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BILL.

(Filed December 6, 1924.)

IN CHANCERY OF NEW JERSEY.

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

The complainants, David N. Rappoport and Bluma C. Rappoport, his wife, both of the City of Ventnor City, County of Atlantic and State of New Jersey, respectfully show:

1. That on or about September 23, 1924, Frank Crawford and Josephine Crawford, his wife and Mary C. Petrie and Alfred A. Petrie, her husband, were the owners of all that tract or piece of land and premises, situate, lying and being in the City of Ventnor City, in the County of Atlantic and State of New Jersey, bounded and described as follows:

BEGINNING at a point in the westerly line of Cornwall Avenue, distant two hundred fifty feet southwardly of the southerly line of Atlantic Avenue and extending thence (1) westwardly parallel with Atlantic Avenue, one hundred twenty-five feet; thence (2) southwardly, parallel with Cornwall Avenue, fifty feet; thence (3) eastwardly, parallel with Atlantic Avenue, one hundred twenty-five feet to the westerly line of Cornwall Avenue; thence (4) northwardly, in and along the said westerly line of Cornwall Avenue, fifty feet to the place of beginning.

2. That on or about September 23, 1924, the said Frank Crawford and Josephine Crawford, his wife

and Mary C. Petrie and Alfred A. Petrie, her husband, entered into an agreement in writing for the sale of the said lands and premises wherein and whereby the said Frank Crawford and Josephine Crawford, his wife, and Mary C. Petrie and Alfred A. Petrie, her husband, contracted and agreed to sell and convey the said land and premises to the complainants by a general warranty deed, in fee simple, free and clear of all encumbrances, for the sum of thirteen thousand dollars ($13,000) to be paid as follows: One thousand dollars ($1,000) upon the signing of said agreement of sale, a copy of which is attached hereto and made a part hereof and twelve thousand dollars ($12,000) upon the delivery of the deed and final settlement at the offices of the Atlantic Guaranty & Title Insurance Company on or before the 21st day of November, 1924, at and to which time the taxes, sewerage, water rents and taxes for the current year were to be adjusted and the title to said premises was to be good and marketable and such as the Atlantic Guaranty & Title Insurance Company would insure.

3. That the said complainants paid to the defendants, Frank Crawford and Josephine Crawford, his wife, and Mary C. Petrie and Alfred A. Petrie, her husband, on or about September 23, 1924, the said sum of one thousand dollars ($1,000) being the first payment on said agreement, which said sum the said defendants received and still retain.

4. Complainants were ready and willing on November 21, 1924, being the time of settlement mentioned in said written agreement, and at the place mentioned in said written agreement, to make settlement and ever since said date complainants have

been ready and willing to make full settlement for the purchase of said land and premises and complainants tender themselves ready and willing to make said settlement under the terms of said agreement. Defendants, Frank Crawford and Josephine Crawford, his wife, and Mary C. Petrie and Alfred A. Petrie, her husband, have neglected and refused to convey said land and premises, in fee simple, free and clear of all encumbrances, and make settlement with complainants, in accordance with the terms of said agreement and these complainants are informed that defendants have repudiated said agreement and refused to make settlement thereunder.

5. Complainants have performed their undertaking in said agreement and still stand ready, willing and able to perform all the requirements on their part to be performed, but the defendants, Frank Crawford and Josephine Crawford, his wife, and Mary C. Petrie and Alfred A. Petrie, her husband, have neglected or refused to make the conveyance of said land and premises to the complainants in accordance with the terms of said contract or agreement as they rightfully should do.

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

1. That the said Frank Crawford and Josephine Crawford, his wife, and Mary C. Petrie and Alfred A. Petrie, her husband, be specifically enforced to perform the agreement above referred to and that they be decreed to convey unto these complainants the aforesaid land and premises in accordance with their said undertaking and within such time as this Court shall fix and upon the payment of the bal-

ance of the purchase price to become due and owing by these complainants to said defendants at the time of such settlement to be fixed by this Court.

2. That the complainants may have such other and further relief as may be equitable and just.

3. That a writ of subpoena may issue out of this Court commanding the said defendants, Frank Crawford and Josephine Crawford, his wife, and Mary C. Petrie and Alfred A. Petrie, her husband, to answer this bill of complaint and to abide by such decree as this Court may make in the premises.

CARLTON GODFREY,
Solicitor of Complainants.
WM. P. GODFREY,
Of Counsel.

THIS AGREEMENT, Made this twenty-third day of September nineteen hundred and twenty-four BETWEEN Frank Crawford and Mary C. Petrie, of the City of Ventnor City, State of New Jersey and his wife, (hereinafter designated as the vendor) and David N. Rappoport and Bluma C. his wife, of the City of Ventnor City State of New Jersey (hereinafter designated as the vendee). WITNESSETH, That the vendor hereby agree to sell and convey and the vendee hereby agrees to purchase, all that lot or parcel of land and premises situate in the City of Ventnor City County of Atlantic and State of New Jersey BEGINNING in the West line of Cornwall Avenue distant 250 feet South of the Southerly line of Atlantic Avenue, thence extending (1) West parallel with Atlantic

Avenue 125 feet, thence (2) South parallel with Cornwall Avenue 50 feet, thence (3) East parallel with Atlantic Avenue 125 feet to the West line of Cornwall Avenue, thence (4) North along said line of Cornwall Avenue 50 feet to the place of beginning. Being known as lot 14 in Blk 42 on Atlas of Ventnor City. Being the same premises described in the Deed from to said vendor, recorded in Book of Deeds, page

For the sum of Thirteen thousand ($13,000.00) Dollars, payable as follows: Upon the signing of this contract, receipt whereof is hereby acknowledged,

Cash	$1,000.00
Assumption of Mortgage now on premises held by Term amounting to	
Purchase money mortgage to be given by vendee to the vendor for term rate	
Cash upon delivery of deed and final settlement	12,000.00
	$13,000.00

Party of the first part to pay L. Bentley Roberts, Agent, a commission of $490.00.

And the vendor hereby agree to deliver or cause to be delivered to the vendee or assigns, a General Warranty Deed, properly executed and acknowledged, conveying said premises in fee simple, free and clear of encumbrances, except as above stated.

And the vendee hereby covenants and agrees to pay the consideration aforesaid, at the times and in the manner aforesaid. The title to said premises is to be a good and marketable title and such as the

Atlantic Guaranty and Title Insurance Company will insure. Said Deed is to be delivered and final settlement made at the office of said Title Company on or before the twenty-first (21st) day of November 1924, at o'clock. M., and at and to which time the taxes, sewerage, water rents, rents, interests on mortgages and fire insurance, if any, are to be adjusted; taxes for the current year to be computed on a basis of the Tax Year extending from January to January.

Possession of above premises to be given on the day of settlement 19

And it is understood and agreed that the agreements aforesaid are to apply to and bind the Heirs, Executors, Administrators and Assigns of the respective parties.

IN WITNESS WHEREOF, the said parties to these presents have hereunto set their hands and seals the day and year first above written.

Sealed and delivered
in the presence of
L. Bentley Roberts.

FRANK CRAWFORD
JOSEPHINE CRAWFORD (L. S.)
MARY C. PETRIE
ALFRED A. PETRIE (L. S.)
DAVID N. RAPPOPORT (L. S.)
BLUMA C. RAPPOPORT

Received Nov. 24, 1924 at 10.30 A. M. and recorded in the Clerk's Office of Atlantic County, at May's Landing, N. J., in Book of Miscellaneous Records No. 8 page 235 &c.

William A. Blair,
Clerk,
M. A. W.

ANSWER OF FRANK CRAWFORD AND JOSEPHINE CRAWFORD.

(Filed December 7, 1925.)

IN CHANCERY OF NEW JERSEY.

Between DAVID N. RAPPOPORT, *et al.*, *Complainants*, and FRANK CRAWFORD, *et al.*, *Defendants.*	On Bill, &c. Answer of Frank Crawford and Josephine Crawford.

Frank Crawford and Josephine Crawford, two of the defendants, of Atlantic City, New Jersey, jointly and severally answering the bill of complaint, say:

1. Paragraph 1 is admitted except as to denials. It it denied that Josephine Crawford was one of the owners or had any interest in the premises.

2. Paragraph 2 is admitted with this qualification. Defendant, Josephine Crawford, says that she is the wife of Frank Crawford and that she never acknowledged the agreement as her voluntary act and deed.

3. Paragraph 3 is admitted with this qualification. Defendant, Josephine Crawford, says that she was not paid nor did she receive any part of the sum of $1,000. Defendant, Frank Crawford, says that he offered to return to complainants $500, his one-half share of the $1000 payment and it was refused by complainants.

4. Defendants deny that complainants were ready and willing on November 21, 1924, to perform upon their part the terms and conditions of said agreement. Whether they have since been ready and willing defendants are without information save by the bill and therefore can neither admit nor deny. Defendants say that they have not neglected nor refused to convey and say that at the time named in the settlement they were ready and willing to convey free and clear of encumbrance except certain restrictive covenants imposed upon the premises by a former owner or owners which restrictive covenants they were then and have since been unable to have removed. They were ready and willing to convey subject to these covenants and complainants refused to accept title with said restrictive covenants outstanding.

5. Paragraph 5 is denied except as to averments admitted. It is true that these defendants have not conveyed in accordance with the terms of the agreement and for the reason that the complainants refused to accept a conveyance subject to the restrictive covenants referred to in paragraph 4 of the bill and defendants are unable to remove said restrictive covenants and therefore cannot convey in ac-

cordance with the agreement and the prayer of the bill.

COLE & COLE,
Solicitors of Defendants,
Frank Crawford and
Josephine Crawford.

ANSWER OF MARY C. AND ALFRED A. PETRIE.

(Filed April 16, 1926.)

IN CHANCERY OF NEW JERSEY.

Between
DAVID N. RAPPOPORT and BLUMA C. RAPPOPORT, his wife,
Complainants,
and
FRANK CRAWFORD and JOSEPHINE CRAWFORD, his wife, and MARY C. PETRIE and ALFRED A. PETRIE, her husband,
Defendants.

Answer of Mary C. and Alfred A. Petrie.

Mary C. Petrie and Alfred A. Petrie, two of the defendants herein, of Ventnor City, New Jersey, jointly and severally answering the bill of complaint say that:

1. Paragraph 1 is admitted excepting insofar as is denied by the statement that Alfred A. Petrie was not one of the owners of the premises.

2. Paragraphs 2 and 3 are admitted but with the qualification that said sum of $1000 was paid to Frank Crawford and Mary C. Petrie.

3. Paragraph 4 is denied.

4. As a further defense to paragraph 4 these defendants say that they were ready and willing to convey to complainant their interest and title in and to the aforesaid premises free and clear of all encumbrance, excepting certain restrictive covenants imposed upon the premises by former owners which they were and still are unable to remove, and certain recognizances entered into by Frank Crawford and Josephine Crawford to the United States of America and to the State of New Jersey respectively, which these defendants were likewise unable to have removed.

5. That said complainants tendered themselves ready to accept a deed for said premises waiving the removal of all encumbrances, excepting the aforesaid recognizances of defendants, Frank Crawford and Josephine Crawford, but refused to accept such a deed because of said recognizances, although a deed for said premises properly signed and acknowledged by all of the defendants was tendered to the complainants.

6. These defendants are still ready and willing to convey to complainants all of their right, title and interest in and to the aforesaid premises but subject

to the aforesaid encumbrances which they are unable to remove.

J. S. WESTCOTT,
Solicitor for Defendants, Mary C. Petrie and Alfred A. Petrie.

REPLICATION.

(Filed December 15, 1925.)

IN CHANCERY OF NEW JERSEY.

Between DAVID N. RAPPOPORT, *et al.*, *Complainants*, and FRANK CRAWFORD, *et al.*, *Defendants.*	On Bill, etc Replication

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Complainants join issue with defendants, Frank Crawford and Josephine Crawford on their answer filed herein.

HARCOURT & STEELMAN,
Solicitors for Complainants.

REPLICATION.

(Filed April 16, 1926.)

IN CHANCERY OF NEW JERSEY.

Between

DAVID N. RAPPOPORT and BLUMA C. RAPPOPORT, his wife,
Complainants,
and
FRANK CRAWFORD and JOSEPHINE CRAWFORD, his wife, and MARY C. PETRIE and ALFRED A. PETRIE, her husband,
Defendants.

On Bill, etc.
Replication.

Complainants join issue with defendants, Mary C. Petrie and Alfred A. Petrie on their answer filed herein.

HARCOURT & STEELMAN,
Solicitors for Complainants.

TESTIMONY.

IN CHANCERY OF NEW JERSEY.

Between
DAVID N. RAPPAPORT and
BLUMA C. RAPPAPORT,
his wife,
Complainants,
and
FRANK CRAWFORD, *et als.*,
Defendants.

On Bill, &c.
Final Hearing.

Atlantic City, N. J., June 24, 1926.

TESTIMONY

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

APPEARANCES:
For complainant, MESSRS. HARCOURT & STEELMAN.
For defendants, MESSRS. COLE & COLE and J. S. WESTCOTT, ESQ.

Mr. Steelman: This is a suit for specific performance. There were restrictions mentioned in the settlement certificate and there were certain recognizances that had appeared in which Mr. Crawford had entered as surety for Josephine Crawford and one for a man named Mack, two of them being in the State court and one of them in the Federal courts. We felt that the restrictions did not affect the property. We still maintain that attitude but that title could not be conveyed at that time because of the recognizances against the property. The proposition was made by the title company that the purchaser, Dr. Rappaport, should put up the balance of the money that was to be paid, that they would then take the deed that had been delivered by Mr. Crawford and Mr. Petrie and that they would record that, they would then send Mr. Crawford out to have the recognizances lifted and that after they were lifted, the deed having been placed on record, the title would be conveyed free and clear of encumbrances. Dr. Rappaport was represented by counsel at the settlement and he stated that that would not be complying with the terms of the agreement, that that would not be delivering a title free and clear of encumbrances and that they should not be called upon to do that. In other words, it was up to the seller to first remove these restrictions or these recognizances and encumbrances before the money could be delivered or before they could make settlement. This was not agreed to. There was some discussion about it at the time and Dr. Rappaport did not leave his money with the title company. We understand that the next day or shortly thereafter Mr. Crawford did go to Trenton and did attend to having the recognizances lifted, but the deed not

having been placed on record, of course, they were on again as soon as they were off, so that there never was a time when the property was free of these liens. Subsequently, namely, after Dr. Rappaport filed a bill for the specific performance of the agreement—and that is the bill under which we are now in court—after this matter had gotten into court, the city of Ventnor City came along and condemned the property as against not only the owners, Mr. Crawford and Mrs. Petrie, but also against the purchaser, Dr. Rappaport, and the price that was paid for that I believe was forty thousand dollars and that money is in court. So we take it that we are in court now, while under the original proceedings, we are in court for the balance of the, for the difference between the price Dr. Rappaport was to pay and the price that the city of Ventnor City has deposited in court, twenty thousand dollars. We are willing, of course, to waive performance of the contract as to the title company, delivered free and clear of the restrictive covenants. We do not feel that they have any application here, but we feel that we are entitled to a decree and that would probably have to take the form of an accounting to determine just exactly how much was due the purchaser of the property and that there would have to be an accounting before a special master in order to determine what that would be.

Mr. Cole: May it please your Honor, the statement made by counsel is partially correct. There was an agreement to convey free of encumbrances. The title company made a search and disclosed restrictive covenants and some recognizances. My understanding is that Mr. Godfrey, who was then representing Rappaport, learned of these covenants

and of the recognizances and at the title company and I think in my office took the position that we were in no position to comply with the agreement because of the recognizances. I do not understand that they ever waived the question of restrictive covenants. The bill your Honor will note calls for a specific performance of the agreement as written and there is no suggestion in the bill of a waiver. Now the covenants were there and we could not remove them. Now when they came to the title company, among others things was this recognizance. My understanding is that the title company suggested a way out, so far as that was concecrned and said to Mr. Godfrey or to the complainant here, "If you are ready to perform and you will leave the money we will guarantee to insure that title. The deed is here signed ready for delivery. We will at once put that deed of record and then Mr. Crawford can go to Trenton and have the present recognizances released, which would release the property because the deed would be of record and then he could place a new recognizance. That they declined to do. They said "We want this title clear before we put up any money." Now in that impossible situation, as I understand this case, Mr. Crawford said, "Very well, if that is the situation, I am through. This matter is all off," as we say he had a perfect right to do in view of their failure. So that our position now is that they declined to perform. They said we could not perform and we couldn't technically, and the whole transaction was declared off, so that, in that situation our insistence is that there is no right to maintain this bill. Incidentally I notice counsel refers to the matter of an accounting and refers to the matter of the money in court. I don't think your Honor is concerned

about that. The question here is whether there shall be a decree for specific performance. That is all there is before the court.

The Court: In that situation, if the title is now in some one else, the money is in court, without an amendment to the bill how can the court do anything in the matter?

Mr. Cole: Of course I think, as the record stands, the bill ought to be dismissed.

The Court: The minute it is shown that the title is now in some one else, there cannot be a decree for specific performance.

Mr. Steelman: If the Court please, my view of that is this, the bill was filed, notice of lis pendens was filed prior to the time when the city of Ventnor City condemned. The city of Ventnor City condemned and made Mr. Crawford and the Petries parties to the condemnation proceeding.

The Court: Since filing your bill?

Mr. Steelman: Since filing our bill.

The Court: All right, we will take that up, then, when we reach it, if that is the situation. Any statement on the part of the defendant Petrie?

Mr. Westcott: No.

The Court: Gentlemen, I notice that there has been a consent order of reference. I take it that you all know that at one time I represented one of the

defendants and that there is no objection to my hearing the case?

Mr. Cole: None so far as we are concerned.

Mr. Steelman: None so far as we are concerned.

If the court please, it seems then, upon the statement of counsel, we should be entitled to a decree. We state now that we are waiving the provisions as to the contract calling for a deed free and clear of all encumbrances in so far as it is affected by the restrictive covenants. We take that posistion now in court and on the statement of counsel that they were not prepared, at the time of settlement, to deliver title to the property free and clear from the recognizance, so it seems that is all there can be in the case.

The Court: You may proceed with the case.

(Agreement offered, admitted in evidence by consent and marked Exhibit C 1.)

CARLTON GODFREY, sworn for complainants,

Direct examination.

By Mr. Steelman:

Q. Mr. Godfrey, you are a practicing attorney and solicitor in the Court of Chancery, are you not?
A. I am.
Q. And at the time that this transactcion arose between Dr. Rappaport and Mr. Crawford and the

Petries you were representing Dr. Rappaport, were you not?

A. I represented Dr. Rappaport at that time in this case.

Q. Did you accompany Dr. Rappaport to the title company on the day of settlement.

A. I did.

Q. Do you recall when that was? About November 21, 1924, wasn't it?

A. I would say it was about that time.

Q. Now will you state who was there at the time, if you can recall?

A. My recollection is that Dr. Rappaport and I think his wife, Mr. Cole, Mr. Crawford, some representative from the title company, there may have been others, I don't remember now, it has been so long.

Q. Now what happened at the title company?

A. A settlement certificate was produced by the title company—this was the Atlantic Guaranty and Title Insurance Company—the settlement certificate showed as exceptions certain recognizances against one of the owners, Mr. Crawford, I believe. These recognizances appeared to be liens against the interest in the real estate and the purchaser could not, therefore, safely take title subject to them in my judgment. The purchaser was there ready with the money to make settlement and offered to make settlement except they insisted that the settlement should be made clear of these liens. There was a suggestion by the title company that if the purchaser should pay the full consideration that they would record the deed and then after that time an application would be made to remove or to substitute other securities for the recognizance, but that was not acceptable because the title company would not guar-

antee that that result would be attained. We offered to make settlement if the title company would give us an assurance that they would guarantee to deliver the title and a clear title policy after the settlement, but they declined to do so.

Q. Then settlement was not made?

A. Then settlement was not made.

Q. Subsequently the bill for specific performance was filed?

A. It was.

Q. Is that all that happened, so far as you can recall the circumstances, at the settlement?

A. That is the happenings at that time, so far as I know.

Cross-examination.

By Mr. Cole:

Q. Were you there more than once in this matter?

A. My recollection is that we were there twice.

Q. Well, the testimony you have given was as to only one, is that right, all this happened on one occasion?

A. That is my recollection, whether we were there once or—

Q. Was that the first or the last visit?

A. The happenings of each, on both occasions, were substantially the same.

Q. Do you notice my question? My question was whether the circumstance, what happened, was at the first or the last visit? You have said, you have related what happened the first time, I mean what happened on one occasion, was that the first or the last?

A. At that moment I had forgotten that there might have been two occasions when we were pres-

ent. My present recollection is that the suggestion of the title company insuring that title would be made, and delivered clear and title policy issued, without showing this exception, was mentioned on the first occasion and that the settlement was adjourned or held over until the next day or some other time early to enable the title company to determine whether they would take the responsibility of insuring the title clear of the encumbrance of these recognizances and they advised me subsequently, I think on the second occasion, that they would not do so.

Q. Now you said a Mr. Cole was present on one of these occasions?

A. Mr., Junior, yes, sir.

Q. Was that the first or the last occasion?

A. One or the other or both, I don't remember which.

Q. On which occasion was it Mr. Rappaport was with you?

A. I couldn't say that.

Q. He wasn't present on both occasions, was he?

A. I don't know.

Q. Well, think and tell us whether you can't recall that he wasn't there on both occasions?

A. I can't remember.

Q. Don't you recall he wasn't there on the last occasion when Mr. Cole was present?

A. I couldn't say.

Q. Will you say that isn't so?

A. No, I wouldn't say whether it is or is not.

Q. What about these restrictive covenants, was there any discussion about them?

A. The subject was mentioned, yes; there was some discussion.

Q. What was said about them?

A. I am simply testifying as to my best recollection; my best recollection is that either the title company was willing to insure against them or else that the purchaser was willing to take subject, one or the other, in other words that they were not deemed important.

Q. You recall stating in my office that you would not take this deed because of the existence of these restrictive covenants?

A. No, I don't remember that.

Q. You remember discussing about it in my office, do you not.

A. I do.

Q. You remember stating, do you not, that Mr. Crawford could not perform the contract because of encumbrances, don't you?

A. I remember your making a suggestion of that kind.

Q. Well, didn't you know when you filed the bill that he couldn't perform this contract?

A. I felt that he could do so.

Q. What?

A. I felt that he could do so and therefore filed the bill.

Q. How could he with these recognizances in the way?

A. He could do exactly as he, as I understood, had agreed to do. It was wholly within his power to substitute another recognizance in place of the recognizance then of record.

Q. Now you say that the title company never agreed to insure the title?

A. They never agreed to insure the title and deliver a title policy clear of the effect of the recognizance.

Q. Now you say that the complainant was ready

and able to perform the contract; how do you know that?

A. They had the funds there to do it with.

Q. Had what?

A. Had the funds there with which to do it.

Q. Did you see them?

A. I know that the funds were there ready to do it.

Q. Did you see the funds, Mr. Godfrey?

A. Did I see the fund? They—

Q. You can answer that yes or no, can't you? Did you?

A. Did I see the funds?

Q. See the money? Of course you are talking about money when you say funds; did you see the money?

A. My recollection is that the purchaser offered the money or a check, one or the other, to the title company with which to make this settlement.

Q. Did you see the money?

A. One or the other, now I am telling you the best of my knowledge.

Q. Did you see the check?

A. One or the other, I couldn't tell you sure.

Q. You saw the money offered to the title company?

A. That is my recollection.

Q. On what condition?

A. To make this settlement.

Q. On what condition?

A. Clear of encumbrances in accordance with the agreement.

Q. And at that time you knew that there were encumbrances there, didn't you?

A. What?

Q. At that time you knew that there were encumbrances there, didn't you?

A. At that time the settlement certificate, which is the only evidence that we had of what was the record showed these recognizances and to a certain extent showed certain restrictive covenants, but I am not clear at this time whether those restrictive covenants were effective against this property. I—the reason that that is true as I recollect it——

Q. You see a deed executed for the property at the title company?

A. I am not sure. Mr. Westcott was there representing the other owner, I mean the one owning the property or an interest in the property, and Mr. Crawford, owning the other interest, and I was—I am inclined to think he had a deed there but as to saying that I saw a deed, I am not clear at this moment.

Q. Did you ever go back to the title company after that date with respect to this matter?

A. My recollection is that I did.

Q. When was it?

A. My recollection is that I was there more than once, probably two or three times, to ask whether they could complete this settlement and insure against these exceptions.

Q. That was before or after the bill was filed?

A. Before.

Q. All your visits were before the bill was filed?

A. My visits to the title company? Yes.

Q. When you filed the bill, therefore, you knew that the title company would not insure this title?

Mr. Steelman: If the Court please, I can't see that this line of cross-examination is material at all, question of his judgment of counsel in the case.

The Court: I will permit it.

(Question repeated.)

A. When I filed the bill I was aware that the title company had taken a position that they would not guarantee to insure this title clear of these exceptions.

Q. What exceptions were they then at the time you filed the bill?

A. To the best of my knowledge the exception regarding the recognizance.

Q. Were you told or was it stated in your presence on the occasion of one of the visits that Mr. Crawford had done all he was going to do and if you didn't take the title the matter was all off?

A. I have no recollection of Mr. Crawford saying that the matter was off.

Q. Did anybody say it on his behalf?

A. I have no such recollection.

Mr. Steelman: We are offering the files of the Atlantic Guaranty and Title Insurance Company.

Mr. Westcott. The contention of the defendants is that the deed was executed and is with the title company and does not appear with the file. The file is all right so far as it goes.

Mr. Steelman: Then you wish to stipulate that the executed deed was delivered to the title company?

Mr. Westcott: Yes, it doesn't appear in the file.

Mr. Steelman: I will agree to that.

(File admitted and marked Exhibit C2.)

DAVID N. RAPPAPORT, sworn for complainants.

Direct examination.

By Mr. Steelman:

Q. Dr. Rappaport, you are one of the complainants in this suit?

A. Yes, sir.

Q. You are the party to the agreement for the purchase of this property between Cornwall and Cambridge Avenue in Ventnor City that is the subject of this suit?

A. Yes, sir.

Q. Did you attend the settlement at the or did you attend the Atlantic Guaranty and Title Insurance Company on November 21, 1924, when settlement was to have taken place in this matter?

A. Yes, sir.

Q. And you attended with whom?

A. Mrs. Rappaport, Mr. Satanov and my attorney, Mr. Godfrey.

Q. Now will you state to the Court, as best you can recall, the happenings at the title company that day?

A. When the clerk of the title company presented a brief or whatever the official title is of the paper covering the transaction my counsel, Mr. Godfrey, pointed out to me the various exceptions, first that there was a restriction covering an eight-foot way that was for one of the beach front owners use as a roadway to his rear of the lot. I discussed that matter and upon advice of Mr. Godfrey we waived that, wouldn't except it. Then there were exceptions about bail bonds that were entered by Mr. Crawford.

As I recollect it two were county bail bonds and one a Federal and the discussion centered upon these. I believe Mr. Crawford said that the county bail bonds were relieved or lifted and Mrs. Mitchell was called in consultation on the affair to aid of the clerk and I believe a telephone to Mays Landing confirmed Mr. Crawford with regard to these two bail bonds, but the other, the Federal, remained. Then a discussion arose how that could be lifted and the proposition was made, as you related, Mr. Steelman, some little time ago. This was not acceptable to my counsel because Mrs. Mitchell refused to guarantee that title would be granted free from all encumbrances and after a very lengthy discussion the settlement was adjourned, as I understood at a time——

Mr. Cole: What was said, Dr. Rappaport, not what you understood. Tell us the conversation.

The Court: Yes.

Q. At any rate the money was not deposited with the title company in accordance with their suggestion.

A. No, it was not.

Q. Settlement did not take place?

A. Did not take place that day.

Q. And the recognizances were not removed at that time?

A. They were not.

Q. When you went there for settlement that morning were you prepared to, with the necessary finances, to make settlement?

A. Yes, sir; I had made the loan in the bank.

Q. What bank?

A. The Boardwalk National Bank of Atlantic City.

Q. I show you a book that purports to be a passbook of the Boardwalk National Bank of David N. Rappaport and I ask you if that is yours?

A. Yes sir, it is.

Q. I show you an item of entry on November 21, 1924, and ask you what that is?

A. That was a loan of $13,000 to enable me to make settlement on this purchase.

Q. Now that was on what date?

A. On the twenty-first.

Q. Twenty-first day of November?

A. Around in the morning.

Q. 1924?

A. Yes, sir.

Q. Did you use that money at the settlement?

A. No, we didn't use it.

Q. What happened to that money after the settlement?

A. It was returned to the bank.

Q. Now subsequently there was another appointment at the Atlantic Title Company, wasn't there?

A. Yes, sir.

Q. Do you recall when that was or about when that was?

A. I do not.

Q. Prior to the date of the second appointment at the title company did you go to the bank again?

A. Yes, sir.

Q. And what did you do then?

A. I made again the same loan, I mean the loan for the same amount of money, $13,000.

Q. And at the time of the second appointment at the title company was that money available for the settlement?

A. Yes, sir.

Q. And were you prepared to pay the price called for in the agreement of sale?

A. Yes, sir.

Q. And was it paid?

A. No, sir.

Q. Were you there at the title company that second time?

A. No, sir.

Q. Did you have a representative there?

A. Yes, sir.

Q. Who was your representative?

A. Mr. Satanov and my counsel, Mr. Godfrey.

Q. Then you don't know what happened the second time when you went to the title company?

A. No, sir.

Q. Are you willing to take this property at the present time subject to these restrictions that we have said were on the property? I am not speaking of the—I am not talking about the bail bonds; I am talking about the covenants or restrictive covenants?

A. Yes, sir; I am.

Cross-examination.

By Mr. Cole:

Q. Now you know perfectly well that that land has been condemned now by the city, don't you?

Mr. Steelman: If the Court please, that is immaterial.

Mr. Cole: You asked him whether he was willing to take the title.

Q. You know that you can't get the title, don't you?

A. I don't know anything about that.

Q. Weren't you made a party in the condemnation proceedings because of your supposed interest?

A. This is a legal matter and I don't know nothing about law; I have to take that advice of counsel.

Q. Didn't you have some papers served on you in the matter of the condemnation by Ventnor City of the very land that is involved in this suit?

A. I can't recall.

Q. Do you now know that the city owns this land by condemnation?

A. I don't know that.

Q. Are you right about that, Dr. Rappaport?

A. Let me amend that statement so it will be clear. I know that from—I have read such a statement as you make as a news item.

Q. You mean to say that your counsel, neither Mr. Godfrey nor Mr. Steelman, have told you that this land has been condemned and that your interest now is purely in the proceeds of the conveyance? Have they never told you that?

A. Mr. Steelman told me after that item has occurred, after that item has appeared in the newspaper, I conferred with Mr. Steelman and he told me.

Q. Do you now know that you cannot get this land?

A. I don't know, no.

Q. Didn't you personally appear before council to resist the condemnation of this land?

A. Yes, I appeared before city council.

Q. You knew it was being condemned, didn't you?

A. I knew that it was considered for condemnation.

Q. But you don't know now that it has been condemned?

A. I understand it has been condemned.

Q. From whom did you get the information?

A. First from a newspaper item.

Q. Did you have any actual money with you when you visited the Title Company?

A. I have had a check.

Q. Was it drawn?

A. Yes, sir.

Q. Who drew it?

A. I drew it.

Q. What?

A. I did.

Q. To whose order was the check drawn?

A. To the Title Company's order.

Q. Where is the check?

A. It has been destroyed, not used.

Q. What had the title company to do with this case?

A. Well, I have been—I had made a settlement previous and learned from mistake that the check is made out to the title company.

Q. Well, the title company represented you, didn't it? You went to the title company to have this title insured, didn't you?

A. I went to have to make settlement at that company.

Q. Did you go to the title company to have them insure this title for you?

A. Yes, sir.

Q. And they told you they couldn't insure the title, didn't they, free of the covenants and the recognizance?

A. That they couldn't insure it.

Q. And you were not willing to take it without

there was a release against these encumbrances, were you?

A. I wasn't willing to take it unless there was a release from these bail bonds.

Q. And you so told the title company, didn't you?

A. Yes, sir.

Q. And after that you never went back any more, did you?

A. My counsel——

Q. I ask you whether you ever——

A. I was up there in person.

Q. You say that Miss Mitchell said that the title company would not insure the title?

A. Mrs. Mitchell said that, made that statement.

Q. Didn't she tell you that if you would leave the money there they had the deed executed and that they would send that deed for record and insure your title and that the title company would take the responsibility of seeing that the recognizance against Mr. Crawford in the Federal court would be released?

Mr. Steelman: If the Court please, I object to that question because that is distinctly not a complying with the agreement upon which we are here suing.

The Court: I will permit it if that is the objection.

(Question repeated.)

A. No.

Mr. Steelman: If the Court please, I object to it on the ground that it wouldn't be binding upon the complainant any way; how could it be?

The Court: Why not?

Mr. Steelman: If the Court please, he is here suing on an agreement——

The Court: Which specifies that the title to said premises to be good and marketable title such as the Atlantic Guaranty Title and Insurance Company will insure; that is one of the conditions.

Mr. Steelman: Now it has been stated that they would not insure it at this time, at the time the deed was produced.

The Court: No, I will permit that.

(Question repeated.)

A. She wouldn't insure that.

Q. Didn't she tell you that if you would leave the money there, the deed was there and executed, they would send the deed for record and that this recognize would not appear as an exception on their policy or words to that effect?

A. You wish a no and yes answer to that? I can't give that way. I can only give you in my own words, if you will accept it, Judge Cole.

Q. All right.

A. Mrs. Mitchell wouldn't guarantee the lifting of these bail bonds. The understanding I got from her was that if and when they were lifted and title was clear then only would the company guarantee it.

Q. Did you agree to buy this property with the idea of using it for a specific purpose?

Mr. Steelman: I object.

The Court: Sustain the objection.

LOUIS SATANOV, sworn for complainants.

Direct examination.

By Mr. Steelman:

Q. Mr. Satanov, were you at the Atlantic Title Company on the two days when this settlement was to have taken place?

A. Yes, sir.

Q. What happened?

A. In the morning of the settlement Dr. Rappaport and I went over to the Boardwalk National Bank and pledged a mortgage of twenty-five thousand dollars as security for a loan of thirteen thousand dollars to enable him to make settlement. The bank give him credit on the book, and went out of the bank. Mr. Godfrey was present and Mr. Godfrey has called a flaw in title—

Q. Pardon me, you say you went to the bank, you went to the title company?

A. Went to the bank first, Dr. Rappaport and I, pledged one twenty-five thousand dollar mortgage for a loan of thirteen thousand dollars to enable Dr. Rappaport to make settlement for the property, then we came to the title company and Mr. Godfrey was there looking over the search or settlement certificate and discovered that there was a flaw against the title, the title wasn't clear, and Miss Mitchell and I believe Judge Cole's son, if I ain't mistaken, was there, and also Judge Westcott was there, also Mr. Petrie and Mr. Crawford and so on, and they were arguing over the title. The Company, Miss Mitchell, absolutely refused to guarantee the title and Mr. Godfrey advised Dr. Rappaport not to make settlement under those conditions until title is clear.

They postponed the settlement for a later day, a few days later. And Mr. Godfrey and I went over there again, Dr. Rappaport and I went over to the bank again and made another loan, paid off the first loan and made another loan to enable him to settle the second time and he gave me his check, Dr. Rappaport gave me his check signed in blank whatever the amount will be to make settlement for the property because I believe Dr. Rappaport had a very serious case at the time and he couldn't attend the settlement, he had a patient. When it came to the settlement the same thing happened as the first time, they positively refused to guarantee title. Miss Mitchell did make a suggestion to leave the money there and Mr. Godfrey asked her whether she would give him a letter to that effect guaranteeing the title. She said no, she absolutely refused.

Cross-examination.

By Mr. Cole:

Q. Have you any interest in this agreement?
A. No—

Mr. Steelman: Objected to.

A. None whatsoever.

The Court: Permitted.

Q. On both occasions that you were at the title company, Mr. Godfrey, representing Dr. Rappaport, refused to deliver the money and refused to perform the contract on behalf of Dr. Rappaport for the reason that Mr. Crawford was not able to make title in accordance with his agreement?

A. Title Company won't insure the title——

(Question repeated.)

Mr. Steelman: I object to his testifying as to Mr. Godfrey's reason.

Q. Mr. Godfrey was there on both of those occasions, wasn't he?

Mr. Steelman: If Mr. Godfrey stated his reasons.

Mr. Cole: I think I am entitled to have an answer to that question.

The Court: I will permit it.

(Question repeated: "On both occasions that you were at the title company, Mr. Godfrey, representing Dr. Rappaport, refused to deliver the money and refused to perform the contract on behalf of Dr. Rappaport for the reason that Mr. Crawford was not able to make title in accordance with his contract?")

A. For the reason the title company would not guarantee title.

Q. Now that was the sole reason, was it?

A. As far as I know, yes.

Q. You were there on both occasions, weren't you?

A. Yes, sir.

Q. You heard everything was said, didn't you?

A. Yes, sir.

Q. And Mr. Godfrey, representing Dr. Rappaport, refused to turn the matter over or permit you to do it for the sole reason that the title company wouldn't insure the title, is that correct?

A. Correct.
Q. And then you left and didn't leave the money?
A. No, sir.
Q. At the time Mr. Crawford was there and Mr. Cole, representing Mr. Crawford was there, is that correct?
A. Yes, sir; your son was there, yes, sir.

MRS. BLUMA C. RAPPAPORT, sworn for complainants.

Direct examination.

By Mr. Steelman:

Q. You are Bluma C. Rappaport?
A. Yes.
Q. Wife of Dr. David N. Rappaport?
A. Yes.
Q. One of the parties to this suit?
A. Yes.
Q. Did you attend at the office of the Atlantic Title Company at the time called for for the settlement?
A. Yes, sir.
Q. Will you state what happened?
A. Well, I only came in and Dr. Rappaport was with his attorney, Godfrey, with him and I was waiting to hear what they had to say, this discussion came up and I said I wasn't going to wait and I did, went out into the hall and I stood there waiting for them outside there. Then doctor came out to me and I says "When are they——"
Q. Pardon me, you can't say what Dr Rappaport

said to you when he came out. Did you stay in there during the time they were having the discussion?

A. No, I did not.

Q. Then you don't know what happened?

A. No, I don't; he simply came out to me and said "We are having some trouble there" and that is all.

Q. That is all.

Miss Bessie M. Mitchell, sworn for complainants.

Direct examination.

By Mr. Steelman:

Q. Miss Mitchell, you are the secretary of the Atlantic Title Company, are you?

A. Yes, sir.

Q. As such do you recall the circumstances of the attempted settlement between Dr. Rappaport and Mr. Crawford and the Petries?

A. Yes, sir; I know they were in there.

Q. Will you state, as near as you can recall, what happened?

A. We have an application to insure a title, I think was Ocean Avenue and the Beach, and our work was completed, appointment made for settlement. The parties interested all came in for settlement and there were restrictions showed against the property and also some recognizances against Mr. Crawford. One was a bail bond or recognizance in the Federal Court at Trenton for ten thousand dollars. That is where the danger seemed to be, the trouble, the hold-up, and the purchaser didn't deposit the money on account of this ten thousand

dollar bail bond at Trenton. Mr. Crawford offered to have that released and I told him he could do that if he went to Trenton and had it lifted one day and we had the money deposited with us and enable us to record the deed and then have the recognizance put on the next day, so Mr. Crawford went to Trenton and had the bail bond cancelled and they put it on the next day, but the purchasers didn't put up the money and we couldn't complete our settlement here or record the papers, so by Mr. Crawford going to Trenton just the same as if he hadn't gone, balled the title all up again.

Q. In other words the deed wasn't recorded?

A. No, wouldn't allow me to, couldn't do that without the money, of course.

Q. Now with the recognizance still against the property was the title company in position to insure the title free of this recognizance.

A. Certainly not.

Cross-examination.

By Mr. Cole:

Q. Was there any suggestion at that time that if the purchaser would leave the money with you the deed could be recorded and that you would insure the title free of the recognizance——

Mr. Steelman: That is objected to.

Q.—and rely upon Mr. Crawford getting that recognizance off the record?

Mr. Steelman: That is objected to.

The Court: Permitted.

A. No, not in that way. It was all to be done the same day, Mr. Crawford was to telegraph me from Trenton that it was being cancelled and I then was going to lodge the deed, when he told me it was cancelled that day, see, that I was sure it would go on the next day.

Q. Was that explained to the purchaser and Mr. Godfrey?

A. I think so.

Q. Were they willing to leave the money with you under those terms?

A. We couldn't get the money at all; I don't know why.

Q. What reason did they give for not giving the money?

A. They simply said the bail bond had to be cancelled before they would put up any money. Of course we couldn't do that, couldn't record the papers or anything.

Q. Were you tendered any money?

A. No, sir.

Q. Were you tendered any check?

A. No, sir; not to my knowledge.

Q. What was the—in what situation was the matter left, did they refuse to put up the money and take the deed?

A. I don't know, we all got disgusted. They came in several times at the counter to talk to me several days afterward and we just didn't get anywheres.

Q. Did they ever come back after that, the purchasers, to get this deed or inquire about this title?

A. They have asked several times, but we took the deed and locked it in the safe; I think we still have it.

Q. Still have what?

A. I think we still have the deed by Mr. Crawford in the safe.

By Mr. Steelman:

Q. Miss Mitchell, it would have been possible for Mr. Crawford to have gotten clear of the recognizance without passing title through Dr. Rappaport necessarily, would it not?

A. Surely.

By the Court:

Q. Miss Mitchell, I show you in your file a letter from Mr. Godfrey dated November twenty-second, will you glance over it and see if that refreshes your memory any?

A. I know he wrote that letter but I don't think it amounted to much. I want to see the date the settlement was attempted.

Q. Twenty-first, was it not? He speaks of it as "yesterday?"

A. Yes, twenty-first. He wanted me to write, to give him something in writing and I refused to do it. I told him I couldn't do that.

Q. The question I especially referred to, however, is this, Miss Mitchell: "I understand that you agreed not to show the recognizance above mention upon the title policy which should be written immediately upon settlement being made."

A. We wouldn't show them if we could have got the money and recorded the deed.

Q. That is the point I am asking now, you were prepared then to guarantee against this recognizance?

A. If we got the money.
Q. If you had the money?
A. Yes, sir; that is all we needed.

By Mr. Steelman:

Q. Were the recognizances still of record?
A. I was going to hold everything until the following day. Mr. Crawford was going to Trenton the following day and get the bail bond lifted and then he was going to call me or have the Supreme Court or the United States Clerk's office to do that and I was going to lodge the deed.
Q. At the time he was requested to put up his money he wouldn't have gotten the title free and clear of encumbrance, would he?
A. Not that same day.

By Mr. Cole:

Q. Exactly, and if Mr. Crawford hadn't accomplished what he said he would, what you probably thought he could, you would have returned the money to Mr. Rappaport?
A. Returned the money and returned the deed.
Q. So if Mr. Crawford carried out his suggestion you had the money and the deed and had it cancelled, you could then insure the title free of that recognizance?
A. Yes, sir.
Q. Did you suggest that to Mr. Rappaport?
A. I did.
Q. And they refused to accept that? In other words, they didn't want to help you, did they?

Mr. Steelman: I object to that.

The Court: Sustain the objection.

By the Court:

Q. Is that the general method of passing title in a title company if there is a mortgage showing, for instance, and you take the money and hold it until it is cancelled?

A. We do that, too, yes, sir.

By Mr. Steelman:

Q. This agreement states "And the Vendor hereby agrees to deliver or cause to be delivered to the vendee, or assigns, a general warranty deed, properly signed and acknowledged, conveying the said premises in fee simple free and clear of all encumbrances except as above stated." Was the seller, on the morning of this settlement, whenever it was, prepared to carry out the terms of that agreement?

Mr. Cole: That is a conclusion. I object.

The Court: If she knows I will permit it.

A. There is no settlement ever made that you can clear up a title, there isn't one in a hundred, without you using the purchaser's money to clear up the title, that is to pay off mortgages, taxes and judgments. Now we were going to do the same in this settlement.

Q. If that is the situation then it isn't the vendor who is delivering the title free and clear of all encumbrances, is it?

The Court: I think you will find cases in court

which hold, in this court, which hold that is the customary method.

By the Court:

Q. Was there any question at the time of the settlement of the matter being held up because of the restrictions?

A. They discussed that when they first came in and we found or gave them two sets and I wasn't in the room, I don't know, but I know that we told them that we couldn't remove them at that time.

By Mr. Steelman:

Q. I understood, Miss Mitchell, you to say that you declined to give Mr. Godfrey or Dr. Rappaport a letter, did I not? What was that letter?

A. He wanted, he had the letter here, I saw nothing only where he wanted us to insure or issue our title policy free of a particular set of restrictions and also this bail bond he wanted it on the very day they were down stairs; we were not able to give it to him until the next day providing settlement was already consummated.

Q. That is at the time he put his money up you couldn't give him that letter?

A. He wanted a policy before he even put up his money and we couldn't record the deed and issue a policy.

COMPLAINANTS REST.

DEFENDANTS' TESTIMONY.

JOHN S. WESTCOTT, sworn for defendants.

Direct examination.

By Mr. Cole:

Q. Mr. Westcott, you are a member of the bar of this state, are you not?

A. Yes, sir.

Q. Did you attend at the title company in connection with this matter here in evidence?

A. I did as representing Mr. and Mrs. Petrie, who are part owners.

Q. How many times were you there?

A. On two particular occasions.

Q. Can you approximate the dates?

A. Well, I have heard it referred to for the first on or about the twenty-first of November, the first day was noticed for settlement.

Q. Will you tell us, please, what happened on both occasions?

A. On the first day Mr. and Mrs. Petrie were there and Mr. and Mrs. Crawford were there. My recollection of it is a deed had been prepared from Mr. and Mrs. Crawford and Mr. and Mrs. Petrie to Mr. David N. Rappaport by the title company and I think one of the first things that we done after we got there was to have that deed signed, Mrs. Crawfor, I think, wanted to go out and that was finished. Mr. Satanov, Dr. Rappaport and Mr. Godfrey were there and there was considerable discussion in the first instance in regards to restrictions. Later the question of bail bonds took place—by the way, I may say the deed was signed, deed I saw——

Q. Yes.

A. Mr. Godfrey, as I recall it, had as I understood to be a set of restrictions which had been received by him some time prior to the day of settlement from the title company and according, looking it over that morning there seemed to have developed another set of restrictions and the question was as to what they were. There wasn't a copy of that, or available copy in the office. That was discussed at some length as also the question of the bail bonds. There didn't seem to have been, to myself, any particular reason why or any discussion as to the bail bonds because it is not an uncommon thing in a settlement, as my experience has been, finding encumbrances upon property, and Miss Mitchell was called into the matter overcoming the question of bail bonds which Mr. Godfrey objected to. In the meantime after we had gotten to a certain point Dr. Rappaport left. He had a very important engagement, he said. Finally, when Miss Mitchell was called into it, Mr. Godfrey and I couldn't agree or didn't seem to be desirous of having an agreement of the deposit of the money and the sending of the deed for record on the cancellation of the bond that the title policy could be issued. That seemed—Miss Mitchell at that time or at the next meeting suggested it could be very easily obviated because the deed could be sent to Mays Landing that afternoon, that Mr. Crawford could go to Trenton on the following morning, have the recognizance released, and immediately put on again. The fact that it was released, once the title of record, would, of course, not then be a lien upon it. There didn't seem to be any disposition upon the part of Mr. Godfrey to concede it, but argued backward and forward against it, that he couldn't see that, that he was entitled to have title policy or to his settlement right then and there at that time,

was not a question of putting up money, he was sentitled to it then. However, the matter was adjourned for a matter of two or three days on account of this additional restriction. Mr. Johnson, of the Atlantic Title Company, who I think is a special examiner, made a trip to Mays Landing especially to examine that restriction, which had no application, when it was brought back and discussed, therefore the only question was left then was the question of the recognizance and the old restrictions. Mr. Crawford up to that time, I think, had been unrepresented in person and Mr. Clarence Cole, Jr., of your office was called. Mr. Clarence Cole, Jr., came down and I think he found us in that status at that time when he arrived there, that Mr. Godfrey would not concede, I think suggested by myself and I think Mr. Cole when he arrived, and Miss Mitchell probably leading in it, that it was an unusual thing for the attitude to be taken that Mr. Godfrey took, he didn't seem to want to make any settlement, that it wasn't the uncommon thing but the usual thing that the money would be paid, deed sent to Mays Landing for record, the title policy would be written up without any exception showing on it excepting the restrictions imposed by the St. Leonards Company, or whatever they were, referred to in the former deed.

Q. Any money produced?

A. I didn't see any money.

Q. Any check produced?

A. Didn't see any; I didn't see any offer of any.

Q. Then what happened?

A. I think then, in other words, Mr. Petrie was with me on the passive condition. I didn't want to speak for Mr. Crawford, he was there to speak for himself, my recollection of it is that when Mr. Cole came down to speak for Mr. Crawford he said:

"Well, either take it or leave it alone, put up your money," practically to that effect.

Q. Then you left?

A. Yes, sir. Understand this had been two meetings covering probably an hour and a half of one, two hours and a half at the other, so I wouldn't undertake to say all the words that took place.

Cross-examination.

By Mr. Steelman:

Q. You don't know that the money wasn't there, do you, Mr. Westcott?

A. Oh, no.

Q. You won't say that it wasn't there?

A. I wouldn't say that.

Q. At the time that they were attempting to make the settlement the recognizances were of record against the property?

A. So stated.

Q. And a deed delivered by Mr. Crawford and by Mr. Petrie at that time would not have been a deed free and clear of encumbrance, would it?

A. At the actual time of its delivery?

Q. Yes.

A. Now not at the time of passing over to the title company, no.

Q. That was the time that they wanted the money, wasn't it?

A. Do you want me to answer that, because I wouldn't have expected to get the money, representing Mr. Petrie, no, until the settlement was made from the title company.

Q. They were demanding the money? The title company demanded the money to be put up when the deed was passed over, did they not?

A. No, sir; the title company demanded the money in this way, if there was any demand, that if Mr. Godfrey—I am speaking of Godfrey because he did the talking—if Mr. Godfrey would deposit the money the deed would be sent to Mays Landing for record.

Q. In other words, when they passed the money over they would be passing money over for a title that wasn't good at that time? Never mind what they were going to do subsequently to clear it up, at that time it wasn't good, was it? It wasn't free of encumbrance?

A. Just at that minute, no.

Q. That is all.

FRANK CRAWFORD, sworn for defendants.

Direct examination.

By Mr. Cole:

Q. Were you at the title company in connection with this matter?

A. Yes.

Q. How many times?

A. Twice.

Q. Will you state your recollection of what happened?

A. Well, our first appearance—don't you want me to first state in reference to our articles of agreement?

Q. First of all, did you have a telephone or communication from Mr. Rappaport before he went to the title company?

A. Yes, well prior to that we will speak of the articles of agreement to deliver the property——

Q. No, don't let's do that; that speaks for itself.

A. I wanted to make a matter of record.

Q. Come right down and answer my questions.

A. Mr. Rappaport called me on the phone and stated that he had heard that Mrs. Crawford was not going to sign that deed. I asked him who gave him that opinion and he said that he refused to tell me. I thought it was Rappaport, it may not have been him, I said "Doctor——"

Mr. Steelman: You don't know that it was Dr. Rappaport?

A. No, I don't know that, of course.

Q. Why?

A. Well, he said it was Rappaport, that is all.

Q. Did the voice say it was Rappaport?

A. Yes, sure.

Q. All right.

A. And he stated that he had heard that Mrs. ——

Mr. Steelman: If the Court please, I renew my objection because there is no proof it was Dr. Rappaport.

The Court: I will permit it, question of probative force, permit it.

A. Haven't any proof it wasn't him.

Q. Don't let's have an argument. Let's get the facts. Now was that the end of that conversation?

A. Well, I told him that the deed would be signed and asked him after it was signed if he would tell me who had given him that message. He said that

he would, so at the day of the title company, of the settlement I asked him then, after the deed had been signed, if he would tell me then who had given him that message and he refused to do it.

Q. Had your wife signed the deed and acknowledged it?

A. Yes.

Q. And she was there, was she not?

A. Yes, she was there.

Q. Tell us what occurred on that occasion at the title company?

A. Well, these recognizances were against the property, one I had relieved, I had released these bail bonds several days prior to that, I believe your office had done that.

Q. You are talking about the ones at Mays Landing?

A. Mays Landing, yes.

Q. What were those for?

A. They were released, I think Clarence, Jr., had them released, somebody put them you know in some other record so when that showed to title company to my surprise—The bonds were still matters of record and I think you could get the knowledge of who done that through ——

Q. I don't care about that. Were they finally released?

A. Yes.

Q. That is out of the way?

A. When they refused to put their money up I stated to Miss Mitchell, also to Mr. Rappaport or Mr. Godfrey, that the money that they would put up there would remain there, as far as I was concerned, until the title and a clear title was given to that lot. And they refused to do that and made a further date.

Q. Was there anything said about your going to Trenton to get rid of that?

A. Yes.

Q. What was said?

A. I had made a trip to Trenton prior to this first settlement and had made a mistake, and had quite an argument over there with the clerk, he said that that was the wrong way to do it, she said "You will have to bring them after your settlement ——

Mr. Steelman: I object to that.

The Court: Yes.

Q. Did you, in point of fact, suggest at that time that you would go to Trenton and have that acknowledgment released?

A. Yes, sir.

Q. Did you do that?

A. Yes, sir.

Q. Did you have it released?

A. Made two trips, yes.

Q. Now then, what happened on the next occasion at the title company?

A. You mean at the title company?

Q. Yes.

A. Well, we had a meeting the same as we did before, Mr. Godfrey, Mr. Satanov, and your son, and Mr. Petrie I believe and his wife was there, and we asked them to put up their money to give me a chance to release the bond, the government bond in order to give them title to the property.

Q. What did they say?

A. They refused to do it.

Q. Let's make it clear, had you before that—this is the second occasion you are talking about now?

A. Yes.

Q. Had you before that gone to Trenton?

A. Yes.

Q. In order to close this transaction and get that recognizance released?

A. Yes, released that bond and called Miss Mitchell on the phone and she said I was a day early, that I would have to go back another day.

Q. You got a receipt from the clerk the day you made that, didn't you?

A. I don't know whether this is the first receipt.

Q. Having that discharged?

A. I think that is the second receipt or first one, I don't remember which, but I can easily get that from Trenton.

Q. December 9, 1924.

A. I believe that is one of them anyway; I released it twice.

Q. You had it released twice?

A. I had it released twice.

Q. Same recognizance, ten thousand dollars, is it?

A. Yes.

Q. Now, has this land been condemned and taken over by Ventnor City?

A. Yes.

Q. When was it condemned?

A. Well, it was—the condemnation proceedings, I believe, had started prior to, or had been taken all prior to our settlement, I don't remember the dates.

Cross-examination.

By Mr. Steelman:

Q. On the day of settlement, first day of settlement, November 21, 1924, had you caused the Federal bonds to be released?

A. I had released the bonds here of the county had been released but had been placed back on record by somebody, I don't know who done it.

Q. I m speaking of the Federal bond at Trenton?

A. No.

Q. Had not?

A. That was to be released after the settlement, that was the understanding that I had with the real estate man, I explained all these bonds to him prior to the signing of that agreement.

JOHN S. WESTCOTT, recalled.

Direct examination.

By Mr. Cole:

Q. You are solicitor of Ventnor City?

A. Yes, sir.

Q. Has this land been condemned by Ventnor City?

A. Yes, sir; taken over by the city for highway purposes.

Q. How long ago?

A. Completed in 1925.

Q. When was the money paid into court?

A. Early in 1926.

Q. Was Mr. Rappaport a party to that proceeding?

A. Yes, sir. He was made party as holding an agreement of sale, outstanding interest.

DEFENDANTS REST.

DAVID N. RAPPAPORT, recalled.

Direct examination.

By Mr. Steelman:

Q. Did you call Mr. Crawford up and have that telephone conversation with him or not?

A. No, not.

TESTIMONY CLOSED.

(It is stipulated between counsel that this land has been condemned by the City of Ventnor for the sum of twenty thousand dollars and that amount has been paid into the Court of Chancery.)

CONCLUSIONS.

(Filed August 3, 1926.)

IN CHANCERY OF NEW JERSEY.

Between

DAVID N. RAPPOPORT, *et al.*,
Complainants,
and
FRANK CRAWFORD, *et als.*,
Defendants.

On Bill for Specific Performance.
On Final Hearing.
Conclusions.

MESSERS. HARCOURT & STEELMAN for the complainants.

MESSRS. COLE & COLE for the defendants, Frank and Josephine Crawford.

MR. J. S. WESTCOTT, for the defendants, Mary and Alfred Petrie.

INGERSOLL, V. C.

On the 23rd of September, 1924, the defendants, Frank Crawford and Mary C. Petrie, entered into a contract with the complainants, Dr. Rappoport and Bluma C. Rappoport, his wife, wherein they agreed to convey to the vendees a certain property therein described for the sum of $13,000; $1,000 of which was paid at the signing of the contract, and

the balance of $12,000 was to be paid in cash at the time of the delivery of the deed, which was to be on or before the 21st day of November, 1924. The title was to be good and marketable and such as the Atlantic Guaranty & Title Insurance Company would insure, and settlement to be made at the office of said company.

This agreement was signed by Josephine Crawford, wife of Frank Crawford, and Alfred A. Petrie, the husband of Mary C. Petrie, as well as by the parties named therein.

On the day fixed for settlement, the complainants appeared at the office of the title company, tendered the amount due and demanded a deed.

The title company declined to insure the premises because of a recognizance in the United States Federal Court in the sum of $10,000 executed by Frank Crawford as surety for the appearance of one John Mack.

A plan was suggested by the title company, that if the money was deposited with them by the purchaser and a deed executed by the grantors, the recognizance would be cancelled and a new one entered into, and in the meantime if this could be done, the deed could be recorded and the title be given clear of the lien of the recognizance. The title company would not at that time either insure the title or guarantee that it would at a later day.

The purchaser declined to deposit the money unless the title company would insure the title at that time.

Later, on December 8th, 1924, counsel for the purchaser wrote the title company as follows:

"Atlantic Guaranty and Title Insurance Company,
Real Estate & Law Building,
Atlantic City, N. J.

Dear Sirs:—

On Saturday, December 6, 1924, you called me by 'phone and suggested that Dr. D. N. Rappoport the purchaser of lot 14 in Block 42 Ventnor City, deposit with your Company the amount necessary to complete the settlement and at the same time you informed me that the recognizances affecting this title had not yet been cancelled. Your position appears to be that upon the deposit of the purchase price with your Company, that you could record the deed from the grantors to my clients, the purchasers, and that immediately thereafter the recognizances could be cancelled and re-entered. This course would result in my clients taking title subject to the lien of a very large recognizance which I cannot advise they to do.

As we informed you on November 22nd, if your Company is willing to assume the responsibility for insuring Dr. Rappoport against loss and would also guarantee to insure all subsequent purchasers and mortgagees clear of any such lien, we might be willing to do this, but the sellers certainly cannot expect the purchaser to take title subject to these defects. You suggested by telephone to-day that this course was usual. I certainly must positively disagree with you in this respect. I have never known of a case where the purchaser would take such a risk and the fact that your Company will not take the risk nor will the grantors do it, is sufficient justification for my position in the matter. If Dr. Rappoport wishes

to take such a risk, he of course is at liberty to do so, but no careful lawyer would ever advise any client to assume such a responsibility. Dr. Rappoport is prepared to make this settlement whenever the title is right for settlement.

Very truly yours,
(Signed) Carlton Godfrey"

The deed has not been tendered, nor has the title company insured the title to said premises to be a good and marketable title.

The complainant was entitled to a conveyance of the premises in question clear of the lien of said recognizance, which conveyance could have been made by the grantors upon Crawford complying with the terms of said recognizance by causing it to be cancelled for that or any other reason.

Since the filing of this bill, the land in question has been condemned by the City of Ventnor and the amount of the award allowed as the value of said premises has been deposited in this Court, and the complainants now insist that a decree should be made in their favor for the amount of such award.

Over fifty years ago the Court of Errors and Appeals in *Haughwout and Pomeroy v. Murphy,* 22 N. J. Eq. 531, on page 546 held:

"In equity, upon an agreement for the sale of lands, the contract is regarded, for most purposes, as if specifically executed. The purchaser becomes the equitable owner of the lands, and the vendor of the purchase money. After the contract, the vendor is the trustee of the legal estate for the vendee. *Crawford v. Berthoff,* Saxton 460 *Hoagland v. Latourette,* 1 Green's Ch. 254; *Huffman v. Hummer,* 2 C. E. Green 264; *King v. Ruckman,* 6 C. E. Green 599.

Before the contract is executed by conveyance, the lands are devisable by the vendee, and descendible to his heirs as real estate; and the personal representatives of the vendor are entitled to the purchase money. 1 *Story's Eq.*, Sec. 789; 2 Ibid., Sec. 1213. If the vendor should again sell the estate of which, by reason of the first contract, he is only seized in trust, he will be considered as selling it for the benefit of the person for whom, by the first contract, he became trustee, and therefore liable to account. 2 *Spence's Eq. Jur.* 310. Or the second purchaser, if he have notice at the time of the purchase of the previous contract, will be compelled to convey the property to the first purchaser. *Hoagland v. Latourette,* 1 Green's Ch. 254; *Downing v. Risley,* 2 McCarter 94. A purchaser from a trustee, with notice of the trust, stands in the place of his vendor, and is as such a trustee as he was. 1 *Eq. Cas. Abr.* 384; *Story v. Lord Windsor,* 2 Atk. 631. The *cestui que* trust may follow the trust property in the hands of the purchaser, or may resort to the purchase money as a substituted fund. *Murray v. Ballou,* 1 Johns. Ch. 566, 581. It is upon the principle of the transmission by the contract of an actual equitable estate, and the impressing of a trust upon the legal estate for the benefit of the vendee, that the doctrine of the specific performance of contracts for the sale and conveyance of lands mainly depends."

This case has been cited innumerable times, and the principles therein stated are firmly established as the law of this State.

A reference will be made to a Master for an accounting.

Determined: July 28th, 1926.

DECREE FOR ACCOUNT.

(Filed August 10, 1926.)

IN CHANCERY OF NEW JERSEY.

Between DAVID N. RAPPOPORT, *et al.*, *Complainants*, and FRANK CRAWFORD, *et als.*, *Defendants.*	On Bill for Specific Performance. Decree for Account.

This cause coming on to be heard in the presence of Harcourt and Steelman, solicitors for complainants, David N. Rappoport and Bluma C. Rappoport, and of Cole and Cole, solicitors for the defendants, Frank Crawford and Josephine Crawford, and of John S. Westcott, solicitor for defendants, Alfred A. Petrie and Mary C. Petrie.

And the Court having examined the pleadings and having taken proofs orally and in open court, and having heard and considered the arguments of counsel thereon, and being satisfied that the complainants, David N. Rappoport and Bluma C. Rappoport, entered into an agreement whereby they agreed to purchase from the defendants, Frank Crawford and Josephine Crawford, his wife, and Mary C. Petrie and Alfred A. Petrie, her husband, the lands de-

scribed in the bill of complaint herein, to wit:

All that tract or piece of land and premises, situate, lying and being in the City of Ventnor City, in the County of Atlantic and State of New Jersey bounded and described as follows:

BEGINNING at a point in the westerly line of Cornwall Avenue, distant two hundred fifty feet Southwardly of the Southerly line of Atlantic Avenue and extending thence (1) Westwardly parallel with Atlantic Avenue, one hundred twenty-five feet; thence (2) Southwardly, parallel with Cornwall Avenue, fifty feet; thence (3) Eastwardly, parallel with Atlantic Avenue, one hundred twenty-five feet to the Westerly line of Cornwall Avenue; thence (4) Northwardly, in and along the said Westerly line of Cornwall Avenue, fifty feet to the place of beginning.

And it appearing that the complainants agreed to pay therefor the sum of thirteen thousand dollars ($13,000.00), of which one thousand dollars ($1000.00) was paid on account at the signing of said contract and the balance of twelve thousand dollars ($12,000.00) was to be paid in cash at the time of final settlement, for which and at which time the defendants were to convey to the complainants by a general warranty deed the aforesaid premises free and clear of all encumbrances, the title to said premises to be good and marketable and such as the Atlantic Guaranty and Title Insurance Company would insure.

And it appearing that on the day fixed for final settlement the complainants appeared and tendered to the defendants the amount due and that they demanded a deed in accordance with the terms and

conditions of the aforesaid agreement, but that said title company declined to insure said premises because of an outstanding recognizance to the United States of America in the sum of ten thousand dollars ($10,000.00) wherein the defendant, Frank Crawford was surety for the appearance of one, John Mack, as principal.

And it appearing that the complainants refused to deposit the balance of the purchase price unless the said title company would insure the title to said premises in accordance with the terms of said agreement.

And it appearing that defendants have not tendered to complainants a deed for said premises in accordance with the terms and conditions of said agreement, and that complainants were of right entitled to a conveyance of said premises free and clear of the lien of said recognizance.

And it further appearing that since the filing of the bill of complaint herein, the City of Ventnor City, a municipal corporation, has condemned the lands hereinbefore described and that the amount of the award allowed therefor has been paid into and deposited with this Court in accordance with the statute in such cases made and provided.

It is, on this tenth day of August, 1926, ordered, adjudged and decreed that there be paid to the complainants, David N. Rappoport and Bluma C. Rappoport, of said moneys, a sum equivalent to the difference between the purchase price as set forth in said agreement between complainants and defendants and the amount of the condemnation award, which shall be increased or diminished by such allowances and adjustments as may be proper and equitable under the terms of said agreement and of this decree, and that for the purpose of ascertaining the

amounts thereof it is further Ordered that said matter be referred to Wm. Frank Sooy, one of the Masters of this court, to be reported on by him.

It is further ordered that the said Master make his report with all convenient speed; and all further equity is reserved until the coming in of said Master's report.

E. R. WALKER,
C.

Respectfully advised,
R. H. INGERSOLL.

NOTICE OF APPEAL.

(Filed September 4, 1926.)

IN CHANCERY OF NEW JERSEY.

Between DAVID N. RAPPOPORT, *et al.*, *Complainants*, and FRANK CRAWFORD, *et al's.*, *Defendants.*	On Bill, &c. Notice of Appeal.

To Harcourt & Steelman, Esqs., solicitors for complainants:

The defendants, Frank Crawford and Josephine

Crawford, his wife, Mary C. Petrie and Alfred A. Petrie, her husband, hereby appeal from an order made in this court by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey by Robert H. Ingersoll, Vice-Chancellor, bearing date the day of August, 1926, requiring an accounting in the above-stated cause, to the Court of Errors and Appeals in the last resort in all causes. Dated August 27, 1926.

COLE & COLE,
Solicitors for and of Counsel with Defendants, Crawford.
C. L. COLE,
of Counsel.
JOHN S. WESTCOTT,
Solicitor for and of Counsel with Defendants, Petrie.

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

C. L. COLE,
Of Counsel with Defendants.

PETITION OF APPEAL.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

DAVID N. RAPPOPORT, *et al.*,

Complainants-Respondents,

and

FRANK CRAWFORD, *et als.*,

Defendants-Appellants.

On Appeal from Chancery.
Petition of Appeal.

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

The petition of Frank Crawford and Josephine Crawford, his wife, Mary C. Petrie and Alfred A. Petrie, her husband, the appellants in the above-stated cause, respectfully show that your petitioners find themselves aggrieved by a decree made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, advised by Hon. Robert H. Ingersoll, Vice-Chancellor, bearing date the 10th day of August, 1926, wherein the said David N. Rappoport and Bluma C., his wife, were complainants, and the said petitioners are defendants, which decree requires an accounting, upon the ground that the same is erroneous for that the

decree grants the relief prayed for in the bill of complaint when it should have been denied and the bill dismissed. Your petitioners therefore pray that the said decree may be, in every particular, reversed, set aside and for nothing holden. And your petitioners may have such relief in the premises as to this Honorable Court shall seem meet.

COLE & COLE,
Solicitors for and of Counsel with Defendants, Crawford.
JOHN S. WESTCOTT,
Solicitor for and of Counsel with Defendants, Petrie.

ANSWER TO PETITION OF APPEAL.

Formal answer filed.

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

NEW JERSEY
Court of Errors and Appeals.

BETWEEN
DAVID N. RAPPAPORT ET UX,
Complainants-Respondents,

and

FRANK CRAWFORD ET AL.,
Defendants-Appellants.

On Appeal
from Chancery.

BRIEF FOR APPELLANTS

STATEMENT

This is a vendees bill for the specific performance of a real estate contract. There was a decree for complainants from which this appeal was taken.

Among other things the agreement provides:

> "And the vendor hereby agrees to deliver or cause to be delivered to the vendee or ..... assigns, by a general warranty deed properly executed and acknowledged, conveying said premises in fee simple, free and clear of encumbrance except as above stated.
>
> And the vendee hereby covenants and agrees to pay the consideration aforesaid at the times and in the manner aforesaid, the title to said premises is to be a good and marketable title and such as the Atlantic Guaranty & Title Insurance Company will insure. Said deed is to be delivered and final settlement is to be made at the office of said title company on or before

the 21st day of November, 1924, at ..... o'clock," etc.

The agreement is executed by Frank Crawford, Josephine Crawford, his wife, Mary C. Petrie and Alfred A. Petrie, her husband, who are the vendors, and the complainants.

Paragraph 4 of the bill says:

> "Defendants Frank Crawford and Josephine Crawford, his wife, and Mary C. Petrie and Alfred A. Petrie, her husband, have neglected and refused to convey said land and premises in fee simple free and clear of all encumbrances and make settlement in accordance with the terms of said agreement, and these complainants are informed that defendants have repudiated said agreement and refused to make settlement thereunder."

Defendant Josephine Crawford, wife of Frank Crawford, says that she never acknowledged the agreement as her voluntary act and deed. Paragraph 4 of the answer denies that complainants were ready and willing to perform on their part and avers that complainants refused to accept a deed unless certain restrictive covenants were removed. Defendants Petrie by their answer also say that complainants insisted upon the removal of certain restrictive covenants as a condition precedent to the performance on their part, and that they also insisted upon the removal of a certain recognizance entered against defendant Frank Crawford before they would accept a deed and pay the consideration price. Complainants joined issue on the respective answers.

It will thus be seen that the issue by the pleadings is whether defendants were willing to perform, as far as they could, whether complainants did not refuse to perform and for the reason of the existence of restrictive covenants and the inability of defendants to remove the recognizance entered against Crawford.

ARGUMENT.

I.

Defendants Could Not Perform in Accordance With the Strict Terms of the Agreement.

It will be observed that defendants agreed to convey free and clear of encumbrance and the title to be "such as the Atlantic Guaranty & Title Insurance Company will insure." The bill prays for strict performance. The answers show a willingness to perform with the exceptions named. Neither by the bill nor by the proofs does it appear that complainants ever retreated from their position of insisting upon strict performance. They were not willing to accept such performance as defendants could make or suggest an abatement by reason of defendants inability to strictly perform.

At the time named for settlement defendant Crawford and his counsel, and the complainant and his counsel, appeared at the office of the Atlantic Guaranty & Title Insurance Company. The company's settlement certificate was produced and it showed restrictive covenants and a recognizance in the United States Court against Crawford. (Testimony of Godfrey, page 19.) Complainant would not perform because the title company would not guarantee the title free of these encumbrances.

There was a later meeting at the same office with the same result.

Thereafter the bill was filed. Apparently complainant was willing to waive the restrictive covenants but insisted upon the removal of the recognizance (testimony, pages 26-27). It will be seen by the testimony of Miss Mitchell (page 38) a representative of the title company, that with the restrictive covenants out of the way the company would have insured the title if the complainant had been willing to deposit the money, allow the deed to be passed and recorded and in the interim have the Crawford recognizance cancelled and

a new one substituted. The details are explained by her and are quite feasible. Pages 41 and 42 in response to the Court's question, she said the company would have insured free of the recognizance had the money been paid. This complainant refused. Defendants delivered a properly executed and acknowledged deed as they had agreed but complainant would not accept.

Counsel for Petrie (bottom page 47), testified as follows:

> "I think then, in other words, Mr. Petrie was with me on the passive condition. I didn't want to speak for Mr. Crawford, he was their to speak for himself, my collection of it is that when Mr. Cole came down to speak for Mr. Crawford, he said: 'Why either take it or leave it alone, put up your money,' practically to that effect."

The bill was filed December 6, 1924. The cause was not brought on for final hearing until June 24, 1926. Complainant remained quiescent until after the city had condemned the land for street purposes and it then appeared that there was an equity beyond the consideration price.

We have this anomalous situation. Complainant by his bill is insisting upon performance according to the terms of the agreement. An answer averring a willingness to perform within defendants' ability and a refusal of complainant to accept subject to restrictive covenants and an outstanding recognizance against one of the defendants. Issue joined on these averments. Proof of an absolute refusal of complainant to perform unless the title company would insure in accordance with the strict terms of the contract and a rescission on the part of the defendants because of complainants refusal to perform. Throughout complainant insisted that defendant do something which he admits defendant could not do. The decree adjudges that the title company would not insure and that defendants did not tender a deed in accordance with the terms and conditions of the agreement. It then provides for an accounting of the

amount due defendants and that the remainder of the proceeds of condemnation be paid to complainant.

The substantial effect of the proceeding is that complainant recovers damages in equity for the failure and inability of the defendants to perform the agreement in strict accordance with its terms. In one breath complainant says defendant cannot perform, and in another he says that he can, and refuses. The legal situation is not changed by the incident of condemnation after issue joined and without any amendment to the bill to change the issue made. Had the property not been condemned, complainant would have been obliged to accept such a title as defendants could give, or accepted it subject to abatement or indemnity, or abandon his bill in equity and proceed at law for breach of the contract. By the decree he has been permitted to recover as though he had sued at law and secured a verdict for damages. The prayer of the bill remains unchanged. The decree is not in accordance with the prayer nor is it within the issue made. It should therefore be reversed.

In the opinion of the learned Vice-Chancellor (page 59), he says:

> "The deed has not been tendered, nor has the title company insured the title to said premises to be a good and marketable title."

The Vice-Chancellor overlooked the uncontroverted testimony that the deed was tendered and was at the time of trial in possession of the title company (testimony of Mitchell, bottom page 40). We are unable to perceive the applicability of the cases cited by the Vice-Chancellor and in the brief of respondent. We concede that those cases correctly express the law and the correct relation between vendor and vendee. But the cases are not analogous to the case in hand. In the cases cited there was ability but refusal to perform. In the instant case there was inability to strictly perform but willingness to perform to the extent of ability and refusal to accept such.

It is apparent that complainant's bill would have been dismissed had the case rested upon the pleadings and proof and without the intervention of the condemnation proceedings. He would not have been permitted to say "I will" and "I won't" in the same breath. His long period of silence until condemnation makes it quite obvious that he was not willing to accept such a title as defendants could give. The decree is in opposition to the clear issues made by the pleadings.

II.

The Decree is Erroneous as to Mrs. Crawford.

She did not acknowledge the agreement. It cannot be enforced against her. See *Schwabinger* v. *Saxon*, 92 *Equity* 461.

Paragraph 2 of the answer says:

> "Paragraph 2 is admitted with this qualification. Defendant Josephine Crawford says that she is the wife of Frank Crawford and that she never acknowledged the agreement as her voluntary act and deed."

She has a prospective dower interest which she could not have been compelled to convey. The practical effect of the decree is to compel her.

Respectfully submitted that the decree should be reversed.

Cole & Cole,
Solicitors for Appellant Frank Crawford.
C. L. Cole,
Of Counsel.
John S. Westcott,
Solicitors for Appellants Petrie.