. Is that all? A. Of course, I would say this: I verified a good deal of what they said on the general run of the advertisements that appeared in the paper in the warm weather months. Before the golf course was opened they seemed to require more members, because they put out this attractive literature of what Mr. Hanan knows about the Ferncliffe Golf & Country Club, and the next day the advertisement in the Newark Evening

News, on June 22, 1925, showing the Club House, tennis grounds, bridle-paths. It would take a long time to tell it.

Mr. Herr: I offer these two advertisements in evidence. The first one is June 22, 1925.

(Admitted and marked Exhibit D-26.)

Also the advertisement of June 23, 1925.

(Admitted and marked Exhibit D-27.)

Well, to verify the privileges, I received letters giving the rates of the horseback riding. So I went up there one Sunday, before the course was open. That was in June, and I asked one of the—I presume he was a member, I don't know; I didn't know him by name; I asked him about the horses——

Mr. Slingerland: I object to that, what he asked.

Mr. Herr: I withdraw that.

Q. Have you been up to the golf club grounds recently? A. Yes.

Q. How lately have you been there? A. Well, what I call recently. I played there even under the receivership right up until the last week in October or the first week in November.

Q. What was the condition of the premises in October last? A. 1927?

Q. Yes. A. Well, there were 9 greens and hazards operated by the receiver with the assistance of the professional Jack O'Connor.

Q. Was there any new club house built? A. Oh, no; even the temporary club house was closed.

Q. Were any tennis courts built? A. Yes, there were three tennis courts built in 1925, but they

had run to weeds toward the end of the season, I would say about October.

Q. Was there any swimming pool built? A. None whatever.

Q. Was there any bridle-path built? A. None whatever.

Cross-examination by Mr. Lane:

Q. You made quite an investigation, didn't you? A. Yes, and I was very careful about it.

Q. Did you ask how much they paid for the land? A. I asked the agent, Mr. Bowke, and it was verified by Mr. Lancaster, whether the Ferncliffe Golf & Country Club owned the land.

Q. Exactly; but how did they pay for it? A. Lancaster as well as Bowke verified the fact that Donaldson and his associates owned the land.

Q. Donaldson and his associates weren't the Club? A. They said they were, and it was verified by the by-laws.

Q. Who were going to pay for it? Did you think that Donaldson and his associates were making a present to the Club of the land? A. No, I didn't think they were making the Club a present of the land, but I assumed that the Ferncliffe Golf & Country Club owned it, subsequently.

Q. Then you weren't told that the Club at that time owned the land at all; is that right? A. Not when I joined, no.

Q. What? A. Not when I joined—the Ferncliffe Golf & Country Club owned the land, yes.

Q. Well, then, how was it to be paid for? A. I assumed that they owned it, as it was stated to me.

Q. Well then the members of the Club weren't supposed to own the land, were they? A. No, they were to get all the privileges out of the

50-cent daily greens fees, except Saturdays, Sundays and holidays when it was to be $1.

Q. They were to get the privileges by using land owned by somebody else? A. Yes.

Q. Whether the money was sufficient to pay for it or not? A. I didn't get that question.

Q. Whether the money was sufficient to pay for the improvements and so forth or not? A. Well, it is easily to be figured. If they had a thousand dollars weekly on an average they could operate the Club and give the members all that they promised they would.

Q. What is the point of the Ferncliffe Golf & Country Club as distinguished from the Club members? What was it to get for the land finally? A. Why, as I understood it, Donaldson was to get a salary, and he was to get the surplus, I believe, over operating expenses.

Q. Surplus of what? A. Surplus of what the geen fees would be over the operating of the Club House, bridle-paths, tennis courts, and so forth.

Q. And all that surplus he was to put in his pocket, as you understood it? A. I suppose he was.

Q. Without any accounting? A. None whatever.

Q. Who was to determine how the money was to be expended? A. The by-laws provide that six members of the Associates of the Ferncliffe Golf & Country Club were to compose a Board of Governors with the three of the Ferncliffe Golf & Country Club who owned the land, and these men were to administer the affairs of the property.

Q. The members had nothing to do with that? A. They were to elect the Board of Governors and three of them were to be members of the Fern-

cliffe Golf & Country Club who owned the property.

Q. A separate organization? A. Yes.

Q. So that before you went in you knew there were two separate organizations? A. Not when I went in; I got it when I paid my second installment after the by-laws came by mail.

Q. I am trying to get back before you made your first installment; at that time how did you understand that the land was to be paid for? A. I asked who owned it and they said the Ferncliffe Golf & Country Club.

Q. But did you understand how in the world the Club could pay for it when it only had $15,000, approximately? A. They were paying for the property out of subscriptions. These subscriptions would amount to $110,000, and then it would be $220, for each member up to the 1,000, and they were to have the money from the first 500 memberships for the land and the rest of it was to pay off the cost of the course and club house, and the greens fees would sustain the whole property. I asked who owned the property and they said the Ferncliffe Golf & Country Club, and they owned it outright.

Q. Did you understand that that meant this Club of which you were becoming a member owned it? A. No.

Q. Then I don't understand you at all, because you told me a moment ago that you didn't discover the two organizations until after you paid the second installment. Now I am talking about it back of that before you paid your first check. A. I didn't know there was a dual organization when I paid my first check.

Q. Who did you think owned it then? A. The Ferncliffe Golf & Country Club.

Q. Of which you were becoming a member? A. Yes.

Q. Did you ask how this Club was to pay for it? A. I understood that with the proper financial activity that the Club would pay for it.

Q. You understood fully that the land was not to be owned by you? A. Exactly.

Q. How was it to be paid for and where was the profit to come to the person owning the land? A. I asked the agent Bowke, and it was verified by Lancaster, that Donaldson and his associates owned the land. I asked him, "Do they really own it" and he said they did.

Q. They weren't making a present of it to the Ferncliffe Golf & Country Club? A. They weren't making a present of it to the Club when the Club owned it.

Q. The whole success of this club depended upon two things, didn't it; first, that the membership would be filled up and the people would play as contemplated? A. That's it.

Q. And, secondly, that your calculations, and those calculations which were told you, were accurate? A. I wouldn't say they were accurate; they were approximate.

Q. Well, approximately accurate? A. Yes.

Q. You knew a great deal of money had to be paid and considerable expense had to be met at that time in promotion expenses? A. Well, it would depend on how fast they were going.

Q. They were going pretty fast when they were putting in such advertisements in the Newark newspapers? That costs money, doesn't it? A. It does.

Q. And they were sending several persons around soliciting subscribers? A. I asked about that, and understood they were putting about 20% into sales promotion.

Q. That is, excluding the advertisements? A. Yes. May I add to what I was saying. I says, "What success is there to this proposition?" and Mr. Bowke said to me, "Mr. Donaldson is familiar with this sort of thing and he has had operations like this and he is going to have a chain of them throughout the country, and you will have interlocking privileges to the various Clubs in various cities."

Q. That was in the future? A. That was in the future. I assumed Donaldson was a man of financial means.

Q. When was the receiver appointed? A. The receiver was appointed the latter part of May or June, 1927. I have the date, but I didn't expect to be called upon to answer that.

Q. Whatever is left of this Club is in the receivership? A. Yes; and not only that, but members who paid for greens fees at the rate of 50c. each and $1, all that money went into the hands of the Committee Treasurer and was handed over to the receiver, so that we are missing out on that, too, in the hands of the receiver.

Cross-examination by Mr. Slingerland:

Q. Did you read the application for membership, Mr. Strigner, before you signed it? A. I did.

By the Court:

Q. I don't understand what was said to you at all by Bowke or anyone else as to the condition of the title of the land on which the Club was to be established. A. Well, I didn't question that particularly, because I assumed that that was rather a personal question; anyway they told me

that they owned the property, and that was verified by Lancaster.

Q. Who owned the property? A. Donaldson and his associates, the incorporation of the Ferncliffe Golf & Country Club.

Q. The Club into which you were contemplating the purchase of membership? A. Yes. All I was to get was the privilege of the Club, no financial equity in the property, so I didn't go there and find out how much they had paid, and all that sort of thing. If a business man was going into it to take stock as an investment he might get all the particulars; but I was satisfied to get the privileges to play on all of these premises. That is, the use of the club house, and the privilege to play on the tennis court and all that; and he particularly stressed the point that they were going to raise the fees from 50c. to $1, and I thought it would exclude a lot of members that they took in, and they wouldn't pay that. It would militate against their financial success, I thought.

Cross-examination by Mr. Slingerland (continued):

Q. You knew that you weren't buying stock in the company? A. I knew I wasn't buying stock. I might say, if I can add here, the first I heard there were other organizations was in 1925, when they sent out a prospectus to members to buy the property. That particularly hit me as being a kind of an inefficient way of doing business, these concerns very seldom put any dates on what they have to offer, and you can see that prospectus is without a date, and I had to mark a pencil notation: "Received October 29th."

JOSEPH F. EBERT, sworn on behalf of the defendant Francisco, testified as follows:

Direct examination by Mr. Herr:

Q. Mr. Ebert, you are a member of the Ferncliffe Golf & Country Club? A. Yes, sir.

Q. About when did you become a member? A. In September, 1924.

Q. Were you furnished with any list of the members, outside of this D-19 list, and subsequently to that list? A. Yes, sir; I was.

Q. I show you a typewritten list, consisting of a large number of pages, of 920 names and addresses, and ask you if that is the list to which you referred? A. Yes, sir.

Q. And where did you get that list? A. That list was presented to the Committee by Mr. J. W. Donaldson.

Q. And you were on the Committee? A. I was Chairman of the Committee.

Q. What was the date? A. It was in the fall of 1924.

Q. What date was it that you were furnished with this list? A. In the fall of 1925.

Mr. Herr: I offer these lists in evidence.

(Admitted and marked D-28.)

Q. Mr. Ebert, you spoke of the formation of a committee of which you were chairman; will you state when that was formed. A. In the early part of November, 1924. I think the date was November 5, 1924. Mr. Donaldson arranged for a meeting of the members in Fulton Hall, Montclair.

Q. Are you sure of the year? A. Did I say 1924? I meant 1925. That meeting had for its

purpose the submission to the members of a plan whereby the members could perhaps acquire rights in the property which, according to a printed agreement, was set forth in these printed agreements and were distributed at the meeting; and previous to that the agreement purported to be between J. W. Donaldson individually, his two companies, the Ferncliffe Golf & Country Club, Inc., and the Recreation Development Company, and the Essex Title Guarantee & Trust Company of Montclair. That was rather an elaborate scheme of a stock-promoting nature whereby, by a new subscription—I think the subscription price was $300—the members could acquire further rights in its enterprises.

Q. What was done by the Committee on Donaldson's suggestion? A. Well, at that meeting, at the time this offer was discussed, it didn't meet with much favor with the members that were meeting, and it resulted in the appointment of a Committee of which I was made the Chairman. The Committee was advised to look into the proposition submitted by Mr. Donaldson and report back to the members at a later date. Following that, the Committee met with Mr. Donaldson in the office of the Ferncliffe Golf & Country Club, which then had an office in Montclair. At that meeting Mr. Donaldson was present and two or three other members of his organization. He agreed to give the Committee a list of the members, which he subsequently did. The list he furnished was the typewritten list which I handed you a short time ago (witness indicating Exhibit D-28).

Q. The result of the Committee's action was a letter sent to Mr. Donaldson under date of December 18, 1925? A. Yes, there was. Under that

date a letter was addressed to Mr. Donaldson, signed by Joseph B. Bloom, who was a member of the Committee assisting in investigating the matter. In this letter a certain plan——

Q. Never mind that. I show you a letter under date of December 18, 1925, addressed to Mr. J. W. Donaldson, and ask you if that is the letter to which you refer? A. Yes, it is.

Mr. Herr: I offer that.

(Admitted and marked Exhibit D-29.)

Q. Did Mr. Donaldson furnish you or your committee with any classified list of members? A. Yes, he did.

Q. About what date? A. It was at the time we had the meeting that I spoke of in Mr. Donaldson's office in Montclair. He handed me a typewritten list at that time, which he said represented the classification of membership according to the date on which this list was filed. According to this list he has the membership classified as "full life men $100" and under that he gives the number 421——

Q. Never min dthat. I show you what purports to be such a classified list or statement and ask you if that's the paper you refer to? A. It is.

Mr. Herr: I offer that.

(Admitted and marked Exhibit D-30.)

Q. Did Mr. Donaldson furnish you or the Committee with a financial statement at or about that same time? A. He furnished us with a typewritten sheet of paper on which there were certain figures. It was a very general financial statement. The items that he had listed on there represented, as I recall it——

Mr. Slingerland: Now, if your Honor please, is this some——

Q. Never mind about that. I show you a typewritten sheet, entitled "Statement as of August 25, 1925 of the Recreation Development Company and the Ferncliffe Golf & Country Club", and ask you if that is the statement to which you refer? A. No, it isn't; but I notice here that there are certain items on this list that were also on the other list, that was furnished at the same time that I received this list.

Q. Have you with you the list that was furnished at that time by Mr. Donaldson? A. No, I have not.

Q. Where did this list that I now show you come from? A. From Mr. Donaldson.

Q. When did you get that from Mr. Donaldson? A. I got this list at the meeting to which I referred, but at that time there were two sheets of paper. This was one of the two sheets. The other sheet had other figures. The other sheet had——

Mr. Slingerland: Never mind what the other sheet had.

Q. Where is the other sheet? A. I don't know. I think it was furnished to Judge Butler.

Mr. Herr: I offer this single sheet.

(Admitted and marked Exhibit D-31.)

In connection with the membership list which Mr. Donaldson furnished the Committee, I might say that the total is marked on that, if my memory serves me correctly, I think 920, and that membership was scattered in the immediate vicinity of

Caldwell, and the Committee afterwards, in sort of organizing that list for certain purposes, segregated the names and towns. I think it represents something like 40 towns from which the memberships were drawn. Those memberships and one of the papers introduced here in evidence will show the number of varieties.

Cross-examination by Mr. Lane:

Q. The letter of December 18, 1925, Exhibit D-29, is in reply to a letter from Mr. Donaldson to you of December 14, 1925, copy of which I show you, was it not? Have you the original of that letter? A. No, I have not.

Q. Haven't you got the whole file of correspondence here? A. No, I haven't.

Q. Where is the rest of it? A. It has been scattered. A lot of it has been furnished to Judge Butler, and others are in the possession of the various members of the Committee.

Q. Well, do you mean that all you have got here are letters which you picked out? A. No, I might say the letters which I have is correspondence which I have left that has not been furnished to other members of the Committee or to Judge Butler.

Q. Well, do you remember this letter (showing paper to the witness)? A. Yes, I think this appears to be the letter to which Mr. Bloom's letter is a reply.

Mr. Lane: I offer it.

(Admitted and marked Exhibit C-14.)

Q. Now, was there any further correspondence, after Mr. Bloom's letter, after December 18, Exhibit D-29; was there any further correspondence? A. With whom?

Q. With Mr. Donaldson, or with Smith & Slingerland, who represented him? A. I don't recall any further correspondence.

Q. Well, what was done? A. We attempted to get in contact with Mr. Donaldson directly.

Q. Did you do it? A. Yes.

Q. What happened? A. Mr. Donaldson came over to my home in Glen Ridge, at the request of the Committee. At that time the Committee was present, and we discussed with Mr. Donaldson the possibility of purchasing the property from him. He represented to the Committee that he was in a position to pass title. I remember their distinctly asking him if he could do that, and he said "yes". I was sort of skeptical about it, because I didn't know but what there might be some reason why he was not in position to pass title, and he assured us that he could.

Q. Well, then what happened? A. We discussed the proposition by which the Committee was trying to negotiate for the purchase of the property. The offer which we then discussed with Mr. Donaldson didn't seem to appeal to him; he seemed to have the impression——

Q. What did you offer? A. As I recall the offer, it was that we would pay him $75,000 for the property and, in addition, there was to be, I think, another $25,000 to be paid to Donaldson to square off the indebtedness, and then he claimed that he should be entitled to a profit; so I think the proposition then made was to give Donaldson a total of $110,000. The reason the Committee felt that that was a fair offer was because, they argued with him, that the money he received as the result of these memberships, subscriptions had been paid in on the property to develop it, and because of that we should be given a pre-

ferred offer rather than to some outsider. For reasons, sufficient to himself, he didn't choose to accept our offer.

Q. Is that the offer contained in the letter D-29, of December 18? A. No, sir.

Q. Where did it differ? A. The sum total here, as I see it, is $100,000. At that time we were going to give Mr. Donaldson a profit to himself.

Q. At which time? A. The time which I mentioned as he being at my house to meet the Committee.

Q. When was that, by the way? A. It was, as I recall it, during the holidays of 1925; that is, shortly before Christmas, or during the Christmas holidays, because Mr. Donaldson, the way I fix the time, he happened to be in New York and said he had come up that way, I think, from North Carolina, and because of that he was able to get in touch with the Committee.

Q. And what happened after that conference in your office? A. In my home.

Q. I beg pardon. A. Mr. Donaldson 'phoned me once or twice, and wanted to know if the Committee would make him a better offer. I told him the Committee would not. I told him that I felt that that was really more than what he was entitled to receive; that we understood that he had purchased the property for $75,000; that he had received the income from the sale of these memberships, and that that offer would allow him $10,000 profit in addition to that. Mr. Donaldson countered, however, with the argument that there was considerable indebtedness. When we asked him to give us a list of the indebtedness he was very evasive and non-committal. All he would say is that there were certain expenses that he would have to pay for, but he would guarantee

that they did not exceed, I think, 25 or 30 thousand dollars. We told him we didn't see how he could have this indebtedness and at the same time expended the money which he received from the property as the result of subscriptions for memberships. He didn't make a very satisfactory explanation.

Q. Did that end the negotiations? A. The negotiations ended after two or three telephone calls that I made.

Q. Where were you going to get the money from to make this purchase? A. We had a subscription planned whereby the members would incorporate and take the shares of stock in the corporation, and in that way make it a sort of mutual proposition.

Q. When you say you had the subscription planned, you mean that you had planned to go out and get the subscriptions, don't you? A. I think prior to that time we had actually circulated something in the way of a definite offer to members.

Q. Is that the one that you hold in your hand now? A. Yes. It don't seem to have a date on it.

Q. I know; but can't you identify it as the one you used at the time? A. I can identify this as being the first communication to the membership body. I am uncertain as to the date in which it was circulated.

Mr. Lane: I offer that in evidence.

(Admitted and marked Exhibit C-15.)

Q. Now, you never obtained sufficient subscriptions to put that plan into effect, did you? A. I wouldn't say that. We obtained something over 200 subscriptions of $300 each. Our activities were slackened up because of the idea that per-

haps some form of compromise might be worked out, and, further, on account of pending litigation. If I remember correctly, this case was called some time last spring. At that time it was adjourned.

Q. Well, at least your response to that was so unsatisfactory that you sent that communication out to your membership, didn't you? A. This communication and letters was a response made to the plan you have just introduced, the letter as an exhibit. That is not the plan that I was talking about as the final plan Mr. Donaldson turned down.

Q. I am talking about different things: You did not get a satisfactory response to the circularization of Exhibit C-15? A. No, we did not. But that wasn't the only plan that was submitted.

Q. And the unsatisfactory nature of your response resulted in your sending this letter that I now hold in my hand, didn't it? A. Yes. I will explain that by saying that at that time the membership was unorganized and there was a lot of work to do. All of the work was voluntary service and the membership was unacquainted, and the only way of getting in contact with the members was through the membership list which was furnished by Mr. Donaldson. It wasn't perhaps natural that a very healthy response was received in reply to that form letter. However, I have subscription blanks signed by something over 200 members. I have, I think, a copy of those subscription blanks.

Mr. Lane: I offer that in evidence.

(Admitted and marked Exhibit C-16.)

Now, I have a form of that. There is over 200 subscribers to these subscription blanks. There is

a printed list gotten out July 1, 1926. I think it was the first 150 or 125. I am more interested in money than I am in numbers.

Q. How much do those subscriptions amount to? That is what I am getting at. A. Each share was for $300 and there are over 200. That would be something over $60,000. There was not that much collected, but that was what they were obligated for. They merely obligated themselves to pay that.

Q. Who constitute the managing directors of the golf club at the present time? A. You mean the association?

Q. The association. A. There are no directors. I think there was a second meeting of the membership and they effected an organization and I was elected President of the organization and Mr. A. P. Dickinson was elected Secretary and Treasurer. The Committee appointed previously, continued in office.

Q. I show you another circular and ask you if that was sent out by your Committee, and if so, when? A. That calls for a meeting on Wednesday, May 12th, no year, but I think it was 1926. Apparently, this was circulated a few days before the date of the meeting.

Mr. Lane: I offer that.

(Admitted and marked Exhibit C-17.)

In connection with these letters I might say that there is a certain amount of serious effort put into that. It was of a discouraging tone, for the simple reason that in any unorganized body there is a certain amount of inertia in the membership, and although there were a goodly number of active individuals we had to regard those as somewhat

of a passive disposition. That is, some of these circular letters were made pessimistic.

Q. The one that I refer to says, "The Court of Chancery has decided in our favor". What decision do you refer to? A. That was probably a little optimistic. The decision referred to there was, I think, the opinion that His Honor made on a receivership application, I think on our application. I am not sure which one it was, but there was a decree entered in this case at one time in which there were certain statements made that it appeared to the court as though the members had some equity in the property.

Q. Now, what kind of a response did you get to that? A. Well, that response was more favorable than the previous one. By that time we began to get organized and the members began to have some confidence in the Committee, and the whole movement gathered momentum.

Q. I show you——

The Court: Your cross-examination will be rather extensive?

Mr. Lane: Yes, I'm afraid we can't finish today. I do want to ask him one question before we adjourn.

Q. Have you any contract agreement with Mr. Francisco with respect to this property?

Mr. Herr: I object as not being relevant and material to the issue here.

The Court: Well, I don't know whether it will be or not. I will overrule the objection at this time. By "you" you mean the association?

Q. The association, yes. A. We have an understanding with the Franciscos.

Q. And when did you have that understanding with them?

Mr. Herr: The same objection.

The Court: The objection may stand to the entire line of inquiry.

A. Previous to today.

Q. How long previous to today? A. I have been discussing the proposition off and on for the last six months.

Q. When did you make your agreement, or the agreement you have, or understanding if you choose to call it an understanding? A. Why, I think I finally consummated it within the last week.

Q. What is the agreement?

Mr. Herr: I object, on the same ground. I renew my objection now, because that is as to the terms of the agreement. I think that is entirely irrelevant. I think that the terms of any agreement that was made is irrelevant.

The Court: I overrule the objection.

A. The agreement contemplates, in the event the Franciscos are successful in this litigation and are in a position to transfer title, that they transfer title to the members in trust. That is, the title to be taken in the trustees for the benefit of the members, for a stipulated sum.

Q. That is just what I am interested in. One of the most important things I am interested in is that stipulated sum. What is the sum?

Mr. Herr: Same objection.

The Court: Same ruling.

A. We are to get title to the property, free and clear of all and any encumbrances, for $150,000. The Franciscos have agreed to take back a purchase-money mortgage of $100,000, which shall continue in effect for five years, and they are to receive a second mortgage for the amount of $25,000, payable, or to be retired, at the rate of $5,000 a year. They are to receive $25,000 in cash at the time the title to the property passes.

Q. Is that agreement in writing? A. The agreement was reduced to writing but it is not signed.

Q. Who has copies of the agreement reduced to writing but not signed? A. I have a copy, but I haven't it with me. Mr. Herr, I think has a copy, and I don't know who else has a copy.

Q. When was that arrangement made, and where?

The Court: He said about a week ago.

Q. Now, have you given me all the terms of all that the Franciscos are to get? A. Yes, with one possible exception. That you may be sure that I have covered your question I will answer that. The original property I think included 157 acres. Since that time there has been a strip off of the eastern edge of it sold to I think the Public Service Company for putting over transmission lines. With that exception, that is all we will get. In other words, we buy less property than was originally covered by the original contract.

Q. And the Franciscos are to retain the benefit of that? A. I don't know that they get anything for that, but if they did there is nothing been said about our receiving anything on it.

The Court: Does that complete that subject of the cross-examination?

A. What I would like to do is to finish my testimony, if possible, as I expect to take a trip in the near future. I may have to go Thursday out to Kansas City, and that depends, of course, upon my presence being required here. I will be out there a week or ten days.

The Court: Oh well, you needn't worry about that.

Mr. Lane: May I ask one more question?

Q. Will you tell me how much money you have got in the treasury to pay for this property?

Mr. Herr: I object to that.

The Court: Same ruling.

A. We have no money in the treasury to pay for this property. Whatever money we did have in the treasury was turned over to the present receiver.

Q. And that was about a couple of thousand dollars, wasn't it? A. I don't recall, but it was a reasonably small amount.

The Court: Now, how many more witnesses will you swear for the defendants?

Mr. Herr: It is almost all cumulative evidence. There is one more witness I would like to put on, and after that it is all cumulative.

The Court: I wonder if Vice-Chancellor Lane wouldn't stipulate as to what they would testify to.

Mr. Lane: We may be able to do that.

The Court: Now, then, for the complainant; how much rebuttal will there be?

Mr. Lane: Practically none, so far as I am concerned. What Mr. Slingerland will have I don't know. Of course, he is more interested in this part of it than I am.

Mr. Slingerland: It looks now as if I wouldn't have anything; but I don't want to decide that now. The case will have to be continued to another day, anyway.

The Court: Oh yes, but the length of time it will be necessary to close it will, to a large extent, influence the date to be assigned for a continuation of the trial.

Mr. Slingerland: I certainly won't take long.

The Court: Then it looks as though one more day would be necessary.

Mr. Herr: Half a day, I should think.

The Court: What about arguing it at the close of the proofs?

Mr. Lane: I shall be ready.

Exhibit C-1.

This consists of original contract of June 11, 1924, between William H. Francisco and Richard S. Francisco of Caldwell, New Jersey, and Recreation Development Corporation, a copy of which is attached to the bill of complaint as Schedule A.

Exhibit C-2.

This is a receipt signed by the Franciscos and their wives under date of December 6, 1924, and is a copy of the receipt attached to the bill of complaint following Schedule A.

Exhibit C-3.

This is a contract dated January 2, 1926, between Recreation Development Corporation and American Plaster Drill Co. and is the same instrument as appears attached to the bill of complaint under the caption "Schedule D".

Exhibit C-4.

This is an assignment from the Recreation Development Company to the American Plaster Drill Company, and appears as Schedule E attached to the bill of complaint.

Exhibit C-5.

LIONEL P. KRISTELLER

SAUL J. ZUCKER

JACOB L. NEWMAN
COUNSELLOR AT LAW

810 Broad Street
Newark, N. J.

Market 5721

February 27, 1926.

Messrs. Smith & Slingerland
Prudential Building
Newark, N. J.

Mr. Robert W. Cromley
176 Broadway
New York City

Re: Recreation Development Co.

Gentlemen:

I have received my preliminary report from the Fidelity Union Title & Mortgage Guaranty Co. in

this matter. There are 29 questions among them, some judgments against William P. Francisco and others, and certain Chancery proceedings which have to be checked, and also some wills which have been handed to the solicitor of the Fidelity for approval.

The Recreation Development Co. is also required to present certain affidavits respecting the non-forfeiture of its charter, etc., and I have instructed the title company to have their clearing department to get in touch with you gentlemen and try and clean up the questions.

In the meantime, will you be good enough to arrange the time of closing until such time as this report is finally approved.

Yours very truly,

JACOB L. NEWMAN.

K:G

Exhibit C-6.

LIONEL P. KRISTELLER
COUNSELLOR AT LAW

810 Broad Street
Newark, N. J.

Market 5721

March 22, 1926.

Messrs. Smith & Slingerland
Prudential Building
Newark, N. J.

Re: Reclamation Development Co.

Gentlemen:

The Fidelity Union Title & Mortgage Guaranty Co. advises me that the report heretofore sent me has been cleared, except:

Exhibit C-6.

a. The lis pendens and suit of Dryden v. Donaldson and others; and

b. They have not yet received copy of the by-laws certified by the Secretary, together with an affidavit that the said company is not in the hands of a receiver, has committed no act of bankruptcy or has not lost or forfeited its charter, together with a copy of resolution of the directors authorizing the sale.

Will you not be good enough to see that this matter receives your immediate attention, so that we will not have to obtain another extension of time to close? My clients do not desire to negotiate the loan of the necessary funds until they are certain that the matter is clear and, of course, as this will take a few days, it is quite likely that if this matter is not cleared during this week, it will be impossible for us to have the closing on time, and we will have to ask your indulgence for a short time thereafter.

I am sending a copy of this letter to Mr. Cromley.

Yours very truly,

LIONEL P. KRISTELLER.

K:G
1.

Exhibit C-7.

JACOB L. NEWMAN
COUNSELLOR AT LAW

810 Broad Street—Newark, N. J.
Market 5721

Lionel P. Kristeller Saul J. Zucker

June 2, 1926.

Messrs. Smith & Slingerland
Prudential Building
Newark, N. J.

Re: Recreation Development Co.—to—
American Plaster Drilling Co.

Gentlemen:

Will you be good enough to advise me whether the Chancery proceedings have been terminated, so that we can arrange to close this title?

Your attention to this matter will be appreciated.

Yours very truly,

JACOB L. NEWMAN.

K:G

Exhibit C-8.

This indenture made this twenty-fifth day of July Nineteen hundred and twenty-four, BETWEEN RECREATION DEVELOPMENT CORPORATION, a corporation of New Jersey, party of the first part (hereinafter designated as the Lessor) and FERNCLIFFE GOLF AND COUNTRY CLUB, INC., a corporation of New Jersey, party of the second part (hereinafter designated as the Lessee).

Exhibit C-8.

WHEREAS, the Lessor has heretofore made and is now the holder of an agreement for the purchase of certain lands and real estate situate, lying and being in the Borough of West Caldwell and county of Essex, consisting of 157 acres of land with the buildings located thereon, which said agreement was made on 11th day of June 1924 by William H. and Richard S. Francisco to the said Lessor, and

WHEREAS, the said Lessor has heretofore granted an option to Joseph W. Donaldson, dated July 25, 1924, which said option has been duly assigned to the said Lessee and which extends to the said Lessee the right to have, hold and use the said lands and premises as tenant to the extent that the said Lessor would be entitled to the possession thereof under said contract for the annual rent of $15,000. per annum, and

WHEREAS, the said Lessee desires to exercise said option in accordance with the terms thereof and pursuant thereto desires to vest said right of possession in the party of the second part.

NOW, THEREFORE, in consideration of the premises and of the sum of One Dollar paid by the party of the second part to the party of the first part, it is agreed by and between said parties as follows:

1. That the Lessor doth hereby lease and demise unto the Lessee all of the lands and premises, buildings and appurtenances comprised and described in the said agreement of sale made by the said William H. and Richard S. Francisco to the said Lessee, as fully and completely as the possession of the same may be vested in the said Lessor under and by reason of said agreement, for the term of twenty years from the date hereof

at the yearly rent or sum of $15,000. to be paid quarter yearly in advance.

2. And it is hereby agreed that if any rent shall be due and unpaid or if default shall be made in any of the covenants on the part of the said Lessee, herein contained, then it shall be lawful for the said Lessor to re-enter the said premises and the same to have again, repossess and enjoy.

3. And the said Lessee covenants with the Lessor to pay to the Lessor the said yearly rent as herein specified; that it, the said Lessee, will not assign this lease nor let or underlet the whole or any part of the said premises or make any alteration thereon without the written consent of the Lessor; that it will not occupy or use, or permit to be occupied or used, the said premises for any improper purpose and that at the expiration of the said term it will quit and surrender the premises herein demised in as good state and condition as reasonable wear and tear would permit, damages by the elements excepted.

4. And the said Lessor covenants with the Lessee that the Lessee will pay the said yearly rent and perform the said covenants on its part, and may peaceably and quietly have, hold and enjoy the demised premises during the term aforesaid.

It is further understood and agreed between the parties hereto that at the time of the execution and making of this lease rights of possession of the said Lessor to said premises are bounded and determined by the agreement of sale herein referred to and it is the purpose and intention of the parties hereto to bind not only the right of possession now vested in the said Lessor, but to

vest in the said Lessee the right to continue in occupancy of said premises under the terms of this lease after the said premises are conveyed to the said Lessor under said agreement. And it is agreed on the part of the Lessee that it will execute any further writings or leases which may be necessary in order to carry out the said purpose.

It is further agreed as a part of the consideration hereof that the Lessor will sell and convey to the Lessee or to its successors or assigns all of said land and premises at any time during the first two years of said lease for and upon the payment of the sum of $150,000. cash to it, the said Lessor, and thereafter, and until the expiration of this lease or any renewal hereof, for the sum of $250,000.

Provided always and these presents are upon this condition:

That if the Lessee, its successors or assigns, shall neglect or fail to perform and observe any covenant herein contained, which on the Lessee's part is to be performed, or if its leasehold estate shall be taken on execution, or if the Lessee shall be declared bankrupt or insolvent according to law, or shall make an assignment for the benefit of its creditors, then and in any such case the Lessor or those having its estate in the premises lawfully may, immediately or at any time thereafter, and without notice or demand, enter into and upon the demised premises or any part thereof in the name of the whole and repossess the same as of their former estate, and expel the Lessee and those claiming under it and remove their effects forceably if necessary without being taken or deemed to be guilty of any manner of trespass, and thereupon this demise shall absolutely determine but without prejudice to any

limitation which might otherwise be accepted by the Lessor for arrears of rent or any breach of the Lessee's covenants herein contained.

In Witness Whereof the parties hereto have caused these presents to be signed by their respective officers thereunto duly authorized the day and year first above written.

Signed, Sealed and Delivered in the presence of }

Recreation Development Corporation

By Joseph W. Donaldson
President.
(Seal)

Attest:
Herbert A. Blanchet,
Secretary.

Ferncliffe Golf and Country Club, Inc.,

By Joseph W. Donaldson
President.
(Seal)

Attest:
Herbert A. Blanchet,
Secretary.

Exhibit C-9.

Certified check of M. Tanenbaum for $7,000.00 to the order of Recreation Development Co., dated New York, Jan. 2, 1926, endorsed "Pay to the order of Robert W. Cromley, Attorney for W. H. and R. S. Francisco; Recreation Development Co., J. W. Donaldson, Pres.; Robert W. Cromley, Attorney for W. H. and R. S. Francisco", paid January 6, 1926.

Exhibit C-10.

Check of M. Tanenbaum for $200.00 to the order of Recreation Development Co., dated New York, March 2nd, 1926, endorsed "Pay to the order of Smith & Slingerland, Recreation Development Co., J. W. Donaldson, Pres." and paid March 5, 1926.

Exhibit C-11.

Check of M. Tanenbaum for $300.00 to the order of Recreation Development Co., dated New York, March 2nd, 1926, endorsed "Pay to the order of M. Tanenbaum, Recreation Development Co., J. W. Donaldson, Pres., M. Tanenbaum", paid March 4, 1926.

Exhibit C-12.

ROBERT W. CROMLEY,
Attorney & Counsellor at Law.
176 Broadway.

Telephone 8800 Cortlandt.

New York, January 28th, 1926

Re: Ferncliffe Golf & Country Club

Smith & Slingerland
765 Broad St.
Newark, N. J.

Gentlemen:

In reply to yours of the 27th instant I would say that I know nothing about the bill of the New York Telephone Company. The Stumpp & Walter Company bill I understood would wait until the property was sold, at least that is what Mr. Donaldson told me. I have paid out all the money which I had and am enclosing a list of the payments.

I think you had better communicate at once with Mr. Donaldson whose address is, Hotel Gaston, Newburn, North Carolina.

I think you should examine the judgment docket and see whether there are any judgments against either the Ferncliffe Golf & Country Club or the Recreation Development Company. If there are any judgments we must see to having them satisfied. So far as I know no judgments have been docketed in the County Clerk's Office. Some were obtained in the District Court but I think they were settled there.

Very truly yours,

ROBT. W. CROMLEY

RWC*KMB

Exhibit C-13.

Statement of Account of Robert W. Cromley of Receipts and Disbursements on Account of the Recreation Development Corporation and the Ferncliffe Golf and Country Club.

Received		7,000.00
Paid:		
Joseph Fischman, Constable, claim judgments and costs of Hansen	$ 357.84	
Claim, Progress Engraving Co.	220.99	
Taxes, Francisco farm 1925	1,329.00	
Louise Allen, rent of Donaldson apartment	235.00	
Rent, Montclair Office, December 1925 and January 1926	70.00	
J. W. Donaldson	300.00	
F. R. Cook, claim, interests and costs	57.86	
Bogart & Hansen, claim, interests and costs	542.09	
Singac Auto Supply Co.	140.28	
Claim, Edward Madison Co., judgment, interests and costs	318.60	
Robert W. Cromley on account of bill against Recreation Development Corporation	200.00	
Robert M. Boyd, bill	143.90	
A. V. Hedin, claim, interests and costs	194.80	
John O'Connor, wages	75.00	
Philip C. Blauvelt, bill	84.00	
Crane & Milligan, claim, judgment, interests and costs	274.06	
Essex Fells Plumbing & Heating Co. claim	769.13	
Albert Wrensch, bill	13.80	
John A. Hines, safe	30.00	5,356.35
Balance		$1,643.65
Deposited in the Caldwell National Bank to the credit of W. H. & R. S. Francisco		$1,643.65

Exhibit C-14.

December
fourteen
1 9 2 5

Mr. Joseph F. Ebert,
c/o Westinghouse Lamp Co.
Bloomfield, N. J.

Dear Sir:—

This letter is written to confirm our conversation respecting the Ferncliffe Golf & Country Club, Inc. matter.

I have told you, on behalf of the Recreation Development Corporation and Ferncliffe Golf & Country Club, Inc., that I would much rather turn this proposition over to the members even though it meant a sacrifice of a considerable sum to me. The companies have had under consideration for some time back, after it developed that the income was not sufficient to maintain the property and after it appeared that some re-organization would be necessary, and after I was convinced that most of the members of the Club were very apathetic upon the subject of re-organization, a proposition which can be immediately closed, which will mean a net return of twice as much as the amount suggested to you in our conference the other day.

Notwithstanding this, I am willing to say, on behalf of these companies, that if the obligations of both companies are paid in full, and by obligations I mean all of the debts which have been incurred in connection with this project and which I can assure you will not exceed $30,000, the companies will accept $15,000. above this sum in settlement of their interest in the whole matter. This will leave the Recreation Development Corpora-

tion and Ferncliffe Golf & Country Club, Inc., in the position of owning the property subject to the present lease from Recreation to Ferncliffe and subject only to a $70,000. mortgage which will be given back to the original owners.

As a condition I would require that $6000. be paid to me not later than December 28th so that payments on account of the purchase of the property and other obligations could be settled before January 1st.

If this could be worked out, I can arrange to have the title transferred and all of the stock of both companies turned over to such committee as you may designate. I do not wish, however, to leave these bills which the companies owe and put the creditors in the position of being compelled to accept such amount as the Club may care to pay, nor do I wish to hold out indefinitely against the offers which have come to these companies to sell the proposition subject to the rights of the Club, and any proposition that may be entered into with your committee after Wednesday, Dec. 16th, the date upon which the rights under the agreement with the Essex Title Guaranty & Trust Company expire, will have to be promptly settled because if there is not enough interest among the membership to close up the matter now under discussion between us, I do not feel that there is any obligation upon either of the companies to hold it any longer. I think that any arrangement which may be made between the companies and the members should be fully completed before December 30th.

Yours very truly,

Exhibit C-15.

To the Members of the
Ferncliffe Golf and Country Club:

After careful study and analysis, your Committee has formulated the following plan and are of the firm belief that an equitable scheme has been worked out whereby the rights or privileges of *all* members will be preserved, whether or not they subscribe for stock, believing, however, that the best possible plan is that every member subscribe.

At the outset it should be stated that the printed form of agreement submitted by Mr. Donaldson has been disregarded inasmuch as he has indicated to the Committee his willingness to accept a modified plan or proposal. By this modified offer, the members will obtain full ownership and control of the property herein involved upon the following basis: Payment in cash to Mr. Donaldson, $60,000.00, mortgage $70,000.00, total cost to club $130,000.00.

In order to insure the successful acquisition of this property, the Committee proposes that at least 400 members subscribe for stock at $300.00 (three hundred dollars) a share, amounting to a total of $120,000.00.

(Plan A) These subscriptions to be made on a cash basis.

(Plan B) For the accommodation of those members who may find the former plan an inconvenience, but who desire to participate, a deferred payment plan is suggested, such as an initial payment of $150.00 for each share, balance in six monthly payments of $25.00 cash.

Exhibit C-15.

It will be seen from the above that if *all* the 400 members take advantage of the deferred payment plan, this will give us *only* the $60,000 necessary to purchase the property and leave nothing in the treasury.

Provided the members purchase the property under Mr. Donaldson's modified offer made to your Committee, the proposition would look as follows:

Cost of property	$ 60,000.00
First mortgage	70,000.00
Total	$130,000.00

for which we get one hundred and fifty-seven (157) acres more or less, on which there are eighteen holes practically completed. Mr. Donaldson will have received for this property the following:

Subscription fees (approx.)	$75,000.00	
Cash	60,000.00	
Mortgage	70,000.00	
		$205,000.00

The total expenditures incurred in promoting and developing the property are:

Organization and promotion	$28,828.00	
Furnishings and equipment	5,754.00	
Ground improvement (est. cost)	50,000.00	$ 84,582.00
Net cost		$120,418.00

This net cost for one hundred and fifty-seven (157) acres figures approximately $765.00 per acre.

The modified offer of $130,000.00 figures approximately $825 per acre, which is considered by your Committee reasonable for land so improved.

IF THE MODIFIED PLAN IS ACCEPTED

The expenses which would be incurred in the operation of the course are:

Interest on mortgage	$ 4,200.00	
Taxes (estimated)	1,500.00	
Cost of operation (estimated)	10,000.00	
		$15,700.00
The possible receipts are:		
Green fees (estimated)	$15,000.00	
Annual dues 500 non-stock subscribing members at $10.00	5,000.00	
		$20,000.00

It is appreciated that many details will have to be worked out before the proposed plan can become effective if approved generally by the members, but such matters will be discussed at the contemplated meeting, the date for which the Committee has tentatively set for November 24th. However, further notice as to the exact time and place of this meeting will be mailed in due course to each member.

The Committee is desirous of getting YOUR reaction immediately to the above suggested plan of purchase, since it appears to the Committee as the most effective plan to salvage our present in-

vestment in this proposition. For this purpose a simple questionnaire is attached herewith, which should be filled out by *every* member and returned immediately.

Respectfully, your Committee,

J. F. Ebert,
A. P. Dickinson,
D. W. Dryden,
H. S. Amer,
J. B. Banister.

Tear Off Here

1. Do you approve of the above recommendation? .....

2. If so, how many shares at $300.00 each will you purchase? .....

3. Which plan of payment do you prefer? (Plan A. or Plan B.) .....

4. Have you any criticism or suggestions? .....

Replies should be mailed to J. F. Ebert, 123 Midland Avenue, Glen Ridge, N. J.

Exhibit C-16.

To the Members of the
Ferncliffe Golf and Country Club:

Your Committee was extremely disappointed at the exceedingly small number of replies received in response to the questionnaire attached to the printed plan or proposal submitted for your con-

sideration. This would seem to indicate that the matter is of little consequence to a vast majority of the members, in which event the Committee wishes to be relieved of any further responsibility.

On the other hand, if the interest thus far shown is not a real criterion of the attitude of the members toward the proposal, but merely is indicative of indecision or procrastination, you are earnestly urged to attend a general meeting of the members, hereby called to be held Tuesday evening, December 8, 1925, at 8 o'clock, in Fullerton Hall, No. 2 South Fullerton Ave., cor. Bloomfield Ave., Montclair, N. J.

At that time the matter will be settled as to what action shall be taken with respect to saving your present investment in the Ferncliffe Golf & Country Club. If you fail to attend this meeting and find yourself without facilities to play golf next season, do not try to pass the blame therefor on to anyone else. An opportunity of expressing yourself will be afforded at this meeting, and if you fail to attend the same, you cannot kick if some action is taken not to your liking.

Remember, the Committee has nothing to sell you. Its interest in this proposition is no greater than yours. You will not be canvassed any further. If you fail to respond to this notice, you may be doomed to disappointment. *Consequently, arrange to be present at the next and perhaps last meeting.*

Respectfully, your Committee,

J. F. Ebert,
A. P. Dickinson,
D. W. Dryden,
H. S. Amer,
J. B. Banister.

Exhibit C-17.

To the Members of the
Ferncliffe Golf and Country Club:

Your Committee is pleased to announce that a decree favorable to the Members has been rendered by the Court of Chancery. It is felt that this decision may make it possible for the Members to acquire title to the property. In order to formulate a definite plan whereby this may be effected, a meeting of the Members is hereby called for Wednesday night, May 12th, at 8 o'clock sharp: This meeting will be held in the hall of the Roseville Athletic Association, corner of 7th Ave. and 7th St. Newark (one block from the Roseville station of the Lackawanna Railroad).

It is very important that we have a large attendance in order to insure the success of the plans the Committee has to present for your consideration. At that time a general report as to the present status of the affairs of the Ferncliffe Golf and Country Club will be made. Get this information direct and not through your neighbor.

As a matter of information it may be added that the Committee has authorized Mr. Jack O'Conner, the Professional of the Club, to collect green fees and turn them into the treasury. This money will be used in an effort to rehabilitate the course and make it possible for you to play golf. Work has already been started in this direction.

At present we urge the Members to use the course as only the "green fees" will be used for the upkeep of the course. Therefore, get busy—the more green fees the better the course.

Every Member is again reminded of the importance of this next meeting, as the ultimate result

of Wednesday's meeting may mean success (we won't say—or failure).

Respectfully, your Committee.

J. F. Ebert
A. P. Dickinson
D. W. Dryden
H. S. Amer
J. B. Banister

Exhibit D-1.

This consists of a contract, copy of which is attached to the bill of complaint under the caption "Schedule A".

Exhibit D-2.

Certificate of Incorporation

of

Ferncliffe Golf and Country Club, Inc.

This is to certify that we, the undersigned, Russell G. Conover, Norman R. Lemcke and Marguerite E. Rogers, do hereby associate ourselves into a corporation under and by virtue of the provisions of an act of the Legislature of the State of New Jersey, entitle "An Act Concerning Corporations (Revision of 1896"," and the several supplements thereto and acts amendatory thereof, and do severally agree to take the number of shares of capital stock set opposite our respective names:

Exhibit D-2.

I. The name of the corporation is Ferncliffe Golf and Country Club, Inc.

II. The location of the principal office in this state is at #765 Broad Street, in the City of Newark, County of Essex.

The name of the statutory agent therein and in charge thereof, upon whom process against this corporation may be served, is Frederic W. Smith.

III. The objects for which this corporation is formed are:

(a). To establish, maintain and conduct an association of members as a golf and country club and to that end to solicit and sell subscriptions to the membership of such association upon such terms and under such conditions and subject to such dues, penalties, privileges, obligations and restrictions ad may be set forth and prescribed in the by-laws of the corporation or the rules and regulations of such association.

(b) to acquire, lease, rent, construct, own, operate and dispose of property of any class or description, either real, personal or mixed or any easements, leases, interests, rights or privileges relating or appertaining thereto, and especially lands, grounds, buildings, houses, garages and other structures, to be used as places of amusement, entertainment, meeting, sport or pleasure; and to provide and operate any and all such grounds or buildings for the purpose of carrying on therein or thereon a sporting or pleasure association or club for the use of the members thereof in playing golf, tennis, baseball, football, bowling, pool, billards and any and all other

indoor and outdoor sports; to provide, maintain and operate dining rooms, restaurants, lunch-rooms, reading or writing rooms, libraries, baths, laundrys and dressing rooms and any and all other rooms or conveniences which may or might be useful, necessary or desirable in connection with the maintenance of a golf or country club.

(c) to purchase, lease, or otherwise acquire, and to hold, own, use, develop, mortgage, lease or sell, or otherwise dispose of, all real or personal property necessary or convenient for use as a golf or country club. To manage, as principals or agents, amusement halls or buildings, athletic fields, golf courses or other lands or premises, and any business in connection therewith.

(d) To acquire the good-will, business, rights, property and assets and to assume or undertake the whole or any part of the liability of any persons, firm, association or corporation, and to pay for the same in cash, stock, bonds, debentures or other securities of this corporation, or otherwise as the directors may determine. To hold or in any manner dispose of the whole or any part of the property so purchased. To conduct in any lawful manner the whole or any part of the business so acquired and to exercise all of the powers necessary or convenient in and about the conduct and management of such business.

(e) To purchase, hold, sell, assign and transfer, mortgage, or otherwise dispose of the shares of the capital stock of, or any bonds, securities or evidences of indebtedness created by any other corporation or corporations of this state, or of any other state, country, nation or government, and while owner of said stock or secur-

ities to exercise all of the rights, powers and privileges of ownership, including the right to vote thereon to the same extent as natural persons might or could do.

(f) To enter into, make and perform contracts of every kind, with any person, firm, association or corporation, municipality or state without limit as to amount and to undertake any business undertaking transaction or operation commonly undertaken or carried on by capitalists, financiers, contractors, merchants, commission men and agents and in the course of such business to draw, make, accept, endorse, discount, execute and issue promissory notes, drafts, bills of exchange, warrants, bonds, debentures and other negotiable or transferrable instruments and evidences of indebtedness, whether secured by mortgage or otherwise.

(g) To conduct its business and have one or more offices and unlimitedly and without restriction to hold, possess, lease, mortgage and convey real and personal property in or out of this state and in such place and places in the several states of the United States and in foreign countries as shall from time to time be found necessary and convenient for the purpose of the company's business.

(h) To do all and everything necessary, suitable, convenient or proper for the accomplishment of any of the purposes or attainment of any one or more of the objects herein enumerated, or incidental to the power herein named, or which shall at any time appear conducive or expedient for the protection or benefit of the corporation, either as holders of or interested in any property or otherwise, with all the powers now or

hereafter conferred by the laws of New Jersey upon corporations under the act hereinbefore referred to.

(i) To do any and all of the things in this certificate set forth as objects, purposes, powers or otherwise, to the same extent and as fully as natural persons might or could do, and in any part of the world, as principal agents, contractors, trustees or otherwise.

IV. The total authorized capital stock of this corporation shall be divided into one thousand shares, all of which shall be without nominal or par value. Said shares may be issued and sold from time to time by the corporation for such consideration and upon such terms as may be fixed from time to time by the board of directors without action by the stockholders and any and all such shares so issued, when the consideration therefor fixed by the board of directors has been fully paid or delivered, shall be full paid stock and shall not be liable to any further call or assessment thereon.

V. The names and post office addresses of the incorporators and the number of shares subscribed for by each, the aggregate of which is fifty shares, and the amount of capital stock with which this company will commence business is as follows:

Name	Address	No. Shares
Russell G. Conover,	765 Broad Street,	10
Norman R. Lemcke,	"	10
Marguerite E. Rogers,	"	30

Exhibit D-2.

VI. The period of existence of this corporation is to be perpetual.

VII. The board of directors shall have power to act by resolution in writing signed by all of the members of the board of directors to the effect therein expressed with the same force and effect as if the same had been duly passed by the same vote at a duly called meeting of such bodies respectively and it shall be the duty of the secretary of the company to place such resolution so signed in the minute book of the company under its proper date.

In Witness Whereof, we have hereunto set our hands and seals this twenty-sixth day of August, 1924.

Russell G. Conover (LS)
Norman R. Lemcke (LS)
Marguerite E. Rogers (LS)

Signed, Sealed and Delivered
in the presence of

John D. Masterton

State of New Jersey }
County of Essex } ss.

Be it remembered, that on this 26th day of August, A. D. 1924, before, me, the subscriber, a Notary Public of New Jersey, personally appeared Russell G. Conover, Norman R. Lemcke and Marguerite E. Rogers, who I am satisfied are the persons named in and who executed the foregoing certificate, and I having first made known to them the contents thereof, they did each ac-

knowledge that they signed, sealed and delivered the same as their voluntary act and deed.

JOHN D. MASTERTON,
A Notary Public of New Jersey

ENDORSED

Received in the Clerk's Office of the County of Essex on the 27th Day of August A/D. 1924 and recorded in book 91 of Inc. Buss. Co's for said county page

JOHN H. SCOTT Clerk
Per SMITH

Filed and Recorded Aug. 28, 1924
THOMAS F. MARTIN, Secretary of State.

STATE OF NEW JERSEY
Department of State.

I, THOMAS F. MARTIN, Secretary of State of the State of New Jersey, DO HEREBY CERTIFY that the foregoing is a true copy of the Certificate of Incorporation of Ferncliffe Golf and Country Club, Inc., and the endorsements thereon, as the same is taken from and compared with the original filed in my office on the Twenty-eighth day of August A. D. 1924, and now remaining on file and of record therein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my Official Seal at Trenton, this Fourth day of December A. D. 1925.

[SEAL]

THOMAS F. MARTIN
Secretary of State

Exhibit D-3.

THIS IS TO CERTIFY that we, the undersigned, do hereby associate ourselves into a corporation under and by virtue of the provisions of an act of the Legislature of the State of New Jersey, entitled "An Act Concerning Corporations (Revision of 1896)" and the several supplements thereto and acts amendatory thereof, and do severally agree to take the number of shares of capital stock set opposite our respective names, and to that end, we do, by this certificate set forth:

FIRST: The name of the corporation is:

"RECREATION DEVELOPMENT CORPORATION"

SECOND: The location of the principal office in this state is at 152 Market Street, Paterson, New Jersey.

The name of the statutory agent therein and in charge thereof, upon whom process against this corporation may be served is Frances Zeliff.

THIRD: The objects for which this corporation is formed are:—

To build, erect, construct, manage and occupy buildings for the purposes of a country club, dwelling houses, apartment houses, and public or private buildings or places of amusements; to buy, own, operate, lease and occupy lands and buildings for golf links, tennis courts or for other amusements, sports, games and entertainment, and for apartment houses, dwelling houses and business structures of all kinds for the accomodation of the public and of individuals; to keep, manage, conduct and carry on buildings for the purposes of a country club, apartment houses, dwelling houses, restaurants, and places of amusement, entertainment, and for the accomo-

dation of the public and of individuals, and to purchase, sell, lease and mortgage buildings, structures, lands and real and personal property of every description.

To survey, sub-divide, plot, improve and develop lands for the purposes of sale or otherwise, and to demand and perform all things needful and lawful for the development and improvement of the same for residence, trade and business.

To acquire by purchase, lease, exchange, hire or otherwise, lands or any interest therein; to erect and construct houses, buildings or works of every description on any land of the company, or upon any other lands, and to rebuild, enlarge, alter and improve existing buildings, houses or works therein to convert and appropriate any such land into and for roads, streets and other conveniences, and generally to deal with and improve the property of the company; to sell, lease, let, mortgage or otherwise dispose of the lands, houses, buildings and other property of the company; to undertake or direct the management and sale of the property, buildings and lands; to transact on commissions the business of real estate agents.

To take, enter into, perform and carry out contracts for constructing, altering, decorating, maintaining, furnishing, fitting up and improving buildings of every sort and kind; to advance money to and enter into contracts and arrangements of all kinds with builders, property owners and others; to carry on in all their respective branches the business of builders, contractors, decorators, deal in stone, brick, timber, hardware and other building materials or requisites, and generally to deal in, sell, lease, exchange or otherwise deal with lands, buildings and any other property whether real or personal.

Exhibit D-3.

To manufacture, buy, sell and trade in any and every kind of wood, lumber, brick, stone, metal, cement, lime and other building materials and supplies.

To buy, sell, manufacture, trade and deal in goods and merchandise of any and every description; to maintain and operate places of business for such buying, selling, trading and dealing and manufacturing; to provide, maintain and operate means of transportation, trucks and other vehicles for transporting said goods and merchandise; to purchase and own real estate necessary and deemed advisable for use in connection with the purchase and sale, manufacture and dealing in said goods and merchandise; and to buy, convey and mortgage said real estate or any part thereof, and to issue bonds for any indebtedness incurred in the purchase or improvement thereof.

To acquire by purchase or otherwise, to hold, own, manage, lease, operate and control, to lease, sell and dispose of for such price or prices and on such terms as may seem disirable, water water rights, power privileges and appropriations, for milling, domestic and agricultural uses and purposes; and to develop, control, grant and dispose of at such price or prices and on such terms as may seem advantageous, desirable and proper, power for the generation, distribution and supply of electricity for light, heat and power, and for any other uses and purposes to which the same may be adapted.

To carry on any other lawful business which may seem to the Company to be of a character which may be advantageously carried on in connection with any of the branches of the Company's business, excepting that of a moneyed corporation, or a corporation provided for by the

Banking, the Insurance, the Railroad, and the Transportation Corporation Laws, it being declared that no such business is to be undertaken by this corporation as principal, and the corporation expressly disclaims any banking powers.

The corporation shall have power to conduct the business in all its branches, have one or more offices, and unlimitedly to hold, purchase, mortgage and convey real and personal property in the State of New Jersey, and as well in all other States, and in all foreign countries, and generally to purchase, take on lease or in exchange, hire or otherwise, acquire any real or personal property, and any rights and privileges which the company may think necessary or conveniet for the purposes of its business.

To issue bonds, debentures or obligations of the company, from time to time, for any of the objects or purposes of the company, and to secure the same by mortgage or mortgages, or deed or deeds of trust, or pledge, or lien on any or all of the real and personal property, rights, privileges and franchises of the company whersoever situated, acquired and to be acquired, and to sell or otherwise dispose of any or all of the same, all in such manner and upon such terms as the board of directors may deem proper.

To do any or all of the things in this certificate set forth as objects, purposes, powers or otherwise, to the same extent and as fully as natural persons might or could do, and in any part of the world, as principals, agents, contractors, trustees or otherwise.

To do all and everything necessary, suitable, convenient or proper for the accomplishment of any of the purposes, or the attainment of any one or more of the objects herein enumerated, or

incidental to the powers herein named, or which shall at any time appear conducive or expedient for the protection or benefit of the company, either as holders of or interested in any property or otherwise, with all the powers now or hereafter conferred by the laws of this State upon corporations under the act herein referred to.

FOURTH: The number of shares of capital stock authorized to be issued are as follows: preferred stock of the value of Ten ($10.00) Dollars per share, twenty-five hundred (2500) shares; common stock without any nominal or par value, one thousand (1,000) shares.

The rights, privileges and conditions following shall attach to the shares aforesaid; that is to say:

1. The common stock shall be subordinate to the rights of the preferred stock except that the common stock only shall have voting powers.

2. The preferred shares shall carry a fixed cumulative preferential dividend at the rate of, but never exceeding seven (7%) per centum per annum, on the par value thereof, and such dividend shall be declared accordingly on the first Monday of March, June, September and December in each year, or at such other times as the Board of Directors shall determine.

If in any year dividends amounting to seven per centum (7%) per anum shall not be paid on such preferred stock, the deficiency shall be a charge on the net profits and be payable but without interest, before any interest shall be paid upon or set apart for the common shares without par value.

Exhibit D-3.

3. The balance of the net profits of the corporation after the payment of said cumulative dividend at the rate of seven per centum (7%) per anum to the holders of the preferred stock may be distributed as dividends among the holders of the common stock without par value, as and when the Board of Directors shall in their discretion determine.

4. In the event of liquidation or dissolution of the corporation the surplus assets and funds thereof shall be applied in the first place in repaying to the holders of the aforesaid cumulative preference shares the full amount of the principal thereof and the accrued dividends, oif any, charged before any amount shall be paid upon the common stock, and after such payment in full to the holders of said cumulative preference shares, the surplus assets and funds shall belong to and be divided among the holders of the other stock.

From time to time the preferred and common stock may be issued in such amounts and proportion as shall be determined by the Board of Directors, in accordance with the laws of the State of New Jersey.

5. After five years, upon not less than sixty days notice in in writing given by mail to the holders of the preferred stock to be redeemed, the corporation may, by such method as shall be provided from time to time by resolution of the Board of Directors and at such time and place as shall be specified in such notice, redeem the whole or any part of the preferred stock at 110% of the par value thereof plus accrued unpaid dividends.

Exhibit D-3.

FIFTH: The names and post office addresses of the incorporators, and the number of shares subscribed for by each, the aggregate of such subscriptions being the sum of One Thousand Dollars, with which the company will commence business, are as follows:

Name	*Address*	*No. of Shares*	
Katherine Larkin	238 Gregory Ave. Passaic, N. J.	preferred	30
		common	300
Frances Zeliff	122 Totowa Rd. Borough of Totowa, N.J	preferred	40
		common	400
Florence Eathorne	Hillburn, N. Y.	preferred	30
		common	300

SIXTH: The duration of the Company is to be for an unlimited period of time.

IN WITNESS WHEREOF, the said parties have hereunto set their hands and seals the 11th day of June, Nineteen Hundred and Twenty-four.

KATHERINE LARKIN (LS)
FRANCES ZELIFF (LS)
FLORENCE EATHORNE (LS)

Signed, sealed and delivered in the presence of
WALTER R. HUDSON

Exhibit D-3.

STATE OF NEW JERSEY }
COUNTY OF PASSAIC } ss.

BE IT REMEMBERED that on this eleventh day of June, 1924, before me, the subscriber, personally appeared Katherine Larkin, Frances Zeliff and Florence Eathorne, who I am satisfied are the persons named in and who executed the foregoing certificate of incorporation 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.

WALTER R. HUDSON....Master in Chancery of New Jersey

ENDORSED

Received in the Clerk's Office of the County of Passaic, on the 11th day of June A. D., 1924 at 2.20 o'clock, in the afternoon, and recorded in book D-2 of Certificate Of Incorporation for said County, on page

JOHN MCCUTCHEON....Clerk

Filed and Recorded Jun. 13, 1924....

THOMAS F. MARTIN, Secretary of State.

STATE OF NEW JERSEY

(Seal)

DEPARTMENT OF STATE.

I, THOMAS F. MARTIN, Secretary of State of the State of New Jersey, DO HEREBY CERTIFY that the foregoing is a true copy of the Certificate of Incorporation of "RECREATION DEVELOPMENT CORPORATION", and the endorsements thereon, as the

same is taken from and compared with the original filed in my office on the Thirteenth day of June A. D. 1924, and now remaining on file and of record therein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my Official (Seal) Seal at Trenton, this Fourth day of December A. D. 1925.

THOMAS F. MARTIN
Secretary of State

Exhibit D-4.

Check of A. J. Pitney to the order of The Ferncliffe Golf & Country Club for $55.00, dated August 12th, 1924, and endorsed by stamp "Pay to the order of North Ward National Bank, Newark, N. J., The Ferncliffe Golf & Country Club" and paid.

Exhibit D-5.

FERNCLIFFE GOLF AND COUNTRY CLUB, INC.
INCORPORATED UNDER THE LAWS OF THE STATE OF NEW JERSEY

MEMBERSHIP CERTIFICATE

THIS CERTIFIES THAT Andrew J. Pitney has subscribed to the Association of Members of the Ferncliffe Golf and Country Club, Inc. and that he has paid in full his said subscription and that in consideration of such payment he is entitled during

his lifetime, without further payment on such subscription, to use the Country Club property, golf courses, buildings and equipment at West Caldwall, Essex County, New Jersey, subject to the provisions of the by-laws and the rules and regulations of the corporation or of the Association of members, as the same now are or as they may at any time hereafter be changed, altered or amended.

No legal obligation for any future assessment nor for any debt of said association or corporation is assumed by this subscription or the acceptance of this certificate and no charges may hereafter be made upon said subscriber by reason hereof except the daily fees or charges for the use of the property, golf courses and equipment of said corporation.

In Witness Whereof, Ferncliffe Golf and Country Club, Inc. has caused this certificate to be signed by its officers thereunto duly authorized this 31st day of October, 1924.

J. W. Donaldson
President

Herbert A. Blanchet,
Secretary

[corporate seal]

Exhibit D-6.

BY-LAWS

OF

FERNCLIFFE GOLF & COUNTRY CLUB

WEST CALDWELL

NEW JERSEY

PREAMBLE

WHEREAS, Ferncliffe Golf and Country Club, Inc., has been incorporated under the Laws of New Jersey for the purpose of establishing and conducting an association of members as a Golf and Country Club, which will entitle the members to use the golf courses, tennis courts, buildings, grounds and equipment of the said Corporation under such terms and conditions and subject to such rules, obligations and restrictions as may be prescribed by said Corporation or said Association of members, and

WHEREAS, all matters pertaining to the management of said Corporation and its property is vested in the officers and Board of Directors of said Corporation and other matters pertaining to the social relationship of the members with each other may be directed by the association of said members through their respective officers and governors.

To this end therefore the following by-laws, to regulate the business affairs of said Corporation and also separate by-laws to regulate the affairs of the said members of said club are hereby adopted.

Exhibit D-6.

By-Laws

of

Ferncliffe Golf and Country Club, Inc.

1. All meetings of stockholders shall be held at the principal office of the company in the State of New Jersey.

2. Stockholders shall be entitled to vote at meetings either in person or by proxy and each stockholder shall be entitled to one vote for each share of stock registered in his name on the books of the company.

3. A majority of the stock issued and outstanding represented by the holders thereof either in person or by proxy shall be a quorum at all meetings of stockholders.

4. If less than a quorum shall be present at the time for which the meeting shall have been called, the meeting may be adjourned from time to time to a day certain until a quorum shall attend.

5. The annual meeting of stockholders for the election of directors and the transaction of other business shall be held on the first Wednesday of September in each year, after 1924, at twelve o'clock noon. At each annual meeting the stockholders shall, by plurality vote, by ballot, elect a board of directors.

Special meetings of the stockholders for any purpose shall be called by the secretary upon the request or direction of the president.

Written notice, stating the place and time of the meeting, and of the business to be considered shall be mailed by the secretary to each stockholder at

his last known postoffice address, at least four days before the annual meeting and six days before a special meeting.

6. The business and affairs of the company shall be managed and controlled by a board of three directors, which number may be altered from time to time, by amendment of these by-laws.

7. Meetings of the Board of Directors shall be at such time, upon such notice, and at such places as the board of directors may determine.

8. In case of any vacancy among the directors the remaining directors, by affirmative vote of a majority thereof, may elect a successor to hold office for the unexpired term and until the election of his successor.

9. A majority of the directors shall constitute a quorum for the transaction of business.

10. The Board of Directors shall, except as otherwise provided by law, have power to act in the following manner: A resolution in writing, signed by all of the members of the Board of Directors, shall be deemed to be action by such board, to the effect therein expressed, with the same force and effect as if the same had been duly passed by the same vote at a duly convened meeting, and it shall be the duty of the secretary of the company to record such resolution in the minute book of the company under its proper date.

11. The Board of Directors shall fix the sum to be charged for membership in the Ferncliffe Golf and Country Club until the entire quota of members shall be filled. Said quota shall not exceed one thousand regular members with such limited or special memberships, to be extended

to ladies, as the Board shall deem to be consistent with the facilities of the Corporation. Such limited or special membership shall not entitle the member to use the golf courses or tennis courts on Saturdays, Sundays or Holidays. After the payment of the sum fixed by said Board, there shall be no further charges or assessments against such members except the daily cash charges to such member for the use of the golf courses and tennis courts.

12. The Board of Directors shall have power to terminate the membership of any subscriber for any of the following reasons:

a. Voluntary resignation in writing tendered by a member in good standing.

b. For any cause, action or misconduct which the Board may deem sufficient after a written complaint preferring charges against such member has been referred to said Board and after a hearing has been held thereon at which said member may be present.

13. At the first meeting after the annual election of directors, when there shall be a quorum, the Board of Directors shall appoint a president and vice-president from their own number who shall hold office for one year and until their successors are appointed and qualify.

14. The Board shall also annually choose a secretary and a treasurer (or one person to act as both secretary and treasurer), who need not be members of the Board, who shall hold office for one year, subject to removal by the Board at any time, with or without cause. The Board may also appoint and remove such other officers and agents as they deem proper.

Exhibit D-6.

15. The duties of the president, vice-president, secretary and treasurer shall be such as are usually imposed upon such officials of corporations and as are required by law and such as may be assigned to them respectively by the Board of Directors from time to time. The Treasurer may be required to give such bond as may be approved by the Board of Directors.

16. If the office of any director, or of the president, vice-president, secretary or treasurer becomes vacant the remaining directors, by a majority vote, may elect a successor or successors, who shall hold office for the unexpired term.

17. In case of the absence of an officer of the company, or for any other reason that may seem sufficient to the board, the Board of Directors may delegate his powers and duties for the time being to any other officer, or to any director.

18. The Board of Directors may fix a sum which may be set aside or reserved, over and above the company's capital stock paid in, as a working capital for the company, and from time to time they may increase, diminish and vary the same in their absolute judgment and discretion.

19. Any notice required to be given under these by-laws may be waived by the person entitled thereto.

20. These by-laws may be altered or amended at any time or by a vote of the majority of the board at a meeting held for that purpose, five days' notice have been given in writing either by mail or personal service to each member of the Board by the president or secretary.

Exhibit D-6.

By-Laws

of

The Association of Members

of

Ferncliffe Golf and Country Club

1. This association shall be known as the Ferncliffe Golf and Country Club.

2. The purpose of this association shall be to organize the subscribing members of Ferncliffe Golf and Country Club, Inc., for their mutual benefit and advantage and to enable them to advance the interests of the said club and the members thereof and to promote social intercourse among each other.

3. Every person admitted by Ferncliffe Golf and Country Club, Inc., as a regular subscriber to its membership and entitled to the use of its golf courses, tennis courts, grounds and equipment shall be a member of this club.

4. The government and affairs of the club shall be vested in a board of nine governors, six of whom shall be elected by the members of the club. At the first meeting two governors shall be elected for three years, two for two years and two for one year and at each annual meeting thereafter two governors shall be elected for a term of three years. The remaining three members of said Board of Governors shall consist of three of the directors of Ferncliffe Golf and Country Club, Inc., and shall be elected annually by the Board of Directors of said corporation.

Exhibit D-6.

5. The officers of said club shall be elected by the Board of Governors from the members thereof and shall consist of a chairman, a vice-chairman, a treasurer and a secretary and such subordinate officers as may from time to time be elected or appointed by the Board of Governors. Such officers shall be elected for a term of one year and until their successors are elected and shall have qualified.

a. The chairman shall preside at all meetings of the club and of the Board of Governors; he shall enforce the rules and regulations of the Board of Governors; call all meetings of the association and the Board of Governors; appoint all committees not otherwise provided for and shall be ex-officio a member of all committees. He shall perform such other duties as shall be imposed upon him from time to time by the Board of Governors.

b. In the absence of the Chairman, the Vice-Chairman shall perform his duties. In the event of the death or disability of the Chairman the Vice-Chairman shall act until the Board of Governors shall fill the office. Should neither be present at any meeting a temporary chairman shall be chosen by vote.

c. The secretary shall keep the minutes and other official reports of the club. He shall conduct the official correspondence of the club and shall keep all records, books, documents and papers relating to the club in such place as shall be designated by the Board of Governors. He shall perform such other duties as may be assigned to him by the Board of Governors.

d. The treasurer shall receive and disburse all monies of the club, keeping an accurate account of

and depositing the same in such depository as shall be designated by the Board of Governors.

6. The Board of Governors shall have the following powers consistent with the certificate of incorporation of Ferncliffe Golf and Country Club, Inc., and its by-laws and with the provisions of these by-laws.

a. To fill vacancies arising among the officers of the association by a vote of the majority of those present at any meeting of the board and the person so appointed shall hold office until the next meeting of the association or until his successor is elected.

b. To appoint such committees as may be desirable or necessary.

c. To appoint delegates to any association of which the club may be a member or for the purpose of conferring with any other association or club.

d. To make, alter and amend rules for the conduct of the members of the club and to enforce or remit penalties for offences against such rules.

e. To consider and act upon any and all matters, suggestions or complaints which may be to the interest of the club or its members.

f. To prefer written charges of acts or misconduct which may be deemed sufficient cause for the suspension or expulsion of any member and transmit such charges to the Board of Directors of Ferncliffe Golf and Country Club, Inc., with recommendation of action to be taken thereon.

7. The annual meeting of the association shall be held on the second Saturday of October of each year at three o'clock P. M. for the purpose of

electing members of the Board of Governors and for the transaction of such other business as may be brought before it. Special meetings of the association may be called by the President whenever in his judgment such meetings may be necessary or whenever he is so directed by a vote of the Board of Governors or by a request in writing signed by at least twenty members.

Twenty members shall constitute a quorum for the transaction of business. If no quorum be present at any of the meetings of the club, the presiding officer may adjourn the meeting to any other date within two weeks.

8. The Board of Governors shall hold such meetings as they shall find necessary and advisable and shall fix the time and place of such meetings and prescribe the notice to be given thereof.

9. Amendments to the by-laws may be made at the annual meeting or at a special meeting called for that purpose by a two-thirds vote of all the members present provided that written notice of the proposed amendment shall be approved by a majority vote of the Board of Governors and provided further that notice of the proposed amendment shall be given to all members by the secretary and posted in a conspicuous place in the club house at least ten days before the day of the meeting.

Exhibit D-7.

Membership card of Wm. J. Sury. This card is similar to the membership card of Herbert A. Blanchet which is Exhibit D-25.

Exhibit D-8.

ANNOUNCING

A Special Opportunity

For the Members of Ferncliffe Golf & Country Club

Many of the members of the Ferncliffe Golf and Country Club have expressed a desire to obtain a financial interest in the Club in order that they may have a voice in the management of same.

Therefore with the interest of the members foremost in mind and with the closing of our membership enrollment at hand, the present Board of Directors of the Recreation Development Corporation (the holding Company) and the Ferncliffe Golf and Country Club, Inc. have, after due consideration, voted favorably on the question of amalgamation to enable the members to become part owners and to participate in the earnings. This arrangement, as you will readily see, will also help toward the rapid completion of the construction program as originally planned.

By virtue of this consolidation, 1000 shares of no par value voting stock shall be offered for subscription first to the members at $300.00 per share and then to public subscription subject to the exercise or waiver of the option of each member of record. This subscription shall be by pledge and

shall be payable either in full or in twelve monthly payments of $25.00 each.

Acceptance of this privilege of ownership is not compulsory and your waiver in no sense will affect the status of the membership of each member.

Funds realized by this subscription will be turned over to a finance committee selected from the members, who will create a trust fund for the financing of the enclosed outlined program of construction.

We are enclosing a card and return envelope and would request that after careful consideration you give us your disposition in the matter.

Very truly yours,

RECREATION DEVELOPMENT CORPORATION.
FERNCLIFFE GOLF & COUNTRY CLUB, INC.
By J. W. DONALDSON,
President.

Exhibit D-8.

PROPOSED MERGER

Recreation Development Corp.....1000 shares no par
Ferncliffe Golf & Country Club, Inc.....1000 shares no par
Consolidation.....1000 shares no par

To be offered to members for subscription one share to each at $300.00 per share	$300,000.00
This sum dispersed as follows:	
Trust fund to be deposited with Bank for future building program. 33⅓% of money collected. On total issue — Club House Furnishings; Bl'd'g of second nine; Swimming Pool; Work'g Cap.	$100,000.00
To pay off present indebtedness on purchase of property	72,500.00
6% on the investment will be guaranteed by the present management for a period of two years, provided the present management remains in control during that period at a salary of $10,000 per year. And 50% of said salary will be pledged by the present management to insure that no deficit will be incurred while in control	36,000.00
Organization campaign, legal, sales and all other expenses, 12% of capital	36,000.00
Original stockholders and all other liabilities	55,500.00
	$300,000.00

Combined Assets

Cash Trust fund for building	$100,000.00
Property Valuation 157 Acres	157,000.00
Equipment, Buildings & Improvements	73,000.00
Good-Will	20,000.00
	$350,000.00

These figures are based upon the sale of the entire issue of shares offered. In the event the entire issue is not sold, the sums collected will be divided pro-rata according to the above statement and plan of expenditures.

Exhibit D-8.

CONSERVATIVE ESTIMATE FOR 1926

OF THE

FERNCLIFFE GOLF AND COUNTRY CLUB, INC.

Golf fees for Members..... .50 week days
$1.00 Saturdays, Sundays and holidays

Golf fees for Guests.....$1.00 week days
$2.00 Saturdays, Sundays and holidays

Estimate Income from Golf, Tennis, Lockers, Restaurant & Swimming Pool for 1926	$42,576.00
Maintenance and Upkeep for 1926	$17,500.00
Estimated Total Net Earnings	$25,076.00

The above estimate shows better than 8% net on the total capitalization and is a fair comparison with the following statistics taken from The American Annual Golf Guide of 1924.

City	Name of Club	No. of Holes	Charges per Day	Charges per Yr	Players During 1922	Upkeep & Operating Expense
Philadelphia	Cobbs Creek	18	50c	$10	80,045	$12,000
Los Angeles	Griffith	18	50c	$10	100,288	2,000 Mo.
San Francisco	Lincoln	18	50c	$7	85,800	22,000
Seattle	Jefferson	18	50c	$10	73,442	15,000
Des Moines	Grandview	18	50c	$5	40,000	5,000
Indianapolis	Riverside	18	75c		65,120	11,500
West Caldwell	Ferncliffe	18	50c 1.00 2.00		*32,000	17,500

* Low estimate for 1926

FERNCLIFFE PROGRESS

THE NEW ROAD AND CLUB HOUSE

The new concrete (Clinton Road) leading to Ferncliffe will be completed about September 15th. In the meantime, the ballast that are being taken from the old macadam road are being used to build a twenty foot road leading from Clinton Road up to the proposed new club house. Upon completion of this road, work will be started on the new club house so that by June 1, 1926, Ferncliffe may have completed its beautiful new home and an eighteen hole championship course.

Exhibit D-8.

THE SECOND NINE HOLES

Work is progressing rapidly on the second nine holes, six of which are completed, and the full eighteen holes will be finished by about September 10th. It is expected that fifteen holes will be playable by October 1st.

LOCKERS AND SHOWERS

The lockers are now installed in the basement of the new pavilion, this being the temporary locker room. Showers with hot and cold water provided. If you have not reserved a locker, do it now—just a few more to be had.

EXTENSIVE DEVELOPMENTS PLANNED FOR WEST CALDWELL

The property adjoining Ferncliffe across Clinton Road from the temporary club house has been sold for development purposes and is to be called Ferncliffe Gardens. From reliable information, this property was sold on a basis of approximately $2500 per acre which would mean that the grounds of Ferncliffe would show along with improvements assets about twice the amount of the capitalization.

Greens Nos. 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 14, 15, 16, 17, and 18 are finished.

Ferncliffe Golf and Country Club
460 Bloomfield Avenue

Phone Montclair 8040 Montclair, N. J.

Exhibit D-9.

(*Opposite*) ☞

Announcing The Ferncliffe Golf and Country Club

Comprising 157 Acres of Rare Beauty in West Caldwell, N. J.

No Dues—Pay When You Play—No Dues

Here is an opportunity for people of moderate means to join a magnificent golf and country club in one of the most beautiful and healthful parts of the country—a place where you can rest, play, drive and enjoy yourself to the utmost.
The Ferncliffe Golf and Country Club means enjoyment for every member of your family. It is a semi-exclusive club, and the membership committee has been instructed to exercise great care in selecting the members. You will meet here the kind of people you like to associate with. It will provide all the conveniences of a luxurious club, without the excessive cost that is usually associated with establishments of this nature.
Mail the coupon below for detailed information

$50 *only*

NO ANNUAL DUES

Golfers and Tennis Players Read This

If you are a golf or tennis player these facts will interest you:

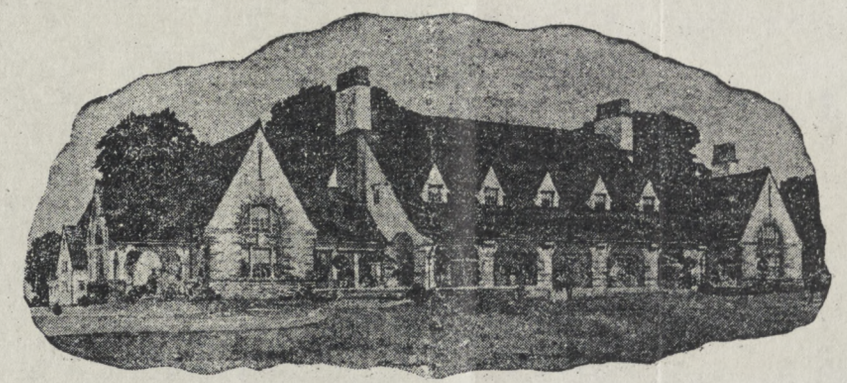
1. No dues to pay. The only charge to members will be a fixed fee of 50c for each day's actual play.
2. No stock or bonds to buy to become a member, and no assessments for deficits.
3. A 6400-yard championship course will give every variety of golf.
4. The easy rolling nature of the terrain will make play thoroughly enjoyable. No arduous climbing.
5. Easy access to grounds, as it is located 300 yards from Bloomfield Avenue and other improved main roads.
6. The fairness of having the people who play most, pay the most charges will appeal to all.
7. First class sport with the greatest economy possible will be the guiding policy.
8. There will be a battery of first class tennis courts for devotees of this popular and beneficial game.
9. There will be hand-ball courts, besides bowling on the green and many other sports when you desire a change from golf or tennis.
10. Social diversions of all kinds will be in the hands of committees of members.
11. Each member will be entitled to vote on all matters except financial affairs.
12. The atmosphere of the club will at all times be such that all members will feel glad to welcome their friends to Ferncliffe.
13. It is the intention of the management to provide every facility and convenience that a country club should provide.
14. If you only get time to play an occasional game then you need a membership in Ferncliffe most of all.

PAY AS YOU PLAY

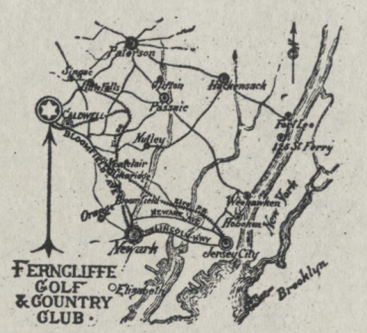
Few members of golf clubs ever get the full value of the excessive dues they pay. The Ferncliffe Golf and Country Club will be quite different. Only a very moderate membership fee—$50 plus 10% tax—will be charged. Thereafter you pay 50c a day only when you play, so that those who play most pay most. This is in accordance with the plan adopted by the most successful European clubs. Where else in the world can you obtain so many advantages at so small a cost? And remember this—after the first 300 memberships the fee will be advanced to $100. When the new club house and 36-hole golf course are finished the membership fee will be increased to $200.

A SCENIC WONDERLAND

The 157 acres that constitute the Ferncliffe Golf and Country Club are situated in a locality long famous for its healthy air and beautiful surroundings. It is absolutely ideal in that it combines unsurpassed natural beauty—mountains, streams, forests and flowering fields—with great accessibility, for Caldwell is only a short distance from the Metropolitan District. Come here for health and pleasure in boundless measure.



C. C. Wendehack of Montclair, Architect of Club House
Seymour Dunn of Lake Placid, N. Y., Golf Course Architect



Holes	Yards	Par	Holes	Yards	Par
1	500	5	10	480	5
2	330	4	11	360	4
3	375	4	12	140	3
4	430	4	13	420	4
5	320	4	14	450	4
6	385	4	15	180	3
7	120	3	16	385	4
8	315	4	17	400	4
9	445	4	18	420	4
	3220	36		3235	35
				3220	36
				6455	71

Only 300 Life Memberships at $50

LIFE MEMBERSHIPS OPEN TO BOTH MEN AND WOMEN

Free Golf and Tennis Lessons to Members

$50 *only*

NO ANNUAL DUES

Non-Golfers and Non-Tennis Players Read This

If you are not a golf or tennis player these fourteen points will appeal to you:

1. You will have the use of the club house and grounds for social purposes.
2. You will find every opportunity for learning these games.
3. Your friends will belong. You will meet them here and learn to play with them.
4. Expert professional teachers will be at your service.
5. You will eventually take up one game or the other. Why not now, at a very nominal cost?
6. When you have joined the increasing army of golf and tennis players your health will be greatly benefited.
7. For the same amount of money there is no greater enjoyment to be purchased.
8. A ride into the country will really mean something to you; a place to dine, dance, play, and otherwise enjoy yourself.
9. There will be many other sports besides golf and tennis.
10. Ferncliffe is located in one of the healthiest localities in the United States.
11. Ferncliffe is situated in a spot long famous for its magnificent and splendid views. It combines mountain, river, forest and field in harmony.
12. Ideal locations for golf courses within reasonable distances will become rarer each year, so your cost for joining a country club will become proportionately greater.
13. Country club life and enjoyments are fast becoming appreciated in the cities of the United States, and are becoming more popular each year.
14. No dues or assessments to pay. Your only expenses after becoming a member will be for services rendered.

MANY OTHER SPORTS AND DIVERSIONS

At this splendid club every member of the family can find endless diversion. Besides the 36-hole golf course and numerous tennis courts, there will be facilities for hand ball, clock golf, bowling on the green, swimming, horseback riding and dancing. Life will be at its best amid these magnificent surroundings.

CUT OUT THIS COUPON AND MAIL TO US

Ferncliffe Golf & Country Club
450 Broad Street, Newark, N. J.

Gentlemen: Kindly send me full particulars about membership in the Ferncliffe Golf and Country Club.

Name .....

Address .....

City .....

Exhibit D-10.

Consists of a folder handsomely printed showing plans and elevations of the clubhouse, bearing the name C. C. Wendehack, Architect, N. Y. C., showing the location of the proposed swimming-pool, locker rooms and other appurtenances.

Exhibit D-11.

This is a printed map of the proposed 18 hole golf course, showing location of swimming-pool, clubhouse, bridle path, tennis courts and other appurtenances, bearing the designation "Architect Seymour Dun, Lake Placid, N. Y."

Exhibit D-12.

Check of Ernst W. Heilig to the order of Ferncliffe Golf & Country Club for $55.00, dated October 3, 1924, endorsed stamped "Pay to the order of North Ward National Bank, Newark, N. J., The Ferncliffe Golf & Country Club," and paid October 6, 1924.

Exhibit D-13.

Phone Humboldt 0436

FERNCLIFFE
GOLF & COUNTRY CLUB
450 Broad Street
Newark, N. J.

October 3, 1924.

Mr. Ernest W. Heilig,
95 Haddon Place,
Upper Montclair, N. J.

Dear Sir:

We gratefully acknowledge receipt of your check in the sum of $55.00, being full payment of the balance due on your own and Mrs. Harriet M. Heilig's membership subscription.

Thanking you for your prompt remittance, we beg to remain,

Yours very truly,

FERNCLIFFE GOLF & COUNTRY CLUB
HERBERT A. BLANCHET
Treasurer.

HAB:S

Exhibit D-14.

Check of Ernest W. Heilig to the order of Ferncliffe Golf & Country Club for $55.00, dated August 19, 1924, endorsed "In full for one-half life membership in Ferncliffe Golf and Country Club at West Caldwell, N. J. for Ernest W. and Harriet M. Heilig including tax in full", endorsed stamped "Pay to the order of North Ward National Bank, Newark, N. J., The Ferncliffe Golf & Country Club", and paid August 22, 1924.

Exhibit D-15.

FERNCLIFFE GOLF AND COUNTRY CLUB
Executive Offices
Newark, N. J.

Date Aug 19 1924

$55 00

Received from Mr & Mrs Ernest W Heilig Fifty-five #.....Dollars in full payment of one Life Membership in the Ferncliffe Golf and Country Club. The Committee on Membership reserves the right to reject any applicant in which case money will be refunded.

Representative JOHN L BENJAMIN

Make all checks payable to Ferncliffe Golf and Country Club

Balance $55.00
payable
Oct 1st 1924

Exhibit D-16.

'Phone Humboldt 0436

FERNCLIFFE GOLF AND COUNTRY CLUB
Executive Offices
450 Broad Street
Newark, N. J.

September 3, 1924.

Mr. Ernest W. Heilig,
80 Park Place,
Newark, N. J.

Dear Sir:

We take pleasure in being able to notify you of your acceptance as a life member in the Ferncliffe Golf and Country Club, and that as such you are entitled to the full enjoyment of all the privileges attached to a regular membership in this organization.

We are enclosing herewith your membership card of admission, and will forward your Membership Certificate and Copy of the By-laws as soon as they are available from the printers.

The temporary club house will be decorated and furnished in a week or two and we invite you to the enjoyment of its accommodations. The blank form enclosed will enable us to enroll additional members of the caliber you will like to associate with and if you will return same to us, we will give the names thereon our prompt attention.

With sincere appreciation for the co-operation and support you have given us, and trusting you will watch developments closely and freely offer suggestions for the guidance of your Club, we beg to remain,

Yours very truly,
FERNCLIFFE GOLF AND COUNTRY CLUB
HERBERT A BLANCHET
Secretary

Exhibit D-17.

Membership card of Ernest W. Heilig. This is similar to the membership card of Herbert A. Blanchet, which is Exhibit D-25.

10

Exhibit D-18.

Membership certificate of Ernest W. Heilig. This is similar to membership certificate of Andrew Pitney, which is Exhibit D-5.

20

Exhibit D-19.

Consists of a printed schedule of 300 names and addresses entitled "Ferncliffe Golf and Country Club, 450 Broad Street, Newark, N. J. Organization Enrollment."

30

40

Exhibit D-20.

Humboldt 0436

APPLICATION FOR LIFE MEMBERSHIP

To be used only by.....

.....1924

To Ferncliffe Golf and Country Club
450 Broad Street
Newark, N. J.

I hereby make application to be admitted to the Ferncliffe Golf and Country Club as a member, and if elected I will conform to and abide by its by-laws, rules and regulations.

It is understood that I shall be entitled to all golf, tennis and club privileges, and that there are no annual dues or assessments. However, following the most successful foreign courses, a nominal green fee or court fee will be charged, only when I play.

Cost of Life Membership at this time	$100.00
Tax, ten per cent	10.00
Total Cost	110.00

Name .....
Address .....
City ..... Telephone .....
Occupation .....

References:

Name..... Address.....
Name..... Address.....

Proposer C. GLENN BOWKER

Exhibit D-20.

The Membership Committee reserves the right to reject any applicant. In such cases money will be returned. In the event of quota being oversubscribed time of Post-Office stamp will be used to decide priority. The cost of life membership will be raised from time to time with the development of the property.

Make all checks payable to Ferncliffe Golf and Country Club.

Remarks: .....

.....

.....

It is expressly understood that no other statement or representation of any kind shall be binding upon the Ferncliffe Golf & Country Club Inc., other than those embodied within the company's printed literature.

Exhibit D-21.

Humboldt 0436

LADIES APPLICATION FOR LIFE MEMBERSHIP

To be used only by.....

.....1924

To Ferncliffe Golf and Country Club
450 Broad Street
Newark, N. J.

I hereby make application to be admitted to the Ferncliffe Golf and Country Club as a member, and if elected I will conform to and abide by its by-laws, rules and regulations.

Exhibit D-21.

It is understood that I shall be entitled to all golf, tennis and club privileges of this class of membership, and that there are no annual dues or assessments. However, following the most successful foreign courses, a nominal green fee or court fee will be charged, only when I play.

Cost of Life Membership at this time	$50.00
Tax, ten per cent	5.00
Total Cost	55.00

Name .....
Address .....
City ..... Telephone .....
Occupation .....

References:

Name..... Address.....
Name..... Address.....

Proposer C. Glenn Bowker

The Membership Committee reserves the right to reject any applicant. In such cases money will be returned. In the event of quota being over-subscribed time of Post-Office stamp will be used to decide priority.

Make all checks payable to Ferncliffe Golf and Country Club.

Remarks: .....
.....
.....

It is expressly understood that no other statement or representation of any kind shall be binding upon the Ferncliffe Golf & Country Club Inc., other than those embodied within the company's printed literature.

Exhibit D-22.

Check of John H. Strigner to the order of Ferncliffe Golf & Country Club for $55.00, dated Oct. 4, 1924, endorsed stamped "Pay to the order of North Ward National Bank, Newark, N. J. The Ferncliffe Golf & Country Club," paid.

Exhibit D-23.

Phone Humboldt 0436

FERNCLIFFE
GOLF & COUNTRY CLUB
450 Broad Street
Newark, N. J.

October 8th, 1924.

Mr. John H. Strigner,
76 Nairn Place,
Newark, N. J.

Dear Sir:

We gratefully acknowledge receipt of your membership application and the fee attached thereto.

The membership committee will act as promptly as possible on these applications and we will notify you further in due course.

Thanking you for your favorable consideration, we are,

Yours very truly,

FERNCLIFFE GOLF AND COUNTRY CLUB
HERBERT A BLANCHET
Secretary

HAB:S

Exhibit D-24.

Check of John H. Strigner to the order of Ferncliffe Golf & Country Club for $55.00, dated Nov. 5, 1924, endorsed stamped "Pay to the order of North Ward National Bank, Newark, N. J. The Ferncliffe Golf & Country Club," and paid.

Exhibit D-25.

F
G & C
C

MEMBERSHIP CARD

FERNCLIFFE GOLF AND COUNTRY CLUB

THIS IS TO CERTIFY THAT

Mr. John H. Strigner is a life member of the Ferncliffe Golf and Country Club, and is entitled to all golf, tennis and club privileges, as provided by the by-laws.

COMMITTEE ON MEMBERSHIP
HERBERT A BLANCHET
Secretary

Date 11-7-24

(This card is not transferable)

Exhibit D-26.

(*Opposite*) ☞

AN ANNOUNCEMENT!

What I Know About the "Ferncliffe" Golf Club

By JOSEPH E. HANSON

There is nothing so refreshing as frankness in this world—and there is so little of that!

If, instead of assuming things, people would only ask a downright plain question you could answer them frankly.

We are all inclined to put too much "Blah" into everything we do—even to the extent of reflecting upon our very honesty of purpose, by the decorative "Blah" with which we surround our assertions!

Say what you mean—and say it outright.

Many men have asked me about the "Ferncliffe" Golf and Country Club—possibly because we are advertising counsellors for the Club and should know something about it.

But a great many men assume they know all about the club. They don't!

I want to tell you here just what I DO know about "Ferncliffe"—for it's an interesting story.

I want to talk about it in short little punches—from the shoulder to the jaw—your jaw!

Last year in July—Mr. Donaldson, who conceived the idea of the "Ferncliffe" Club, ran an advertisement telling us about the proposed club and offering memberships—life memberships—for $50.00.

That was all—just $50.00—no dues, no bonds, no stocks, no assessments; just $50.00.

A lot of smart golfers shined up their clubs, went off to play on the public links and said "Blah"—just like that—and forgot all about the $50.00.

Another lot of smart fellows paid the $50.00 and became members! They asked frank questions—they didn't assume that it couldn't be done—and out came their check books!

Mr. Donaldson said: "When I have 300 members I will close the books on the $50.00 price, and it will cost $100.00 to join—won't some more of you come in before we raise the price?"

A great many golfers did!

A great, great many did not!

And on the appointed day the price went up to $100.00.

Score 1—for Mr. Donaldson. Now remember that incident!

Right away the "Ferncliffe" Golf Club received a great many special delivery letters with $50.00 bills from those who wanted to get in at the low price!

But the checks were all returned—and the fine part of it was that they all came back with an extra $50.00—making the new $100.00 membership!

Apparently Mr. Donaldson was sincere about his Club and his price!

He told me at the time: "I am going to build the finest Golf Club I know how to build! I am going to have it ready for next summer's play. I am going to remodel the old house into a club house temporarily—with a real dining room in charge of a real chef!"

And I believed that Mr. Donaldson would—because he is sincere and frank, and he has a sort of go-getting way about him that makes people like him.

going to build a new, beautiful club
a hill overlooking the course.

tis courts are ready—and they are
them.

A picturesque bridle path will eventually roam in and out about the edge of the course.

The plans contemplate a swimming pool that will be a thing of real beauty and a blessing on a hot summer's day!

The practice putting green is going to be one of the finest I have ever seen.

But to get down to the present.

At "Ferncliffe" the job was tackled in the fall. Seymour Dunn, the great golf architect, laid out the course. You couldn't find a better man.

The first greens were seeded in September. From there on the work went fast!

Ahead of Mr. Donaldson were the long, drab months of winter—enough to discourage any man—with their snows and rains and thaws.

But the work went on—the fairways were leveled, the hollows filled, the natural hazards made more hazardous, the greens formed.

With spring came the little shoots of green grass—and the warm sun coaxed them up into sizable blades.

The course began to take shape—to look like something fine. From the club house the fairways stretched as far as the eye could see, rolling gently off into the wooded hills.

Rough men who loved golf came and looked and said—"Damn fine course"—and paid their hundred dollars in.

Members brought their wives and came to dine on fat roasted chickens and dance in the club. It's a homey place!

And all the time the course took on a new appearance! The ninth green looked so inviting from the club house! You could almost picture the little white balls rolling, rolling into the cup.

And meadowlarks, flying over the fairways in the distance, brilliant in the sunlight, looked like "Silver Kings" soaring outward in search of a sand trap!

The spirit of golf is in the air at "Ferncliffe" now. Everything is in readiness—and yet Donaldson holds back just a little to make sure that nothing is amiss, and that when the players come in a few short days they will find the course at its best!

The other day Donaldson said to me:

"We ought to run a big ad and tell them all about it—show them pictures of the place."

"And the price?"—I asked.

"I will keep it at $100.00 until July 1st and then we'll boost it up to $200.00. I've got to do it! We'll have to limit the membership now at $100.00. After July 1st we'll ask $200.00 and begin to think about closing the membership lists."

Tomorrow we will publish the "big page ad" that Donaldson wants, but today I thought I would tell you frankly what I knew about it.

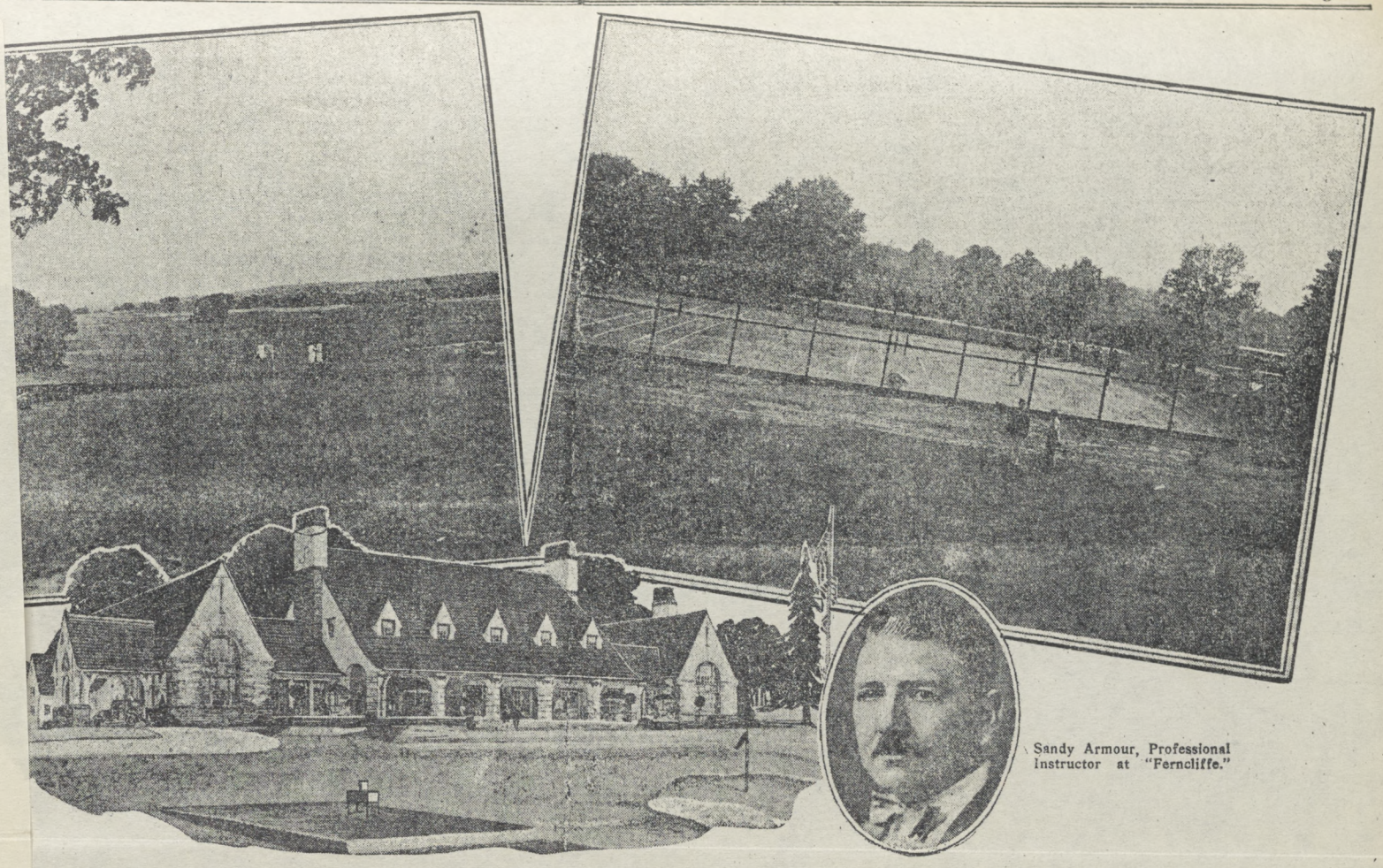
And if you believe Donaldson after what I've told you, as I believe him, you will get in under the bar at $100.00—and be glad you did!

But be frank with yourself, and if you don't know all about it that you want to know call up Donaldson at Montclair 8040 or drive out and see the course and stop into the "Ferncliffe" office at 460 Bloomfield Avenue, Montclair.

There are only a few days left before July 1st—just eight days between you and another $100.00! That's worth thinking about!

Exhibit D-27.

(*Opposite*) ☞



Sandy Armour, Professional Instructor at "Ferncliffe."

Final Opportunity to Join this Exclusive Club for $100

"Ferncliffe" is ready! Its beautiful fairways retch out as far as the eye can see. Nine sporty oles of 3,683 yards in length await the golfer who n make the round in par!

And you can become a member in one of nerica's most beautiful golf clubs now and enjoy its privileges and pleasures for only $100.00. o dues! No stocks! No bonds! No assessments!

What man, who is far-sighted enough to see e future that lies ahead of "Ferncliffe," can ist this last offer of a membership for $100.00--- d a life membership, at that?

And Sandy Armour is our "pro"---famed in all land of golfers as the ex-champion of Scotland, England, Ireland and France---and now the guiding spirit of the "Ferncliffe" staff!

The membership price goes up to $200.00 on July 1. A few more days remain for you to get under the wire. No need to hand us your check in full now---simply sign and reserve your membership before the advance price date!

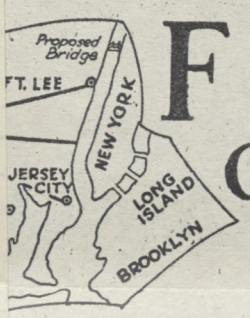
At "Ferncliffe" there is not only golf, but there is tennis as well. And here, when completed, will be a swimming pool, a bridle path, a billiard room, dancing, dining, and all the country club pleasures and excitements that men are often willing to pay thousands to obtain.

Yours—if you act quickly and make reservation now—for $100.00. Mail the coupon, or phone your reservation in!

JOIN NOW!

After July 1st a membership in "Ferncliffe" will cost you $200.00.

Send in your application today! Mail coupon!



FERNCLIFFE
Golf and Country Club

460 Bloomfield Avenue Montclair, N. J.
Telephone Montclair 8040

Located in West Caldwell, N. J., in Essex County, Easily reached by motor, train or trolley! In the heart of a beautiful rolling country! We're ready for you! Come in and join our exclusive membership!

Some photographs taken *the other day at "Ferncliffe"*

"Ferncliffe" Golf and Country Club
460 Bloomfield Avenue, Montclair, N. J.

☐ Reserve a membership for me at $100.00.

☐ Send me more data, with maps, and pictures of "Ferncliffe"

Name .....

Address .....

(It would be wiser to phone your reservation in today! Montclair 8040)

T NOW!

Exhibit D-28.

Consists of a typewritten list of 920 names and addresses of enrolled life members of the Ferncliffe Golf & Country Club.

Exhibit D-29.

Law Offices
Joseph B. Bloom
128 Market Street
Newark, N. J.

Telephone Mitchell 0361

December 18th, 1925.

Mr. J. W. Donaldson,
c/o Smith and Slingerland,
763 Broad Street,
Newark, N. J.

Dear Sir:

On behalf of the Reorganization Committee of the Ferncliffe Golf & Country Club, I beg to acknowledge receipt of your letter of December 14th. Inasmuch as it does not conform to the terms suggested by the committee and acquiesced in by you, we are constrained to disregard it.

At a meeting of the committee held last night, however, a new proposition was formulated and is herewith submitted to you. We are inspired by a desire both to do justice to our fellow members and to be fair with you and to that end, we have gone thoroughly into every phase of the matter. We have considered your acknowledged

revenue from membership subscriptions of $75000. and from "green fees" of about $5000. We are convinced, and in this conviction we are backed by the opinions of golf course architects whom I personally have interviewed, that this sum of $80000. has been more than sufficient to reimburse you for any outlay to which you may have been put for promotion, construction of course and equipment; in fact, we are of the opinion that you have taken a greater profit from this source alone than is commensurate with the effort and time expended by you. Having arrived at this conclusion, we were tempted to demand that your turn over the property to us, the membership, at a price at which you have contracted to buy it from the Messrs. Francisco.

Disregarding our personal opinions, however, we have concluded to make the following offer, subject to the approval of the membership, and will urge its adoption:

1. We will take an assignment of the contract with Messrs. Francisco and will undertake to carry out its terms, provided said contract provides that the purchase price of the grounds upon which the golf course and club house are located is not more than $75000. and provides for the payment of at least $55000. of the purchase price by the acceptance of a purchase money mortgage.

2. We will pay to you any sum which you have paid on account of the purchase price of said land by executing to you a mortgage to mature in three years, payable one-third at the expiration of each year, said mortgage to be second in priority to the aforementioned purchase money mortgage.

Exhibit D-29.

3. We will pay you in addition $25000. in cash in thirty, sixty and ninety days.

4. Acceptance of this offer must be made by December 28, 1925, and if accepted, settlement to be made by us no later than January 20, 1926.

Please understand that we do not contemplate taking over any of your corporations but if the proposition is consummated, title will be taken in the name of a new corporation now in the process of formation.

May I say in passing that there is a portion of the membership which sees in the situation confronting the club an element of fraud and deception and misrepresentation. This sentiment was vociferously expressed at the last meeting and has taken the form, we are informed, of a contemplated action against you which, whether successful or not, will not place you in a very favorable public light. Deploring such action, the committee has prevailed upon them to defer action until such time as our negotiations fail.

Awaiting then, your favorable disposition, I beg to remain,

Very truly yours,

JOSEPH B. BLOOM

Exhibit D-30.

Full Life Men $100.	*Full Life Ladies $100.*	*Full Life Men $50.*	*Full Life Ladies $50.*
421	20	282	40
$42,100.	$2,000.00	$14,100.00	$2,000.00

Restricted Ladies $50.	*Non-resident 5-Year Ladies $50.*	*Non-resident Men $50.*	*Non-resident 5-Year Family $100.*
115	1	6	4
$5,750.00	$50.	$300.00	$400.00

	Members
42,100.	421
2,000.	20
14,100.	282
2,000.	40
5,750.	115
50.	1
300.	6
400.	4
$66,700.	889

Exhibit D-31.

COMBINED STATEMENT AS OF AUGUST 25, 1925

—of the—

RECREATION DEVELOPMENT CORPORATION AND FERNCLIFFE GOLF AND COUNTRY CLUB, INC.

Organization and Promotion	$ 28,828.08
Land & Ground Improvement	195,000.00
Buildings	35,000.00
Furnishing & Equipment	5,754.21
Accounts Receivable	4,772.25
Cash & Deposits	1,460.35
	$270,814.89
Business done on golf course—to date	4,409.00
Amount due on memberships—to date (52)	3,121.00

12 FEB.T.1931

New Jersey Court of Errors and Appeals

Between

AMERICAN PLASTER DRILL COMPANY,
Complainant-Appellant,

and

WILLIAM H. FRANCISCO, *et als.*,
Defendants-Respondents,

and

RECREATION DEVELOPMENT CORPORATION,
Defendant-Respondent,
Defendant-Appellant.

On Appeal from Court of Chancery.

ON APPEAL OF RECREATION DEVELOPMENT CORPORATION.

BRIEF FOR WILLIAM H. FRANCISCO, *ET UX.*, RICHARD S. FRANCISCO, *ET UX.*, AND D. W. DRYDEN AND OTHERS SIMILARLY SITUATED, DEFENDANTS-RESPONDENTS.

The position of the appellant, Recreation Development Corporation, on its appeal here, is inconsistent with its position in the Court below. There it filed an answer to the complainant's bill (pp. 63-67) denying allegations of fact essential to complainant's case and setting up facts in defense of the complainant's claim, thereby joining issue with the complainant.

Yet its argument on this appeal completely ignores the position taken by it below, being confined solely to a denial of the fraud charged by

Dryden and his associates, and an attack on their position. In other words, the Recreation Development Corporation took the position in the Court of Chancery that the complainant's bill ought to be dismissed, and now, on this appeal, takes the position that the prayer of the complainant's bill ought to be granted and that an unconditional decree of specific performance in favor of the complainant should have been made.

POINT I.

The appellant is estopped to attack the decree of the Court of Chancery, insofar as it decrees the dismissal of the bill.

It is bound to take the position in this Court that the Court of Chancery should have entered an unconditional decree of dismissal. It should not, therefore, be heard in this Court except to attack the so-called options contained in the decree. To the extent that it does attack these options (Brief, p. 9), we concur in its argument. To the extent that it attacks the provisions for dismissal of the bill, it should not be heard here because of the inconsistency with its position in the Court of Chancery.

The facts admitted in the answer of the Recreation Development Corporation entitle the respondents, Franciscos, to a decree dismissing the bill without condition. That answer (p. 64, ll. 3-4) denies the facts alleged in paragraphs 9 and 10 of the bill (pp. 17, 18), to wit: That on and after April 20, 1926, the complainant was ready, able and willing to carry out its agreement to purchase; that the Franciscos were unable to convey; that complainant requested a conveyance, which was refused, and that complainant fulfilled its part

of the agreement; and sets up that the reason given by the complainant for its refusal to perform, namely, the existence upon the record of the notice of *lis pendens,* etc., did not constitute a valid and sufficient reason for its refusal to perform (p. 65, l. 30), and that the Recreation Development Corporation was rendered unable to perform because of the default of the complainant (pp. 66, 67).

These allegations of fact in the answer of the Recreation Development Corporation are solemn, judicial, admissions binding upon it in this Court as in the Court of Chancery.

> Wigmore, Evidence, secs. 2588-2591;
> *Hyer* vs. *Little,* 20 N. J. E. 443;
> *Walker* vs. *Hill's Executors,* 21 N. J. Eq. 191, aff'd 22 N. J. Eq. 513;
> *Craft* vs. *Schlag,* 61 N. J. Eq. 567;
> *Manley* vs. *Mickle,* 55 N. J. Eq. 563;
> *Hageman* vs. *Brown,* 76 N. J. Eq. 126;
> *Rheinfort* vs. *Abel,* 76 N. J. Eq. 485;
> *Ward* vs. *People's Bank,* 91 N. J. E. 110.

The Vice-Chancellor in his memorandum (p. 73, l. 40) mistakenly says that he understands that the Franciscos were willing to waive such defenses as they had to specific performance, provided the rights of the members were protected. The Franciscos and the members combined defenses, but it was not intended to waive any defenses which either of them had, and there is nothing in the record which indicates any such intent. A decree unconditionally dismissing the bill could have been and should have been entered on the defenses raised by the Franciscos. This would have been in accord with the facts set up in the answer of the Recreation Development Corporation. Indeed, assuming the truth of the facts set up in that answer, a decree of unconditional dismissal was ne-

cessitated thereby. It is, therefore, immaterial to the Recreation Development Corporation whether fraud was perpetrated as charged by the members, or not; and it is immaterial to the Recreation Development Corporation what effect such fraud has if it existed, and it is immaterial to the Recreation Development Corporation what happens to the members. The decree (except for the options) is justified and necessitated by the facts pleaded below by the Recreation Development Corporation, and it is therefore bound by the decree (except so far as the options are concerned). It makes no difference that the Court below did not consider or pass upon the defenses raised by the Franciscos and by the Recreation Development Corporation. If the decree is right, it will stand even though the Vice-Chancellor was wrong in the reasoning which he applied, and even though he applied no reasoning at all.

Gillespie v. *John W. Ferguson Co.*, 78 N. J. L. 470;
Sadler vs. *Young*, 78 N. J. L. 594;
Pierson vs. *N. Y. S. & W. R. R. Co.*, 83 N. J. L. 661;
Cork vs. *L. V. R. R. Co.*, 98 N. J. L. 143;
McCrory Stores Corp. vs. *Braunstein*, 99 N. J. L. 166;
McAndrews & Forbes Co. vs. *Camden*, 78 N. J. E. 244;
Shauinger v. *Apter*, 96 N. J. Eq. 302.

The result is that it is open to the appellant, Recreation Development Corporation, to question only that part of the decree which provides for the options, and we heartily agree with the Recreation Development Corporation that this part of the decree should be set aside and reversed, leaving it an unconditional decree dismissing the bill.

POINT II.

The Court of Chancery was fully justified in finding fraud.

The appellant argues (Brief, pp. 12, 13) that "there was no proof whatever that all moneys received as greens fees and for membership fees were not used in improving and completing the golf course". In this claim the appellant is mistaken. The situation was set forth quite favorably to Donaldson in the letter written to him under date of December 18th, 1925, by Joseph B. Bloom (Ex. D-29, p. 230). Bearing also on this question are Exhibits D-30, p. 233, and D-31, p. 234 (see testimony, p. 152, l. 20; p. 150, ll. 35-40). Donaldson claimed that he had incurred unpaid debts amounting to $25,000 or $30,000, but he refused to give any account of them (p. 155-157), and the players never secured an account from him of money expended or claimed by him to have been expended on the property. The clubhouse was merely a temporary affair, consisting of a building which was already on the land. Only the first nine holes of the course were completed. Presumably all the work that was done on the property in Donaldson's regime, could have been paid for by the $25,000 or $30,000 debts which he claimed to have incurred and which he never paid. These facts were peculiarly within his knowledge and he refused to disclose them. The testimony of the various witnesses shows that very little work was done on the land, and in view of all of these facts, it is reasonable to conclude, as the Vice-Chancellor did conclude, that Donaldson with his two corporations, which were his alter egos, engaged in a scheme to defraud the members, and that very little, if any, of the moneys

collected by him went into the land, or in any wise for the benefit of the nine hundred and twenty (920) persons whom he had duped.

Appellant further says that there was no proof whatever of any guarantee that the members, upon payment of greens fees, were to have the use of the property as a club during life (Brief, p. 13). In this assertion the appellant is also mistaken, for the printed literature in evidence furnishes ample proof of such a warranty. (See for example, Ex. D-25, p. 225; Ex. D-5, p. 200.)

Without repeating what we said on the question of fraud in our brief on our appeal, we respectfully refer the Court thereto at this point. We might point out more specifically here the false representations as to the exclusive nature of the membership, made by Donaldson and his agents and in the literature used for advertising purposes, the necessity that the "membership committee" approve applications for membership, etc. (Ex. D-9, p. 215; Ex. D-20, p. 222; D-21, p. 223; D-23, p. 224.) There never was a membership committee in existence for this purpose. The memberships were promiscuously sold to anyone who could be induced to buy them, through the newspaper advertising and high pressure salesmanship.

The appellant objects to the members charging fraud to Donaldson, because they refused to deal with Donaldson on a basis of $115,000.00 and yet agreed to pay the Franciscos $150,000.00 for the same property (Brief, p. 10). Of course, the so-called agreement between the Franciscos and the members was made several years after the proposal of Donaldson which the players refused. The ground of their refusal was that Donaldson was in the position of a trustee toward them and was seeking to secure an unconscionable profit. As against Donaldson, they had the right to have

the property for $75,000.00 or thereabouts. Their arrangement with the Franciscos contemplates a joint working out of a practical plan for a real golf club, including an agreement on the Franciscos' part to finance the new club which will be formed, if as a result of this appeal the claims of the complainant are disposed of. It is pointed out in our other brief, that the players and the Franciscos are entirely free to make any arrangement which they choose to make between themselves. While they are both parties to the suit, there was no issue between them. Neither one is seeking any decree against the other. They both seek a dismissal of the bill without options or conditions, and any arrangements which they may make are quite immaterial to the issues here.

Appellant remarks (Brief, pp. 22-23) that "there may also be a grave question as to whether or not the members come into this court with clean hands. While accusing Donaldson of misrepresentation, their committee themselves baldly misrepresented to the other members the result of litigation pending in this Court, stating that a decree had been entered, favorable to the members (Exhibit C-17, Case, p. 183, l. 3 *et seq.*) when in fact no decree whatever was made, and in fact no suit started".

In this respect the appellant is also mistaken. The explanation is contained in the testimony of Mr. Ebert (p. 160, ll. 2-17). The letter was sent out in May of 1926. The witness referred to the memorandum of Vice-Chancellor Bentley which is printed on pages 12-15 of our brief on our appeal, in the suit which had theretofore been instituted by Dryden on behalf of all the members, and in which Vice-Chancellor Bentley had decided the motion to strike the bill favorably to the members. The letter in question (Ex. C-17) mistakenly refers to the decision as a decree.

Finally the appellant remarks (Brief, pp. 23-24) that "to deny the complainant and the defendant, Recreation Development Corporation, their rights under these contracts is to place the members in a position where they may obtain the advantage of the increased property value, when they had no legal or equitable rights in the property whatever. It would result, in effect, in vesting in the members property rights which they never had or contemplated at the time of their purchasing their memberships".

To dismiss the bill unconditionally would be to terminate the claims of the complainant and of the Recreation Development Corporation in the land. Except for such arrangement as the Franciscos and the players may have made between themselves, and which is of no concern to the Recreation Development Corporation or the complainant, the result would be to leave the property in the Franciscos, where it originally came from. Any advantage which the players will get will be through their arrangement with the Franciscos, and not through such a decree. The complainant and the Recreation Development Corporation are naturally interested in the increase in value of the property, and want to hold on to their contracts if they can, but their claims, based as they were merely upon a contract to purchase upon which a small deposit was paid, cannot stand in the face of the strong equities of the members arising through the fraud practiced against them by Donaldson, or of the defenses raised by the Franciscos themselves.

For the reasons above stated, we respectfully submit that the appeal of the Recreation Development Corporation should be considered by this Court only so far as it attacks the options provided by the final decree; that as to those options the objections of the appellant are well taken, but

that the final decree, modified so as to omit all options and conditions, should be affirmed as a simple decree dismissing the bill.

DOUGAL HERR,
Solicitor for and of counsel with
William H. Francisco, *et als.*,
defendants-respondents.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.
(6715)

12 FEB.T.1931

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

Between

AMERICAN PLASTER DRILL COMPANY,
Complainant-Appellant,

and

WILLIAM H. FRANCISCO, *et al.*,
Defendants-Respondents,

and

RECREATION DEVELOPMENT CORPORATION,
Defendant-Respondent,
Defendant-Appellant.

On Appeals from Court of Chancery.

BRIEF OF RECREATION DEVELOPMENT CORPORATION, DEFENDANT-APPELLANT.

This is an appeal by the Recreation Development Corporation, one of the defendants in the above-entitled suit, from the final decree dismissing the bill of complaint unless the complainant should accept one or the other of two options particularly set forth in said decree (Case, p. 77). This decree followed the opinion of Vice-Chancellor Bigelow (Case, p. 68) who took over the case after the untimely death of the late Vice-Chancellor Bentley, who had heard all of the testimony and arguments.

Statement of Facts.

On June 11, 1924 the defendants, William H. Francisco and Richard F. Francisco and their

respective wives, entered into a written agreement with the defendant, Recreation Development Corporation (Exhibit C. 1, Case, p. 164) in and by which the Franciscos agreed to convey certain premises consisting of 157.27 acres in the Borough of West Caldwell, in the County of Essex, to the Recreation Development Corportion, for the consideration of $75,000. A copy of this agreement is attached to the bill of complaint and marked Schedule A (Case, p. 26). The first two payments called for by said contract, aggregating $2,500, were duly paid and the time for making the third payment was extended by agreement from time to time until April 20, 1926 (Schedules B and C annexed to bill of complaint) (Case, p. 32 *et seq.*).

On June 13, 1924 the certificate of incorporation of the said Recreation Development Corporation was filed in the Office of the Secretary of State of New Jersey under which it had the right to acquire by purchase, lease or otherwise, lands or any interest therein (Exhibit D. 3, Case, pp. 191, 192).

By instrument dated July 25, 1924, the said Recreation Development Corporation leased the said premises unto the Ferncliffe Golf & Country Club, Inc., recited therein to have been a corporation of New Jersey (Exhibit C. 8, Case, p. 168) although, as a matter of fact, its certificate of incorporation was not actually filed until August 28, 1924, for some reason which does not appear (Exhibit D. 2, Case, p. 184 *et seq.*). This lease recited the agreement of June 11, 1924 held by the said Recreation Development Corporation and provided for the leasing of the said premises to the said Ferncliffe Golf & Country Club, Inc. for the term of twenty years at the yearly rental of $15,000. (Exhibit C. 8, Case, p. 168.)

The Ferncliffe Golf & Country Club, Inc. was formed for the purpose as stated in its certificate of incorporation, among other things, to establish, maintain and conduct an association of members as a Golf and Country Club and to that end to solicit and sell subscriptions to the membership of such association upon such terms and under such conditions etc. as might be set forth and prescribed in the by-laws of the corporation or the rules and regulations of such association (Exhibit D. 2, Case, p. 185).

Pursuant to this arrangement, the corporation solicited members for the so-called "association of members" and issued membership certificates to those who joined and paid the membership fee, by the terms of which such members became entitled during their lifetime to the use of the country club property subject to the provisions of the by-laws and the rules and regulations of the corporation or of the association of members (Exhibit D. 5, p. 199).

The by-laws of the corporate entity known as the Ferncliffe Golf & Country Club Inc., in the preamble thereof, provided that the management of said corporation and its property should be vested in the officers and board of directors of the corporation, but that other matters pertaining to the social relationship of the members with each other might be directed by the association of said members (Exhibit D. 6, Case, p. 201).

Following the by-laws of the corporation and included in the same pamphlet, copies of which were sent to the members (Case, p. 116, l. 25; p. 125, l. 15) appeared the by-laws of the association of members of Ferncliffe Golf & Country Club which provided among other things, that every person admitted by Ferncliffe Golf &

Country Club Inc. as a regular subscriber to its membership and entitled to the use of its golf courses, tennis courts, grounds and equipment could be a member of said association (Case, p. 206).

Briefly, therefore, the setup was as follows:

The Recreation Development Corporation was the vendee in possession under its agreement of purchase from the defendants, Franciscos; the Ferncliffe Golf & Country Club Inc. was the lessee of said premises under lease from the Recreation Development Corporation; and the subscribers to membership for the privilege of using the golf course, etc. became members of what was designated as the "association of members" as distinct from stockholders in the corporation itself.

The plan was conceived by one J. W. Donaldson, apparently in the belief that the money received for membership fees would be sufficient to acquire the property and build the golf course and make the other improvements contemplated, and that the income from greens fees and other sources would be sufficient for the proper maintenance of the property. He apparently obtained the idea from similar golf courses in other cities and in foreign countries (Exhibit D. 8, Case, p. 213; Exhibit D. 20, Case, p. 221).

The project, however, was not successful and a receiver pendente lite was appointed in May or June, 1927 (Case, p. 1248). While nine holes of the golf course were fully completed and operated (Case, p. 143, l. 35) and eighteen holes were practically completed (Exhibit C. 15, Case, p. 179, l. 20) the money gave out and the Ferncliffe Golf & Country Club Inc. owed some $30,-

000. to its creditors (Exhibit C. 14, Case, p. 176, l. 37).

When it became apparent that the project could not succeed, Donaldson endeavored to get the members to take over the property and, by letter dated December 14, 1925, offered to transfer all of the stock of both of his companies and transfer their title to the property to such committee as the members might designate, upon payment of an amount sufficient to pay the debts of the companies not exceeding $30,000, and the payment of $15,000 in cash to the companies, the members to assume the land mortgage of $70,000. In other words, Donaldson offered to turn over all of the property to the members for the sum of $115,000, even though it meant a sacrifice of a considerable sum to him (Exhibit C. 14, Case, p. 176).

This offer was refused and thereafter by agreement dated January 2, 1926 the Recreation Development Corporation entered into an agreement with the complainant for the sale of said premises to it for the sum of $130,000 (Schedule D, Case, p. 36). This agreement specifically provided that conveyance was to be made subject to the lease hereinbefore referred to and to the rights of the members of the Ferncliffe Golf & Country Club Inc. to use said premises under their said memberships as provided and set forth in their certificates of membership and the by-laws of said Company (Case, p. 38, l. 38 *et seq.*).

On January 4, 1926 the Recreation Development Corporation assigned to the complainant all its right, title and interest of, in and to its contract with the defendants Franciscos, dated June 11, 1924, which assignment provided that it was to be delivered only in the event of the failure

of the Recreation Development Corporation to carry out its said agreement with the complainant of January 2, 1926, and upon payment to the said Recreation Development Corporation of the balance of the purchase price due to it from said American Plaster Drill Company under said contract (Schedule E, Case, p. 45).

Complainant refused to accept title from the Recreation Development Corporation under their said agreement because of the existence of a lis pendens filed in a suit instituted by one C. W. Dryden, on behalf of the members of the Club (Case, p. 87, l. 30; p. 93, l. 27 *et seq.*) The Recreation Development Corporation was unable to carry out its agreement to convey free from such lis pendens, and therefore the assignment above referred to became effective, and thereupon the complainant filed its bill as such assignee to compel the Franciscos to specifically perform the agreement which they had made with the Recreation Development Corporation; to which this appellant answered asking that in the event of a decree for the complainant such decree should provide for the payment to this appellant of the balance of the purchase price due to it under its contract with the complainant (Case, p. 67).

The members of the "association of members" were permitted to intervene in the suit and they filed an answer by their representative, C. W. Dryden (Case, p. 52). The answer of these defendants charged that said Donaldson and Ferncliffe Golf & Country Club, Inc. had made certain fraudulent representations to induce the sale of the certificates to the members (Case, pp. 56, 57) and it is to the findings of the learned Vice-Chancellor who wrote the opinion below in which he fastens fraud upon this appellant, Recrea-

tion Development Corporation, and Ferncliffe Golf & Country Club Inc. and Donaldson (neither of the latter of whom was a party to this suit) that this appellant will address itself especially, leaving the burden of the argument upon the other features of the case to the complainant.

Specification of Grounds of Appeal.

The following is a specification of the grounds of appeal asserted and urged by this appellant:

1. Because the final decree is erroneous in that it adjudges that the complainant is not entitled to the relief prayed for, but dismisses the bill of complaint unless one or the other of the options mentioned in said decree is accepted by the complainant.

2. Because the said decree is erroneous in that it should have ordered, adjudged and decreed that the contract in question should have been specifically enforced in accordance with its terms, upon the complainant complying with the terms of said contract and with the terms of the assignment thereof made by the Recreation Development Corporation to the complainant.

3. Because the learned Vice-Chancellor erred in finding as follows: "I find that the Development Corporation and the Golf Company were mere *alter egos* of Davidson (Donaldson) and that with him they engaged in a scheme to defraud the members." (Case, p. 74, l. 12 *et seq.*)

4. Because the learned Vice-Chancellor erred in finding as follows: "Any title or interest which the Development Corporation has in the property is held in trust for the members to the extent that it may be necessary to make good the representations which induced the members

to join the Club;" and also "The practical effect of the foregoing is that the members, in equity, have the entire title and interest of the Development Corporation for the term of their joint lives." (Case, p. 74, l. 25 *et seq.;* p. 75, l. 3 *et seq.*)

ARGUMENT.

POINTS I AND II.

The Final Decree is erroneous in that it adjudges that the Complainant is not entitled to the relief prayed for, but dismisses the Bill of Complaint unless one or the other of the options mentioned in said Decree is accepted by the Complainant.

The said Decree is erroneous in that it should have ordered, adjudged and decreed that the contract in question should have been specifically enforced in accordance with its terms, upon the Complainant complying with the terms of said contract and with the terms of the assignment thereof made by this Appellant.

The decree dismisses the bill unless (1) The complainant agreed to deposit $75,000 for the purpose of refunding to the members of the association the amounts paid by them as membership fees; or (2) the complainant agreed to comply with the requirements of said contract (Exhibit C. 1) and assignment (Exhibit C. 4) and to lease said premises to the members or to some corporation or trustees for them for the joint lives of said members, approximately 920 in number, upon payment by way of rental of certain greens fees, etc. to be determined by the Court (Case, pp. 78 and 79).

While this appellant would have no cause for complaint from a financial standpoint if the complainant should have accepted the second option above referred to, because it would then have received the balance of the purchase price from the complainant, nevertheless it contends that the findings of the learned Vice-Chancellor and the final decree based thereon were erroneous both in law and in fact. The complainant was either entitled to a decree for the specific performance of the contract according to its terms and according to the terms of the assignment, or it was not. To impose conditions such as are contained in the two options embodied in the final decree, amounts to the making of a new contract between the parties by the Court, and if the second option should have been accepted by the complainant, the practical effect would have been to involve this Court in the management and conduct of a golf course. If, as we hope to show by our argument under Points III and IV of this brief, the Court was in error in fastening fraud upon this appellant, then the legal question involved is exceedingly simple. The complainant was the assignee of a contract for the sale of this property and as such assignee was entitled to a conveyance according to its terms. If the members of the "association of members" had no right, title or interest, either legal or equitable, in the real estate in question, then the lis pendens filed in their suit to establish such alleged rights should have been discharged, and the defendants Franciscos could then have conveyed to the complainant free and clear of that encumbrance in accordance with the terms of their contract; or, they could have conveyed to this appellant, and this appellant, in turn, could have conveyed to complainant, thus performing both contracts.

As a matter of fact, the said suit of the members in which the lis pendens was filed should have been dismissed by the Court below for lack of prosecution in accordance withe the motion of this appellant (Case, p. 102, l. 10, *et seq.*). The only papers filed by the complainants in that suit was the bill of complaint and affidavits and order to show cause. No subpoena was ever issued and no order taken after argument upon the order to show cause; so that, in fact, that suit was never begun by the issuance of process.

It is, of course, perfectly apparent why the interest of the defendants Franciscos lies with the members of the club. It means a difference of $75,000 to them in the purchase price of the land. The same property that they had agreed to convey to this appellant for $75,000 they have now agreed to sell to the members for $150,000. (Case, p. 162, l. 1 *et seq.*) In this connection it ill becomes the members to charge fraud or unfair dealing to Donaldson, when, as a matter of fact, he offered the property to them for an outlay of $115,000. (Exhibit C. 14, Case, p. 176) which they refused, and yet they turn around and agree to pay the Franciscos $150,000 for the same property. Had they accepted the offer of Donaldson, they could now have been the owners of the property for the price of $115,000 and all of this extensive litigation could have been avoided; because it was only after their refusal of Donaldson's offer that Donaldson entered into the agreement with the complainant. Even then he used every means to preserve the rights of the members and the contract with the complainant expressly provided that conveyance was to be made subject to the lease of the Ferncliffe Golf & Country Club Inc. and subject to the rights of the members to use the golf courses, etc. (Case, p. 38, l. 40, *et seq.*).

But whether there was fraud on the part of Donaldson or not, the members thereby acquired no title, legal or equitable, to any part of the real estate in question. If fraud existed, the remedy of the members was by way of rescission and suit against Donaldson or the Ferncliffe Golf and Country Club Inc. for the return of their money. The mere fact that they had been induced to become members by the misrepresentations of Donaldson would not elevate them to the position of owners of the title; and if they had no legal or equitable title to the real estate itself, then there can be no denying the fact that the complainant was entitled to a decree for a conveyance of the lands free from the lis pendens in the suit filed by the members, upon its complying with the terms of the contract and of the assignment.

POINTS III AND IV.

The Court erred in finding that this Appellant was guilty of fraud.

The third and fourth specifications of grounds of appeal may be considered together, because they both involve the erroneous conclusion of the Court below that this appellant and J. W. Donaldson and the Ferncliffe Golf & Country Club Inc. induced the members to join the club by means of fraudulent misrepresentations, and in finding that the said members in equity have the entire title and interest of this appellant for the term of their joint lives.

It would seem to be almost superfluous to state that these members never acquired and never intended to acquire any right, title or interest in the real estate in question when they paid $50 or $100 for the privilege of using the club's facilities for life. There was never any

such representation made to the members in soliciting their memberships, and the testimony of those who appeared as witnesses clearly shows that none of them ever had any idea that he was obtaining a share in the title to the property.

It is alleged in the answer which the members were permitted to file that certain representations were made by or on behalf of J. W. Donaldson and the Ferncliffe Golf & Country Club Inc. (neither of whom is a party to this suit) in order to induce the sale of memberships to the intervening defendants, which representations they allege to have been false. The representations alleged are as follows:

(a) That said Ferncliffe Golf & Country Club Inc. was the owner of lands upon which the Golf Club was constructed.

(b) That all moneys received as greens fees and for membership fees would be used in improving and completing the golf course.

(c) That the said Golf Company was organized for developing the land and building said golf course, after which it would turn the management of said Club into the hands of the members of said corporation.

(d) That the Golf Company would make numerous improvements on said grounds, to wit, build a swimming pool, build a new club house, build tennis courts, and add other features which would make the golf club a first-class and up-to-date country club, the use of which features defendants were entitled to upon payment of certain fees, and the use of such privileges and features during their lifetime was guaranteed defendants by the Golf Company.

There was no proof whatever that all moneys received as greens fees and for membership fees

were not used in improving and completing the golf course as stated in paragraph (b) above nor of any promise that the management of the club would be turned into the hands of the members of said corporation as stated in paragraph (c) above; nor of any guaranty as alleged in paragraph (d) above.

Fraud is never presumed but must be proven by clear, congent and convincing evidence. *Guerber Eng. Co.* v. *Stafford,* 86 N. J. Law, 280, *Summerill* v. *Summerill,* 83 N. J. Eq. 3 (affirmed 83 Eq. 350).

Even if any of these allegations had been sustained by competent proof, the remedy, if any, is properly against the persons responsible for such misrepresentations and not against the property.

Furthermore, the alleged misrepresentations were made by agents of Donaldson or Ferncliffe Golf & Country Club Inc. and not by this appellant. The power delegated to the alleged agents is not shown. There is no proof of the scope of their agency, except as appears upon the applications for membership, as follows:

> "It is expressly understood that no other statement or representation of any kind shall be binding upon the Ferncliffe Golf & Country Club Inc., other than those embodied within the company's printed literature."

Nowhere in the testimony is there any evidence of fraudulent misrepresentations authorized or ratified by the appellant, Recreation Development Corporation.

The only misrepresentation of any substance sought to be proved is that regarding the ownership of the property. Even if made, this was not a misrepresentation, because admittedly the Recreation Development Corporation was an

equitable owner under contract of purchase and the Ferncliffe Club was an owner under a lease. But aside of this, each witness produced by the members stated that he had made a careful investigation before joining the club regarding the representations made by the persons soliciting the membership. For instance, Mr. Pitney, the first witness, testified that he was a friend of the agent who solicited his membership and that he relied upon the statements made because of this friendship (Case, p. 112, l. 20). He also made a personal inspection of the developments of the property before purchasing his membership (Case, p. 113, l. 33, *et seq.*). The representations made to him were only as to the future plans of the club (Case, p. 114, l. 16).

Mr. Sury, the next witness, stated that the representative soliciting his membership painted a picture of the future (Case, p. 119, l. 11; p. 121, l. 3); that he knew the only money to pay for the development was to come from the members and that he was among the first 300 members (Case, p. 120, l. 14, *et seq.*) He also spoke to several other men before joining (Case, p. 122, l. 4) and concluded it was a good proposition (Case, p. 122, l. 11). It is fair to assume that it was just as much the opinion of these other men whom he consulted which induced him to become a member as to assume that it was the representations of the club's representative.

Mr. Helig, the next witness, a very careful business man (Case, p. 132, l. 35; p. 124, l. 37) testified that he made an investigation and believed the property could be bought with the membership fees (Case, p. 124, l. 15), and that the club was ultimately to pay for the land (Case, p. 131, l. 12). He said he thought it a

certainty it would be a success (Case, p. 132, l. 23 *et seq.*); that he did not think that he was buying any real estate (Case, p. 133, l. 36, *et seq.*) and did not look up the records with reference to the title (Case, p. 133, l. 15).

Mr. Stringer, the next witness, stated that he made careful inquiries before joining (Case, p. 138, l. 27) and that "I do not intend to buy anything until I see what I am going to get." (Case, p. 137, l. 35.) He went to see the property (Case, p. 138). An agent who solicited his subscription told him to figure it out for himself (Case, p. 139, l. 35). He paid one-half of the membership fee saying, "there are a lot of promises made," (Case, p. 141, l. 17) and the balance he was to pay in thirty days, provided they showed him the by-laws (Case, p. 141, l. 35). He verified a good deal of what they said (Case, p. 142, l. 33). Nine holes of the golf course were completed and he played right up to November, 1927 (Case, p. 143, l. 30). Tennis courts were built in 1925 (Case, p. 143, l. 40). He was very careful about his investment (Case, p. 144, l. 12). He was not told that the club owned the land when he joined (Case, p. 144, l. 30) and he says that the members were not supposed to own the land (Case, p. 144, l. 40); and he understood fully that the land was not owned by the members (Case, p. 147, l. 10); and that they had no financial equity in the property (Case, p. 149, l. 11); and that he knew that he was not buying stock in the club (Case, p. 30).

Each one of these witnesses admitted signing an application for membership, one of which was admitted in evidence (Exhibit D. 20, Case, p. 221). It will be observed that the application specifically provides as follows: "It is expressly understood that no other statement or representa-

tion of any kind shall be binding upon the Ferncliffe Golf & Country Club Inc. other than those embodied within the company's printed literature." (Case, p. 222.) The witnesses all admitted that they had seen no statement in the club's printed literature that it owned the property.

All of the witnesses produced by the members testified to having made careful investigations before buying their memberships; and yet they would have the Court believe that they relied blindly upon alleged statements of the solicitors that the club owned the property; when inquiry of the Franciscos, who had owned the property for many years, and who lived in the immediate neighborhood, would at once have elicited information regarding the true situation.

> "If, after a representation of fact, however positive, the party to whom it was made institutes an inquiry for himself, has recourse to the proper means of obtaining information, and actually learns the real facts, he cannot claim to have relied upon the misrepresentation and to have been misled by it. Such claim would simply be untrue. The same result must plainly follow when, after the representation, the party receiving it has given to him a sufficient opportunity of examining into the real facts, when his attention is directed to the sources of information, and he commences, or purports or professes to commence, an investigation. The plainest motives of expediency and of justice require that he should be charged with all the knowledge which he might have obtained had he pursued the inquiry to the end with diligence and completeness. He cannot claim that he did not learn the truth, and that he was misled" *2 Pomeroy's Equity Jurisprudence* (4th Ed.) *Section 893.*

Nor is there any merit in the contention that the members were not informed as to the existence of the two organizations, to wit, the Recreation Development Company and the Ferncliffe Golf & Country Club Inc., for an examination of the by-laws would at once have disclosed their separate existence. This is admitted by the witness Stringer (Case, p. 146, l. 9). Whether or not such information was brought to their attention is, however, of no materiality in this suit.

All of the other alleged representations related to future plans, and they, of course, afford no ground for relief as they were not representations of existing material facts.

> "There is no legal principle more firmly rooted in the law that a representation, in order to form the basis of an action of deceit, must be material to the subject-matter of the contract and relate to some existent fact. *Bayard* v. *Holmes,* 34 N. J. L. 298. If it merely affect the probability that it will be kept, *i, e.,* some assurance what shall thereafter be done, or as to any further event, it is not a representation but a contract for the violation of which a remedy must be sought on the contract. Dawe *v.* Morris, 149 Mass. 188; 4 L. R. A. 158." *Lembeck* v. *Gerken,* 86 N. J. Law, 111.

And in the case of *Dawe* v. *Morris,* 149 Mass., 188; 4 L. R. A. 158 the Court said:

> "A representation, in order that, if material and false, it may form the ground of an action where one had been induced to act by reason thereof, should be one of some existing fact. A statement promising in its character that one thereafter will sell goods at a particular price or time, will pay money, or do any similar thing, or any assurance as to what shall thereafter be done, or as to any further event, is not properly a representation, but a contract for the violation of which a remedy is to be sought by action thereon."

In *Norfolk and New Brunswick Hosiery Company* v. *Arnold,* 49 Eq. 390, complainant alleged that it was induced to enter into a contract because the defendant promised that he would, by a new invention or discovery perfect a machine. Vice-Chancellor Van Fleet, at p. 394 says:

> "Such an affair possesses none of the essential elements of a fraud. A promise of that kind would not be the assertion of a fact, but must, from its very nature, be regarded as the mere expression of a belief. The rule laid down by Chief Justice Shaw, in Page *v.* Bent, 2 Metc. 371, 374, and adopted by the supreme court, in Conlan *v.* Roemer, 23 Vr. 53, 56, declares the law on this subject. The chief-justice said: 'The principle is well settled that if a person makes a representation of a fact, as of his own knowledge, in relation to a subject-matter susceptible of knowledge, and such representation is not true; if the party to whom it is made relies and acts upon it, as true, and sustains damage by it, it is a fraud and deceit, for which the party making it is responsible. But in a matter of opinion, judgment or estimate, if one states a thing as of his own knowledge, if he in fact believes it, and it is not intended to deceive, it is not a fraud, although the matter thus stated is not in fact true. The reason is, that it is apparent, from the subject-matter, that what is thus stated, as knowledge, must be considered and understood by the party to whom it is addressed as an expression of strong belief only, because it is a subject of which knowledge, in its strict sense, cannot be had.' From this statement of the law, it appears to be very plain that a promise to make a new invention, or a new discovery in mechanics, can in no sense be regarded as the assertion of a fact, but must be looked upon, both in law and in fact, as the simple expression of an opinion in relation to a

matter about which there can be no such thing as certainty until the fact stands accomplished.''

In *Halpern* v. *Carfarelli,* 98 N. J. Law, 77 it was held that an agreement to do something *in futuro,* relieved of all the elements indicating specific fraud, is regarded as a mere expression of opinion, or a mere promise or conjecture upon which the other party has no right to rely, particularly where the means of information or investigation are equally within the range of both parties.

It is true that to profess an intent to do or not to do, when a party intends the contrary, constituted a case of fraud. For instance, the English case of *Edgington* v. *Fitz Maurice, 29 Ch. Div. 459,* was an action to recover money paid through the influence of a misrepresentation through a prospectus issued by the directors stating that the object of the company was to spend the money raised for certain purposes, when in fact the purposes stated were not the real purposes. The Court there held that the misstatement of the intention of the defendant was a misstatement of fact, and the plaintiff was permitted to recover. But here we have no evidence whatever that the money paid by the members was not used for the purposes intended; on the contrary, it is admitted by all parties that the golf course was built, club house provided, etc. In any event, there is no proof whatever from which the Court would be justified in attaching any fraud to this defendant or to Donaldson or the Ferncliffe Club because there is no proof before the Court of any misappropriation or misapplication of any of the moneys paid by the members. It appears that nine holes of the golf course were completed and played

upon for a considerable time and a second nine practically completed and that tennis courts were built and a temporary club house provided. There was no evidence offered on behalf of the members from which it could be reasonably inferred that the money collected was not expended in an entirely proper manner; and in the absence on any such proof, this defendant considered itself under no duty to explain how the moneys were disbursed, as the presumption is that they were properly, even if inadvisedly, expended. It submits that the burden of proving any such misappropriation or misapplication of funds was upon the members making such allegations. We know as a matter of general knowledge that large commissions must be paid to salesmen who sell membership of this character and we know how expensive it is to advertise in newspapers and to provide printed literature, etc., advertising the proposition. So far as the evidence discloses, the Court may properly assume that the cost of commissions, advertising, etc. very materially reduced the amount received by the Ferncliffe Golf Club from the members' subscriptions. Deduct from this reduced amount the cost of the improvements which were admittedly made and it becomes apparent why the proposition was a failure. Because it was a failure financially is no reason for assuming that there was anything fraudulent concerning it. That is was poorly conceived and badly managed might be conceded without furnishing the members with any legal or equitable ground for relief in this Court on the ground of fraud.

That Mr. Donaldson (who was the originator of the plan) acted in good faith and had in mind the best interests of the members is shown by his letter to Mr. Ebert of December 14, 1925

(Exhibit C. 14). This letter exhibits his entire good faith. It was his desire that the members take over this property and he made to them a most reasonable offer. He insisted upon receiving enough money to pay his creditors, which was most laudible. He was offering this property to the members for $115,000 when he knew that he could sell it to others for many thousands of dollars more. His negotiations at about that time with the members indicates also that the members realized at that time that they had no title to the property, and that they were fully aware of this is borne out by their circular letters in evidence, written during these negotiations with Donaldson for the purchase of the property (Exhibit C. 15 and C. 16).

That Donaldson's offer to the members was extremely reasonable is evidenced by the fact that almost immediately thereafter complainant agreed to pay $130,000 and the members have now offered the Franciscos $150,000 for the same property. Nevertheless, they turned down Donaldson's offer and it was not until then that Donaldson entered into the agreement with the complainant. And even in that agreement, he insisted upon preserving the rights of the members, and the contract between the complainant and the Recreation Development Company so provides.

As the claim of the members is based upon alleged fraudulent misrepresentations made to them, which they claim induced them to purchase their memberships, we are not concerned on this appeal with the question as to whether or not the club was administered in a businesslike manner, or whether or not it might have been a success under proper businesslike management. If there were no fraudulent misrepresentations

inducing the purchase of their memberships, then this Court can afford them no relief in this suit.

Whether the moneys received were wisely administered is of no consequence in this proceeding. As a matter of fact, there is proof that the moneys were used for the development of the Club. The members in their petition to intervene and in their answer state that neither the Ferncliffe Golf & Country Club nor Donaldson have done anything toward improving the golf course, and yet, at the same time, they allege that greens fees during 1924-1925 amounted approximately to $10,000. How could there be greens fees unless there were greens? The testimony is that the nine hole course was completed and was played upon until as late as November, 1927 and that 18 holes were practically completed. The petition and answer also refer to alleged guarantees made by Donaldson and the Ferncliffe Golf & Country Club. There is no evidence of any such guaranty nor was there, in fact, any made. The petition and answer also allege that as an inducement to the members, it was represented that the Golf Club was organized for developing the land and building the golf course, after which it would turn the management of said club into the hands of the members of said corporation. If by this is meant that the property was to be turned over to the members, there is no proof of any such representation nor is there any such statement anywhere in the literature of the club placed in evidence.

There may also be a grave question as to whether or not the members come into this court with clean hands. While accusing Donaldson of misrepresentation, their committee themselves badly misrepresented to the other members the

result of litigation pending in this court, stating that a decree had been entered, favorable to the members, (Exhibit C. 17, Case, p. 183, l. 3 *et seq.*) when in fact no decree whatever was made, and in fact no suit started.

To decree, as has been done by the Court below, that whatever interest Recreation Development Corporation has in the lands is held in trust for the members, is not warranted by the evidence. Such decree vests in the members an interest in the property which they are not entitled to have. There is no proof in this case of any rights of the members so far as the land is concerned, extending beyond the written lease. There may have been glowing accounts sent out, but there were no misrepresentations made. It was at no time represented that the Golf Club owned the land. It was fully understood, and common sense required that it should be understood, and the witnesses produced by the members indicated that it was understood, that the success of the project depended upon the acquisition of sufficient members of the club and the raising of sufficient money. The fact that the project failed, furnishes no legal ground for extending the rights of the members beyond that indicated by the written instrument; and so far as this appellant is concerned, the rights of the members are limited by the lease. Whatever rights the members have may be preserved by decreeing that the Franciscos convey to the Recreation Development Company, and it to the complainant, subject to the members' rights, thus carrying out both contracts and preserving the rights of the members.

To deny the complainant and the defendant, Recreation Development Corporation, their rights under these contracts is to place the members

in a position where they may obtain the advantage of the increased property value, when they had no legal or equitable rights in the property whatever. It would result, in effect, in vesting in the members property rights which they never had or contemplated at the time of their purchasing their memberships.

For the reasons stated, we respectfully submit that the decree of the court below should be reversed.

SMITH & SLINGERLAND,
Solicitors for and of Counsel with
Recreation Development Corporation,
Defendant-Appellant.