INDEX.

TESTIMONY.

EXHIBITS.

Notice of Appeal.

(Filed May 3, 1918.)

New Jersey Supreme Court.

LOUIS CAPORALE, Plaintiff-Respondent, *v.* SAMUEL H. RUBINE, Defendant-Appellant.	Action at Law.

To Messrs. Mackay & Mackay,
Attorneys of Plaintiff.

Sirs:

Take notice, that the defendant appeals to the Court of Errors and Appeals of the State of New Jersey, from the whole of the judgment entered in this cause.

Dated April 29, 1918.

GROSS & GROSS,
Attorneys of Defendant-Appellant.

Capias.

NEW JERSEY SUPREME COURT,

BERGEN COUNTY.

LOUIS CAPORALE, Plaintiff, *v.* SAMUEL H. RUBINE, Defendant.	Action at Law.

The State of New Jersey to the Sheriff of the County of Hudson: (L. S.)

GREETING: We command you that you take Samuel H. Rubine, if in your County he may be found, and him safely keep so that you may have his body before the New Jersey Supreme Court, to be holden at Hackensack in and for said County of Bergen to answer unto Louis Caporale in an action at law wherein the plaintiff demands three thousand one hundred and fifty dollars, with interest from May 1, 1917, and have you then and there this writ.

Witness, Wm. S. Gummere, Chief Justice of our said Court at Trenton, the 28th day of November, in the year one thousand nine hundred and seventeen.

WM. C. GEBHARDT,
Clerk.

Mackay & Mackay,
Attorneys for Plaintiff.

A true copy of original.

WM. C. GEBHARDT,
Clerk.

Complaint.

NEW JERSEY SUPREME COURT,

BERGEN COUNTY.

LOUIS CAPORALE,
Plaintiff,

v.

SAMUEL H. RUBINE,
Defendant.

The plaintiff residing in the Borough of Fairview, in the County of Bergen and State of New Jersey, says:

1. On April 16, 1917, plaintiff and defendant signed an agreement for the sale and exchange of lands in the Township of North Bergen, New Jersey, a copy of which agreement is hereto annexed.

2. On May 1, 1917, plaintiff demanded a deed of conveyance from defendant in accordance with the terms of the contract, and was ready and willing and offered to defendant to carry out the terms of the said contract and duly to perform all the terms of said contract upon his part upon the like performance by defendant.

3. Defendant then refused to deliver any deed of conveyance for said property and still refuses so to do.

4. By the terms of said contract plaintiff agreed to sell and convey to the defendant lots numbered twenty (20), twenty-one (21), twenty-two (22) and twenty-three (23) in block 1, on Map "E" of the Woodcliffe Land Improvement Company and more particularly described in the contract hereto annexed in Schedule "A."

5. Defendant entered into possession of the said premises but has neglected and refuses to carry out the terms of the said contract.

6. Subsequently and without the knowledge and consent of the plaintiff the defendant fraudulently conveyed the lands and premises which he agreed to sell and convey to the plaintiff, and received therefor, this deponent is informed, the sum of eighteen thousand dollars ($18,000).

7. Defendant agreed to sell the said land and premises to the plaintiff for the sum of fourteen thousand eight hundred and fifty dollars ($14,850).

8. Plaintiff has been damaged in the sum of three thousand, one hundred and fifty dollars ($3,150) by reason of said fraudulent transaction and therefore demands damages for the sum of Three thousand, one hundred and fifty dollars ($3,150) with interest from May 1, 1917.

MACKAY & MACKAY,
Attorneys of Plaintiff.

AGREEMENT.

Made this sixteenth day of April, nineteen hundred and seventeen, between Samuel H. Rubine of Jersey City, N. J., hereafter referred to as the party of the first part, and Louis Caporale, of the Borough of Fairview, N. J., hereafter called the party of the second part.

WITNESSETH that the party of the first part for and in consideration of the sum of one dollar, the receipt of which is hereby acknowledged, agrees to sell and convey and the party of the second part hereby agrees to purchase, all that parcel of land with the buildings and improvements thereon situate on the southeast corner of

Broadway and Thirtieth Street, Woodcliffe-on-Hudson, Township of North Bergen, N. J., and known as house No. 934 Broadway.

The purchase price is fourteen thousand eight hundred and fifty dollars ($14,850). This is subject to a first mortgage of ten thousand dollars, with interest at six per cent. payable semi-annually. The party of the first part agrees to take back a purchase money mortgage of seventeen hundred and fifty dollars ($1750), for a period of three years with interest at six per cent., payable semi-annually. The party of the second part agrees to reduce the principal of the purchase money mortgage, by equal payments of one hundred and twenty-five dollars every three months.

To further insure the sale of the above premises, the party of the first part agrees: (1) to complete the concrete sidewalk about the premises; (2) paper the halls of the building; (3) to build a bulkhead on the roof; (4) to build a rack for a clothes line on the roof; (5) to furnish and set four (4) gas hot water heaters in each kitchen of the building; (6) to furnish certificates from the N. Y. Board of Fire Underwriters, and the N. J. Tenement House Commission, with the assurance that any violations declared by them will be complied with by him at his expense.

Also witnesseth that the party of the second part for and in consideration of the sum of one dollar, the receipt of which is hereby acknowledged, agrees to sell and convey, and the party of the first part hereby agrees to purchase, that certain parcel of four (4) lots, known as lots, numbered twenty, twenty-one, twenty-two and twenty-three in Block One, on Map "E" of the Woodcliffe Land Improvement Co. being a plot on the southeast corner of Thirtieth street and

Bergenline Avenue, Woodcliffe-on-Hudson, North Bergen, N. J.

The purchase price is ten thousand dollars. The party of the second part declares that the plot is absolutely free and clear of all encumbrances, excepting, a balance of sixty-nine hundred dollars due the Woodcliffe Land Improvement Co. The party of the second part further agrees that any taxes or other charges against the property remaining unpaid will be settled by him at his own cost and expense.

The title is to be passed on or before May 1st, 1917, and all insurance premiums, water charges, apartment and store rents and mortgage interest are to be apportioned pro rata on the passing of title.

In witness whereof the two parties to this agreement have hereunto interchangeably set their hands the day and year first above written.

SAMUEL H. RUBINE,
LOUIS CAPORALE.

Witness:
Wm. H. Halpin.

Answer.

(Filed Dec. 27, 1917.)

NEW JERSEY SUPREME COURT,

BERGEN COUNTY.

LOUIS CAPORALE, Plaintiff, *v.* SAMUEL H. RUBINE, Defendant.	Action at Law.

The defendant residing in the City of Jersey City, County of Hudson and State of New Jersey, says that:

First Defense:

1. Paragraph 1 is admitted.

2. Paragraphs 2 and 3 are denied.

3. Paragraph 4 is admitted, except that defendant says that the premises described in said Paragraph 4 of the complaint were to be conveyed to him, the defendant, by the plaintiff, in exchange for the property of the defendant, mentioned in said contract.

4. Paragraphs 5 and 6 are denied.

5. Paragraph 7 is denied, except that defendant says that the said premises by him to be conveyed, in exchange for the property of the plaintiff, in said contract described, were in said exchange placed at a valuation of $14,850, so that the equity claimed by plaintiff in his property in the contract described, with the mortgage of $1,750 agreed to be delivered by the plaintiff to this defendant, as set forth in the said

contract, after deducting the mortgage of $10,000, a lien upon defendant's property, would constitute an equal exchange of the equities in the respective properties.

6. Paragraph 8 is denied.

Second Defense:

1. Plaintiff was never able to consummate the said exchange of properties, or to perform the contract on his part to be performed, and refused to pay the taxes remaining unpaid upon his property in the said contract described, or to apportion the mortgage interest that was then due upon the same, and entirely repudiated his said contract.

Third Defense:

1. Defendant will object that the complaint discloses no cause of action. It fails to show that plaintiff made any tender to the defendant of a deed of conveyance for the premises by him agreed to be conveyed, to the defendant, or of the purchase price of defendant's property, in said contract described, or of the mortgage therein mentioned.

GROSS & GROSS,
Attorneys of Defendant.

Appearances.

NEW JERSEY SUPREME COURT,

BERGEN COUNTY.

Before—Hon. WILLARD W. CUTLER, Judge, and a Jury.

LOUIS CAPORALE,
Plaintiff,
v.
SAMUEL H. RUBINE,
Defendant.
} Action at Law.

Hackensack, N. J., April 19, 1918.

APPEARANCES:

For the Plaintiff, MACKAY & MACKAY. William B. Mackay, Esq., of Counsel.
For the Defendant, GROSS & GROSS. Isaac Gross, Esq., of Counsel.

The jury was empanelled, accepted and sworn.

Mr. Mackay opened the case to the jury on behalf of the plaintiff.

Mr. Gross opened the case to the jury on behalf of the defendant.

Mr. Mackay: I will offer in evidence the contract dated April 16, 1917, between Samuel H. Rubine of the first part, and Louis Caporale of the second part.

The Court: Exhibit P1.

Mr. Mackay: Shall I read it to the jury?

The Court: Yes, you better read it, because that is the basis of your action.

Exhibit P-1.

Mr. Mackay: Agreement, made this sixteenth day of April, Nineteen Hundred and Seventeen, between Samuel H. Rubine of Jersey City, N. J., hereafter referred to as the party of the first part, and Louis Caporale of the Borough of Fairview, N. J., hereafter called the party of the second part.

Witnesseth that the party of the first part for and in consideration of the sum of One Dollar, the receipt of which is hereby acknowledged, agrees to sell and convey, and the party of the second part hereby agrees to purchase, all that parcel of land, with the buildings and improvements thereon, situate on the southeast corner of Broadway and Thirtieth Street, Woodcliffe-on Hudson, Township of North Bergen, N. J. and known as house No. 934 Broadway.

The purchase price is Fourteen Thousand Eight Hundred and Fifty Dollars ($14,850); This is subject to a first mortgage of Ten Thousand Dollars ($10,000.00) with interest at six per cent., payable semi-annually. The party of the first part agrees to take back a purchase money mortgage of Seventeen Hundred and Fifty Dollars ($1,750.00), for a period of three years, with interest at six per cent., payable quarter-annually. The party of the second part agrees to reduce the principal of the purchase money mortgage, by equal payments of One hundred and Twenty-Five Dollars every three months.

To further insure the sale of the above premises, the party of the first part agrees: (1) to complete the concrete sidewalk about the premises; (2) paper the halls of the building; (3) to build a bulkhead on the roof; (4) to build a rack for a clothes line on the roof; (5) to furnish and set four (4) gas hot-water heaters in each kitchen of the building; (6) to furnish certificates

Exhibit P-1.

from the New York Board of Fire Underwriters, and the New Jersey Tenement House Commission, with the assurance that any violations declared by them, will be complied with by him at his expense.

Also witnesseth that the party of the second part for and in consideration of the sum of One Dollar, the receipt of which is hereby acknowledged, agrees to sell and convey, and the party of the first part hereby agrees to purchase, that certain parcel of four (4) lots, known as lots numbered Twenty, twenty-one twenty-two and twenty-three, in Block one, on Map E of the Woodcliffe Land Improvement Company, being a plot on the southeast corner of Thirtieth Street and Bergenline Avenue, Woodcliffe-on-Hudson, North Bergen, N. J.

The purchase price is Ten Thousand Dollars. The party of the second part declares that the plot is absolutely free and clear of all encumbrances, excepting a balance of Sixty Nine Hundred Dollars due the Woodcliffe Land Improvement Company. The party of the second part further agrees that any taxes or other charges against the property, remaining unpaid will be settled by him at his own cost and expense.

The title is to be passed on or before May 1st, 1917, and all insurance premiums, water charges, apartment and store rents, and mortgage interest are to be apportioned pro rata on the passing of title.

In Witness Whereof, the two parties to this agreement have hereunto interchangeably set their hands the day and year first above written.

SAMUEL H. RUBINE,
LOUIS CAPORALE.

Witness:
M. H. Halpin.

Exhibit P-2.

Mr. Mackay: Now, I will offer in evidence the agreement between the Woodcliffe Land and Improvement Company and Rose Caporale, wife of Louis Caporale.

Mr. Gross: Yes, that is consented to.

Mr. Mackay: Bearing date July 15, 1913.

The Court: Exhibit P-2.

Exhibit P-2.

Mr. Mackay: This Agreement, made this fifteenth day of July, in the year One Thousand Nine Hundred and thirteen, between The Woodcliff Land Improvement Company, a corporation of the State of New Jersey, of the first part, and Rose Caporale, wife of Louis Caporale, of the Borough of Fairview, in the County of Bergen, and State of New Jersey, of the second part,

Witnesseth, as follows:

First.—The said party of the first part, in consideration of the sum of One Thousand ($1,000.00) Dollars, to it duly paid, at or before the ensealing and delivery of these presents, hereby agrees to sell unto the said party of the second part, her heirs and assigns, subject to the covenants hereafter mentioned to be kept and performed by the party of the second part, all those certain lots, pieces, or parcels of land and premises situate, lying and being in the Township of North Bergen, Hudson County, New Jersey, known and described as lots numbers Twenty (20), Twenty-one (21), Twenty-two (22) and Twenty-three (23), block No. One (1), on a certain map entitled "Map 'E' of a portion of the property belonging to The Woodcliffe Land Improvement Company, Township of North Bergen,

Exhibit P-2.

Hudson County, New Jersey, made by T. H. McCann and R. Beyer, Civil Engineers, Hoboken, New Jersey, November, 1908," duly filed in the Register's office of the said County of Hudson, on the Twenty-fifth day of January, Nineteen Hundred and Ten, and which lots may be more particularly described as follows:

Beginning at the southeast corner of Bergenline Avenue and Thirtieth Street, as said avenue and street are laid down on said map; thence (1) easterly and along the southerly line of Thirtieth Street ninety-one and twenty-eight hundredths (91-28/100) feet to a point; thence (2) southerly and at right angles to the first course one hundred ten and seventy-six hundredths (110-76/100) feet to a point; thence (3) westerly and along the boundary line of the property of the Estate of Thomas Prosser, deceased, and the property of the Woodcliffe Land Improvement Company eighty-seven and fifty-eight hundredths (87-58/100) feet to the easterly line of Bergenline Avenue; thence (4) northerly and along the easterly line of Bergenline Avenue one hundred nine and nine hundred ninety-five thousands (109-995/1000) feet to the point or place of beginning.

Together with the right to the party of the second part, her heirs and assigns, to use the sewer built in Thirtieth Street perpetually. Subject to all taxes and assessments which may be levied upon said lots during the continuance of this contract, which taxes and assessments the party of the second part assumes and agrees to pay in addition to the amount to be paid for said lots as herein stated, for the sum of nine thousand ($9,000.00) Dollars, which the said party of the second part, hereby agrees to pay to the said party of the first part, as follows:

One thousand ($1,000.00) Dollars, is paid on

the signing of these presents, being the consideration above mentioned.

The balance eight thousand ($8,000.00) Dollars, with interest thereon from date hereof, at the rate of six per cent., per annum, payable monthly, to be paid in equal monthly payments of fifty ($50.00) Dollars each, with interest as aforesaid. Said payments to be made on the first day of each and every month after the date hereof, at the office of the party of the first part at No. 212 Union Street, Town of Union, New Jersey, the last of said payments to be made on the first day of October, 1926, at the office aforesaid, at which time and place (provided all of said payments, with interest as aforesaid, have been paid), the deed hereinafter mentioned shall be delivered.

And the said party of the first part, on receiving such payments at the times and in the manner above mentioned, shall at its own proper cost and expense, execute, acknowledge and deliver to the said party of the second part, or to her assigns, a proper deed for the conveying and assuring to her or them, the fee simple of the said premises, which deed shall contain the following covenants by the party of the second part, viz.: not to erect upon the said premises any slaughter house, smith shop, wheelwright shop, livery stable, blast furnace, brass foundry, nail, iron or other foundry, or any manufactory of gunpowder or fireworks, glue, varnish, vitriol, ink, lard, soap, candles, oil, starch, turpentine, or petroleum or for the tanning, dressing or preparing of skins, hides or leather, or any chemical, gas or poudrette factory, or any ale house, wine or lager beer saloon, grog or dram shop, tavern or hotel where beer or alcoholic or fermented liquors shall be sold or offered for sale, or any

Exhibit P-2.

place for the manufacture of intoxicating liquors, or for carrying on any noxious, dangerous, or offensive trade or business, nor for any other nuisance, nor to erect any building less than two stories in height and costing less than three thousand ($3,000.00) Dollars; and that she will connect any such building with the sewer built or to be built in the said street. Which shall be deemed to be covenants running with the land and enforceable as such until the first day of January, in the year Nineteen Hundred and Twenty.

And which deed shall also contain a general warranty and the usual full covenants.

And it is understood that the stipulations aforesaid are to apply to and bind the successors, heirs, executors, administrators and assigns of the respective parties.

In witness whereof, the party of the first part hath caused its corporate seal to be hereunto affixed and to be attested by its secretary, and these presents to be signed by its president, and the party of the second part hath hereunto set her hand and seal the day and year first above written.

Signed by the Woodcliffe Land Improvement Company by Joseph Meeks, President, seal affixed, and signed by Rose Caporale.

Mr. Mackay: Now, I will offer in evidence the will, the last will and testament of Rose Caporale, bearing date February 4th, 1916, proved in the Bergen County Surrogate's Office, March 14, 1916, in Book 59 of records of wills and proofs, for Bergen County, Page 74.

The Court: That is an original record and will not be marked. It will be P-3.

(Designated as Exhibit P-3.)

Mr. Mackay: It reads as follows:

Exhibit P-3.

I, Rose Caporale, being of sound and disposing mind and memory, and considering the uncertainty of this life, do make, publish and declare this to be my last will and testament as follows, hereby revoking all other and former wills by me at any time made.

First, after my lawful debts are paid, I give to my beloved husband, Louis Caporale, the property consisting of a three-story brick store and dwelling house, situate at No. 26 Anderson Avenue, in the Borough of Fairview, in the County of Bergen, and State of New Jersey; also lot Number 25 on Kamena Street and Third Street, a two-story frame building, in the Borough of Fairview, County of Bergen and State of New Jersey, also the four lots on the southeast corner of Thirtieth Street and Bergenline Avenue, in the Township of North Bergen, County of Hudson, State of New Jersey.

Second, I also give to my husband, Louis Caporale, my equal share of the property, located in the Town of Policastrello, Italy.

I further direct that this, my last will and testament, shall not be probated until ten days after my death.

I hereby appoint Mr. James Lapietra to be my executor of this my last will and testament.

In witness whereof, I have hereunto subscribed my name and affirmed my seal, the fourth day of February, in the year of our Lord, one thousand nine hundred and sixteen.

ROSE CAPORALE (SEAL.)
Her X Mark.

Mr. Gross: When was it probated, sir?

Mr. Mackay: March 14th, and witnessed by

Joseph Fiore of Fairview, New Jersey, and John Brunas, Fairview, New Jersey.

It is admitted by counsel for the defendant that the property in this case which was to be exchanged with Mr. Caporale was sold in the month of September, 1917, or exchanged, either sold or exchanged; and to whom?

Mr. Gross: I think you have it in your pleadings.

Mr. Mackay: To George Rein, of where?

Mr. Gross: Of Catskill, New York.

The Court: September, of what year?

Mr. Mackay: The same year, 1917.

The Court: And the agreement is dated when?

Mr. Mackay: April 16, 1917.

LOUIS CAPORALE, the plaintiff, being duly sworn on his own behalf, testified as follows:

Direct examination by Mr. Mackay:

Q. Where do you live, Mr. Caporale? A. Anderson Avenue, Fairview.

Q. And how long have you lived there? A. I lived there for the last sixteen years, I think.

Q. Is your wife living? A. No, sir.

Q. When did she die? A. She died February 6, 1916.

Q. And did she leave a will? A. Yes, sir.

Q. You have heard the record of the will read? A. Yes, sir.

Q. Was that your wife? A. Yes, sir.

Q. Was she the person mentioned in this agreement with the Woodcliffe Land & Improvement Company? A. Yes, sir.

Q. Do you recall this first agreement, Exhibit P-1, between you and Mr. Rubine? A. Yes, sir.

Q. Where did you meet the day that agreement was made? A. In Mr. Halpin's office.

Q. And where is his office? A. On Broadway, Woodcliffe, near Thirty-first Street.

Q. And at that time was anything said as to where the transaction would be closed? A. It was said that the transaction would be closed in the same office.

Mr. Gross: I object, the contract should be referred to. I withdraw the objection, your Honor.

The Court: Objection withdrawn.

Q. What is your answer? A. It is said that the final would be closed in the same place.

Q. At Mr. Halpin's office? A. At Mr. Halpin's office.

Q. And on May the first, the date fixed for closing the title, or the transaction, what did you do? A. I went to Mr. Halpin's office.

Q. And who was there? A. Mr. Halpin.

Q. Did you see Mr. Rubine? A. No, sir.

Q. Did anyone endeavor to get in touch with him? A. Mr. Halpin did.

Q. And how did he try to get in touch with him? A. By 'phone.

Q. By telephone? A. Yes, sir.

Q. And talk with him, did he, on the 'phone?

Mr. Gross: Well, I object to that.

The Court: What he knows himself.

Q. Well, Halpin was the agent?

The Court: What he knows that Mr. Halpin did.

Q. Well, what did Mr. Halpin do? A. After he telephone, he told me that—

Mr. Gross: I object to that.

The Court: No, not what he told you.

Q. Well, did Mr. Rubine show up? A. No, sir.

Q. Did you get any instructions from Mr. Halpin as to when to come again? A. Mr. Halpin told me to call there on May the third.

Q. And did you go there on May the third? A. I did.

Q. And who was there on May the third? A. Mr. Halpin.

Q. Anyone else? A. No, sir.

Q. Did Mr. Halpin do anything? A. What is that?

Q. Did Mr. Halpin do anything that day? A. He telephoned again.

Q. To whom? A. To Mr. Rubine.

Q. Did Mr. Rubine show up? A. He did not.

Q. Did you get any further instructions from Mr. Halpin? A. He told me to call there again within a few days.

Q. Did he say what day? A. I think he said May the eighth.

Q. And did you call on May the eighth? A. I did.

Q. Where did you go? A. The same place, Mr. Halpin's office.

Q. And who was there? A. Mr. Halpin.

Q. Anyone else? A. No.

Q. Anything done that day? A. No, sir.

Q. Did Mr. Rubine show up? A. No, sir.

Q. Did Halpin communicate with him? A. He did.

Q. And did he give you any instructions? A. He told me that he had information that Mr. Rubine was sick.

Q. Did he say anything about coming again? A. He told him to give him time until he got better.

Q. Then when did you call again? A. I called again after two weeks from that day.

Q. And who was there? A. Mr. Halpin.

Q. Anyone else? A. No.

Q. Did you get in touch with Mr. Rubine? A. No, sir.

Q. Did he get in touch with Mr. Rubine? A. No; he didn't.

Q. Did he talk to Mr. Rubine at all? A. Mr. Halpin?

Q. Yes. A. No.

Q. Not that day? A. Not that day.

Q. You were told to come back again? A. I was told to come back again. He said he didn't understand it himself why he was keeping away.

Q. Then did you come back again? A. I did.

Q. When did you come back after that? A. I went back almost every other day.

Q. Almost every other day continuously? A. Continuously, yes, sir.

Q. Up until what time? A. Up until the latter part of July, I think.

Q. Did you during that time, up to the latter part of July, see Mr. Rubine personally? A. I did meet him in Mr. Halpin's office.

Q. When? A. The latter part of July.

Q. And who were there? A. Mr. Halpin, I and Mr. Rubine.

Q. And what did you meet there for, for what purpose? A. For the purpose of concluding what was on the agreement.

Q. And what conversation took place that day in July between you and Mr. Rubine and Mr. Halpin? A. The conversation that day? Mr. Rubine told me that he had started to dig the foundation on the lots on Bergenline Avenue, and that he was going to put up six buildings on it, and he offered up a new proposition to give me the corner on 30th Street and Bergenline Avenue, instead of the one that was agreed

upon, and I—he told me, I give you a set of plans, look them over and if it is satisfactory you give me the answer. So I took the set of plans and I told him that I didn't think anything of that proposition at all, that I wanted to keep on with the first; but, however, I said, I will look that up, and he told me that the mortgage on that building when it was completed would be $7,000.00. He said, "that will be more easy for you to get through, and perhaps it is more convenient." So I took the set of plans home and I looked them over, and I had an idea from other peoples, and finally I concluded that that $7,000.00 was too much, so when I—after two or three days I brought the set of plans back to Mr. Halpin's office, but Mr. Rubine wasn't there, and I left them at Mr. Halpin's with the answer that I couldn't take them up for the price he—for the $7,000.00.

Q. I just want to ask you at this point, after you entered into this contract with Mr. Rubine of April 16, 1917, Exhibit P1, how long after that did Mr. Rubine take possession, or did he take possession of your— A. I understood from Mr. Halpin that he took possession right away.

Mr. Gross: I object.

The Court: Not what you understood.

Q. No, as to the property that you were to convey to him? A. He took possession right away.

Q. After the day of the signing of the contract? A. Yes, sir.

Q. You are referring now to the property described in Exhibit P2, the four lots at the Woodcliffe Land & Improvement Company? A. Yes.

Q. That is what he took possession of? A. Yes, sir.

Q. Well, now, then, after you returned these plans to Mr. Halpin—

The Court: What do you mean by taking possession?

The Witness: That he started to dig the foundation.

The Court: You know that, do you?

The Witness: Yes, sir.

Q. That is, he started to dig the foundation on those four lots? A. On the four lots; yes, sir.

Q. How much digging did he do on it? A. About a half, I think.

Q. What do you mean, a half? A. A half of the land.

Q. Half of the foundation? A. Yes; about a half of the foundation.

Q. Now, then, after you brought these plans back in July and left them at Mr. Halpin's, when did you again see Mr. Rubine? A. I didn't see him again until the latter part of August.

Q. And where did you see him then? A. Mr. Rubine and Mr. Halpin and another gentleman came up to my place of business.

Q. And where is your place of business? A. On Anderson Avenue, Fairview.

Q. And what took place that day? A. Mr.—they—Mr. Rubine told—when I saw them coming in, I said, "Why, it is about time to come to conclusion"; Mr. Rubine said, "We will get down to the bottom of it now." I says, "All right"; so, he says to me then, "well," he says, "I can't carry on the first proposition and neither the second; so the best thing we can do," he says, "is to settle it in cash." "Well," I said, "all right; let's hear what you got to say." So he offered $1,500.00 to settle. And I said, "No, nothing doing." I said, "By allowing the taxes

and what I am in arrear with the Woodcliffe Land & Improvement Company," I said, "I am willing to consent on $2,500.00." Then Mr. Halpin and the other gentleman that was with him tried to intercede and asked me to split the difference and make it $2,250.00; so I said, "All right, let her go."

Q. That is for who to get $2,250.00? A. I was to get $2,250.00.

Q. From whom? A. From Mr. Rubine.

Q. For what reason? A. For the land, and dropping the other propositions.

Q. For the settlement of this contract? A. For the settlement of that contract.

Mr. Gross: I object to that; he said for the land.

The Court: Yes; that is what he said. Find out if he meant that.

Q. What do you mean by "the land"? A. For the settlement of the agreement.

Q. Then what was done about it? A. Then he took his check book out and he started to make out a check. After, he stopped a while, and said, "Well, we got to deduct from the $2,250.00 what you are in arrear with the Woodcliffe Land & Improvement Company and the taxes." I said, "I have allowed it already. That is why I come down from $3,100.00 to $2,250.00."

The Court: You were going to convey him the land, were you?

The Witness: Yes, sir.

The Court: Proceed.

Q. Well, you were going to convey him what land? A. My equity that was in the plot on Bergenline Avenue and 30th Street.

Q. Your equity in this tract that your wife had in the Woodcliffe Land & Improvement Company? A. Yes, sir.

Q. And that was to settle the whole matter, is that correct? A. Yes, sir.

Q. Then you had an argument, you say, about the taxes and so forth; you said you reduced it from $3,100 to $2,250 on that account? A. Yes, sir.

Q. Then what was said when you said that? A. Then he said he wanted to reduce the taxes and what I had in arrear with the Woodcliffe Land & Improvement Company from the $2,250.

Q. Yes? A. Where I meant to reduce that from the $3,100.00.

Q. Well, then what was said after that? A. Then he said, "Nothing doing, nothing doing." I said, "Let us carry on the first proposition then. I am satisfied to carry on the first." He says, "No, I can't do it."

Q. And what did he do with this check? A. That was destroyed; he destroyed it himself.

Q. Now, did he say why he wouldn't carry out the contract? A. Because his partner wouldn't let him.

Q. Did he say who his partner was? A. Somebody by the name Grossman.

Mr. Mackay: Cross examine.

Cross examination by Mr. Gross:

Q. This last talk that you tell us about took place in August was at your house, or at your place of business? A. Yes, sir.

Q. In Fairview? A. Yes, sir.

Q. And you were to sell to Mr. Rubine, then, your property for $2,250.00 without an exchange of any kind, is that it? A. He wanted me to throw off the first agreement.

Q. And to buy your property without an exchange, without your taking in his property? A. Yes, sir.

Q. And you wanted $2,250.00? A. That is what I agreed upon.

Q. And they insisted that if they paid you $2,250.00 outright for your property, that you should pay all of the taxes and all the interest on the Woodcliffe Land & Improvement Company debt, didn't they? A. That was—we talked about that before we come to the conclusion of the $2,250.00.

Q. But they wanted that to come off the $2,250.00? A. He said it after, but I said that had come off from the thirty-one.

Q. But they wanted it off the $2,250.00. Is that correct? A. Yes.

Q. And you wouldn't let that go? A. No.

Q. Now, coming back to the first agreement. You say you met Mr. Rubine in Halpin's office some time in July, about that? A. In April when we signed the agreement, that was the first time I met him.

Q. When did you meet Mr. Rubine about carrying that agreement out? A. In April.

Q. When did you meet him about carrying it out? A. In July.

Q. The first time in July? A. That was the second time; not the first time; the first time in April.

Q. Yes. A. The second time in July.

Q. In July for the purpose of carrying it out? A. Yes, sir.

Q. And didn't Mr. Rubine insist at that time, the same as he did at this time at your place in August, that he wanted you to allow interest on the Woodcliffe Land & Improvement Company mortgage, and the taxes that were due and in

arrears on this property of yours? A. No, it was no such conversation.

Q. Well, would you have allowed it if he had asked you for it? A. Certainly.

Q. You would have? A. Certainly.

Q. And you are sure that this talk about buying your property for $2,250.00 was in August? A. I think it was in August.

Q. It wasn't before August, was it? A. I wouldn't say, I am not quite sure exactly when.

Q. Would you say it was in July? A. I don't think it was in July.

Q. Would you say it was in June? A. No.

Q. Mr. Rubine was there? A. Where?

Q. At your place? A. Yes.

Q. On this occasion? A. Yes.

Q. Mr. Halpin there? A. Yes, sir.

Q. And Mr. Barbash there? A. Yes, sir.

Q. And they sat down to write out a receipt, to write out a check, didn't they try to write out some sort of a check or agreement? A. Yes.

Q. And you gave them the paper on which to write it didn't you? A. I don't know that I did.

Q. Don't you remember that you did? A. No, I don't remember that I gave them any paper.

Q. But whatever was written was written right in your presence, wasn't it? A. I didn't see them writing anything.

Q. You didn't see them write anything? A. No.

Q. Weren't you examined in this case before the trial? A. Yes, sir.

Q. Before Mr. Charles Young, a Supreme Court Commissioner? A. Yes, sir.

Q. And weren't you asked this question?

Mr. Mackay: I object to this now; this testimony is taken, and can be offered in evidence.

The Court: He may ask him on cross examination.

Mr. Mackay: I think it should be offered in evidence. If they want it to use in cross examination, under the statute, it must be offered, if they want to use it?

The Court: No.

Mr. Mackay: You will grant me an exception?

The Court: Yes.

Q. And weren't you asked this question with respect to the carrying out of the original contract? "Was there anything spoken of at that time about the allowance of interest?" and your answer: "I don't think there was any such conversation." Do you remember that? A. Yes.

Q. Do you remember being asked this question: "If Mr. Rubine had asked you to allow the interest on account of the Woodcliffe Land Improvement Company's mortgage for any time after April 16, 1917, would you have allowed it?" and your answer, "I don't think he ever asked me any such question." Do you remember that?

Mr. Mackay: Now, if your Honor please, that was objected to on the ground that it called for a conclusion. I want to make the same objection, and also that it is not proper cross examination.

The Court: He is asking now whether he said that.

Q. Do you remember that? A. I remember it.

Q. Then, do you remember next being asked this question: "Would you have allowed it if he did ask you?" and your answer: "Of course not; I didn't have to do it." Do you remember that? A. I said I didn't have to do it.

Mr. Mackay: Same objection.

Q. What did you say? A. I said that I didn't have to do it.

Q. Then you mean to say that the question and answer as I read them to you are accurate; they are correct. Is that what you mean to say? A. That I don't know.

Q. You don't know? A. No.

Q. Do you remember being asked this question: "If he had asked you to allow any interest after April 16, 1917, would you have allowed it to him?" and your answer: "What should I allow it for?"

Mr. Mackay: Same objection; your Honor. I ask an exception.

Q. Do you remember being asked that question: and making that answer? A. I do.

The Court: You can only ask what questions he contradicts now. I don't understand that he has said anything about that, has he? I do not think you can use a deposition that has been taken except to contradict. If he has made a statement which is conflicting with that, you may cross examine him on that; but that is the extent you can use it. You may use the whole thing if you want to put it in evidence, but I understand the distinction to be that if the witness goes on the stand and makes a statement contradictory to that, you may ask him if he didn't say so in that deposition, the same as if he did not say so at some other time.

Mr. Mackay: Does the testimony stand or will it be stricken out?

The Court: Oh, it does not make any difference.

Q. Do you remember being asked this question: "Were you willing to allow Mr. Rubine interest on the Woodcliffe Land Improvement Company's mortgage from July 16 and—

Mr. Mackay: I object.

Q. (Continuing): and you answered to that, "No."

Mr. Mackay: I object to that on the ground that it is entirely irrelevant and incompetent at this time.

The Court: How is that in contradiction of anything that he said?

Mr. Gross: Well—

The Court: You may not refer to anything that he has sworn to before unless you want to use it in contradiction.

Mr. Gross: Well, it is really unimportant. I will offer this in evidence later, if it should become necessary.

Q. You called at Mr. Halpin's office quite a number of times? A. Yes, sir.

Q. In an attempt to close this exchange? A. Yes, sir.

Q. And in this exchange you were giving your property for Mr. Rubine's property, weren't you? A. Yes, sir.

Mr. Mackay: I object; it speaks for itself.

The Court: I suppose the agreement speaks for itself.

Q. In going to Mr. Halpin's office you passed near by your property several times, didn't you? A. Yes.

Q. You saw Mr. Rubine's men working there, excavating for the cellars? A. Yes, sir.

Q. And you say they excavated about half of the lots? A. Well, I—pretty near.

Q. And every time you called at Mr. Halpin's, did you have this agreement with the Woodcliff Land Improvement Company with you, Exhibit P2? A. Yes.

Q. Did you have that with you? A. Yes, sir.

Q. Did you ever get a deed from the Woodcliff Land Improvement Company for that property?

Mr. Mackay: I object to that as irrelevant and immaterial.

The Court: I suppose that is perhaps immaterial. I think you might ask him whether or not he had a deed to be delivered to your client.

Mr. Gross: It does not make any difference.

The Court: As I understand the law, if he has a deed to fulfill his contract, that is all that is required.

Mr. Gross: I can put it both ways.

The Court: The question really is whether or not—read the question.

(Question read.)

Mr. Mackay: I object to that as entirely incompetent, irrelevant and immaterial, and has no bearing on the case and does not affect the case one way or the other.

The Court: I will allow the question.

Mr. Mackay: You will grant me an exception?

The Court: Yes; take your exception.

A. No, sir.

Q. Did you ever have the Woodcliff Land Improvement Company make out the deed for this property to Mr. Rubine?

Mr. Mackay: I object to that on the same grounds.

The Court: I will allow it.

Mr. Mackay: I ask an exception.

The Court: You may take your exception.

A. Mr. Halpin was going to attend to all that.

Q. I am asking you, did you ever have one made out? A. No, sir.

Q. Did your wife ever have a deed for this property from the Woodcliff Land Improvement Company?

Mr. Mackay: I object to that on the same grounds as stated before.

The Court: You may answer that question.

A. She couldn't.

Q. Why? A. Because the property was bought on a contract.

Q. Is that why she couldn't get a deed for the property?

Mr. Mackay: I object on the same ground, your Honor.

The Court: Yes.

Mr. Mackay: I ask an exception. It simply calls for a conclusion, too.

The Court: Yes.

Mr. Gross: This is cross examination. I have a right to inquire—

The Court: You are going into a matter now, that is not cross examination.

Mr. Gross: He has testified, if the Court please, that he went to Mr. Halpin's office to close this transaction several times.

The Court: I have allowed you to ask him if he had a deed or his wife had a

deed. The question is, did she have a deed to this property?

The Witness: No.

Mr. Mackay: I object.

The Court: Note your exception.

Q. Did you ever have any other agreement with the Woodcliff Land Improvement Company than this paper marked Exhibit P2?

Mr. Mackay: I object as being irrelevant, incompetent and immaterial.

The Court: I do not think that makes any difference.

Mr. Gross: Well, I want to show that there has never been any modification of this agreement.

The Court: Well, suppose there has not been? I will sustain the objection.

Mr. Gross: I ask an exception.

Q. When did Mr. Rubine give you these plans that you spoke about? A. I think in July, the latter part of July.

Q. You are sure it was before they paid you a visit to your house in Fairview? A. Yes, sir; before.

Q. Sure about that? A. Yes, sir; before.

Q. How long before that? A. Oh, two or three weeks, I think.

Q. Two or three weeks before the visit to your house in Fairview? A. Yes, sir.

Q. And the idea then was to have you transfer to Rubine these lots without an exchange and that Rubine should build a house for you on the corner lot; was that the proposition? A. On what?

Q. This time when he gave you the plans, what did he give you the plans for? A. That was his proposition.

Q. I say, the proposition was to let the exchange go, and that you should transfer to him your lots, and that he should build a house on the corner lot for you? A. Yes; that is what he suggested.

Q. And that was two or three weeks before this visit to your house? A. About; yes.

Q. How long did you keep those plans? A. Two or three days, I think.

Q. And then returned them to him? A. Returned them, brought them down to Mr. Halpin's office.

Q. And left them at Mr. Halpin's office? A. Yes, sir.

Q. Mr. Halpin is a real estate agent? A. Yes, sir.

Q. And you had left your property with him for sale? A. Yes, sir.

Q. And let me ask you, have you ever been convicted of a crime, Mr. Caporale?

Mr. Mackay: I object; it is entirely irrelevant.

The Court: You may always ask that question.

A. I don't know.

Q. You don't know? A. No.

Q. Don't you know that you were convicted in this County of the crime of arson and an attempt to defraud two insurance companies, by setting fire to your house? A. Yes.

Mr. Mackay: I object.

The Court: You may take your exception.

Q. Do you know that? A. Yes.

Q. You know that, don't you? A. Yes.

Q. What did you mean a moment ago when

you said you did not know? A. I didn't mean anything.

Q. Didn't you know? A. Yes.

Mr. Gross: That is all.

Redirect examination by Mr. Mackay:

Q. Mr. Coporale, did you ever show this contract to Mr. Rubine, this Exhibit P2?

Mr. Gross: I object to that. This is not proper redirect, and is irrelevant and immaterial.

The Court: Objection overruled.

Mr. Gross: I desire an exception noted.

A. Yes, sir.

Q. You did show it?

The Court: He may answer.

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

Mr. Gross: I object. The written contract speaks for itself.

The Court: You cannot change a written contract, of course. He can show it if he wants to.

Mr. Gross: I ask an exception.

Mr. Mackay: I am endeavoring to show that Rubine knew of the existence of this contract, and read it.

A. He did.

Mr. Mackay: That is all.

William H. Halpin, direct.

WILLIAM H. HALPIN, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. Mackay:

Q. Mr. Halpin, where do you live? A. Woodcliff-on-Hudson.

Q. And what is your business? A. Real estate and insurance.

Q. And how long have you been located there? A. About twenty years.

Q. And do you know Mr. Rubine? A. I do.

Q. Do you know Mr. Caporale? A. I do.

Q. Do you recall the 16th day of April, 1917? A. Yes, sir.

Q. You were a witness to that contract? A. I was.

Q. There is nothing mentioned in the contract about when the transaction was to be closed or where it was to be closed; was anything said about that? A. It was supposed to be closed in my office on the first day of May.

Q. That was the understanding of the parties? A. That was the understanding of all parties.

Q. And on the first day of May, did anyone appear? A. Mr. Caporale came down.

Q. What did you do after he came there? A. Why, we waited a little while for Mr. Rubine.

Q. Did he show up? A. He did not.

Q. Did you communicate with him? A. I tried to communicate with him on the telephone, but was unable to that day.

Q. Did you inform Mr. Caporale? A. I did.

Q. He showed up that day? A. Mr. Caporale came down the third, and Mr. Rubine was not there.

Q. Did you telephone him again? A. I did, and he said he would be up on about the third.

Q. Did you endeavor to get in touch with Mr. Rubine? A. I did. I telephoned to him the next day again, and I think he said he would be up Saturday the following week.

Q. Did you notify Mr. Caporale? A. That I don't know; I think I did.

Q. Well, who showed up; anybody show up? A. No. I don't think anybody showed up that day.

Q. Well, was there any meeting later; did Caporale come up to your place after that? A. Caporale telephoned to me several times and called several times.

Q. Called quite often, did he? A. Yes.

Q. And did Rubine show up? A. No.

Q. And when was the first you saw Rubine again after the signing of the contract? A. Well, Mr. Rubine was in the building business, and he drops in occasionally now and then; he has no particular time.

Q. When was the first time you took up this matter with him, or saw him so that you could speak with him about it? A. It must have been about the tenth of May.

Q. And what did you say to him on that day? A. I told him that Caporale deal was past due. He said, "All right," he would take care of it in a day or two.

Q. Well, was it taken care of in a day or two? A. No.

Q. Did he make any special date with you? A. I think he did. I think he made a date, and Mr. Caporale did not keep it. One time I telephoned to him, if I ain't mistaken.

Q. When was that? A. That was along after the 15th of May.

Q. Along after the 15th of May? A. Yes; about the 16th or 17th of May.

Q. Was there any other arrangement after that? A. I got tired making dates.

Q. You did finally see Mr. Rubine, didn't you? A. Yes, I saw him.

Q. And saw Mr. Caporale? A. Yes.

Q. Were they together? A. Yes.

Q. And when was that? A. Why, I think the next time I saw them together, I took them up in my car to Mr. Caporale's place of business.

Q. When was that, do you recall? A. I don't really know. I think it was in June.

Q. The same year? A. Oh, yes.

Q. And was anything said in relation to this transaction? A. Yes; I was very anxious to have it closed up, and we went up there to see him.

Q. Yes. A. Then Mr. Caporale and Mr. Rubine almost decided to sell the lots and make a new deal, and get the old transaction off.

Q. I see. A. And we drew up a little agreement, and then when he was just about ready to give him a check, there was an argument about back interest and the unpaid taxes; so we busted up again.

Q. So it didn't go through? A. No.

Q. Did Rubine do anything about writing out a check? A. Yes, he did. He had a check all ready to write out; I think he had it written out.

Q. And what did he do with it? A. Why, he put it back in his pocket.

Q. I see. A. There seemed to be some misunderstanding about the back interest and the unpaid taxes.

Q. Were you preesnt when Mr. Rubine saw the contract of the Woodcliff Land Improvement Company? A. I don't think so.

Mr. Gross: That is, if he ever did show it to him.

Mr. Mackay: If he wasn't there and didn't know anything about it, why—

Mr. Gross: Rubine says he never saw it.

Mr. Mackay: That you can prove when you get your hearing.

Q. Do you know whether or not Rubine took possession of the Caporale property? A. Rubine started excavation there.

Q. When did he start? A. Well, he started some time, I think it was in May.

Q. Some time in May? A. Yes.

Q. How much excavating did he do? A. Oh, I should judge he took out, probably, two cellars.

Q. Two cellars? A. Yes.

Q. Did you draw this contract, Exhibit P-1, Mr. Halpin? A. Yes, sir.

Q. That you had typewritten? A. Yes, sir.

Q. And do you know why this was put in relative to the Caporale property, excepting a balance of $6,900.00 due to the Woodcliff Land Improvement Company? A. That was the agreement between Mr. Caporale and Mr. Rubine.

Q. Do you know why that was put in, or why that was mentioned, $6,900.00? A. That was the balance that was due the Woodcliff Land Improvement Company on this contract.

Q. And was that stated so at that time? A. I believe so.

Q. You were present, then, at that time? A. I was.

Mr. Mackay: Cross examine.

Cross examination by Mr. Gross:

Q. Mr. Halpin, you say you drew this contract? A. Yes, sir.

Q. And with reference to this $6.900.00 item; do you know whether the Woodcliff Land Im-

provement Company contract was mentioned, or was it merely said that so much was due the Woodcliff Land Improvement Company as a lien? A. So much was due the Woodcliff Land Improvement Company.

Q. Were you present at every meeting between these people at your office? A. What is that?

Q. Were you present at every meeting between these people at your office? A. I think I was.

Q. Did you ever see Caporale show Rubine this Woodcliff Land Improvement Company contract? A. No.

Q. In this contract, Mr. Halpin, the purchase price of the Rubine property is set forth at $14,850.00, subject to a $10,000.00 mortgage, and Caporale was to give back a mortgage of $1,750.00 on that property. Is that right? A. Mr. Rubine was to give back a purchase money mortgage for $1,750.00.

Q. You mean Mr. Caporale was to give to Mr. Rubine? A. Yes.

Q. How was the balance of the purchase money to be paid? A. Those lots were taken in exchange.

Q. After the first of May, when did Mr. Rubine first come to your office? A. Mr. Rubine was building in my neighborhood, and he was in my office almost every day.

Q. After the first of May? A. No; not after the first of May. He was through about the first of May, and then he was building down in Jersey City.

Q. After the first of May, when was it that he was at your office? A. He didn't get up there until pretty near the middle of the month, I don't think.

Q. Were his men working on these lots before

he came? A. Some of them, yes; I think Mr. Rubine was sick at that time.

Q. You learned that when you telephoned to his house, didn't you? A. Yes.

Q. And that is why he didn't come to your office? A. Well, that is one of the reasons, I believe.

Q. Then, when he did come, did he meet Mr. Caporale there? A. No, Mr. Caporale was not there that day.

Q. Did he make an appointment to meet Mr. Caporale there? A. Yes; he left that to me, and I thought it best to go up and see him.

Q. To see Caporale? A. Yes.

Q. And when was that? A. I couldn't give you the exact date; but it was either the last of May or the first of June.

Q. Well, wasn't it after the first of June? A. It might have been a few days; I couldn't say exactly.

Q. Was that the time when this exchange was spoken of? A. To have Mr. Rubine purchase the Caporale property at that time.

Q. Did you see Mr. Rubine give Mr. Caporale a set of plans? A. Mr. Rubine left a set of plans in my office, and I gave them to Mr. Caporale.

Q. Rubine didn't give Caporale any plans that you saw, did he? A. He left them there.

Q. Left them with you? A. Yes.

Q. But at this visit to the Caporale house when you say that Mr. Rubine took out some checks or a check, that was the sale of the property outright that was spoken of, wasn't it? A. Yes.

Q. And was there anything said prior to that, at any time, about the interest on the mortgage or taxes on the Caporale property? A. Mr. Caporale had his last receipt from the company.

Q. Yes. And for what amount was that? A. I do not remember now what the amount was.

Q. Do you know how old the receipt was? A. I guess it was over a year old.

Q. And was this at the visit to his house? A. No, that was down in my office.

Q. When? A. When we first drew up the contract.

Q. And was there, at that time, anything spoken about the interest on the mortgage and the taxes in arrears? A. Why, the interest and the insurance and the taxes were to be considered; I believe that is specified in the contract.

Q. Just as mentioned in the agreement? A. Yes.

Q. Now, after that, was there any talk about these taxes and mortgage interest? A. No.

Q. Don't you remember on one occasion Mr. Caporale absolutely refusing to apportion any interest on the Woodcliff Land Improvement Company mortgage or pay the taxes in arrears, and claimed that it was up to Mr. Rubine to pay them? A. That was the time we were drawing the new contract, up to his place in Fairview.

Q. And was that mentioned in connection with this original agreement, marked Exhibit P1? A. Yes.

Q. How many times did you go over to Mr. Caporale's house? A. Once.

Q. Who was with you? A. Mr. Rubine and Mr. Barbash.

Q. And was there any writing done on that occasion? A. Yes; they drew up a little agreement between themselves, and we were going to settle the matter up right there and then.

Q. Who did the writing? A. Mr. Barbash wrote it.

Q. Did you see him write it? A. I did.

Q. Was Mr. Caporale there? A. Yes.

Q. Did he see him write it? A. Yes.

Q. He gave them the paper for the writing? A. I think Mr. Caporale gave us a piece of blank paper to write. We didn't have any with us.

Q. Now, so as to fix the date if we can, I show you this paper and ask if that was the paper that was written on in Mr. Caporale's presence? A. Yes, that's the paper.

Q. Does that refresh your recollection as to the date? A. Yes.

Q. What date was it? A. June 26th.

Q. It wasn't in August? A. No, I thought it was June the first. I was not sure.

Mr. Gross: I ask that this be marked for identification.

Marked Exhibit D1 for identification.

Q. And this was the sheet of paper given to Mr. Barbash by Mr. Caporale? A. Yes, sir.

Q. Now, did the people meet again, Mr. Caporale and Mr. Rubine, after this visit to the Caporale house? A. I don't think so; not to my knowledge.

Q. Don't you remember, Mr. Halpin, on or about the 15th or 17th of May, Mr. Rubine and Mr. Caporale met at your office for the purpose of trying to arrange for the closing of this transaction; Mr. Caporale then and there refusing to recognize any obligation on his part to pay the arrears of interest and the tax arrears on his property? A. No, I don't remember.

Q. You don't remember? A. No.

Q. You wouldn't say that it was not so? A. No, I wouldn't.

Mr. Gross: That is all.

William H. Halpin, redirect.

Redirect examination by Mr. Mackay:

Q. Mr. Halpin, you said in answer to a question by counsel, Caporale had his last receipt from the company? A. He had his last receipt from the company when we drew up the contract.

Q. You mean that he produced it? A. Yes, sir.

Q. And showed it? A. Yes, sir.

Q. And showed it to you? A. Yes, sir.

Q. And to Mr. Rubine? A. I think Mr. Rubine saw it.

Q. Was that the receipt on account of a payment? A. That was a receipt on account of a payment; that is where we get a receipt, balance due.

Q. So that shows that it was bought under contract?

Mr. Gross: I object to that, as it is not proper redirect examination; and, in the second place, the receipt itself would be the best evidence of what it showed.

The Court: The fact that Rubine saw the receipt, that is competent; but what was on the receipt, you can not show by somebody else. I will sustain your objection.

Mr. Mackay: I ask an exception.

The Court: Yes.

Q. I show you a receipt, Mr. Halpin; I believe you recognize it? A. Yes, that's the same receipt.

Q. That is the one he showed you? A. Yes, sir.

Q. Is that the one that Mr. Rubine saw? A. That is the same receipt. I don't know whether Mr. Rubine—I guess Mr. Rubine saw it.

Q. He was right there with you at the time? A. Yes, sir.

Mr. Mackay: I will offer that in evidence, your Honor.

Mr. Gross: No objection.

Exhibit P4.

Joseph Meeks, President.
Hamilton V. Meeks, Treasurer & Vice-President.
Clarence G. Meeks, Secretary.

141

North Bergen, N. J., Apr. 1, 1914.

Mrs. Rose Caporale,
Fairview,
Cliffside P. O., N. J.

To The Woodcliff Land Improvement Co. Dr.,
Secretary's Office,
212 Union Street, Town of Union, N. J.,
Address, Weehawken P. O., N. J., Lock Box 88.
600
Telephones: 601 Union
602

Balance due bills rendered for int.	146.00
To monthly payment due on lots 21, 23, 22 & 20 bk 1 Map E	
To int. due on Bal. of Prin. $7,300.00 36.50	36.50
	$182.50

Received Pay't 5/4/14

THE WOODCLIFF LAND IMPROVEMENT CO.,
Per F. A. B.

All payments should be sent to 212 Union Street, Union Hill, N. J.

The Court: It may be marked.
Marked Exhibit P4.

Recross examination by Mr. Gross:

Q. Mr. Halpin, are you sure that Mr. Rubine saw that receipt? A. Why, I think we went over it; yes, before we made the contract. But we had to get the last balance due the company and we got it from the last receipt.

Q. Well, will you be certain that he saw the receipt, or did you compute the amount? A. Well, that I couldn't say. I know we had the receipt in the office. Mr. Caporale showed us the receipt.

Q. Are you certain that Mr. Rubine read it? A. I don't know; I think he did. It is a long time ago.

By Mr. Mackay:

Q. You say you think he did see it? A. I think so.

By Mr. Gross:

Q. You say you wouldn't be certain about that? A. Well, the receipt was there.

Q. It was there, but you are not sure whether Mr. Rubine read it or not, are you? A. I didn't see him read it.

Mr. Gross: That is all.

WILLIAM S. MANSFIELD, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. Mackay:

Q. Mr. Mansfield, where do you live? A. Woodcliff-on-Hudson.

Q. And what is your business? A. Real estate.

Q. How long have you been in the real estate

business? A. Real estate alone about three and one-half years.

Q. And have you bought and sold property in the vicinity of where this particular property is located?

Mr. Gross: Which property do you refer to, Senator?

A. No, not in that vicinity.

Q. Nearby? A. I have sold property nearby.

Q. How near by? A. Oh, that block between Palisade and Bergenline, on that block.

Q. That is how far away from the property in question? A. Half a block.

Q. Half a block away? A. Yes, sir.

Q. And do you know where these properties are? A. Yes, sir.

Q. Do you know where the Caporale property is located? A. Yes, sir.

Q. And how far away is that from the Rubine property? A. It is—it is three long blocks; you mean the—yes, it is three long blocks.

Q. So it is really all in the neighborhood, both properties are in that neighborhood? A. Yes.

Q. And you say you sold properties in the block? A. I sold property in the block that the lots are located in. That is not on Bergenline, but on 31st Street.

Q. And are you familiar with the values of the property there? A. Yes.

Mr. Gross: That is a conclusion. I think the witness ought to qualify.

By Mr. Gross:

Q. You sold property on 30th Street? A. Yes.

Q. That is how far from where these vacant lots of Caporale's? A. Well, I sold a house and lot there this winter; nearly a block away.

Q. Nearly a block? A. Yes.

Q. Do you know where the Caporale property is situated? A. Yes.

Q. Where? A. 30th Street and Bergenline Avenue, southeast corner.

Q. Bergenline Avenue is a busy thoroughfare, isn't it? A. Yes; but not along there, there is not so much business yet.

Q. And the property that you sold is in somewhat of a different character of neighborhood, isn't it? A. Well, it is on a side street, and that is on Bergenline Avenue.

Q. Exactly. So that the property you sold is of a different character then, the Bergenline Avenue property? A. Yes.

Q. And how about the property that you say you sold near Rubine's property? A. I didn't say I sold any near his property.

Q. You didn't sell any near his property? A. I have sold houses around there. Well, I sold two lots not two weeks ago one block away from there.

Q. Did you sell any there in May of 1917? A. I sold houses around in that neighborhood.

Q. Near Rubine's property? A. Well, within a half a block.

Q. And do you know where Rubine's property is situated? A. Yes.

Q. Where? A. On the southeast corner of 30th Street and Broadway.

Q. And what kind of buildings are there on that property. A. Three story brick.

Q. Is that stores? A. Yes; two stores in that building, particular building.

Q. Did you ever sell any property of that character?

Mr. Mackey: I object to that.

The Court: Yes; you may find out what his qualifications are.

Mr. Mackay: You mean exactly that character?

The Court: I think the character is not the same; the character is of a general character. Proceed.

The Witness: I do not understand the question.

The Court: Read the question.

(Question read.)

The Court: Put the word "general" in there.

A. Not in Woodcliff.

Q. Broadway is a business thoroughfare? A. Yes, sir.

Q. And these other houses that you say you sold are what kind of houses? A. Private houses.

Q. Situated on side streets? A. Side streets generally.

Q. And they are not in a business neigborhood? A. No.

Mr. Gross: That is all. I submit, if the Court please, that this man is not at all qualified to place any values on either property.

The Witness: If you will let me say a few words?

The Court: Yes.

The Witness: There has been very little property, if any, sold on Bergenline Avenue in the last eight or ten years.

The Court: How do you know anything about the value then?

The Witness: Well, we have got to judge from what they are asking, and what other property is around there nearest to it.

The Court: Well, have you sold any building around in that vicinity of the general character of these houses?

The Witness: There's very few houses of this kind in Woodcliffe now; that's the idea. You see there's very few houses of this kind in Woodcliffe.

Q. You are in the real estate business three and one-half years? A. I have been in the real estate business three and a half years exclusively, but I have been buying and selling for the last fourteen years.

Q. You have been selling chewing gum before three and a half years ago, haven't you? A. Well, while I was in the candy business I was still in the real estate business too.

Q. And you were selling shoe laces too, weren't you? A. No, sir. I am not—

Mr. Gross: That is all.

By Mr. Mackay:

Q. So that, in your fourteen years, you have a knowledge of the value of buildings themselves, have you?

Mr. Gross: I object.

A. Yes, sir.

Q. You have sold buildings of that character, that is, you have been able to fix the value of buildings of that character? A. I have been interested in buildings, and collect rents from different buildings of that character, and I value from the rents that are—that the buildings bring in, value the—put a value on the building. That is the way the buildings are generally valued in that neighborhood from what rents they bring in, and that's about the only way they

can be valued in a place like that where there is no buildings selling.

Q. And what, in your opinion, is the value of the Rubine property?

Mr. Gross: I object to that, if your Honor please.

The Court: I do not think he is qualified as an expert as far as the building is concerned. There might be some question about the lots. He has never bought or sold any property of this general character.

Mr. Mackay: He knows that none has been sold, but that what little has been sold, he has had something to do with it.

The Court: If none has ever been sold, there is never any market value.

Mr. Mackay: If there is property sold there, and only one or two purchases, that gives them some market value; that is some evidence.

The Court: But he has not sold them.

Mr. Mackay: Well, as to the land, he is qualified to testify.

The Court: I say you may ask him some further questions as to the land. He has disqualified himself so far as the house is concerned.

Mr. Mackay: I think his fourteen years experience as a real estate man has qualified him to testify to the value of buildings.

The Court: Not to those in that vicinity. You may ask him any further questions about the lots. He may be qualified as far as the lots are concerned.

Mr. Gross: Your Honor was engaged at the time I cross examined him with regard to those.

The Court: No; I heard what was said. You may ask him when it was he sold, and where they were, and how far away from the lots, and find out something more about it.

Q. Where were the lots that you sold? A. I sold—I sold lots on Park Avenue later; that is so lately as two weeks ago.

Q. How far away? A. Four blocks away.

Q. And what kind of lots were they? A. I have lots for—

Q. No, no; what kind of lots were they? A. They were for private dwellings.

Q. And how were they as to character compared with this property in question, as to the land? A. They wasn't so valuable.

Q. They weren't as valuable? A. No.

Q. And where else did you sell property? A. I sold lots on 33rd Street.

Q. How far away was that? A. Well, about the same distance, a little more than that.

The Court: When did you sell those?

The Witness: A year, two years ago, nearly two years ago.

Q. And how did they compare? A. They brought $2,500.00.

The Court: No; that wasn't asked.

Q. How did they compare? A. They wasn't for business property. Bergenline Avenue is for business property. This is not business. There has been no business property sold on Bergenline Avenue.

Q. And what other properties have you sold? A. Two-family houses and one-family houses by the dozen, you might say.

Q. Near where? A. Well, I sold one two-family

house in that block between Bergenline and Palisades this winter. I sold one in the next block last year, a two-family house.

Mr. Mackay: Now, if your Honor is of the opinion that the evidence as to the value of the entire property including the building, is not admissible, I want to ask him a general question. I don't want to ask him piece-meal about the thing.

The Court: I do not think he is qualified as an expert so far as the building is concerned. If you want to use him as an expert on the vacant lots, I think he is qualified, or shown enough knowledge on that subject to allow him to testify.

Mr. Mackay: And I will ask an exception.

The Court: Yes; you may take your exception.

Mr. Mackay: And I will withdraw him temporarily, Mr. Halpin.

WILLIAM H. HALPIN, recalled as a witness on behalf of the plaintiff, testified as follows:

Direct examination by Mr. Mackay:

Q. Mr. Halpin, are you familiar with the land values and building values? A. Yes, sir.

Mr. Gross: I will admit Mr. Halpin's qualifications.

Q. What is the value, in your opinion, of the Rubine property? A. They are worth about $2,000.00 a lot.

Q. What is the value of the entire property of Rubine that Rubine was going to convey to Caporale under this contract, including the lots and buildings as a whole? A. Well, $9,500.00 in-

cluding the corner; one of those parcels of ground is a corner lot.

Q. And what do you make the total? A. About $9,500.00.

Q. That includes what? A. Includes the four lots.

Q. And what valuation did you place on the buildings?

Mr. Gross: Well, I understand—are you testifying with respect to the Rubine corner on Broadway and 30th Street, Bergenline Avenue and 30th Street.

Q. You are testifying as to the Caporale property? A. Yes.

Q. Oh, that is the property that Caporale was to convey to Rubine? A. Yes.

Q. That you value at $9,500.00? A. Yes.

Q. What about the other property that Rubine was going to convey to Caporale? A. That house, that plot is 60 feet deep by 40 feet front, and the house is 20 foot by 45.

Q. Yes. A. That property is worth about $17,000.00.

Q. That includes the land? A. The land and the building.

Q. And the Caporale property $9,500.00? A. $9,500.00 at the present time. As you know, there is not much sale for vacant lots, now.

Q. What value was it— A. Well, that was in exchange, and he was asking $10,000.00 for the lots at that time, and they were asking a little more for the building, too; a trade is always a thing that is going up.

Q. So you fixed the Rubine property at a value, and it has retained about that same value for the past year? A. Just about; yes.

Q. And the Caporale, about the same value? A. Just about the same.

Q. For the past year? A. Yes.

Mr. Mackay: That is all.

Cross examination by Mr. Gross:

Q. Mr. Halpin, at the time of this exchange, you figured this was about an equal break, didn't you?

Mr. Mackay: I object.

A. Yes, sir.

Q. And in this agreement the price of the Rubine property is put in at $14,850.00?

Mr. Mackay: I object, your Honor.

The Court: He may answer.

Mr. Mackay: I ask an exception.

The Court: Yes; note your exception.

Q. And in this contract you put in the price fixed for the Rubine property as $14,850.00? A. Yes, sir.

Q. Is that the price that you considered that property worth at that time?

Mr. Mackay: I object to that as irrelevant.

The Court: I will allow it.

Mr. Mackay: I ask an exception.

(Question read.)

Mr. Mackay: I object; that price was not fixed in the contract.

The Court: You may answer the question.

Mr. Mackay: Exception.

The Court: Yes.

A. This is the price that both agreed upon.

The Court: Did you fix that price or not?

The Witness: No; I did not fix that; they fixed that between themselves.

Q. Would you, as a real estate man, consider that that was a reasonable price for the Rubine property? A. Yes.

Q. You didn't consider it worth any more at that time, did you? A. No, sir.

Q. And with respect to the Caporale property, the price is fixed at $10,000.00; do you consider that that was a reasonable price for the Caporale property at that time? A. Yes; in a trade.

Q. And would you, as an expert, say that the exchange between these parties of their equity was an equal exchange?

Mr. Mackay: I object to that as incompetent.

The Court: I do not think that would be proper. You may cross examine him as to the value of the various properties, and whether he has put values on them. It is immaterial whether he thought it was right or not.

Q. In your opinion, as an expert, Mr. Halpin, about May, 1917, you would say the Rubine property was worth about $14,800? A. Yes.

Q. And you would say that the Caporale property was worth about $10,000.00? A. Yes, sir.

Q. And those prices are about all that the fair value of these respective properties would be; is that correct? A. Yes, sir.

Mr. Gross: That is all.

Redirect examination by Mr. Mackay:

Q. You said a few minutes ago, Mr. Halpin, that you figured the market value of that property was $17,000.00? A. Yes, sir.

Q. And you said it has been that for the past year? A. Yes; that is correct.

Mr. Gross: He said at the present time.

The Court: He said also for the past year. How do you make those two statements coincide if in April, 1917, you say it was worth $14,800, $14,850.00; now, you say it is worth $17,000.00; how do you make the difference?

The Witness: It costs a great deal more than that to build a house of that kind at the present time on account of the scarcity of material and labor; it is worth $2,000.00 more than it was last year.

The Court: Then the $17,000.00 is figured at the present time?

The Witness: The present time.

Q. Well, what would you say as to the price in September, 1917?

Mr. Gross: I object to that if the Court please; the price in September is irrelevant. It is the time that the contract should have been performed that the inquiry should relate to; not to some subsequent time.

The Court: Yes; that is the time.

Mr. Mackay: Well, is that the time, your Honor?

The Court: Why, certainly; that is what you bring your suit for; that there was a breach, unless it was extended.

Mr. Mackay: Well, the breach was extended until September when he disposed of the property, and there was no opportunity of his getting it.

The Court: As it stands now, there seems to have been a failure at the very time—

Mr. Mackay: Yes; but under the evidence in the case, your Honor, there is proof of extensions apparently from time to to time until the parties finally met.

The Court: You may find the valuation in September.

Mr. Mackay: In June and September.

The Court: Yes; in June and September.

Mr. Gross: I ask an exception.

Q. What would you say in June, 1917, as to the price? A. Well, it was about the same as we sold it for, $14,850.00. That was the price that was agreed upon at that time in May.

Q. Well, but what was its value; had it increased in value between that time?

Mr. Gross: I object.

The Court: I will allow that.

Q. (Continuing):—and June 26th?

Mr. Gross: The witness has already stated that it was the same.

The Court: He may ask him again.

A. I do not know; I think it would be about the same; one month wouldn't make much difference.

Q. This was between the first of May and June 26th, almost two months? A. About the same.

Q. And between June 26th and the month of September? A. Well, it might have gone up ten per cent.

Q. Ten per cent.? A. It might have; yes.

Q. What would that be in money, how much money? A. That would be—

Q. $1,400.00? A. About $1,400.00.

Q. In September? A. Yes.

Q. And then, how did it increase after that? A. It stayed just about that way. It is getting worse all the while. You cannot build anything now in the brick line.

Recross examination by Mr. Gross:

Q. Mr. Halpin, you don't know of any change between the values in May and September, do you? A. Well, there isn't much; there is some, though.

Q. What is that? A. There is some. There was quite a lot of improvements put on that house from the first of May to September; fire escape put on it; bulkheads; clothes lines on the roof; paper, decorated and so forth.

Q. Have you any personal knowledge of any change in value there? A. Well, the price of material—

Q. (Continuing) :—from June to September? A. The price of material goes up from June to September quite some on some articles, brick and steel.

Q. Are you sure they went up from June to September, 1917? A. Yes; going up right along.

Q. Are you sure that they were going up during this time? A. No, no, sir.

Q. Are you sure that they went up between June 26th and September? A. That's 1917?

Q. Yes. A. No; I ain't sure.

Q. You are not sure of that? A. No.

Q. You would not be sure then, Mr. Halpin, that the value of this property increased in between June and September of 1917, would you, in these two months? A. It hasn't gone up much, no; I was thinking of 1918 when you spoke about the high cost of material, this year.

Q. Well, now, referring back to 1917, would you say that there was any change between June

and September? A. Change in the price of material?

Q. Change in the value of these buildings. A. Well, there was quite some improvements made on the buildings.

Q. Well, eliminate the improvements. Outside of the improvements, would you say that there was any change? A. No.

Q. Or would you say that the value was the same? A. Pretty near the same, yes.

Mr. Gross: That is all.

By Mr. Mackay:

Q. Well, when did this price go up that you are speaking about? A. Well, the price goes up on a building when there is a demand for it.

Q. Wasn't there an increase in the price of materials between April, 1916, and September, 1917? A. Sure there was. I said about ten per cent. increase.

Q. And that ten per cent. increase could apply to this building, couldn't it? A. Well, it could.

Q. And you say what improvements were made? A. There were decorations and fire-escapes put on the building.

The Court: Is there any need of going into that?

Mr. Mackay: Because it is in the contract that that was to be done, and that was an advantage which Caporale was to get, which he lost.

The Court: If it is in the contract, you may ask about it.

Q. And what else? A. Why, all those were fulfilled. I believe there was hot water heaters put in the kitchen, and the halls were decorated,

clothes poles were erected on the roof of the building, and I guess that is all.

Q. To what extent would that increase the property? A. That would tend to increase it to a certain degree, yes.

Q. How much? A. Oh, probably four or five hundred dollars.

Q. And when were those improvements made? A. Some time during June.

Q. 1917? A. I believe so, yes; in fact, they may have been complete in May.

Mr. Mackay: That is all.

By Mr. Gross:

Q. Mr. Halpin, these improvements are referred to in this contract, aren't they? A. I believe they are.

Q. And when you placed the value of $14,850.00 on this property, you took into consideration those improvements, didn't you? A. I did not place the value on there; that was the value that was placed on it by Mr. Rubine and Mr. Caporale.

Q. I mean when you testified here before as to the value of the Rubine property, you took into consideration those improvements, didn't you? A. Yes.

Q. As if those improvements had been made; that was referred to in the contract?

Mr. Mackay: I object; he had nothing to do with that.

A. I had nothing to do with it.

Q. You testified before on cross examination, Mr. Halpin, the value of the material you had in mind in any way changing the value of this property were changes that took place in 1918;

isn't that it? A. 1917 material advanced in price also.

Q. I asked you before if there was any change in the value of the materials between June and September, during those two months, that you thought would increase the value of this property, and you said you didn't think so; is that correct? A. Oh, the price of material has gone up since May, 1917; there is no question about that.

Q. Well, from June to September?

Mr. Mackay: He has answered you; he said since May.

Q. From June to September the price of materials has gone up so as to change the value that you gave us, or would you say it was the same? A. Why, no; it would be more, because the values have gone up since May, 1917.

Q. I am talking of the period between June and September. A. Between the first of June and the first of September?

Q. Yes. A. Well, things have gone up from that time, yes.

Q. Well, you testified before that you thought the value would be about the same, that you had in mind the advance in 1918, which is correct? A. 1917.

Q. Well, I mean, would you say— A. 1917; there isn't any June, 1918, so far as I know of.

Q. And you said that you did not consider the advance between June and September would in any way change the value of this property? A. It would change it some.

Q. That would be very slight, wouldn't it? A. Well, not so very; brick is going up, steel and all the material that is used in constructing and building of that kind has gone up.

Q. But your value of the Rubine property on the first of May, the time when this contract was to be carried out, or during the month of May, was that it was worth only $14,850?

Mr. Mackay: No, I object to that.

The Court: Well, the jury has heard what he said.

By Mr. Mackay:

Q. You didn't fix any value in the contract, did you, Mr. Halpin? A. They made the price themselves.

Q. Yes. A. Of course, I helped them a little bit.

Q. And you say since the first of May right on continuously month by month, prices have gradually increased and increased? A. They are; yes.

Mr. Mackay: That is our case, your Honor.

Mr. Gross: If your Honor please, I move for a non-suit upon the ground that the plaintiff has failed to prove that he was able to carry out this agreement according to its terms. The plaintiff is required to show that he could deliver a title to this property in exchange for the defendants' property free and clear of all encumbrances. According to his own case, he has failed to show that he was possessed of that ability. If your Honor will read this contract, even assuming that he had the title, he could not carry that contract out, that is, carry out the contract in suit, because of the existence of all of these encumbrances by way of restrictions against the property by him to be conveyed.

In the second place, he has failed to show a proper tender of an instrument to convey this title so as to put the defendant in default, either by himself or by anybody on his behalf. The title to this property as far as the evidence shows, has never been conveyed by the Woodcliff Land Improvement Company, and it must therefore be assumed that the plaintiff never had a legal title to it, and he never procured an instrument to convey a title from the Woodcliff Land Improvement Company to this day. I submit that under the proofs of the plaintiff, that a nonsuit should be ordered.

The Court: I will hear you.

Mr. Mackay: Why, as to a tender, that, of course, is unnecessary where the defendant disposes of the property, under the case in 75 Law, Wolff against Meyer, 75 Law, Page 181, that was referred to in 76 Law, Page 574. That is well settled. This title was to be delivered on the first. The proof is very clear in the case that Caporale went there. Halpin says he went there, and Rubine did not show up, and did not make any excuse for not showing up, and did not make any attempt to show up, and that when they finally did meet, Rubine suggested another proposition which Caporale considered and rejected, and they considered a second or third proposition. They were about writing out a check, and Caporale said no, then Rubine refused to write out a check, and then Caporale said, "What about this original agreement; I want to settle it; I am ready to settle it," and Rubine refused; that is

the evidence. He said he refused, "he refused to give me the deed," and then the subsequent proof which comes within the case in 76 Law, that which does away even with the tender, Wolff against Meyer, 75 Law, 181, and then referring to 76 Law, page 574.

The Court: How about your party being able to carry out the terms of his contract.

Mr. Mackay: It has been shown by sufficient evidence in this case that Rubine had knowledge that this property was owned by Caporale under contract, and that the matters would be adjusted on the day of closing, and that the receipt was shown to Halpin, and that Rubine was there and present, and there is evidence in the case to show that Rubine knew what the transaction was, and then the additional evidence of Rubine actually going on the property and excavating it and taking actual possession of it.

The Court: Well, does that relieve your client from having a deed free from encumbrances?

Mr. Mackay: He didn't have to have a deed. He was to make a settlement and an adjustment of these matters.

The Court: Doen't the contract call for a deed to be delivered at some certain time?

Mr. Mackay: Yes, but—

The Court: Purchase price of $10,000.00. The party of the second part declares that the plot is absolutely free and clear of all encumbrances except a balance of $6,900.00 due the Woodcliff Land Improve-

ment Company, and unpaid taxes will be settled by him at his own cost and expense.

Mr. Mackay: It doesn't mention deed.

The Court: Free from encumbrances.

Mr. Mackey: Except $6,900.00, and these matters in dispute, and he was ready to do it; but the proof in this case is that the defendant always refused to make any settlement.

The Court: Yes; what did the other party have to do if your man was not ready to convey? I think that is a jury question. I shall refuse to non-suit at this time, but it is a question whether your man cannot sit down and do absolutely nothing, and say to the other party, you have got to do your part, and I will not fulfill mine.

Mr. Mackay: Mr. Caporale went there on May first prepared to settle and dispose of the matter.

The Court: How could he be in a position to convey property free and clear from encumbrances—

Mr. Mackay: It doesn't say free and clear from encumbrances. It says, free and clear from encumbrances, except; but Mr. Rubine made no exception on that score. Mr. Rubine has made no objection that Mr. Caporale wasn't able to carry out the contract. Mr. Rubine read the agreement fully, saw the agreement and read it; that is in evidence; knew what he was doing; saw the receipt; went there and excavated, and after excavating, after seeing the contract, refused to do anything. It was not the question of what Caporale could do or couldn't do. Rubine had knowledge of all

this; was taking it with this knowledge, and yet refused to do it, and so it fell through.

The Court: The difficulty there is going to be in this case is this: The contract, and the only right he has in the property has restrictions as to certain use of this property.

Mr. Mackay: Which Rubine saw.

The Court: That does not make any difference.

Mr. Mackay: The breach is on the part of Rubine because Rubine didn't raise any objection because of anything like that.

The Court: Let us hear what you have to say.

Mr. Gross: Assuming that Rubine—

The Court: You need not argue any further. I refuse your motion.

Mr. Gross: I want to make it clear, fully, my point. Assuming that Mr. Rubine the very next moment after this contract was drawn, said, "I refuse to carry it out." Before the plaintiff could recover, he must show ability to carry it out on his part. Otherwise, he has not been damaged. He could not perform. Now, could he perform? All that he had in his possession was this mere contract right subject to these restrictions. If he couldn't perform, it didn't make any difference what Rubine did. Rubine went on the property in good faith, excepting to take the title.

The Court: Suppose your client comes on and deliberately refused to do anything with it and threw up the contract. Would

the other party be obliged, before he could recover, to go and pay up his title?

Mr. Gross: No; but he would have to show that he was able to perform.

The Court: That is a jury question. I do not think you are entitled to your motion to non-suit.

Mr. Gross: Your Honor will allow me an exception.

The Court: Yes, take your exception.

Mr. Gross: I call Mr. Meeks.

CLARENCE G. MEEKS, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination by Mr. Gross:

Q. Mr. Meeks, what position do you hold with the Woodcliffe Land Improvement Company? A. I am treasurer.

Q. And have been treasurer for how long? A. Two or three years.

Q. And are you the Clarence G. Meeks who signed on Exhibit P2 (referring)? A. Yes; I was secretary at that time.

Q. You were secretary then? A. At that time.

Q. The Woodcliffe Land Improvement Company was the owner of an extensive tract of land in the vicinity of and including this property described in the Caporale contract? A. Yes.

Q. And had it, prior to this agreement marked Exhibit P2, conveyed any lots or plots of that tract?

Mr. Mackay: I object; entirely irrelevant.

Mr. Gross: I offer to prove that this company, owners of this extensive tract

of land of which the Caporale lots were part, conveyed away about all the lots with like restrictions as in P2.

The Court: Yes; I do not think it makes any difference, and overrule it.

Mr. Gross: I ask an exception.

Q. You notice in this agreement certain restrictions, Mr. Meeks?

Mr. Mackay: I object; it speaks for itself.

The Court: I will allow it; you may answer that question.

A. Yes, sir.

Q. Has your company ever waived any of these restrictions? A. No.

Mr. Mackay: I object to that; it is irrelevant.

The Court: I will allow that.

The Witness: We have not.

Mr. Mackay: I ask an exception.

The Court: Yes.

Q. Has your company ever given a deed to Rose Caporale?

Mr. Mackay: I object.

Mr. Gross: Let me finish.

Mr. Mackay: I know; but he talks so quickly.

Q. Did your company ever give any deed to Rose Caporale, or to Caporale, or to anybody described in that contract?

Mr. Mackay: I object; it is irrelevant and entirely incompetent, and contains a combination of answers.

The Court: You may answer the question.

A. We have not.

Mr. Mackay: I ask an exception.

Q. Can you tell us when Mrs. Caporale in her lifetime made the last payment on account of this contract?

Mr. Mackay: I do not see that this is material, your Honor; I object to it.

The Court: I think it is material as to the amount due at that time.

Mr. Mackay: I want my objection noted, and ask an exception.

The Court: Yes.

A. I have the ledger pages here; I can tell approximately of my own knowledge. Some time in December, 1914.

Q. That was the last payment made on account of this contract?

Mr. Mackay: Same objection.

Q. You say about December, 1914?

The Court: Yes.

Mr. Mackay: Exception.

A. Yes.

Q. And can you tell us how much is due your company on account of that contract?

Mr. Mackay: I object as entirely irrelevant.

The Court: You may answer that as to the amount due at the time this contract was executed.

Q. Has there been any payment made since December, 1914?

Clarence G. Meeks, cross.

Mr. Mackay: I object as entirely irrelevant.

The Court: He may answer.

A. There has been no payment since that time.

Q. Can you tell us how much is due on the contract?

Mr. Mackay: I object.

A. $6,950.00 and interest from July 1, 1915.

Mr. Mackay: Is that at the present time?

The Witness: No.

The Court: At that time.

Q. And that is the amount due now?

Mr. Mackay: I object on the same grounds, your Honor, and ask an exception.

The Court: With interest, he said.

Mr. Gross: That is all.

Cross examination by Mr. Mackay:

Q. Do you have a stamp, Mr. Meeks, for your business? Do you stamp the name of the Woodcliffe Land Improvement Company? A. This is sent out by our accountants; the certified public accountants who audit our books each year. I suppose that is why it was sent out that way.

Q. By your authority? A. Yes.

Q. That is officially from your place? A. Yes, that came from our office.

Q. That Rose Caporale, is that the same person referred to that you were speaking about? A. Judging from the lot numbers and the amount of the principal, I should say it was.

Q. Referring to the same property in this case? A. Yes.

Mr. Mackay: I ask that that be marked for identification.

The Court: Yes; mark it.

Marked Exhibit P5 for identification.

Q. Is it your practice, Mr. Meeks, the practice of your company to accept the balance of contract monies in advance of the time specified in the contract?

Mr. Gross: I object to that as to what the practice of the company is. It is improper cross examination, irrelevant and immaterial.

The Court: No, I will allow that.

Mr. Gross: I take an exception.

The Witness: Will you ask the question again?

(Question read.)

A. We have done so, and we would be willing to do so in almost every case that tender was made us.

Mr. Mackay: That is all, Mr. Meeks.

Redirect examination by Mr. Gross:

Q. This was sent to Rose Caporale on the first of January? A. I assume so. We sent out each year letters similar to that to each one of the people on our books for the purpose of checking up our accounts.

Recross examination by Mr. Mackay:

Q. I show you a check, Mr. Meeks, was that check paid to your company? A. Apparently.

Q. You received the money on it? A. Apparently.

Q. That was what date? A. July 21, 1915.

Q. That was on account of this particular contract? A. I do not know.

Q. Did you have any other contract with Mr.

Caporale? A. We may have had; I am not sure as to that.

Q. Have you your books here? A. I have the Rose Caporale account here.

Q. Well, can you tell? A. I cannot tell from that whether there was a payment credited to her at that time.

Q. Can you tell whether there is any other account besides this one? A. I do not think there is; I couldn't say positively.

The Court: You can tell by looking at your account whether or not that check has been credited?

The Witness: I can whether it has been credited to this account.

Q. Well, July 21 1915? A. July 20 there was $278.25 credited.

Q. $278.25? A. Apparently, yes.

Q. Was that by check? A. It does not say.

Q. This check is $278.00 even? A. Why, the balance of the interest to that date was $278.25. Apparently, Mr. Caporale came in and paid $278.00, or had drawn a check and assumed that that was the amount of the interest, and our bookkeeper evidently told him there was 25 cents more, and he probably paid it in cash, payment made July 20, 1915.

The Court: Paid it up to when?

The Witness: Up to date.

The Court: Up to this date?

The Witness: Apparently; no, that paid the interest up to July 1, 1915.

The Court: Was there any payment made after that?

The Witness: None.

Q. What is that next item you have there? A. This is a charge.

Q. Charge of what? A. Interest.

Q. Interest against— A. From July first to August first.

Q. You enter the credits under a certain heading called "credit," don't you? A. No.

Q. And below the $278.00 and 25 cents, you have the total of the credits? A. Yes, that is a total of the credit on account of interest on that page—

Q. Well, that is the interest, is it? A. Yes, that is the principal account, and this is the interest account.

Q. What is the total of interest paid? A. The total of interest, apparently, was $842.25, during the entire time of the contract.

Mr. Mackay: Yes; that is all.

By Mr. Gross:

Q. But the interest is due from July 1, 1915? A. Yes.

Q. And no payment on account of the principal was made since December, 1914, is that it? A. December 7, 1914, was the last payment made on account of the principal, that was $50.00.

Q. No interest been paid since July, 1915?

Mr. Mackay: That is what he said.

The Court: That is what he said.

Mr. Gross: That is all, Mr. Meeks.

If the Court please, I offer in evidence a transcript taken from the tax records of the Township of North Bergen. It is agreed by Mr. Mackay that I might use this transcript instead of the original books because the Town Collector said he would have to hire an automobile to bring down the City's records. He has sworn to this as a correct transcript from the original books

showing the taxes due on this property of Caporale's, as shown by the contract.

Mr. Mackay: I have no objection; we consent.

Marked Exhibit D2.

The Court: Now, what does it show?

Mr. Gross: Taxes for 1915, $97.54, including 50 cents for the cost of advertising for sale. 1916 and including interest 1916, $87.11; tax, $9.28 interest; $96.39, total. 1917, $97.40, $2.59 interest, and $99.99 total.

Mr. Mackay: Now, if your Honor please, I meant to object to it before he started to read it. I have no objection, I consented that this copy might be used to save the trouble of bringing these big books over here, but I objected and I told Mr. Gross I would object to the relevancy of the testimony, and of course, I would like to have my objection on the record, if your Honor will permit; that it is incompetent, irrelevant and immaterial, and does not in any way affect the plaintiff's case.

The Court: Yes, proceed. I think it is competent to have him testify as to the facts, to show what the taxes were.

Mr. Gross: And we also offer it to show the condition of his title at that time.

Mr. Mackay: I contend that the taxes has absolutely nothing to do with this case under the claim as alleged. The taxes, if any, were to be adjusted. It is immaterial what they were.

Charles Barbash, direct.

CHARLES BARBASH, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination by Mr. Gross:

Q. Mr. Barbash, what is your business? A. Real estate.

Q. Have you built any houses? A. I did.

Q. Built any houses in Woodcliff-on-Hudson? A. Yes, I did.

Q. And how long have you been a builder and in the real estate business? A. Fifteen years.

Mr. Mackay: Fifty?

The Witness: Fifteen.

Q. You met Mr. Caporale? A. I did.

Q. When did you first meet him? A. I met him two years ago.

Q. In connection with this transaction? A. No, sir.

Q. When did you first meet him in connection with this transaction? A. In the latter part of June, 1917.

Q. And where did you meet him? A. In his place of business.

Q. Who was there? A. Mr. Rubine, Mr. Halpin and myself.

Q. And did you have any conversation with him? A. I did.

Q. Just tell us what it was? A. Mr. Rubine tried to buy the property from him for cash and Mr. Caporale asked $2,500.00. Finally they agreed on a certain price; I do not remember whether it was $2,000.00 or $2,200.00.

Q. Which property was this? A. Property on Bergenline Avenue, and I asked Mr. Halpin he should draw the papers, and Mr. Halpin told me I should draw the papers. So I started to draw the papers, and when I come to the amount, he

said $6,900.00, sixty-nine hundred and some odd dollars.

Q. Who said that? A. Mr. Caporale. Then I said, "How about interest and taxes?" He said, "Interest and taxes I want Mr. Rubine to pay." So I said, "This would be the same thing as you wanted before on the first transaction, the exchange that you wanted to pay the interest and taxes." He said, "Yes, I want it also on the first transaction. I don't want the first transaction unless he pay the interest and taxes." I said, "Is the reason you don't want to pay because you haven't got any money and you may make some arrangements to take out a mortgage on the property?" He said, "No, I wouldn't pay the interest and taxes." He didn't do anything.

Q. What interest and taxes were spoken of? A. Of his property on Bergenline Avenue and 30th Street.

Q. For what time? A. During the period of time—I don't remember the period. I think—it was mentioned at that time for a couple of years, I don't remember exactly, on Bergenline Avenue.

Q. On the Bergenline Avenue lots? A. Yes.

Q. Did Mr. Caporale at that time show Mr. Rubine any contract? A. No.

Q. Did he show him any receipts? A. No, sir.

Q. Do you remember exactly the date when you were there? A. I remember it was before July, because I left a couple of days after for the country for July.

Q. You said that you drew up, or were going to draw up some sort of agreement, and I show you Exhibit D1 for identification and ask you whether that is the paper (referring)? A. Yes, sir.

Q. And why wasn't that completed? A. On ac-

count of Mr. Caporale didn't want to pay the interest and taxes.

Q. Does that paper bear date the same day that you were there? A. Yes, sir; it must.

Q. And who gave you the paper to write on? A. Mr. Caporale from a pad.

Q. Was there any paper signed on that occasion? A. No, sir; Mr. Rubine had a check prepared. I think he signed it, but when Mr. Caporale refused to pay the taxes and interest, he took the check back.

Q. Did you ever see Mr. Caporale after that? A. I don't remember.

Q. Don't you remember whether you saw him again or not? A. I don't.

Q. Is that all you know about this transaction? A. That's all that happened in my presence.

Q. Oh, was this paper marked Exhibit D1 for identification written in Mr. Caporale's presence? A. Yes, sir.

Q. Was Mr. Halpin present also? A. Yes, sir; all at the table, a round table, when this paper was written.

Q. And have you bought and sold property in Woodcliff-on-Hudson? A. I did.

Q. In the neighborhood of Bergenline Avenue or Broadway and 30th Street? A. I sold this plot to Mr. Rubine in connection with Mr. Halpin, and I sold one plot in 28th Street and Broadway.

Q. Well, did you ever sell any buildings in Woodcliff of the same character? A. That is, business buildings you mean?

Q. Yes. A. Yes, sir.

Q. How far from the corner of the property at the corner of Broadway and 30th Street? A. Two blocks.

Q. Is the neighborhood there the same as this neighborhood? A. This neighborhood is better.

Q. Where was the other? A. On 28th Street, near Broadway and 28th Street.

Q. It was on the same Broadway? A. The same Broadway.

Q. Except it was two blocks down at 28th Street? A. Yes.

Q. Were the buildings there the same character of building? A. They were two-story buildings.

Q. Have you sold any other buildings, Mr. Barbash, of this same general character in Woodcliff-on-Hudson? A. No, sir.

Q. Have you built any? A. I told you I built on 28th Street and Broadway.

Q. And have you sold any lots in a neighborhood of such general character? A. The lots I sold to Mr. Rubine on 30th Street.

Q. These same lots? A. The same lots.

Q. Do you know the cost of building a house? A. I think I do.

Q. And have you been in the habit of estimating from plans the cost of erecting buildings? A. I did.

Q. And for how many years have you been doing that? A. Nine years.

Q. Have you also heard of other sales of property in this same locality at the corner of Broadway and 30th Street? A. No, there wasn't any.

Q. There weren't any sales? A. No.

Q. How about the location of the Caporale property at the corner of Bergenline Avenue and 30th Street. Have you known of any sales of lots in that location? A. Yes, sir.

Q. Have you sold any? A. No, sir.

Q. Well, who did you get your information from? A. There is a real estate man by the name of McKenna sold three lots on 31st Street and Bergenline Avenue.

Q. That is one block from this property? A. Yes, sir.

Q. How does the neighborhood there compare with the property on 30th Street? A. 30th Street is considered better neighborhood.

Q. 30th Street is? A. Yes, sir.

Q. And any other sales that you know of in that neighborhood? A. Yes, sir. On 34th Street, northwest of Bergenline Avenue.

Q. The northwest corner? A. Yes; 50 x 100 was sold by Chief of Police Mauss.

Q. Do you know those sales? A. Yes.

Q. Have you been following up the sales of property in Woodcliff-on-Hudson? A. I have tried to.

Q. And made a study of it? A. Yes, sir.

Q. Can you tell us the value of the Rubine property on or about the first of May, 1917?

Mr. Mackay: I object.

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

Mr. Mackay: He has already stated all he knew, and he is in the same class as Mansfield.

The Court: You may ask him with regard to the dwellings or buildings; he says he sold one.

Mr. Mackay: That does not qualify him.

The Court: That he just simply sold one building would not qualify him as an expert.

Mr. Gross: If your Honor please, this man has made a study of following the market, and needn't have made sales himself as long as he has heard of sales of the same general character.

The Court: Yes; but he does not know anything about it; that somebody told him

is not evidence. You see he does not know it himself. He would not have to buy it or sell it himself, but he would have to have personal knowledge of it. That somebody told him is not actual knowledge.

Mr. Gross: If a man has made a study of the subject and—

The Court: You cannot consider a study of the subject to hear what somebody else has said. That is not any study of the subject; that is gossip.

Mr. Gross: I understand, your Honor then to rule that the man's qualifications—

The Court: Yes, he hasn't qualified as an expert.

Mr. Gross: I ask an exception.

The Court: Yes, you may take your exception.

Mr. Gross: That is all.

Cross examination by Mr. Mackay:

Q. Were you present when the first contract, Exhibit P-1, was signed, Mr. Barbash? A. No, sir.

Q. I think you said, Mr. Barbash, that Mr. Rubine wanted to buy these particular lots which he had excavated? A. Yes, sir.

Q. And that was in the latter part of June? A. Yes, sir.

Q. And the thing was talked over thoroughly, was it? A. Made an appointment with me to be there.

Q. Well, I mean it was talked over at that time? A. No, they made an appointment with me to be there with Mr. Halpin, at Mr. Caporale's place at that time.

Q. Yes; and you went there? A. I went there.

Q. And you talked the thing over? A. Yes, sir.

Q. Surely; and you talked about the price? A. Yes, sir.

Q. And the money that you would give Caporale? A. Yes, sir.

Q. And you talked about how much Caporale owed on the property? A. Yes, sir.

Q. The balance he owed the Woodcliff Land Improvement Company? A. Yes, sir.

Q. How much was there then that was owing to the Woodcliff Land Improvement Company? A. $6,900.00, with interest.

Q. And Rubine was right there? A. Yes.

Q. And heard that? A. Yes, sir.

Q. And who was it wanted to get the deed if that went through, Caporale or Rubine? A. We didn't come so far.

Q. You had not decided who was to see the Woodcliff Land Improvement Company about the deed? A. This arrangement about the taxes, when Mr. Caporale refused to pay the taxes and interest, we stopped right there.

Q. Then you stopped? A. Yes, sir.

Q. Somebody said Rubine started to write out a check for $2,250.00? A. He did. He started to write a check.

Q. He was writing a check for $2,250.00? A. No, sir; a check for $175 or $200 as a deposit. I don't know the amount; the amount is stated in the contract.

Mr. Gross: You mean that is mentioned in this paper, Exhibit D-1?

The Witness: Yes, sir; in this paper.

Q. But no agreement was reached? A. No agreement was reached.

Q. Have you told us everything that was said at that time? A. Unless I can refresh my memory I don't remember any more.

Q. But, as far as you remember, everything that took place you have stated? A. This was the substance; we were there about an hour and a half. I won't say. We kept quiet all the while.

Q. I see. You don't keep quiet as a rule? A. Well, sometimes I do.

Q. Were you there an hour and a half? A. I should judge we were there an hour and a half.

Q. You had a long conversation? A. I do not know. We had a drink there.

Q. What did you have to drink?

The Court: That is immaterial.

Mr. Gross: I offer this paper in evidence.

Mr. Mackay: I object to it.

The Court: I do not think it is competent.

Mr. Gross: I offer it to corroborate the witness, in contradiction of the plaintiff's story, where he was asked on cross examination whether a paper wasn't written there, and he said, "No"; corroboration of Halpin's testimony, and of the witness that there was such a paper written.

The Court: Let me see the paper.

Mr. Gross: It is written on the plaintiff's own stationery. He said he never gave them a paper, and there was nothing written.

Mr. Mackay: Caporale didn't say there was nothing written; he said he didn't recall whether there was or not; he didn't recall giving a paper.

The Court: That is my recollection. I do not understand that he denied it, as I recall the testimony.

Mr. Gross: He said he didn't give any paper, there was no writing done. Then, with respect to the date, he testified it was in August. This is used to corroborate the witness who said it was on the 26th of June when this paper is dated. I want the jury to see this.

Mr. Mackay: You cannot introduce a proposed new agreement that was never carried out.

Mr. Gross: I am not offering it for that purpose.

The Court: If the witness says there was no such paper written that day, I will allow it. The other witness fixed the date by looking at a paper; I think that is as far as it ought to go.

SAMUEL H. RUBINE, the defendant, called as a witness in his own behalf, being duly sworn, testified as follows:

Direct examination by Mr. Gross:

Q. Mr. Rubine, where do you live? A. 251 Claremont Avenue, Jersey City.

Q. How long have you lived in Jersey City? A. About fifteen years in Jersey City.

Q. What is your business? A. Real estate and building.

Q. And how long have you been in that line? A. Well, I have been—oh, about twenty years, I guess.

Q. Do you know Caporale? A. Yes, sir.

Q. You are the man that signed this agree-

ment marked P1 for the exchange of these properties of yours with Mr. Caporale? A. Yes, sir.

Q. And who drew this paper? A. Mr. Halpin, that is, Mr. Halpin's clerk; it was done in his office.

Q. And you signed it? A. Yes, sir.

Q. And Caporale signed it in your presence? A. Yes, sir.

Q. Now, referring to Exhibit P2, contract between Rose Caporale and the Woodcliff Land Improvement Company; did you ever see that paper (referring)? A. No, sir; I did not.

Q. I call your attention to Exhibit P4 and ask you whether you ever saw that receipt (referring)? A. No, sir; I never did.

Q. Were any recipts ever shown to you from the Woodcliff Land Improvement Company? A. No, sir.

Q. Did you at any time know, or have any idea, that Caporale was not the owner of and had legal title to the property at the corner of 30th Street and Bergenline Avenue? A. No, sir.

Q. Now, after this agreement P1 was signed, what did you do with respect to the Caporale property? A. Well, we were supposed to pass the title May first, or thereabouts. I was sick; I did not come around, and I sent word to Halpin. I didn't come around there until about the 7th, and Mr. Caporale was not there, and arrangements were made for a day or two after, and Mr. Caporale came there and I was there and Mr. Halpin. And when we came to talk it over, I asked him if he could deliver it free and clear. He says, "No. I wasn't going to pay the taxes and interest"; he was going to transfer the equity. He says, "My intentions were that Mr. Rubine was to take the property subject to the taxes and interest," and I says, "Now, Mr. Caporale, that isn't the agreement." I had already started to

excavate on the land at that time. "That isn't what we have agreed on." He says, "That isn't the way I want to do that." I says, then, "It is off." He says, "All right."

Q. Did you see him after that? A. About then I took my men right off the job.

Q. How often were you on the job? A. I am around there about every day. Sometimes I miss a day or two; the jobs are scattered.

Q. And you say you took your men off the job as soon as you found Caporale would not comply with the contract? A. I told the men to stop.

Q. You say you saw Caporale again in June? A. I saw him in June.

Q. Where? A. In his place of business.

Q. Who called you there? A. Mr. Halpin and Mr. Barbash had made the arrangements for me to go there.

Q. And do you remember any paper being written there? A. Yes.

Q. In Mr. Caporale's presence? A. Yes, sir.

Q. And that was written after you had some talk? A. We talked something about buying the property.

Q. Just tell us what was talked about? A. When we come there, I told Caporale that I would like to buy the property, because I have invested so much money, plans and excavating and surveying the property and all like that; and he wanted $2,500.00 for his—for the property. I says, "No, that's too much." So we agreed on $2,250.00. Well, that was settled, and I was going to give him a check of deposit, and I was going to take title in a week or two, and when we come to the talk about being free and clear, he kicked up again, and that's the same thing again. He says, "I ain't got no money to pay no taxes. What do you think I am selling it for?

You buy it just as it is. I want $2,250.00 just as it is." I says, "Well, nothing doing then."

Q. Was there anything said on that occasion about the first contract? A. No, sir. Nothing was said about that contract at all.

Q. Was, at that time, any paper written out? A. Yes, sir.

Q. Who gave the paper to write on? A. Mr. Caporale.

Q. And was the paper dated on the day that it was written? A. Mr. Barbash dated it; he wrote it. The 26th, that is about the time we were there.

Q. Showing you D1 for identification, is that the paper that was written out that day (referring)? A. Yes, sir. That is the paper that was written out that day.

Q. Did you, at that time, know that Mr. Caporale had not the title to this property? A. No, sir.

Q. Did you know that the Woodcliff Land Improvement Company still owned the title?

Mr. Mackay: I object to this, your Honor.

The Court: I will allow that question, if he knew.

A. No, sir; I did not.

Mr. Mackay: I ask an exception.

Q. And this $6,950.00 due the Woodcliff Land Improvement Company, how did you believe that was secured?

The Court: You may tell what was said.

Q. Did you know that $6,950.00 was due the Woodcliff Land Improvement Company on a contract?

Mr. Mackay: I object; that is leading, your Honor.

A. No, sir.

The Court: The question is objectionable as to form; not otherwise.

Q. Did you ever meet Mr. Caporale besides the occasions that you already have mentioned? A. I do not recollect ever meeting him before.

Q. Well, did you ever meet him after the talk of June 26th? A. No, sir.

Q. Did you meet him after June 26th? A. No, sir; I did not.

Q. Did you meet him during the month of August? A. No, sir; I did not.

Q. He testified that you gave him some plans. Did you give Mr. Caporale any plans? A. I did not. Mr. Halpin had my plans there.

Q. And did Mr. Halpin give him those plans, if you know? A. I do not know.

Q. Did you ever make any proposition to Caporale with reference to buying his property and building a house for him on his corner lot? A. No, sir.

Q. Did you ever tell Mr. Halpin that he should ever make such a proposition as that? A. No, sir; I did not.

Q. Did you ever get your plans back from Mr. Halpin? A. I don't think I did. I think it is in Mr. Halpin's office yet.

Mr. Mackay: I don't like this; he is leading.

The Court: Oh, I do not think it makes any difference. I do not think it is material.

Q. Did you ever know Mr. Caporale ever had those plans of yours? A. No, sir; I did not.

Q. For what building were those plans? A. For Bergenline Avenue and 30th Street.

Q. For the very property on which you had already commenced excavations? A. Yes, sir.

Q. Was it for one building, or more? A. No, sir; six buildings.

Mr. Gross: That is all.

Cross examination by Mr. Mackay:

Q. So that you did have plans, eh? A. Yes, sir.

Q. And this day that you called at Mr. Caporale's in June, who started the conversation, you or Caporale or Halpin? A. Mr. Barbash and Mr. Halpin, I suppose.

Q. Well, you suppose? A. Well, I didn't start it.

Q. Well, who did? A. Barbash did.

Q. And how did Barbash happen to come up there? A. Well, I guess there was some arrangement between Barbash and Halpin.

Q. You had nothing to do with that? A. No.

Q. Then Barbash started to talk to Caporale about the— A. Yes, sir.

Q. —about the statement of the matter, eh? A. About me buying his lots.

Q. In other words, you came up to decide about carrying out this contract, didn't you? A. No, sir.

Q. You didn't? A. No.

Q. About this contract matter: This contract was all off? A. Mr. Caporale said in Halpin's office, he ain't going to live up to this agreement; he ain't going to pay the taxes and he ain't going to pay the interest.

Q. This was all done away with? A. That was all done away with.

Q. You quit on that, did you? A. Mr. Caporale quit on it; I didn't follow him up.

Q. Didn't you say that you personally objected to carrying out the transaction? A. No, sir.

Q. Did you ever personally? A. No, sir.

Q. Did you have any man that was interested with you at all? A. Not as a partner.

Q. How was he interested? A. I don't know; I haven't anybody as a partner.

Q. Who was it, Mr. Grossman? A. He does the plumbing work.

Q. So that you and Grossman did have an interest together? A. He does work for me.

Q. So you did mention Grossman's name to Caporale? A. I did not, sir.

Q. Where does Grossman live? A. In Jersey City.

Q. Caporale never heard of him that you know of, did he? A. No, sir.

Q. So you did finally come up to Mr. Halpin's office? A. Yes, sir.

Q. And you came up early in May, did you? A. About the 15th of May, or the 13th; thereabouts; about the middle of May.

Q. About the middle of May? A. The first time I was there, about that; but Mr. Caporale was not there. I was there about the 7th or 8th.

Q. Why didn't you show up on the 1st of May? A. I was sick.

Q. What was the trouble? A. I had a bad cold. I was on the jobs all the time, and I had a bad cold, and I couldn't get out.

Q. When were you taken sick? A. A couple of days before the first; I don't exactly know.

Q. How long were you sick after the first? A. About two or three days.

Q. And what day was it that you first went up there? A. I guess about the 7th I was in Halpin's office.

Q. Do you remember the day? A. I do not remember.

Q. You cannot recall that? A. No, sir.

Q. And after that? A. Well, I went to Halpin, and he says, "What you going to do about the Caporale matter?" I says, "All right, make arrangements, I am ready."

Q. What day was that, the 15th? A. About the 12th or 13th, probably the 15th.

Q. You are not sure of the date? A. No, sir.

Q. You suggested then to Halpin to get hold of Caporale? A. Yes, sir.

Q. And settle the matter up? A. Yes, sir.

Q. And who was preparing your deed? A. A lawyer by the name of Tackella of Hoboken.

Q. Halpin wasn't to do that for you? A. No, sir.

Q. Well, you did meet Caporale, then? A. Yes, sir.

Q. At the office? A. At Halpin's office.

Q. And you talked about this principal contract, did you? A. Yes, sir.

Q. And who started the talking, you or Halpin or Caporale? A. That I couldn't say.

Q. That you don't remember? A. Don't remember.

Q. What did you say to Caporale? What was the first thing you said to Caporale? A. Well, I said to him to clear up the taxes he owed, three years' taxes on it; then he owed interest to the Woodcliffe Land Improvement Company since July, I think it was July, 1915. I wanted to see if the receipts were paid out to date, and then he said, "I am not supposed to pay them. We exchanged equity. I am not supposed to pay that."

Q. Yes. You don't remember who spoke first, but did you speak first? A. I do not remember

whether I spoke first; but that is the argument I had with him.

Q. From what you say now, you apparently did not start it going? A. I do not know as I started it.

Q. You do not remember the entire conversation? A. I remember what I spoke.

Q. You do not remember the entire conversation, do you? A. No.

Q. But you remember then the first thing you recall about this meeting was—now, just let us have it again? A. The first thing I remember, I come for the purpose of arranging for closing that title.

Q. No, the first thing that you recall about that meeting when you first met Caporale was your saying something. What was said, now? A. I spoke about Caporale paying the taxes and interest which he owed to the Woodcliffe Land Improvement Company since July, 1915. I wanted to see the receipts for them.

Q. Now, did you know how far back he was in his payments? A. I knew that it was in July, 1915.

Q. That he made the last payment? A. That he owed them interest since that date.

Q. On the contract? A. I didn't know anything about the contract. I presumed it was a mortgage.

Q. You didn't know what it was? A. I didn't know what it was. I knew there was interest on $6,900.00.

Q. And you said something about taxes? A. Yes, sir.

Q. What taxes? A. There was three years' taxes due on it.

Q. Now, then, you were shown a receipt or a

check for July, 1915? A. I was never shown a receipt.

Q. You said you were told that interest was paid up to July, 1915? A. I was told that interest was paid up to July, 1915.

Q. Who told you that? A. Mr. Halpin, at the time the agreement was drawn.

Q. And Mr. Caporale was there at the time, was he? A. Yes, sir.

Q. Now, at the time you drew up the agreement, did you say? A. Yes, sir.

Q. At the time in May when you were to close the thing up? A. I never said how much he owed.

Q. I just asked you what the conversation was, and what you remembered about it, and you said the first thing you remembered was about asking about the interest? A. I spoke about the interest; nobody told me anything about it.

Q. That was about May 15th? A. Yes, sir.

Q. I do not want you to go back to the other point; I want you to stick to May 15th; that was the time you spoke about the interest, wasn't it? A. Yes, sir.

Q. Then, had you already spoken about it before on April 16th? A. No; but I knew of it.

Q. You knew of it? A. Yes, sir.

Q. How did you know of it? A. Mr. Halpin told me.

Q. That was when Caporale was there? A. That was when Caporale was there.

Q. Then you knew that in April at the time of signing the contract? A. Yes.

Q. Then you didn't say anything about it then? A. I concluded he would pay it when it was time to pass title.

Q. Then there wasn't any argument about it? A. No.

Q. And you knew all about it at the time of the signing of the contract? A. Yes.

Q. Why didn't you bring it up? A. Why, I didn't think it was necessary.

Q. You thought it was necessary the very next time you met him? A. That was the time of taking title.

Q. Then you thought you would spring something on him then?

Mr. Gross: I object to that.

The Court: Proceed.

Q. Well, you had read the contract, hadn't you? A. Yes, sir.

Q. And the party of the second part further agrees that any taxes against the property will be settled by him at his own cost and expense? A. Yes, sir.

Q. Well, why should there be any argument about it? A. I only asked him for the receipts and he refused. He says, "I ain't going to pay it; it ain't up to me to pay it."

Q. That was your agreement, wasn't it? A. It was plain to me.

Q. Then what was your idea of meeting him later?

Mr. Gross: I object to that, if your Honor please. It is an unwarranted assumption of fact. This man required the plaintiff to live up to his contract, that is all.

Mr. Mackay: He says he refused.

Mr. Gross: Certainly.

Q. Then, I say, why did you meet him later? A. Because I had already invested money in excavating, as well as about $230.00, about $135.00 in—

Q. If you thought there was going to be some argument about the interest on April 16th, the date that you signed the contract? A. I didn't think of no arguments then.

Q. Yes, you said you knew then the fact about the interest? A. I knew he owed, but I did not think there would be any argument about it.

Q. You didn't ask for permission to dig the cellars, did you, and you didn't hesitate on that, did you? A. No; I wanted to save time.

Q. But on May first you had a cold? A. Well, I just happened to catch cold then.

The Court: We will take a recess at this point (4:55 P. M.) until Monday morning at 10 o'clock.

Monday, April 22, 1918.

SAMUEL H. RUBINE, recalled as a witness in his own behalf, testified as follows:

Cross examination by Mr. Mackay:

Q. Mr. Rubine, I understood you to say that you had been in the real estate business for twenty years? A. In the real estate and building line for about twenty years.

Q. Located where? A. Jersey City and Bayonne, West New York; but I was located in Jersey City for the last fifteen years.

Q. And doing business around Woodcliffe and all those places? A. Yes, sir.

Q. Buying property in Woodcliffe and building? A. Yes, sir.

Q. Buying property on this particular map, the map of Woodcliffe-on-the-Hudson? A. Yes, sir.

Q. You have bought property in that? A. Yes;

I bought these lots and built the buildings; that is not the only lots I bought.

Q. From other people than Caporale? A. Yes, sir.

Q. That is on the map?

Mr. Gross: I object to that as immaterial and irrelevant.

The Court: Why do you consider it necessary or proper?

Mr. Mackay: The question may arise, your Honor, as to whether or not he knew of this restricted tract, as to the restrictions on it.

The Court: I do not think that can make any difference.

Mr. Mackay: Whether there were restrictions or not?

The Court: No, whether he knew of it or not. As I understand this contract, as I interpret it, it is a contract by which your client was to convey a piece of property free of encumbrances, and that he was bound to do whether he knew of these or whether he did not.

Mr. Gross: The Court of Errors determined that in 62 New Jersey Law.

The Court: There is not a question about the contract.

Mr. Mackay: Well, if the particular matters are not set forth, and there is a general clause there as there is, any other charges will be settled.

The Court: Oh, no. He says in so many words he is to convey the property free of encumbrances.

Mr. Mackay: Now, then, the evidence

shows that this was talked over by the parties and that Rubine knew.

The Court: It doesn't make any difference. You have a written agreement, and you must live up to that agreement. It cannot be changed. If there is a modification, you would have to go into the Court of Chancery to modify it.

Mr. Mackay: I ask an exception.

The Court: Yes; take your exception.

Mr. Mackay: That is all.

Redirect examination by Mr. Gross:

Q. Mr. Rubine, you testified that you told Mr. Caporale that you wanted to buy his property outright in June because you had already gone to the expense of drawing plans and having the property surveyed. Did I understand you to so testify? A. We spoke that over at the time we came to his place of business.

Q. And had you already had the lots excavated at that time? A. I had half of it excavated.

Q. I show you a plan and also a survey, and ask you if those are the plans and that the survey that you had made? A. That is the survey.

Mr. Mackay: I object to that.

The Court: Objection sustained.

Mr. Gross: I ask an exception.

Q. You testified that you had sold the property at the corner of Broadway and 30th Street in September? A. Yes, sir.

Q. To George Rein? A. George C. Rein, Catskill.

Q. And how much did you sell the property for?

Mr. Mackay: I object to that as irrelevant.

The Court: Well, has it not been held that what the property sold for may be offered in evidence, not as showing the value of the property, but showing, tending to show matters to be considered by the jury? I think that has been held in a case, as I recall. I will allow that.

Mr. Mackay: I ask an exception.

The Court: You may take your exception.

A. I sold that house in particular for $14,500.00.

Q. Did you do all of the work called for in this contract, P1 required to be done by you on the property which you were to convey to Caporale? A. Yes, sir.

Mr. Gross: If the Court please, I desire to offer in evidence the plans and survey which the witness has identified.

The Court: The Senator objected, and I sustained his objection.

Mr. Gross: Your Honor will allow me an exception?

The Court: Yes; take your exception.

Q. Who was it called you to Caporale's place in June? A. Barbash came to me and we went—

Mr. Mackay: I object.

Q. Barbash and who?

Mr. Mackay: I object to anything that he and Barbash did involving Caporale.

The Court: Who called him there? That is your question, is it?

Mr. Gross: Yes, sir.

The Court: How does it make any difference who called him there unless you go

a step further and show that he went there by something that the plaintiff did?

Mr. Gross: I want to explain his conduct in going there; how it came that real estate men were trying to interest him in the purchase of the property.

The Court: No, I do not think it is competent unless you show that he was sent for by the plaintiff. Otherwise, I will not allow it. I sustain your objection.

Mr. Gross: Your Honor will allow me an exception.

The Court: Yes, take your exception.

Mr. Gross: That is all.

Recross examination by Mr. Mackay:

Q. This sale to Mr. Rein, or George Rein, was it? A. Yes, sir, George C. Rein.

Q. Was that an exchange, too? A. Yes, sir.

Q. That's the way you fix the price, is it? A. That's the way I fix the price.

Mr. Mackay: That is all.

Mr. Gross: That is all, Mr. Rubine.

Now, if your Honor please, I desire to offer in evidence the paper marked Exhibit D1 for identification.

Mr. Mackay: I object to it on the ground it has no evidential value. It is not a contract, and has no bearing on this case.

The Court: I shall sustain the objection. I cannot see how it throws any light on the subject.

Mr. Gross: Your Honor will allow me an exception?

The Court: Yes.

Mr. Mackay: We rest.

Mr. Gross: If your Honor please, I move for the direction of a verdict for defend-

ant in this case upon the ground that the plaintiff himself was unable to perform the contract marked Exhibit P1 at any time, and therefore could not hold the defendant liable, even assuming the defendant did refuse to perform it.

I have here the law as laid down in Cyc. and which covers this case, I think, exactly. If your Honor desires me to read it—

The Court: Yes; I will hear what you have to say.

Mr. Gross: I am reading now, from 39 Cyc, page 1983: "The vendor, in order to recover for a breach of contract by the purchaser, must himself have been able and ready to perform his part of the contract, unless his inability was due to some act of the purchaser; and if time is of the essence of the contract, he must have been able to perform promptly at the time stipulated. Notwithstanding the circumstances may be such as to obviate the necessity of an actual tender or offer of performance, this fact does not dispense with the necessity of an ability and readiness on the part of the vendor to perform."

Then the text proceeds, and I might say that there are several cases cited to sustain the text, one of which is from the Court of Appeals, New York, cited as sustaining this proposition. "However positively a purchaser may have refused to perform his part of the contract, and however insufficient the reason assigned for his refusal, he cannot be subjected to damages without it being shown that he would have

received what he contracted in case he had performed."

I maintain that that is exactly the situation here. This plaintiff was unable to perform the contract according to its terms, nor has he shown that he was able to discharge the other encumbrances which are recited in the contract, taxes and interest due on the Woodcliffe Land Improvement Company debt.

The text then proceeds: "It follows from the general rule above stated, that the vendor in order to recover for a breach by the purchaser of the contract of purchase, must have been able to convey a good title, or such as would comply with the requirements of the contract; but it is not necessary that he should have a good title at the time of the contract, but only that he should be able to convey a good title at the time of performance."

Your Honor will see in this case he has never had a good title, nor could he get it. "Nor is it absolutely essential that the vendor should ever actually have the legal title if he is able to procure it or control it, and have it conveyed to the purchaser and offers to do so; but, in such cases, the fact that he could and would have procured the conveyance of a good title to the purchaser must be affirmatively shown."

Now, in this case, the plaintiff has failed to show that he could ever have conveyed a good title, assuming that he had the money and went on and paid the Land Company, that he would get what his contract calls for. That is what must be as-

sumed. There is no proof here that it would have been otherwise, and the contract shows that these restrictions have never been waived, that the interest has never been paid, that no installment has been paid since 1914, approximately, two years prior to the death of Mrs. Caporale.

We have in this State the case of Conover *v.* Tindall, in 20, New Jersey Law, page 513, which arose upon a question of pleading, and one of the pleas set up that the said farm was not free from encumbrance, but was subject to the dower right of the widow of and in the farm, and concludes with a verification, but adds no prayer for judgment. That plea was demurred to. The Court held the demurrer well-founded, and then proceeds thus:

"If our decision upon this point would settle the cause, we might stop here and overrule the plea on this ground alone. But it involves another matter, which is more important, and upon which it is our duty to express an opinion. The principal and important question raised by this demurrer is, whether the fact of an existing dower right on the premises, at the date fixed for delivering the deed, if well pleaded, is a good defense to the action." In that case, there was no contention made by the defendant prior to the actual commencement of the suit that the title was defective, and the Court proceeds:

"I must confess I cannot see why not. Surely the defendant was not bound to accept and pay for a title he knew to be imperfect or encumbered and look to his covenants for indemnity. The Court of

Equity would not under such an agreement as this decree a specific performance with such an encumbrance on the estate, and why should a court of law permit the plaintiff to recover damages for not accepting and paying for a title which a Court of Equity would not compel the defendant to take? So far from this, where the vendor brings an action for the purchase money, or for damages for not performing the contract, a court of law will even take notice of equitable objections to a title and not permit a plaintiff to recover."

"The plaintiff in this case contracted to deliver 'a good and sufficient deed'; in other words, to convey a 'good title,' etc."

"In the case of Duke against Shore, 'a plea that the plaintiff, after making the agreement, had cut down timber trees and thereby disabled himself from performing, was, on demurrer held to be a good plea and judgment was given for the defendant. I am of opinion, therefore, that if the farm, at the time fixed for consummating the contract, was encumbered with a dower right, either inchoate or absolute, it would be a good defense if well pleaded.' "

Then the Court further says: "It was argued on the part of the plaintiff that the defendant ought to have averred a readiness to accept but for the encumbrance; that if the defendant had interposed that difficulty at the time, the plaintiff might have removed it; and then a court ot equity would have decreed a specific performance. But I think the defendant might have pleaded a defect of title even

if it had not come to his knowledge until after he had refused to accept the deed, or even after action brought." In other words, the plaintiff isn't damaged if he could not perform his part of the contract. There is no reason why you can come into a court and say to a court and jury, "True, I couldn't have performed if called upon, but nevertheless I am entitled to recover in this action in spite of my own default." That is what the Court in that case held.

Then we have the other opinion in the case by Judge Randolph. He says: "If then the agreement for a good and sufficient deed means a good title, of course the defendant may plead and show in evidence a defective title, whether he was present or absent at the tender; and an averment of readiness to receive a title but for this objection is not necessary; for the plaintiff must make such a tender as he can sustain by proof to make a good title. Absence of the party may waive a personal tender, but not a defective title." So that, in this case, the plaintiff seeing the necessity for proving that he was able to perform his part of the contract, in his complaint set forth, I believe, in the first paragraph, that he was able and willing to perform.

Now, what do the proofs show? The proofs show that he was unable to perform the contract according to its terms. Now, whether we knew that there were encumbrances or not, does not make a particle of difference. They tried to get away from the conditions in the contract

by saying that we read the contract, P-2. Well, Mr. Rubine denies it and Mr. Halpin has no recollection of ever having shown Mr. Rubine the contract; but assuming that we read the contract—that is the contract marked P-2 between the Woodcliffe Land Improvement Company and Mrs. Caporale—assuming that we read it, we then, in the face of that agreement and its provisions, enter into a written contract by which this plaintiff agrees to give us an unencumbered title.

The Court: What are the encumbrances?

Mr. Gross: These restrictions.

The Court: Are the restrictions in the nature of a proviso, or condition, or what?

Mr. Gross: They are in the nature of covenants and the contract expressly says that the stipulations aforesaid are to apply—

The Court: What are they.

Mr. Gross: I might say that the Court of Errors in 75 New Jersey Equity has held that restrictions such as these are encumbrances, and a purchaser need not accept title under such restrictions.

Covenants by the party of the second part, to wit: not to erect upon the said premises any slaughter house, smith shop, wheel-wright shop, livery stable, blast furnace, brass foundry, nail, iron or other foundry, or any manufactory of gunpowder or fireworks, glue, varnish, vitriol, ink, lard, soap, candles, oil, starch, turpentine, or petroleum, or for the tanning, dressing or preparing of skins, hides or leather, or any chemical, gas or poudrette factory, or any ale house, wine or lager beer

saloon, grog or dram shop, tavern or hotel where beer or alcoholic or fermented liquors shall be sold or offered for sale, or any place for the manufacture of intoxicating liquors, or for carrying on any noxious, dangerous, or offensive trade or business, nor for any other nuisance, nor to erect any building less than two stories in height and costing less than Three Thousand Dollars; and that she will connect any such building with the sewer built or to be built in the said street.

Your Honor, those covenants together with the other encumbrances existing, that is, the interest and taxes, which the plaintiff has not proved his ability to pay, but certainly these restrictions which have not been waived, constitute such an encumbrance that a court of equity would not decree a specific performance.

Now, according to the Conover case, we could not be compelled to take title to that property, and we certainly should not be charged with any liability for nonperformance of our contract, because the plaintiff could not perform. He wasn't damaged. Assuming, your Honor, that we held the title to our property, we hadn't conveyed it, and this man came to us with a deed containing these covenants tendering a deed to his property in exchange for ours, and we simply sat back and said, "We will not perform." Now, the Court of Appeals in New York in a case squarely in point, and that is the case cited in Cyc., has said that the plaintiff could not recover because he himself was unable to perform, whether the

objection was made or not. Now, true, we went into the possession of this property, and did some work. That only goes to show the good faith with which this defendant entered into this contract, and as soon as we discovered that this man, the plaintiff, would not perform, according to our version of the case, we quit, left our money there; but certainly the mere going into the possession and excavating the lot doesn't change the legal situation as to the ability of performance by the plaintiff of this contract. I say, therefore, your Honor, that the defendant is entitled to the direction of a verdict in his favor.

The Court: I will hear you, Senator.

Mr. Mackay: Why, in the first place, it doesn't appear that the plaintiff Caporale ever had any chance to carry out this contract with the defendant; and from his testimony, he was ready and willing and able to perform.

Now that, I think, that evidence goes to show that Caporale, the plaintiff, was in a position to perform, and he endeavored from time to time to get the defendant to carry out the agreement, and the defendant always sidestepped. He didn't show up when he agreed to on May the first. He didn't show up until later on, and he immediately took possession of Caporale's property. He started to dig on it. He then went to Caporale's house and endeavored to make a different bargain with him, and failing in that, he sold this property to a third party. Now, so far as the defendant is concerned, the evidence through the entire case shows that he never wanted to

perform the contract, apparently never intended to perform it, and never intended to let Caporale have a deed of the property. And you don't have to tender when the property has been conveyed to a third person. That is clear. That is the case that your Honor was just mentioning.

The Court: That is the Meyer and Wolff case?

Mr. Mackay: Yes. Now, then, so far as the defendant is objecting to the title, he never objected on the ground that Caporale could not give a good title. I say we have shown from Caporale's testimony that he was ready and willing to give a good title. The defendant claims he did not know of this agreement, so that didn't bother him. He never raised that as an objection, and when the time came to perform, Caporale would probably have been able to straighten things out, and was ready to do it; but the defendant would never meet him. Now, then, so far as the plaintiff's case is concerned, he has shown readiness and a willingness to carry out his part of the agreement, what he was bound to do legally. The defense doesn't like to use this in the argument before your Honor, but they like to deny any knowledge of it on the stand. Now, how can they argue it before your Honor, that they couldn't give a good title because of this contract when Rubine claims he didn't know anything about it? Now, if he didn't know anything about that, and if he thought there was only a mortgage on the property as he says, then he thought Caporale was in a position to give him a good title, and Caporale agreed

to do it and wanted to meet and settle the thing, and said he was ready and willing and able to do it. But the last meeting when Caporale says, "What about carrying out this first agreement, P1"; he says, "My partner won't let me." That was the evidence. His partner wouldn't let him. Now, he wanted to make the other bargain. He doesn't succeed in making another bargain. He doesn't succeed in rescinding this contract, and he goes and disposes of the property to George Rein.

Now, I say, clearly, under the evidence of Caporale, that he was willing and ready at numerous times. He has made out a *prima facie* case for the jury, which they have not disputed, because they don't dispute the fact that he was ready and able and willing, because in one breath they say they didn't know about this contract, and they only use it here at this moment in an argument before your Honor; so they had no knowledge of any such contract as this until they see it here now, and then they don't use it as a real defense. To say that Rubine came to Caporale and said, "Why, Caporale, you can't give me good title; why, you have a plot, four plots, with restrictions on them. I can't make any settlement with you." Is there anything like that in this case? Why, no. Rubine says, "I didn't know whether he had any contract or a deed; I thought maybe there was a deed and a mortgage." But he never wanted to carry it out, never made any attempt to carry it out. But when they come into Court, in spite of the fact that Caporale has sworn that he was ready, what

is to hinder Caporale from having these restrictions erased at the time the deed was turned over? Was there anything? They never gave him an opportunity to perform. He told them he was ready; he told them he was willing and able, and he agreed to do it. He said on the stand he would do it. There's the case for the jury, and they don't claim—

The Court: When do you claim, Senator, that the breach took place?

Mr. Mackay: I think the breach took place when the property was sold to a third party.

The Court: Then, prior to that time, had your client ever put himself in a position to carry out the terms of that contract?

Mr. Mackay: He had been going to Rubine.

The Court: Had he ever put himself in a position where he could say that these parties could give him a deed free from encumbrances?

Mr. Mackay: That was not necessary until the time came for him to deliver the contract, and he never did meet and arrive at a settlement of the matter. He wanted to perform. He said on June 26th, "What about carrying out this original agreement? I am ready to do it." There was an absolute refusal, and the particular point about the refusal is this, your Honor; that they did not refuse on account of this contract. That was not their refusal. Their refusal was that his partner would not let him do it; that was the refusal, and that was the evidence

uncontradicted. So I say clearly, it is a question for the jury.

The Court: I shall refuse your motion, and let it go to the jury.

Mr. Gross: Your Honor will allow me an exception.

The Court: Yes, take your exception.

Mr. Gross summed up the case to the jury on behalf of the defendant, during which the following statement was made:

Mr. Gross: * * * He had the property surveyed. What did he do that for?

Mr. Mackay: I object, sir. I thought your Honor refused to permit any plans. I want my objection noted, your Honor.

The Court: The plans are not in evidence. Proceed.

Mr. Mackay summed up the case to the jury on behalf of the plaintiff, during which Mr. Gross made the following objection:

Mr. Gross: That is objected to, that Mr. Rubine bought other lots on this contract.

The Court: I did not allow that to go in at all. There was no evidence that he bought on this particular contract, as I recall.

Mr. Mackay: Yes, sir; there is, as I recall.

The Court: Will the stenographer turn back and read at that point.

Record read as follows:

"Q. Doing business around Woodcliffe and all those places? A. Yes, sir. Q.

Buying property in Woodcliffe and building? A. Yes, sir. Q. Buying property on this particular map, the map of Woodcliffe-on-the-Hudson? A. Yes, sir. Q. You have bought property in that? A. Yes, I bought these lots; I built the buildings; that is not the only lots I bought. Q. From other people than Caporale? A. Yes, sir."

The Court: You may comment upon it.

Mr. Gross also noted an objection to the following statement during the summing up:

Mr. Mackay: We took this man Rubine up on a capias, took the body.

Mr. Gross: I object to that. There isn't the slightest evidence of any such thing.

The Court: There is nothing in this case to show that there was a capias in this case. It would not be fair to comment on it anyhow, if there was. The transcript that you handed me does not contain any such reference.

Mr. Mackay: But the original capias does, and the original order to hold to bail.

The Court: All right; proceed.

Mr. Mackay: They don't like it when the shoe is on the other foot.

Mr. Gross: I object to that statement. I think it is entirely uncalled for and unfair.

The Court: Proceed.

Charge.

CUTLER, J.:

Gentlemen of the Jury, on the 16th day of April, 1917, the plaintiff and defendant in this case entered into a written agreement by which this plaintiff agreed to sell and convey to the defendant four lots on the southeast corner of 30th Street and Bergenline Avenue in Woodcliffe-on-the-Hudson. He further states that the lots are absolutely free and clear of all encumbrances, excepting a balance of $6,900.00 due the Woodcliffe Land & Improvement Company, and agreed that any taxes or other charges against the property remaining unpaid will be settled by him. The price to be paid and received for these lots was $10,000.00. In this agreement the defendant agreed to sell and convey to this plaintiff a tract of land with the buildings and improvements thereon on the southeast corner of 30th Street and Broadway, in the same place known as Number 934 Broadway, subject to a first mortgage of $10,000.00, for $14,850.00, and to take back a purchase money mortgage for $1,750.00, payable in three years, drawing six per cent. interest, the interest to be paid quarterly each year, and to reduce the mortgage by the payment of $125.00 each month. In addition to this, the defendant agreed to do the following work on his property: To build a concrete sidewalk; to paper the halls; build a bulkhead on the roof; build racks for clothes lines on the roof; to furnish and set gas and hot-water heaters in each kitchen; to furnish certificates from the New York Board of Fire Underwriters and the New Jersey Tenement House Commission with assurance that any violation found by them will be complied with at his expense. This agreement provided further that

the title was to pass on or before May 1st, 1917; that all insurance premiums, water charges, apartment and store rents and mortgage interest are to be apportioned pro rata upon passing of title. That was the contract which those parties entered into, or, rather the substance of that contract. You will notice that the defendant was to receive for his property $14,850.00, sold subject to a mortgage of $10,000.00, and his equity was $4,850.00. The plaintiff was to receive for his property, $10,000.00. There was due the Land Company, $6,900.00, and the plaintiff's equity in this property was $3,100.00. The difference between the equity of the plaintiff in his property and the equity of the defendant in his property was $1,750 in favor of the present defendant, and that equity was to be paid by the plaintiff giving the defendant, and the defendant receiving it, a mortgage for that amount on the property to be sold by the defendant to the plaintiff.

There is no dispute, although the date was not in the contract, that the title was to pass at the office of Mr. Halpin, a real estate agent. This agreement, gentlemen, is in writing, and expresses exactly what the parties were to do, and both parties were bound by its terms. The general rule of law is that where one party to a contract stands ready and willing to carry out his part, and the other party either refuses or neglects to carry out his part, damages can be recovered from the party in default. If both parties are in default, there can be no recovery; and that is the general rule of law governing actions on contracts.

The deeds were to be delivered on or before the first day of May. The plaintiff was on hand at the office of the agent. He does not claim

that he had his deed ready for delivery, or that he even had title to the property at that time. He was not ready to perform his part of the contract on that day, even if the defendant appeared. The defendant admits that he did not appear on that day, and gives as an excuse that he was sick. Both parties, gentlemen, were in default on the first day of May, and no cause of action accrued to either at that time. The plaintiff came again to Mr. Halpin's office, and the defendant did not appear. The defendant came to the same office to meet the plaintiff, and the plaintiff did not appear. The plaintiff and defendant, however met some time about the middle of May in Mr. Halpin's office, and they differ as to what took place. The plaintiff says that the defendant wanted him to take some other property in exchange for his lots, and he gave him plans to look over. He says that on that occasion the defendant said that he could not carry, would not carry out the terms of the original agreement because his partner did not want him to do so. That the plaintiff took the plans, looked them over and in a day or two returned them to Mr. Halpin, saying that he did not want to exchange in that way. The defendant says that this did not take place at all. That on this occasion he asked the plaintiff how much was due for interest and taxes, and that the plaintiff said in substance, that he would not pay these taxes and interest, and found fault about the contract having these provisions in it. And they parted, the defendant saying to the plaintiff, according to his version of the story, "if you won't pay the taxes and the interest," or words to that effect, "then the matter is off." So far as appears, the plaintiff never offered to carry out his part of this contract. Some time after, the de-

fendant endeavored to buy these lots from the plaintiff. It appears that they came to an understanding, and a friend who was then present, started to draw up an agreement of sale, and while the agreement was being drawn, when they came to the part of the agreement referring to the taxes and interest, the plaintiff again refused to pay them, and the matter fell through. The defendant says the reason why he tried to buy those lots a second time was because he had gone to some expense in the matter, and had, as I recall it, made some excavation on the property, which cost him some money. So far as the evidence shows, the matter ended at this meeting in June, and nothing further was done by either party until September, when the defendant sold the lot and building which he had agreed to sell to the plaintiff, to some other person. The plaintiff never had title to the lots he agreed to convey. He could not fulfill his contract by assigning the agreement to convey which the Land Company had made with his wife, and which she had devised or bequeathed to him by her will; his contract was to sell and convey the lots without encumbrances except so far as the encumbrance of $6,900.00. This contract of the Land Company called for the conveyance of the lands in question subject to certain restrictions. An officer of the Land Company has been produced. and says that they would accept the money and convey the lots at any time, although the time for the conveyance mentioned in the agreement might not have expired, but they would not release the restrictions on which the lots were to be sold. Plaintiff says in his testimony that he could have conveyed the lots without encumbrances, and you are to say, gentlemen, whether you are satisfied from the evidence that he could. If he could have conveyed the property, and the

defendant refused to take title, then the plaintiff could recover. But if the plaintiff could not convey the property, could not obtain title to these lots without the restrictions mentioned in the contract with his wife, the defendant is not obliged to take title, and the plaintiff could not recover. The plaintiff claims that because the defendant sold the property to someone else instead of conveying it to him, he can recover. If one party to an agreement puts himself in a position where he cannot carry out his part, the other party is not bound to make a tender, but this would not be so if the party had been in default before the other party placed himself in such a position. Had the plaintiff ever been in a position to carry out his part of the contract, or had he offered to do so prior to the time the defendant sold the property? The defendant says he sold it because the deal was off, and the plaintiff had refused to live up to his contract; in other words, that he rescinded the contract. It is the law that when a party announces his intention not to fulfill his contract, the other party may take him at his word and rescind the contract. That word "rescind" implies that both parties have agreed that the contract shall be at an end as if it had never been. If you find that this contract was rescinded by mutual consent, neither party could recover against the other, and your verdict should be for the defendant, and both parties would be in the same position as they were if the contract had never been made. If you find the plaintiff has never been ready to carry out his part of the contract, and so informed the defendant before he conveyed the property, that he would not live up to its terms, he cannot recover. If the defendant conveyed his property to avoid carrying out the

terms of the contract without any knowledge that the plaintiff was not ready to carry out his part, and the plaintiff was in a position to carry out his part of the contract, he would not be obliged to make a tender, and could recover, and he would be entitled to recover what he lost from such failure, provided the loss was directly from the breach of the contract itself, or is such as might reasonably be supposed to have been in contemplation of both parties at the time of the making of the contract, and is the result of its non-performance. The plaintiff claims that the property he was to have purchased had increased in value by reason of the improvements that the defendant had made, and also by reason of the increased price of material, and that he was entitled to such increase or profits on his bargain.

You are to say, from all the evidence, whether the plaintiff lost any profits by the failure of the defendant to comply with the terms of his contract, if you find that he can recover anything, and if so, how much, and your verdict should be for the plaintiff for that amount. If you find, however, that the plaintiff has not established his case by a preponderance of the evidence, or if you find that the contract has been rescinded, your verdict should be for the defendant. You, gentlemen, are the sole judges as to what the evidence has been and the weight you will give to the testimony of the various witnesses.

The Court refused to non-suit the plaintiff and refused to direct a verdict for the defendant, but that does not indicate in the slightest degree what your verdict should be. The decisions of those motions was only the finding of the Court that this case was one for you to decide, applying the rules of law which I have laid down for your

guidance. Now, gentlemen, consider the case carefully and then render such verdict as you think the evidence warranted, being governed by the rules of law that the Court has laid down for your guidance.

There were some requests to charge, and I will dispose of them before the jury retires.

Unless there is evidence in the case to satisfy the jury otherwise, the law presumes that the values of the lands of the respective parties are as recited in the contract. I so charge you.

If the plaintiff has not proved to the satisfaction of the jury, and the burden is upon him to make such proof by a fair preponderance of the evidence, that the values of the respective properties referred to in the contract sued upon, are different than therein recited, and to his advantage, then all that he is entitled to recover, if he is entitled to a verdict at all, is nominal damages, to wit, six cents. I so charge you.

3. The burden also rests upon the plaintiff to prove by a fair preponderance of the evidence, that the defendant was guilty of a breach of the contract sued upon, and if he has failed to so establish his case, the defendant is entitled to a verdict. I so charge you.

4. If it appears that the plaintiff was guilty of a breach of the contract sued upon, or that he, without legal excuse, refused to perform it on his part, then the defendant is entitled to a verdict, even though he, defendant, thereafter sold and conveyed away the property which he was to convey to the plaintiff. I so charge you.

5. If the plaintiff stated that he would not pay the taxes in arrears and the interest due to the Woodcliffe Land Improvement Company, in order to perform his part of the contract sued

upon, then the defendant was justified in treating the contract as having been broken by the plaintiff, and to sell and convey away his property without being liable to the plaintiff therefor, and if the jury is satisfied, from the evidence, that the plaintiff so refused to pay the taxes on his property and the interest on the debt of the Woodcliffe Land Improvement Company, the plaintiff cannot recover, and the verdict should be for the defendant. I so charge you.

The sixth, seventh, eighth, ninth, tenth and eleventh requests to charge I refuse otherwise than I have already charged.

12. Notice to the defendant that the plaintiff would not be able to perform and carry out the terms of the contract by him, the plaintiff, to be carried out, does not excuse the plaintiff from the performance of his part of the contract, and even though the defendant had such notice and plaintiff nevertheless was unable to convey the lands and premises by him to be conveyed to the defendant, absolutely free and clear of all encumbrances, excepting for the debt of $6,900.00 due the Woodcliffe Land Improvement Company, the plaintiff cannot recover in this case. I so charge you.

Let the jury retire.

(The jury retired at 11:40 A. M.)

Mr. Gross: I take an exception to your Honor's refusal to charge the sixth, seventh, eighth, ninth, tenth and eleventh requests. Will your Honor allow me an exception?

The Court: Yes, you may have it.

Mr. Gross: I also ask an exception to that part of your Honor's charge where you say that

plaintiff testified that he could have conveyed without incumbrances.

Mr. Mackay: I want to take an exception to the charges Numbers 1, 2, 3, 4, 5 and 12. I also except to that part of the charge which said, so far as appears, the plaintiff never offered to carry out his part of the contract; also, to that part of the charge which said that plaintiff could not fulfill his contract; and also, that part where you said, nothing was done until September, and then continuing on.

The Court: Yes, you may take an exception to what I did say.

Mr. Mackay: Also exception to that part which says that in June the defendant went to the plaintiff and the plaintiff refused to pay the taxes and interest, because what was said, according to the plaintiff's version of it, was that the plaintiff said that the interest and taxes are included in that reduction that I am giving you from $3,100.00 to $2,250.00.

Mr. Gross: Your Honor left that as a question of fact.

The Court: Yes, I will allow you an exception, or call the jury back. Let the jury come back a moment.

Mr. Mackay: And also that if the plaintiff could not obtain title without restrictions, and so forth?

The Court: Yes.

(The jury returned for further instruction at 11:45 A. M.)

The Court: Gentlemen, counsel desire me to call your attention to a matter that when the plaintiff and defendant had their meeting in June, and the defendant attempted to buy the property, the lots, the contract price then spoken

of, the equity was $2,250 instead of $3,150, and when the question of the taxes and interest was spoken of, the plaintiff, you will recall, said that he would not pay those at that time because he had deducted them from $3,150.00 and reduced the price to $2,250.00; but that, gentlemen, had nothing to do with the original transaction; that was a new bargain which the parties at that time tried to make in reference to the lots. That is all.

The defendant's requests to charge as originally submitted to the Court were as follows:

1. Unless there is evidence in the case to satisfy the jury otherwise, the law presumes that the values of the lands of the respective parties are as recited in the contract.

(Fairchild *v.* Llewellyn Realty Co., 82 Atl. Rep., 924.)

2. If the plaintiff has not proved to the satisfaction of the jury, and the burden is upon him to make such proof by a fair preponderance of the evidence, that the values of the respective properties referred to in the contract sued upon, are different than therein recited, and to his advantage, then all that he is entitled to recover, if he is entitled to a verdict at all, is nominal damages, to wit: six cents.

3. The burden also rests upon the plaintiff to prove by a fair preponderance of the evidence, that the defendant was guilty of a breach of the contract sued upon, and if he has failed to so establish his case, the defendant is entitled to a verdict.

4. If it appears that the plaintiff was guilty of a breach of the contract sued upon, or that he, without legal excuse, refused to perform it

on his part, then the defendant is entitled to a verdict, even though he, defendant, thereafter sold and conveyed away the property which he was to convey to the plaintiff.

5. If the plaintiff stated that he would not pay the taxes in arrears and the interest due to the Woodcliff Land Improvement Company, in order to perform his part of the contract sued upon, then the defendant was justified in treating the contract as having been broken by the plaintiff, and to sell and convey away his property without being liable to the plaintiff therefor, and if the jury is satisfied, from the evidence, that the plaintiff so refused to pay the taxes on his property and the interest on the debt of the Woodcliff Land Improvement Company, the plaintiff cannot recover, and the verdict should be for the defendant.

6. It was the duty of the plaintiff to be ready, able and willing to perform his part of the contract sued upon at the time fixed for performance, and he must, at that time, have been able to give to the plaintiff a title absolutely free and clear of all encumbrances, except a debt of $6,900, due to the Woodcliff Land Improvement Company, and if he was not able to convey such title, then of course, he cannot recover in this action, and the verdict should be for the defendant.

7. The restrictions contained in the contract between the Woodcliff Land Improvement Company and Rose Caporale, marked "P2," are encumbrances against the property therein mentioned, and if those restrictions were still in force at the time fixed for performance of the agreement, the plaintiff was not able to deliver to the defendant, a title such as called for by

the contract, and he would of course not be entitled to recover, because he himself was not able to perform the contract.

8. The defendant was entitled, as a performance by the plaintiff, to have conveyed to him, the defendant, an estate in fee simple of the lands required by the contract to be conveyed to the defendant, absolutely free and clear of all encumbrances, except the debt of $6,900.00 to the Woodcliff Land Improvement Company, and unless he could convey such title, at the time fixed for performance, free of the restrictions mentioned in the agreement, marked "P2," the defendant is entitled to a verdict, even though the defendant, without notice, sold and conveyed his property to another.

9. There is no evidence in the case that the plaintiff was ever able to convey to the defendant, or have conveyed to him, title to the lands by him, the plaintiff, to be conveyed, free and clear of all encumbrances, except the debt of $6,900.00 due Woodcliff Land Improvement Company, and the jury's verdict must therefore be for the defendant.

10. The plaintiff must show by a preponderance of the evidence, that he was able, at the time fixed for performance, to pay the taxes then a lien upon the property by him to be conveyed, and also the interest, then accrued upon the claim of the Woodcliff Land Improvement Company, and also the difference between the amount actually due the said company and the amount specified as due in the contract, and if the plaintiff has failed to show his ability to make such payment or to otherwise satisfy the same, the verdict should be for the defendant.

Exhibit D-1 for Identification.

11. If the plaintiff was unable, at the time fixed for performance, to convey the lands by him to be conveyed, absolutely free and clear of all encumbrances, excepting the debt of $6,900.00 due the Woodcliff Land Improvement Company, even though the defendant knew, at the time of the making of the contract sued upon, that plaintiff would be unable to convey such title, the plaintiff cannot recover.

12. Notice to the defendant that the plaintiff would not be able to perform and carry out the terms of the contract by him, the plaintiff, to be carried out, does not excuse the plaintiff from the performance of his part of the contract, and even though the defendant had such notice and plaintiff nevertheless was unable to convey the lands and premises by him to be conveyed to the defendant, absolutely free and clear of all encumbrances, excepting for the debt of $6,900.00 due the Woodcliff Land Improvement Company, the plaintiff cannot recover in this case.

(Demars *v.* Koehler, 62 N. J. L., 203.)

Exhibit D1 for Identification.

Phone 396 Cliffside.

P. O. Lock Box, 48 Cliffside.

L. CAPORALE'S ASSOCIATION.
Headquarter
Cor. Anderson Avenue & Kamena St.

Fairview, N. J., June 26th, 1917.

I agree to sell to Samuel Rubine the S. E. Corner of Bergenline Av. and 30th Str., North Bergen—size of plot, 110 x 90 more or less; price 9,200.00 dollars, on following terms: One hundred dollars by signing this agreement; one hun-

dred and fifty dollars on the 6th of July, 1917; the balance of two thousand dollars on 1st of August, 1917. Subject to six thousand nine hundred and fifty 00/100 which has to be paid to Woodcliff Land Improvement Company.

Judgment.

NEW JERSEY SUPREME COURT.

LOUIS CAPORALE *v.* SAMUEL H. RUBINE.	Action at Law. On Postea.

It is ordered that judgment be and hereby is entered in favor of plaintiff and against the defendant for the sum of nine hundred and twenty-five dollars besides costs to be taxed *nisi.*

Entered April 26, 1918.

On motion of

MACKAY & MACKAY,
Attorneys.

A true copy.

ENOCH L. JOHNSON,
Clerk.

Grounds of Appeal.

(Filed May 7, 1918.)

COURT OF ERRORS AND APPEALS OF NEW JERSEY.

LOUIS CAPORALE, Plaintiff-Respondent, *v.* SAMUEL H. RUBINE, Defendant-Appellant.	On Appeal.

The defendant-appellant states the following grounds of appeal:

The following questions were overruled:

1. To the witness, Louis Caporale:
Did you ever have any other agreement with the Woodcliff Land Improvement Company than this paper marked Exhibit P2?

2. To the witness Clarence G. Meeks:
And had it, prior to this agreement, marked P2, conveyed any lots or plots of that tract?

3. To the witness, Charles Barbash:
Can you tell us the value of the Rubine property on or about the first of May, 1917?

4. To the witness, Samuel H. Rubine:
I show you a plan and also a survey and ask you if those are the plans and that the survey that you had made?

5. To the witness Samuel H. Rubine:
Who was it called you to Caporale's place in June?

6. The paper dated June 26, 1917, written by Charles Barbash in the defendant's presence,

and marked D1 for identification was excluded from evidence.

7. The plans and survey which the witness Samuel H. Rubine has identified were excluded from evidence.

8. The Court overruled defendant's offer to prove that the Woodcliff Land Improvement Company, owners of this extensive tract of land of which the Caporale lots were part, conveyed away about all the lots, with like restrictions as in P2.

9. The Court refused to permit the witness Charles Barbash to testify as an expert with reference to the values of the properties involved in the case.

The following questions were admitted:

10. To the witness, Louis Caporale:

Mr. Caporale, did you ever show this contract to Mr. Rubine, this Exhibit P2?

11. To the witness, Louis Caporale:

Do you know whether or not he read it?

12. To the witness, William H. Halpin:

Well, what would you say as to the price in September, 1917?

13. To the witness, Clarence G. Meeks:

Is it your practice, Mr. Meeks, the practice of your company, to accept the balance of contract moneys in advance of the time specified in the contract?

14. The Court refused to grant defendant's motion to nonsuit the plaintiff at the conclusion of plaintiff's case.

15. The Court refused to grant defendant's

motion to direct a verdict for the defendant at the conclusion of the case.

16. The Court charged the jury that plaintiff testified that he could have conveyed without encumbrances.

17. The Court refused to charge the jury,—defendant's sixth request, as follows:

It was the duty of the plaintiff to be ready, able and willing to perform his part of the contract sued upon at the time fixed for performance, and he must, at that time, have been able to give to the plaintiff a title absolutely free and clear of all encumbrances, except a debt of $6,900, due to the Woodcliffe Land Improvement Company, and if he was not able to convey such title, then, of course, he cannot recover in this action, and the verdict should be for the defendant.

18. The Court refused to charge defendant's seventh request, as follows:

The restrictions contained in the contract between the Woodcliffe Land Improvement Company and Rose Caporale, marked "P2," are encumbrances against the property therein mentioned, and if those restrictions were still in force at the time fixed for performance of the agreement, the plaintiff was not able to deliver to the defendant a title such as called for by the contract, and he would of course not be entitled to recover, because he himself was not able to perform the contract.

19. The Court refused to charge the defendant's eighth request as follows:

The defendant was entitled, as a performance by the plaintiff, to have conveyed to him, the defendant, an estate in fee simple of the lands

required by the contract to be conveyed to the defendant, absolutely free and clear of all encumbrances, except the debt of $6,900.00 to the Woodcliff Land Improvement Company, and unless he could convey such title, at the time fixed for performance, free of the restrictions mentioned in the agreement, marked "P2," the defendant is entitled to a verdict, even though the defendant, without notice, sold and conveyed his property to another.

20. The Court refused to charge the defendant's ninth request, as follows:

There is no evidence in the case that the plaintiff was ever able to convey to the defendant, or have conveyed to him, title to the lands by him, the plaintiff, to be conveyed, free and clear of all encumbrances, except the debt of $6,900.00 due Woodcliff Land Improvement Company. and the jury's verdict must therefore be for the defendant.

21. The Court refused to charge the defendant's tenth request, as follows:

The plaintiff must show by a preponderance of the evidence, that he was able, at the time fixed for performance, to pay the taxes then a lien upon the property by him to be conveyed, and also the interest then accrued upon the claim of the Woodcliff Land Improvement Company, and also the difference between the amount actually due the said company and the amount specified as due in the contract, and if the plaintiff has failed to show his ability to make such payment or to otherwise satisfy the same, the verdict should be for the defendant.

22. The Court refused to charge the defendant's eleventh request, as follows:

If the plaintiff was unable, at the time fixed for performance, to convey the lands by him to be conveyed, absolutely free and clear of all encumbrances, excepting the debt of $6,900.00 due the Woodcliff Land Improvement Company, even though the defendant knew, at the time of the making of the contract sued upon, that plaintiff would be unable to convey such title, the plaintiff cannot recover.

GROSS & GROSS,
Attorneys of Appellant.

[1413]

Court of Errors and Appeals

OF NEW JERSEY

LOUIS CAPORALE, Plaintiff-Respondent, *v.* SAMUEL H. RUBINE, Defendant-Appellant.	Action at Law. On Appeal from Supreme Court.

BRIEF OF DEFENDANT-APPELLANT.

Statement of Facts.

This action is brought for the recovery of damages alleged to have been suffered by the plaintiff, because of an alleged breach of a contract entered into between plaintiff and defendant on April 16, 1917, marked Exhibit "P1," and appearing in the state of case on page 10. Under the agreement, the defendant agreed to convey to the plaintiff, certain property owned by defendant on the southwest corner of Broadway and 30th Street, Woodcliff-on-the-Hudson, for which the purchase price was fixed at $14,850, and was subject to a mortgage of $10,000, thus leaving the equity of the defendant in the said property, at $4,850. The plaintiff was to execute to the defendant a purchase money mortgage upon the same property in the sum of $1,750 for a period of three years, which was to bear interest at six per cent., payable quarter-annually, and further reduce the principal thereof by equal payments

of $125 every three months. This leaves the net equity in the property which the defendant was to convey to the plaintiff $3,100. In exchange for this equity and conveyance by the defendant (Halpin, p. 39, line 26), the plaintiff was to convey to the defendant four lots of land known as Lots Nos. 20, 21, 22 and 23 in Block 1 on Map E of the Woodcliff Land Improvement Company, situated on the southeast corner of 30th Street and Bergenline Avenue, Woodcliff-on-the-Hudson, at a valuation of $10,000, subject to an indebtedness due thereon to the Woodcliff Land Improvement Company, in the sum of $6,900, thus leaving the equity in the property which the plaintiff was to convey equal to the equity in the property which the defendant was to convey to the plaintiff in the exchange. The plaintiff, in this agreement, expressly declared that the plot to be by him conveyed, is *absolutely free and clear of all encumbrances,* except a balance of $6,900 due the Woodcliff Land Improvement Company. Under this agreement, the title was to pass on May 1, 1917, but time was not of the essence of the agreement. The parties are in agreement that the title was to be passed in the office of Mr. Halpin, where this agreement was drawn and signed. According to the plaintiff's testimony, he called at Mr. Halpin's office on May 1st, but the defendant was not there and another appointment was arranged for with the defendant by Mr. Halpin over the telephone, which the defendant was unable to keep because of his being ill at the time. The defendant, however, did call at Mr. Halpin's office about May 7th, and arrange for an appointment with the plaintiff, and appeared at the appointed time, but according to Mr. Halpin's testimony, the plaintiff failed to keep this appointment, although the defendant

did. The defendant testified (pp. 84, 92, 93) that on or about May 15th, he met the plaintiff at Mr. Halpin's office for the purpose of arranging for the closing of the title, and then the plaintiff insisted that it was not his obligation to pay the interest in arrears due to the Woodcliff Land Improvement Company, or the taxes in arrears on the property by him to be conveyed, but maintained that he was to convey to the defendant merely his equity as it was, and that the defendant was to pay all these liens against the property, and that then defendant said that the deal was off, to which the plaintiff replied, "All right." The parties met again on June 26, at the request of Mr. Halpin and Mr. Barbash, real estate agents, for the purpose of having the defendant purchase the plaintiff's property outright, and the parties then agreed that the defendant should pay the plaintiff for his property $2,250. The plaintiff handed to Mr. Barbash a sheet of his stationery paper (marked Exhibit D1 for Identification, p. 124), upon which Mr. Barbash commenced to write an agreement for the purchase of the property by the defendant, and when the point was reached for making provision for the payment of the interest and taxes in arrears by the plaintiff, the latter refused to make any allowance for these charges, and insisted that he was not obliged to pay them under the original agreement of exchange, and that thereupon the defendant refused to have anything further to do with the transaction (see Testimony of Plaintiff, p. 24; Barbash, p. 76; Rubine, pp. 84, 85). That was the last meeting of the parties.

Shortly after the making of the original contract (Exhibit P1), the defendant had the property to be conveyed by the plaintiff, surveyed, had plans drawn for the erection of several build-

ings thereon, and actually commenced to excavate for foundation walls thereon, which plans plaintiff examined, and when the plaintiff expressed his unwillingness to pay the arrears of interest to the Woodcliff Land Improvement Company, or the tax liens upon the property to be by him conveyed, the defendant immediately ceased further work.

Plaintiff never had title to the lots by him to be conveyed under his agreement with the defendant (Exhibit P1), and to meet the requirements of proof necessary to show his ability to perform the contract on his part, as well as the allegation of his complaint to that effect, produced and offered in evidence an agreement dated July 15, 1913, between the Woodcliff Land Improvement Company and Rose Caporale (marked Exhibit P2, p. 12), wherein and whereby the Land Improvement Company agreed to convey to the said Rose Caporale, the lots in question, *"subject to all taxes and assessments which may be levied upon the said lots during the continuance of this contract, which taxes and assessments the party of the second part assumes and agrees to pay, in addition to the amount to be paid for said lots, as herein stated,"* and that the purchase price of the said lots, to wit, the sum of $9,000, was to be paid by a down payment of $1,000, and the balance of $8,000, with interest thereon from the date of the contract at the rate of six per cent. per annum, payable monthly in equal monthly payments of $50 each, with interest. Said payments to be made on the first day of each and every month after the date thereof, and the last of said payments to be made on October 1, 1926, at which time and place (provided all of said payments with interest as afore-

said have been paid), the deed thereinafter mentioned shall be delivered. That upon such payments being made at the times and in the manner therein mentioned, the said Land Company shall, at its own proper cost and expense, execute and deliver to the said Rose Caporale, a proper deed for the conveying to her the fee simple of the said premises, which deed shall contain the following covenants by the party of the second part (Rose Caporale, p. 14), viz.,

> "not to erect upon the said premises any slaughter house, smith shop, wheelwright shop, livery stable, blast furnace, brass foundry, nail, iron or other foundry, or any manufactory of gunpowder or fireworks, glue, varnish, vitriol, ink, lard, soap, candles, oil, starch, turpentine, or petroleum or for the tanning, dressing or preparing of skins, hides or leather, or any chemical, gas or poudrette factory, or any ale house, wine or lager beer saloon, grog or dram shop, tavern or hotel where beer or alcoholic or fermented liquors shall be sold or offered for sale, or any place for the manufacture of intoxicating liquors or for carrying on any noxious, dangerous, or offensive trade or business, nor for any other nuisance, nor to erect any building less than two stories in height and costing less than three thousand ($3,000.00) dollars; and that she will connect any such building with the sewer built or to be built in the said street. Which shall be deemed to be covenants running with the land and enforceable as such until the first day of January, in the year nineteen hundred and twenty."

The plaintiff further produced the last will and testament of Rose Caporale, his wife, wherein and whereby all of her interest in the said property was devised to the plaintiff (Exhibit P3, p. 16). The Land Company was at all times the owner of the said lots, and had never executed

any deed of conveyance therefor to either Rose Caporale, the plaintiff, or any other person, nor has it ever waived any of the restrictions contained in the said agreement marked Exhibit P2 (see Testimony of Mr. Meeks, p. 68). The Court overruled the defendant's offer to prove that the development company had been the owner of an extensive tract of land, including the lots mentioned in Exhibit P2, and that all of the lots conveyed by it were so conveyed with like restrictions as contained in that exhibit. The testimony further shows that the defendant, after negotiations with the plaintiff had finally broken off, and in September, 1917, sold the property which he was to convey to the plaintiff in the exchange, to George Rein of Catskill, N. Y., for $14,500 (p. 17, p. 97), which price was $300 less than figured on in the contract with the plaintiff.

The defendant moved for a judgment of nonsuit at the conclusion of the plaintiff's case, and for the direction of a verdict for the defendant at the conclusion of the whole case, both of which motions were denied by the Court and exceptions to the Court's ruling were duly taken.

The Court further permitted the plaintiff to testify, over objection by the defendant, that the defendant read the contract marked Exhibit P2, to which ruling of the Court, the defendant duly excepted (p. 34).

POINT I.

The Court erred in refusing to grant defendant's motion to non-suit the plaintiff at the conclusion of plaintiff's case.

At the conclusion of the plaintiff's case, defendant moved for a judgment of non-suit upon the ground that the plaintiff had failed to prove his ability to carry out the agreement sued on on his part, or to show an offer or tender of performance (pp. 62, 63, 64, 65, 66 and 67), which motion the Court refused, and to which ruling the defendant took exception (p. 67). This point is raised by the fourteenth ground of appeal. The plaintiff had no title to the lands which by his agreement he agreed to *convey*. The defendant was entitled to an instrument conveying to him the legal title to the property, "absolutely free and clear of all encumbrances." A mere assignment of the contract, if one had been offered, would not have been a performance by the plaintiff, because that would merely have entitled the defendant to bring suit against the Improvement Company for specific performance, and the defendant was not negotiating, nor did he contract for a law suit. Such a conveyance the plaintiff could not make (see his testimony, pp. 30, 31 and 32).

Assuming, hewever, that plaintiff had the legal title, he could not perform the contract on his part, because of the encumbrances existing thereon, by virtue of the covenants creating the restrictions which appear in Exhibit P2 (on p. 14), and above set forth. That these restrictions are encumbrances which would justify a purchaser in refusing to accept the title, is settled in the Court of Chancery, by the case of *Krah* v. *Wassner,* 75 N. J. Eq., 109 at page 115, and by

this Court in *Lounsbery* v. *Locander,* 25 N. J. Eq., 554. In the latter case, it is held that in every contract for the sale of lands, an agreement is implied to make good title, unless that liability is expressly excluded. In the case in hand, the agreement for the conveyance of a title, "absolutely free and clear of all encumbrances," is expressly set forth in the contract. (See 39 *Cyc.,* 1500.)

We, therefore, maintain that if the plaintiff was himself unable to perform his part of the agreement sued on, and was unable to convey or place himself in a position to convey to the defendant at any time, a title *absolutely free and clear of all encumbrances,* in order to entitle him to a conveyance from the defendant, he, the plaintiff, was not entitled to recover, and the motion for the non-suit should have prevailed. It is clear that the performance by both parties was to be concurrent, one being the consideration for the other, and neither party could maintain an action upon the contract, unless he alleged and proved a tender of performance on his part, or that he was ready, able and willing to perform, and that an actual tender was excused by the acts of the other party. (*Ackley* v. *Richman,* 10 N. J. L., 304.) Of course, if the defendant had done anything which would have prevented the plaintiff from procuring such a title as he agreed to convey under the contract, it might be held that he thereby waived the condition, but the defendant herein did absolutely nothing, and the rules of law still require the plaintiff to allege, as he did, and also prove, ability to perform on his part. If he was not able to perform, and could not prove that he might have placed himself in a position to convey a title absolutely free and clear of all en-

cumbrances, then he suffered no damage, because he himself was in default. In 39 *Cyc.*, page 1983, the rule is laid down thus:

> *"A vendor, in order to recover for a breach of contract by the purchaser, must himself have been able and ready to perform his part of the contract, unless his inability was due to some act of the purchaser, and if time is of the essence of the contract, he must have been able to perform promptly at the time stipulated. Notwithstanding the circumstances may be such as to obviate the necessity of an actual tender or offer of performance, this fact does not dispense with the necessity of an ability and readiness on the part of the vendor to perform.*
>
> *"It follows from the general rule above stated, that the vendor, in order to recover for a breach by the purchaser of a contract of purchase, must have been able to convey a good title or such as would comply with the requirements of the contract; but it is not necessary that he should have a good title at the time of the contract, but only that he should be able to convey a good title at the time of performance, and a good title does not necessarily mean a perfect record title. Nor is it absolutely essential that the vendor should ever actually have the legal title, if he is able to procure it or control it and have it conveyed to the purchaser, and offers to do so, but in such cases, the fact that he could and would have procured the conveyance of a good title to the purchaser must be affirmatively shown."*

In this case, all that the plaintiff showed, at best, is that he had a contract which might have entitled him to a conveyance subject to certain restrictions which are encumbrances thereon. Nor has he attempted to show that it would at all have been possible for him to have had these removed. The defense shows clearly that

the restrictions have not been waived. If the defendant had conveyed away his property prior to the time set for performance, the plaintiff might have been relieved of the necessity of making an actual tender; but he would not have been relieved of the necessity of showing an ability on his part to make and convey a good title. This distinction is pointed out in the case of *Wells Fargo and Company* v. *Page,* 3 L. R. A., New Series, page 103. In the case of *Bigler* v. *Morgan,* 77 N. Y., 312, the Court of Appeals of New York, speaking through Mr. Justice Rapallo, says that, to entitle the vendor

> "to recover damages for a breach of the contract, he must show that he was ready and willing to deliver such a deed as the contract called for. The refusal of the defendant to perform, although it obviated the necessity of a formal tender of a deed, did not dispense with the necessity of showing that the plaintiff was able, ready and willing to perform; and ordinarily this requires that the deed called for by the contract should be prepared and ready for delivery."

In that case, as in this, the action was brought upon a contract for the exchange of lands, and the Court held that:

> "However positively a purchaser may have refused to perform his part of the contract, and however insufficient the reason assigned for his refusal, he cannot be subjected to damages, without it being shown that he would have received what he contracted for in case he had performed."

See also

Booth v. *Milliken,* 127 N. Y., App. Div., 522, affirmed in 194 N. Y., 553;
Langley v. *Dauray,* 145 Mass., 325;
Stevenson v. *Fox,* 40 N. Y., App. Div., 354, affirmed in 167 N. Y., 599.

In our own State, we have the case of *Conover* v. *Tindall,* 20 N. J. L., 513, in which the opinion of the Chief Justice upon this subject is illuminating. In that case as in this, the plaintiff agreed to convey the farm free from encumbrances, and the defense was that the farm was not free from encumbrances, but was subject to a dower right. On page 515, the Chief Justice says:

> "The principal and important question raised by this demurrer, is, whether the fact of an existing dower right on the premises, at the day fixed for delivering the deed, if well pleaded, is a good defense to the action. I must confess I cannot see why it is not. Surely the defendant was not bound to accept and pay for a title he knew to be imperfect or incumbered, and look to his covenants for indemnity. A court of equity would not, under such an agreement as this, decree a specific performance, with such an incumbrance on the estate, and why should a court of law permit the plaintiff to recover damages for not accepting and paying for a title, which a court of equity would not compel the defendant to take? So far from this, where the vendor brings an action for the purchase money or for damages, for not performing the contract, a court of law will even take notice of equitable objections to a title and not permit a plaintiff to recover. (Sugd. on Vendors, p. 160. Shaw *v.* Jakeman, 4 East., 207; Elliott *v.* Edwards, 3 Bos. and Pul., 181-3.) The plaintiff in this case covenanted to make and deliver 'a good and sufficient deed with covenants of warranty;' in other words, to convey 'a good title,' as was decided by this Court in a case between these same parties; * * * I am of opinion, however, that if the farm at the time fixed for consummating the contract, was incumbered with a dower right, either in-

choate or absolute, it would be a good defence if well pleaded."

Further down, on page 516, the Court says:

> "It was argued on the part of the plaintiff, that the defendant ought to have averred a readiness to accept but for the encumbrance; that if the defendant had interposed that difficulty at the time, the plaintiff might have removed it; and then a court of equity would have decreed a specific performance. But I think the defendant might have pleaded a defect of title, even if it had not come to his knowledge until after he had refused to accept the deed, or even after action brought."

In the opinion of Justice Randolph, in the same case, at page 519, it is said:

> "If, then, this agreement for 'a good and sufficient deed,' means a good tile, of course, the defendant may plead and show in evidence a defective title, whether he was present or absent at the tender; and an averment of readiness to receive a title, but for this objection, is not necessary; *for the plaintiff must make such a tender as he can sustain by proof, to make a good title. Absence of a party may waive a personal tender* (25 Wen., 405; 2 Hill, 351), *but not a defective title.*"

In this case the plaintiff testified, over objection, that the defendant had read the agreement existing between his wife and the Land Improvement Company (Exhibit P2) prior to the making of the contract between the parties (Exhibit P1), so that if the plaintiff was telling the truth, in face of the encumbrances existing, he, by his contract with the defendant, agreed to convey a title *absolutely free and clear of all encumbrances.* The word "convey" has a technical legal meaning, and "absolutely free

and clear of all encumbrances" has also a well fixed legal significance. The contract was drawn by a real estate man, and there is no question in the case but that the parties understood what the contract obligated each to do. True, the defendant did not know that the plaintiff merely had a contract right, or what encumbrances there were against the property, but that did not obviate the necessity of the plaintiff being able to perform his part of the contract, and showing such ability at the trial; for if he was unable to perform the contract, according to its terms, whether the defendant knew of it or not, would not enlarge the plaintiff's rights and entitle him to recover damages for a breach of the contract by the defendant, when he himself was in default and could not perform if called upon to do so. In other words, even a tender of performance by the defendant would have been an idle and futile ceremony.

It is therefore submitted that the Court's refusal to non-suit the plaintiff at the conclusion of his proofs was error, and that the exception taken to such refusal should be sustained.

POINT II.

The Court erred in refusing to direct a verdict in favor of the defendant at the conclusion of the whole case.

This is the fifteenth ground of appeal. The motion to direct a verdict will be found commencing at the bottom of page 98. The Court refused this motion and defendant took an exception to the ruling of the Court (page 110).

At the conclusion of the whole case, so far as its legal aspects are concerned, it stood in substantially the same status as when the motion for the nonsuit was made, with the exception that it was proved

upon the defense by the testimony of Mr. Meeks (page 68) that the restrictions have not been waived, and that no deed was ever given by the Improvement Company for the property; that there was no payment made on account of the principal of the contract (Page 2), since December, 1914, or interest thereon since July 1, 1915 (pages 69 and 70), although the contract required the payments to be made monthly. It was also proved (page 74) that the taxes upon the property to be conveyed by the plaintiff, for the years 1915, 1916 and 1917, have not been paid. The plaintiff did not in any way attempt to explain these conditions or to indicate how he would have enabled himself to perform his contract, but upon the argument, allowed by the Court upon the motion for the direction of a verdict, counsel argued that the plaintiff said that he was ready, able and willing to carry out the contract on his part. We submit that there is not a scintilla of evidence in the case to sustain that insistment, but the contrary seems to be conclusively proved, although the burden, we maintain, was on the plaintiff to affirmatively establish his ability to perform. The plaintiff further cited the case of Wolf *v.* Meyer, which we contend has no application to this case whatever. The questions involved in that case, were, first, whether an action might be brought against a married woman upon her contract to convey lands; and, secondly, whether the conveyance by her of her lands to a third person over whom she had no control, so that she lost dominion of the property, before the time for performance set in the contract, constituted a breach or repudiation of the contract on her part, so that she might be sued at once without waiting for the date of performance to arrive. The latter point was one upon which the authorities differed, but the doctrine that suit might be maintained for an

anticipatory breach of contract, had been finally settled in this State by the case of *O'Neill* v. *Supreme Council,* 41 Vroom, 410. In this case the contract was to be performed on May 1st. The plaintiff was not able to perform at that time, nor was he able to perform at any time thereafter, and even though the defendant should have repudiated his contract before the time for performance, a tender on the part of the plaintiff might have been excused, but he still would have been required to show that he might have been able to perform but for the act of the defendant. Failing in this, he has proved his own default, for if the defendant had gone through the idle and futile ceremony of making a tender to the plaintiff, the latter could not have performed. It will be observed from the argument upon the motion for the direction of a verdict (pages 99-109) that the Court refused this motion with some misgivings, and in its charge to the jury, states substantially that the plaintiff has not proved his ability to perform, but that he testified that he could have performed. An examination of the entire record will disclose that the plaintiff did not so testify, and exception was duly noted to that part of the Court's charge (bottom of page 119). The case is entirely barren of any evidence, either direct or by way of inference, that the plaintiff could have performed, and under the authorities cited in the next preceding point, the defendant was entitled to have a verdict directed in his favor. In view of the fact that the defendant's testimony and that of his witnesses indicates quite clearly that the plaintiff refused to perform the contract on his part, by refusing to make any allowance to the defendant for the accrued interest on the debt of the Woodcliff Land Improvement Company, or for the taxes in arrears, as he was obliged to do by the contract sued on, the

plaintiff should have proved also his readiness, willingness and ability to meet these charges. The defendant's witnesses indicated that plaintiff said that he had no money wherewith to do this. The plaintiff's complaint (p. 3), declares upon the agreement for the exchange of these properties and in paragraph 2, sets forth that he was ready and willing to carry out the terms of the said contract. The second defence of the answer (p. 8), sets forth that the plaintiff was never able to consummate the said exchange or to perform the contract on his part to be performed; and the third defence, that the complaint discloses no cause of action because of its failure to allege a tender of a deed of conveyance or the purchase money mortgage referred to in the contract annexed to the complaint. Under these circumstances, the burden was clearly upon the plaintiff to show his ability, readiness and willingness to perform, and we submit that there is no evidence whatever in the case that he was so able, ready and willing to perform, but all the testimony indicates to the contrary, and the verdict should have been directed for the defendant.

POINT III.

The Court erred in overruling defendant's offer to prove that the Woodcliff Land Improvement Company, owners of an extensive tract of land of which the Caporale lots were part, conveyed away about all the lots with like restrictions as in P2.

This is the eighth ground of appeal (p. 127), and the ruling of the Court, to which exception was duly taken, appears on the bottom of page

67 and top of page 68. Together with this ground of appeal might also be taken up the second ground, where the Court overruled the question put to the witness, Clarence C. Weeks, on page 67:

> "Q. And had it prior to this agreement, marked P2, conveyed any lots or plots of that tract?"

The defendant's purpose in asking this question and in making this offer, was to prove that in pursuance of a development scheme, the Improvement Company, being the owner of an extensive tract of land which included the lots described in the plaintiff's agreement (P2), conveyed away about all of these lots, with like restrictions as contained in that exhibit. If that were shown, this proof would have established that others than the Improvement Company would have an interest in the enforcement of the restrictions, so that the Improvement Company could not waive them if they desired to do so; in other words, that the purchasers of the various tracts from the Improvement Company would have an interest in the plaintiff's lots to the extent of prohibiting their use except in accordance with the restrictions. *Bowen* v. *Smith,* 76 N. J. Eq., 456, is a case where such third persons enjoined the violation of restrictions by a purchaser from a common grantor, and Vice-Chancellor Leaming in that case reviews the authorities. He even goes to the extent of holding that the record of the deeds to other grantees of parcels of the tract, would charge a subsequent purchaser from the grantor with notice of the existence of the restrictions.

We submit that the defendant should have

been permitted to prove that such an encumbrance did exist upon the lots for which the plaintiff merely had a contract right, if any, and that in overruling this question and offer, the trial court erred, and that such error was harmful to the defendant.

POINT IV.

The Court erred in admitting testimony of the plaintiff against defendant's objection.

The plaintiff, on direct examination (p. 34), was asked by his counsel:

> "Q. Mr. Caporale, did you ever show this contract to Mr. Rubine, this Exhibit P2?
> "Q. Do you know whether or not he read it?"

Both of these questions were objected to, which objections were overruled by the Court and exception duly taken. These points are raised by the tenth and eleventh grounds of appeal. The contract upon which the suit is based, requires the plaintiff to convey his property to the defendant, "absolutely free of all encumbrances." Assuming that the defendant had read the agreement between Rose Caporale and the Improvement Company (which he denies, as do the other witnesses, who were present), and was familiar with the existence of these restrictions, can it be contended that the defendant by insisting upon a written agreement, whereby the plaintiff obligated himself to convey absolutely free and clear of all encumbrances, would have been deprived of the provisions of such contract in that particular? To so hold, would mean that the provisions of sol-

emn written instruments could be entirely destroyed and rendered nugatory, especially when the written instrument requires the performance of something entirely to the contrary. It is hardly necessary to do more in the presentment of this point, than to cite the case of *Demars* v. *Koehler*, 62 N. J. L., 203, where this Court, in an opinion by Chief Justice Magie, lays down the rule that knowledge on the part of a party, of the existence of an encumbrance, does not relieve the other party from the performance of his convenant. The parties have contracted for a certain piece of property, with a title unencumbered in any way, except the $6900 debt due the Improvement Company, and the defendant was entitled to such performance by the plaintiff, even though the defendant knew that the plaintiff did not have such title.

The prejudicial character of this testimony is manifest from the fact that counsel for the plaintiff, upon the argument of the motion for non-suit (pp. 63, 66), and upon the argument for the direction of a verdict, laid stress upon the fact that this testimony indicated that the defendant knew of the existence of these restrictions, and that because of this knowledge, the plaintiff would not be obliged to otherwise enable himself to perform than to convey such an encumbered title; and in the argument to the jury counsel laid similar stress upon this point. It is manifest that the admission of such testimony which tended to affect the terms of the written agreement sued on, and alter them, did prejudice the defendant before the jury.

The Court likewise erred in refusing the defendant's eleventh request to charge (p. 124), for the same reason, and the refusal to so charge was error, harmful to the defendant. This is

raised by the twenty-second ground of appeal (bottom of pp. 129-130), and the exception to such refusal appears on page 119.

This request was as follows:

> "If the plaintiff was unable, at the time fixed for performance, to convey the lands by him to be conveyed, absolutely free and clear of all encumbrances, excepting the debt of $6,900.00 due the Woodcliff Land Improvement Company, even though the defendant knew, at the time of the making of the contract sued upon, that plaintiff would be unable to convey such title, the plaintiff cannot recover."

We maintain that this request should have been charged, so that the attention of the jury would have been called to the rule that the plaintiff was bound by his contract to deliver an unencumbered title, regardless of whether the defendant had knowledge of the condition of the plaintiff's title or not, and the refusal thereof tended to indicate that the Court ruled that such knowledge on the part of the defendant might be considered by the jury upon the question of whether the plaintiff could have performed, not in accordance with the requirements of the contract in suit, but by an assignment of the contract subject to the restrictions, merely because the defendant, as was said, knew of their existence, or had read the contract wherein they were set forth.

POINT V.

The Court erred in charging the jury that plaintiff testified that he could have conveyed without encumbrances.

This part of the charge complained of is found at about line 40 on page 115 and the exception to that part of the charge commences at the bottom of page 119 and is raised by the sixteenth ground of appeal.

We submit that there is not the slightest testimony in the case, either by the plaintiff or anyone else, to the effect that the plaintiff could have conveyed without encumbrances. That seems to be the only question that the Court left for the jury's decision, when there was no evidence in the case upon that score, and all the evidence was to the contrary. It is held that where the Court in its charge states a fact as having been proven, when, in fact, such fact has not been testified to, it is harmful error, and the judgment should be reversed. (Bennett *v.* State, 41 N. J. Law, 370; Baker *v.* N. J. R. Co., 77 N. J. Law, 336; Heindel *v.* Hetzel, 82 Atl. Rep., 511.) It is clear from the reading of the entire charge, that were it not for this one question, the charge would have been substantial direction of a verdict for the defendant.

POINT VI.

The Court erred in refusing to charge the jury the defendant's sixth request.

This is raised by the seventeenth ground of appeal (p. 128), and the Court's ruling, to which exception is taken, appears on page 119. The

request to charge appears on page 122, and was as follows:

> "It was the duty of the plaintiff to be ready, able and willing to perform his part of the contract sued upon at the time fixed for performance, and he must, at that time, have been able to give to the plaintiff a title absolutely free and clear of all encumbrances, except a debt of $6,900, due to the Woodcliff Land Improvement Company, and if he was not able to convey such title, then, of course, he cannot recover in this action, and the verdict should be for the defendant."

The point raised by this request is presented above under points one and two, and was submitted to the court with a view of its charging the jury and making clear to them the legal rule which they were to apply. This request the court refused to charge, and we contend that this was error.

POINT VII.

The Court erred in refusing to charge the defendant's seventh request.

This request appears on page 122 and the exception to its refusal appears on page 119, and is raised by the eighteenth ground of appeal, page 128. The request was as follows:

> "The restrictions contained in the contract between the Woodcliff Land Improvement Company and Rose Caporale, marked "P2," are encumbrances against the property therein mentioned, and if those restrictions were still in force at the time fixed for performance of the agreement, the plaintiff was not able to deliver to the defendant a title such as called for by the contract, and he would, of course, not be entitled to recover, because

he himself was not able to perform the contract."

We submit that this request sets forth the correct legal rule applicable, and that is, that the restrictions above referred to are encumbrances against the property mentioned in the contract "P2," and that if they were still in force at the time fixed for performance, the plaintiff was not able to deliver the title called for by the contract, and could not recover. We submit that the Court erred in refusing this request.

POINT VIII.

The Court erred in refusing to charge the defendant's eighth request.

This request appears on page 123, and the exception to its refusal is found on page 119, and is raised by the nineteenth ground of appeal. The request was as follows:

> "The defendant was entitled, as a performance by the plaintiff, to have conveyed to him, the defendant, an estate in fee simple of the lands required by the contract to be conveyed to the defendant, absolutely free and clear of all encumbrances, except the debt of $6,900.00 to the Woodcliff Land Improvement Company, and unless he could convey such title, at the time fixed for performance, free of the restrictions mentioned in the agreement, marked "P2," the defendant is entitled to a verdict, even though the defendant, without notice, sold and conveyed his property to another."

We submit that this request contained the correct legal rule applicable to the evidence, and should have been charged by the Trial Court, and the refusal of it was error, harmful to the defendant.

POINT IX.

The Court erred in refusing to charge the defendant's ninth request.

This request is found on page 123, and the exception to the refusal to charge, on page 119, and is raised by the twentieth ground of appeal, on page 129. The request was as follows:

> "There is no evidence in the case that the plaintiff was ever able to convey to the defendant, or have conveyed to him, title to the lands by him, the plaintiff, to be conveyed, free and clear of all encumbrances, except the debt of $6,900.00, due Woodcliff Land Improvement Company, and the jury's verdict must, therefore, be for the defendant."

We submit that this request should have been charged, and its refusal was error.

This point is presented by the argument upon the refusal of the Court to direct a verdict for the defendant and that entire argument is apposite and applicable to this point.

POINT X.

The Court erred in refusing to charge the defendant's tenth request.

This request is found on page 123, and the exception to the refusal to charge it is found on page 119, and is raised by the twenty-first ground of appeal. The request was as follows:

> "The plaintiff must show by a preponderance of the evidence, that he was able, at the time fixed for performance, to pay the taxes then a lien upon the property by him to be conveyed and also the interest, then accrued upon the claim of the Woodcliff Land Improvement Company, and also the difference between the amount actually due the said

company and the amount specified as due in the contract, and if the plaintiff has failed to show his ability to make such payment or to otherwise satisfy the same, the verdict should be for the defendant."

We submit that this request clearly presented to the Court for submission to the jury the question as to whether the plaintiff was able to meet the obligations which he was to pay and satisfy at the time fixed for performance, to wit, the payment of taxes, and the interest accrued upon the Woodcliff Land Improvement Company debt, as well as the difference between the amount actually due the said company, $6,950, and the amount specified as due in the contract, $6,900. This was raised particularly because of the statement attributed to the plaintiff that he had no money with which to meet these charges. If he was unable to do so, and the jury might have found from the long lapse of time that no payments have been made for either taxes, installments of principal or interest on the Improvement Company's contract and his said statement, then the plaintiff was unable to carry out his part of the contract, and should not have been permitted to recover. He made no explanation of any kind in these respects. The Court nowhere in its charge stated that the plaintiff was obliged to prove his ability to perform by a preponderance of the evidence, as set forth in this request, and we submit this was error.

POINT XI.

The Court erred in permitting the witness Halpin to testify as to the value of the properties in September, 1917.

The testimony which is objected to is found on page 56 with the exception thereto, and is raised by

the twelfth ground of appeal. Even according to the plaintiff's testimony, and fixing the time of the conversation from Exhibit D1 for identification (p. 124), which was used by the witnesses Barbash, Halpin and Rubine, to fix the date as June 26, 1917, the defendant finally told the plaintiff that he would not perform the contract (see Testimony of Caporale, p. 24). That was also the Court's version of the evidence (Charge, p. 115, l. 17). If, therefore, the contract was broken by the defendant and any liability on his part existed, the damages would be measured by the difference between the contract price and market price on the date of the breach. It would appear from the testimony of Mr. Halpin, page 57, that the values in June were about the same as they were when the contract was entered into, and that thereafter the values somewhat increased. According to this testimony, if the breach occurred in June, as the plaintiff himself testified, he suffered no damage, and we submit that the Court erroneously admitted in evidence the value as of September, 1917. The question read thus:

> "Well, what would you say as to the price in September, 1917?"

We maintain that this was entirely irrelevant and tended to affect the minds of the jury with respect to the ascertainment of damages, and that this was harmful to the defendant.

There was no evidence whatever that the time for performance had been extended to September, the time to which this inquiry relates.

POINT XII.

The Court erred in overruling a question asked of the witness Louis Caporale on cross examination.

Upon cross examination of the plaintiff, the defendant (p. 32) asked of the witness:

> "Q. Did you ever have any other agreement with the Woodcliff Land Improvement Company than this paper marked Exhibit P2?"

The Court overruled this question, to which ruling of the Court the defendant duly excepted. The point is raised by the first ground of appeal (p. 126). The exhibit mentioned in this question was the agreement between the Woodcliff Land Improvement Company and Rose Caporale, wherein the restrictions were contained and the defendant sought by way of elimination to prove, out of the mouth of this very witness, the plaintiff, that he had no other agreement with the Improvement Company, so that it could not be claimed that the Improvement Company ever waived these restrictions, or that they had ever agreed to convey to him the title otherwise than as mentioned in that exhibit. The question was objected to, and the grounds of objection were that it was irrelevant, incompetent and immaterial. We submit that this question is not objectionable on any of these grounds, and was proper cross examination of the plaintiff himself, and should have been allowed, and that its exclusion was error.

POINT XIII.

The Court erred in overruling a question asked of the witness Charles Barbash.

On page 79 the witness Charles Barbash was asked:

> "Q. Can you tell us the value of the Rubine property on or about the first of May, 1917?"

And after some colloquy, continuing over on page 80, the Court overruled this question, and also refused to permit this witness to testify as an expert on the values of the respective properties involved in the suit, to which the defendant duly excepted. These points are raised by the third and ninth grounds of appeal (pp. 126 and 127). This witness testified that he has built and sold several houses in Woodcliff-on-the-Hudson in the neighborhoods of the respective properties of the plaintiff and defendant, and has sold the very lots upon which the defendant's house was built, and knows the cost of building a house, and has knowledge of sales of other properties in the vicinity, and has made a study of the values and real estate market in that locality. We submit that it is not necessary for an expert witness to have made actual sales himself, if he makes a study of the market, familiarizes himself with it from sales by others, and with general market conditions. Thus, merchants acquire their knowledge of values from general market conditions; similarly the values of securities are founded upon such conditions, and also from quotations which, strictly speaking, are nothing more than hearsay; but there would be no other way of establishing such values, and we submit that the law has found that this method of establishing values has been

quite reliable. So it is held in the case of Wheeler & Wilson *v.* Buckhout, 60 N. J. L., 102:

> "That a person may be qualified to testify as an expert either by study without practice, or by practice without study, but not by mere observation, without either study or practice."

In view of the uncertain and vague quality of the expert testimony of the witness Halpin as to values, and the many contradictory statements made by Mr. Halpin, Mr. Barbash's testimony would have thrown great light upon the actual values, and we submit, would have established that the values were the same on May 1st and in June as they were on the date that the contract was entered into, so that the plaintiff suffered no actual damage, and we submit that the overruling of the above question, put to the witness, Mr. Barbash, and the refusal to permit him to testify as an expert, was error.

POINT XIV.

The Court erred in overruling questions put to the witness Rubine.

On pages 96 and 97, the defendant was asked:

> "Q. I show you a plan and also a survey, and ask you if those are the plans and that the survey that you had made?
> "Q. Who was it called you to Caporale's place in June?"

And on page 96, the defendant offered in evidence the plans and survey which had been identified by the witness, Mr. Rubine. To each of these rulings the defendant excepted, and the points are raised by the fourth, fifth and seventh grounds of appeal (pp. 126-127). The plaintiff

testified that after the making of the contract (Exhibit P1), upon which the suit is based, the defendant did not make his appearance until he called at the plaintiff's place on June 26th, and that the plaintiff did not recall any conversation between the parties wherein he refused to make any allowance or settlement for the taxes in arrears and for the interest due the Improvement Company, and that at the meeting, in June, the defendant stated that he could not carry out the contract because his partner did not let him. The defendant states that he had no partner interested with him, and that the reason why the transaction broke off was because the plaintiff refused to acknowledge his obligation to meet the taxes and interest charges. Under these circumstances, the defendant was entitled to show what he did with respect to the property and in reliance upon the plaintiff's performance of his contract, to show his good faith in the matter and also to indicate that his intention was to perform the contract if the plaintiff had been ready, able and willing to perform the same on his part; and that he, the defendant, had gone to considerable expense in preparation or in anticipation of the contract being carried through. The admission of the plans and survey would have incidentally corroborated the defendant's story that he was satisfied and intended to carry out the agreement so far as he was concerned, but that he had lost the cost of excavation and for the preparation of the plans and the making of the survey because of the plaintiff's refusal to carry out the contract on his part. The jury would have a right to infer, from this, that it is improbable that the defendant would have gone to all of this expense and trouble and then himself broken the contract. This point is made more apparent by the

fact that the defendant called upon the plaintiff on June 26th, for the purpose of arranging for an outright purchase of the plaintiff's property, because of the moneys he had already invested in it. The defendant sought to show that prior to this visit in June all negotiations had terminated because of the plaintiff's attitude, but that he was again interested in the proposition of purchasing the plaintiff's property outright by Barbash and Halpin, two real estate agents who called him to the plaintiff's place in June. That the overruling of this offer and question was harmful to the defendant is manifest from the refusal of the Court to permit defendant's counsel to comment upon that in the argument before the jury (p. 110, line 20).

POINT XV.

The Court erred in excluding from evidence the paper marked P1 for identification.

The plaintiff testified (page 126, about line 30), that on the occasion of the visit to his place by the defendant, Mr. Barbash and Mr. Halpin, which he fixes as some time in August, that he did not remember giving the parties any paper on which to write, and that he did not see them write anything. Mr. Halpin, Mr. Barbash and the defendant all testify that the plaintiff did hand to Mr. Barbash a sheet of his stationery paper which was written upon in the plaintiff's presence, and that the paper was dated on the day it bore date.

This paper is marked (Exhibit D1 for identification), and appears on page 124, line 30. The paper was offered for the purpose of fixing the date of this visit, and also to contradict and

affect the credibility of the plaintiff. The paper tended to show that it was written upon the plaintiff's stationery and, coupled with the testimony of the other witnesses, that it was written in his presence. The Court, on page 98, excluded this from evidence, to which ruling the defendant duly excepted. This point is raised by the sixth ground of appeal, page 126.

POINT XVI.

The Court erred in admitting the question asked of the witness Clarence G. Meeks.

On page 71, the witness Clarence G. Meeks was asked:

> "Q. Is it your practice, Mr. Meeks, the practice of your company, to accept the balance of contract moneys, in advance of the time specified in the contract?",

to which question objection was made, as to what the practice of the company is, that it is improper cross examination, and irrelevant and immaterial. The Court allowed the question over defendant's objection, to which exception was duly taken. This point is raised by the thirteenth ground of appeal (page 127). We submit that this question was not proper cross examination, because the witness was not examined in chief, on any matter pertaining to the practice of his company. We further submit that the question was entirely irrelevant and immaterial. The parties to this suit were bound by their contract, and we cannot understand how it is at all relevant or material whether the Improvement Company's practice is to accept the balance of contract moneys in advance of the

time specified in the contract. Had the question been whether the Improvement Company would waive the restrictions in the contract, that would have been another matter. Furthermore, what the practice of the company is generally, would be of no value whatever. It does not go to show what the company might do in this particular instance. There was no question raised in the case about paying the Improvement Company the balance of the contract moneys in advance of the time specified in the contract. Neither of the parties had that question in mind, nor was that at all referred to in the contract. Defendant was not obliged to make any such payment for he believed that the plaintiff was the owner in fee of the property, and that the Improvement Company merely held a mortgage.

We submit, therefore, that it was error to have admitted this question, and that it was harmful to the defendant. This testimony afforded counsel an opportunity upon his argument to the jury, to insist that the defendant could have gone to the Improvement Company and by paying them in advance, obtain a deed, whereas the plaintiff's obligation was to obtain a deed for the defendant, absolutely free and clear of all encumbrances, which he could not do. The plaintiff was to "*convey*" to the defendant, subject to the lien against the property by the Improvement Company, to the extent of $6,900. The defendant was entitled to a conveyance of the property in accordance with his said contract, subject to the Improvement Company's lien, and not himself to pay to the Improvement Company the $6,900 before he could obtain a deed of conveyance and thereby become the owner of the property. The defendant was entitled to more than a mere right to

bring action against the Improvement Company for specific performance upon the contract, the installments of which were at the time almost two years in arrears, and the interest almost two and one-half years in arrears; a suit of probably doubtful result.

POINT XVII.

We respectfully submit that the judgment of the Supreme Court in the above entitled action should be reversed.

GROSS & GROSS,
Attorneys and Counsel with
the Defendant-Appellant.

New Jersey Court of Errors and Appeals

LOUIS CAPORALE, Plaintiff-Respondent, *v.* SAMUEL H. RUBINE, Defendant-Appellant.	Action at Law on Appeal from Supreme Court.

BRIEF OF PLAINTIFF-RESPONDENT.

Statement of Facts.

This action was brought for the recovery of damages alleged to have been suffered by the plaintiff because of an alleged breach of contract entered into between plaintiff and defendant on April 16th, 1917, which contract appears on page 10, State of the Case.

By an examination of the contract it will appear that the plaintiff and defendant agreed to exchange their properties. The defendant was to convey to the plaintiff certain property owned by the defendant, on the southwest corner of Broadway and Thirtieth Street, Woodcliffe on the Hudson, for $14,850, subject to a mortgage of $10,000, and a mortgage to be executed by the plaintiff to the defendant for $1,700, leaving an equity of $3,100 in defendan't property. The plaintiff was to convey to the defendant four lots which he was buying under a contract from

the Woodcliffe Land Improvement Company, and on which they figured at the time of making the contract there was a balance remaining unpaid of $6900.00, which the defendant was to assume and which left an equity in plaintiff's property of $3,100. The contract further provided that the party of the second part (who was the plaintiff in this case) was to settle at his own cost and expense any taxes or *other charges* against the property remaining unpaid. The title was to be passed on or about May 1st, 1917, at the office of William H. Halpin, a real-estate agent. On May 1st, the plaintiff appeared at the office of Mr. Halpin for the purpose of carrying out the terms of his agreement (State of the Case, p. 18, l. 20), but the defendant did not appear. The plaintiff appeared again on May 3rd and on May 8th, and on that day Mr. Halpin, the agent, informed the plaintiff that he had information that Mr. Rubine was sick (State of the Case, p. 19). Plaintiff called again and still the defendant did not appear, and he didn't meet the defendant until the latter part of July, when the defendant gave the plaintiff a set of plans for a new building, and told him that he wanted to give him a new proposition, and the plaintiff said, "he didn't think anything of that proposition at all," that he wanted to keep on with the first (State of the Case, pp. 20 and 21).

This was the first meeting plaintiff had with the defendant since the signing of the contract, although the defendant had entered into possession of the plaintiff's property almost immediately after making the agreement. The plaintiff testified (State of the Case, p. 22), that he saw the defendant again some time in August (he believed), but which the defendant said was in

June, 1917, when the defendant, Mr. Halpin and a Mr. Barbash called at the plaintiff's place of business, at which time the plaintiff said (p. 22, l. 31): "Q. And what took place that day? A. Mr. * * * they * * * Mr. Rubine told * * * when I saw them coming in, I said, 'Why, it is about time to come to conclusion'; Mr. Rubine said, 'We will get down to the bottom of it now.' I says, 'All right'; so he says to me then, 'Well,' he says, 'I can't carry on the first proposition and neither the second; so the best thing we can do,' he says, 'is to settle it in cash.' 'Well,' I said, 'all right; let's hear what you got to say.' So he offered $1,500.00 to settle. I said, 'No, nothing doing,' I said, 'By allowing the taxes, and what I am in arrears with the Woodcliffe Land & Improvement Company,' I said, 'I am willing to consent on $2,500.' Then Mr. Halpin and the other gentleman that was with him tried to intercede, and asked me to split the difference and make it $2,250.00; so, I said, 'All right, let her go.'"

Then a dispute arose as to the payment of the taxes and what was in arrears with the Woodcliffe Land Improvement Company and the deal was not consummated, and the plaintiff said, (page 24), "Well, what was said after that? A. Then he said, 'Nothing doing, nothing doing.' I said, 'Let us carry on the first proposition then. I am satisfied to carry on the first.' He says, 'No, I can't do it.' Q. And what did he do with this check? A. That was destroyed; he destroyed it himself. Q. Now, did he say why he wouldn't carry out the contract? A. Because his partner wouldn't let him. Q. Did he say who his partner was? A. Somebody by the name of Grossman."

This was the last meeting of the parties. Sub-

sequently the plaintiff learned that the defendant had conveyed his property to a third person; then this suit was started for breach of contract; a *capias* was issued and the defendant was arrested and gave bail in the sum of $3150.

The case was tried at the Bergen Circuit for the April Term, 1918, and judgment was rendered in favor of the plaintiff by a jury for $925.00.

POINT I.

The Court rightfully refused to grant defendant's motion to non-suit the plaintiff at the conclusion of the plaintiff's case.

Counsel for defendant in their brief (p. 7) contended that the plaintiff had failed to prove his ability to carry out the agreement sued on or to show an offer or tender of performance. By a close examination of the agreement (State of the Case, p. 10), the Court will notice that the purchase price which the defendant was to pay for the plaintiff's property was $10,000. The contract clearly showed there was a balance due to the Woodcliffe Land Improvement Company of $6900 and that the contract further provided that *any taxes or other charges* against the property remaining unpaid would be settled by him (plaintiff) at his own cost and expense. The title was to be passed on or before May 1st at the office of William H. Halpin, a real-estate agent.

The plaintiff appeared at the office of William H. Halpin on May 1st, and several times thereafter for the purpose of carrying out the agreement. The defendant did not put in an appearance nor did he raise any objection whatsoever as to the inability of the plaintiff to perform, and

from that time on, we respectfully submit, the defendant was in default, and the plaintiff would, therefore, be relieved from making any tender whatsoever until such time as he had been notified definitely by the defendant that he wanted to carry out the agreement.

The Court will also keep in mind that the defendant's excuse for not appearing on May 1st was that he had caught cold, and it was, therefore, impossible for him to be there (State of the Case, p. 94).

> "Q. But on May 1st you had a cold? A. Well, I just happened to catch cold then."

Plaintiff was not given any knowledge of the illness of the defendant until May 8th (State of the Case, p. 19).

> "Q. And did you call on May the 8th? A. I did.
> "Q. Where did you go? A. The same place, Mr. Halpin's office.
> "Q. And who was there? A. Mr. Halpin.
> "Q. Anyone else? A. No.
> "Q. Anything done that day? A. No, sir.
> "Q. Did Mr. Rubine show up? A. No, sir.
> "Q. Did Mr. Halpin communicate with him? A. He did.
> "Q. And did he give you any instructions? A. He told me that he had information that Mr. Rubine was sick."

Counsel for defendant also argue in their brief, page 8:

> "Of course, if the defendant had done anything which would have prevented the plaintiff from procuring such a title as he agreed to convey under the contract, it might be held that he thereby waived the condition, but the defendant herein did absolutely nothing."

That seems to have been the whole trouble in this case, namely, refusal on the part of the defendant to do anything towards carrying out his part of the contract; as counsel said, "He did absolutely nothing." He failed to appear on the 1st of May, and did not appear until some time after; as to the exact date, there was a disputed question of fact for the jury; time was not of the essence of the contract, and, therefore, the plaintiff was not obliged to be in a position to convey a good title to the defendant until the minds of the parties had met upon a definite time for carrying out the contract. Therefore, not having met and fixed a definite time, the plaintiff had a right to assume that the defendant would notify him when he was ready to close, so that by that time the plaintiff could convey a good title as agreed. Furthermore, defendant positively refused to carry out the terms of the contract, giving as an excuse therefor that "his partner would not let him."

We further submit that the Court rightfully refused to non-suit the plaintiff, because at no time had it appeared that the defendant refused to carry out his part of the agreement because of the alleged encumbrances against the property.

The case of Conover *v.* Tindall, 20 N. J. L., 513, cited by counsel for the defense, doesn't help the defendant; if anything it favors the plaintiff, because the Court said (p. 516):

> "I am of opinion, therefore, that if the farm at the time fixed for consummating the contract, was encumbered with a dower right, either inchoate or absolute, it would be a good defence, *if well pleaded.*"

On page 516, the Court says:

> "It was argued on the part of the plaintiff that the defendant ought to have averred a readiness to accept but for the encumbrance; that if the defendant had interposed that difficulty at the time, the plaintiff might have removed it; and then a court of equity would have decreed a specific performance. But I think the defendant might have pleaded a defect of title, even if it had not come to his knowledge until after he had refused to accept the deed or even after action brought."

This law was dismissed by our Supreme Court in the case of Stryker *v.* Vanderbilt, 27 N. J. L., 68, at page 72, where the Court said:

> "The case falls clearly within the principle of Todd *v.* Hoggart, 1 Moody & Mal., 128."

It was there held that:

> "In an action by the purchaser to recover the deposit made on the purchase price of an estate, on the ground of a defect in the vendor's title *that no objection could be insisted on at the trial* which was not stated as a reason for refusing to complete the contract, if it be of such a nature that it might, if then stated, have been removed."

At no time did the defendant refuse to carry out his agreement or refuse to accept a deed from the plaintiff because of the alleged encumbrances, and it certainly stands to reason that had an objection of that kind been made by the defendant, the plaintiff, no doubt, could have made arrangements to have the restrictions released from the contract under which he was to obtain his deed, and it is a matter of common knowledge that restrictions are always subject to be released by agreement between the parties.

The time fixed for the performance of this con-

tract was May 1, 1917. Time was not of the essence of this contract and the evidence shows that no definite time thereafter had been fixed for performance by the plaintiff, and, therefore, the plaintiff had a right to assume the defendant would arrange with him for a definite day for closing. But when the defendant, in September, conveyed his property without notifying the plaintiff or giving him any notice whatsoever, then the plaintiff had a right immediately to assume that the defendant had abandoned the contract and had conveyed his property for the purpose of putting it beyond the control of the plaintiff, thereby relieving the plaintiff from any further responsibility and giving to the plaintiff an immediate right of action.

And, further, the testimony was that Rubine saw the contract with the Woodcliffe Land Improvement Company. That he knew, or should have known, that there were restrictions contained therein. See the testimony of Wm. H. Halpin (State of Case, p. 38).

> "Q. Do you know why that was put in, or why that was mentioned, $6,900.00? A. That was the balance that was due the Woodcliffe Land Improvement Company on this contract.
>
> "Q. And was that stated so at that time? A. I believe so.
>
> "Q. You were present then at that time? A. I was."

POINT II.

The Court rightfully refused to direct a verdict in favor of the defendant at the conclusion of the whole case.

The particular point involved in this case is that there was no definite time fixed for the performance of the contract after May 1st. It is not disputed by the defendant that on May 1st he failed to appear. He doesn't dispute the fact that the plaintiff appeared for the purpose of closing the transaction. By reason of the defendant's failure to appear on the day set for closing, the plaintiff was released from any furthere performance on his part until a definite day had been settled upon for closing. The evidence as to whether a definite day had been fixed is conflicting. The plaintiff testified that he went to the office of Mr. Halpin a number of times. The defendant admits that he was not there, but says that he called at the office some time after the first of May, to-wit, May 7th (State of the Case, p. 84):

> "Q. Now, after this agreement P. 1 was signed, what did you do with respect to the Caporale property? A. Well, we were supposed to pass the title May 1st, or thereabouts. I was sick; I did not come around, and I sent word to Halpin. I didn't come around there until about the 7th, and Mr. Caporale was not there, and arrangements were made for a day or two after, and Mr. Caporale came there and I was there, and Mr. Halpin. And when we came to talk it over, I asked him if he could deliver it free and clear, and he says, 'No. I wasn't going to pay the taxes and interest,' and I says, 'Now, Mr. Caporale, that isn't the agreement.' I had already started to excavate on the land at that time. 'That isn't what we

agreed on.' He says, 'That isn't the way I want to do that.' I says, 'Then, it is off.' He says, 'All right'" (page 85).

"Q. You say, you saw Caporale again in June? A. I saw him in June.

"Q. Where? A. In his place of business.

"Q. Who called you there? A. Mr. Halpin and Mr. Barbash had made the arrangements for me to go there."

Page 86:

"Q. Was there anything said on that occasion about the first contract? A. No, sir, nothing was said about that contract at all."

This testimony is flatly contradicted by the plaintiff, page 24, where, after testifying about the meeting June 26th (which the plaintiff stated he believed was some time in the latter part of August),

"Q. Then what was said when you said that? A. Then he said he wanted to reduce the taxes and what I had in arrear with the Woodcliffe Land & Improvement Company from the $2 250.

"Q. Yes? A. Where I meant to reduce that from the $3,100.00.

"Q. Well, then what was said after that? A. Then he said, 'Nothing doing, nothing doing.' I said, 'Let us carry on the first proposition then. I am satisfied to carry on the first.' He says, 'No, I can't do it.'"

And the witness Halpin testified on cross examination page 42:

"Q. Don't you remember, Mr. Halpin, on or about the 15th or 17th of May, Mr. Rubine and Mr. Caporale met at your office for the purpose of trying to arrange for the closing of this transaction; Mr. Caporale then and there refusing to recognize any obligation on his part to pay the arrears of interest

and the tax arrears on his property? A. No, I don't remember."

Certainly this evidence as to whether a definite time for performance had been agreed upon was sufficiently conflicting to allow the jury to pass upon it and we respectfully submit that the jury had a right to say whether or not the default on the part of the defendant on May 1st, had been waived; whether or not the parties had agreed upon a definite day thereafter for closing, and if the plaintiff waived the default of the defendant and agreed to extend the time of performance, the jury had a right to say which party was in default, and when the default, if any, occurred, namely, either on May 1st, or in June, or in September, when the defendant conveyed his property, thus putting it out of his power to carry out the contract.

All the law submitted by the counsel for defendant lays down the general rule of law, that the plaintiff was not required to convey a good title at the time of the contract *but only that he should be able to convey a good title at the time of performance,* and a good title doesn't necessarily mean a perfect record title, nor is it absolutely essential that the vendor should ever actually have the legal title, if he is able to procure it or control it and have it conveyed to the purchaser, and offers to do so.

The plaintiff testified that he was always ready to carry out his part of the agreement, and in the case of Conover *v.* Tindall, 513, cited by counsel for the defendant in his brief, the Court said, at page 520:

"Readiness and ability are synonymous. For if the plaintiff was ready he could or was able to make a good title; and if he

was not ready he could not or was not able to do it, and so *vice versa.*"

And the Court may bear in mind that at no time did the defendant refuse to carry out the contract upon the ground that the alleged restrictions were an encumbrance against the property; that his only objection seemed to be concerning the adjustment of the taxes and the amount due the Woodcliffe Land Improvement Company.

Brown *v.* Honniss, 70 N. J. L., p. 260.

The Court may also bear in mind that defendant was in the real estate business and had been for twenty years (State of the Case, p. 83). That he had bought property in this same neighborhood, and that the very property that he was to convey to the plaintiff was on the same map and subject to the same restrictions. Furthermore, if defendant refused to carry out his contract because of the encumbrances against the property, why, after May 7th (State of the Case, p. 84), did he go to the plaintiff again in June and try to negotiate for the purchase of these same lots for $2,250 (State of Case, p. 86)? We contend that, as the defendant did not give as an excuse for his non-performance, the alleged restrictions, he was estopped from introducing any evidence thereof at the trial.

To further show the fallacy or unreliability of defendant's testimony at the trial, he offered in evidence an unpaid tax certificate against the property for the years 1915, '16 and '17, and the Court can readily see that in May, 1917, or even in September, 1917, the taxes for that year were not due and were not a lien; that they didn't become a lien until December 20th, 1917. See Defendant's Brief, page 14.

POINT III.

(Under this point we will consider Points 3, 4, 11, 12, 13, 14, 15 and 16, and take them in that order.)

The Court did not err in overruling the defendant's offer to prove that the Woodcliffe Land Improvement Company, owners of an extensive tract of land, of which the Caporale lots were part, conveyed away about all the lots with like restrictions, as in P2.

The question asked of the witness was entirely irrelevant and immaterial in this case. It would not make any difference whether or not the Woodcliffe Land Improvement Company had conveyed all of the other lots in the contract with like restrictions. That fact standing alone would not compel them to give a deed to Caporale with the restrictions.

The Court must bear in mind that Caporale was buying the land from the Woodcliffe Land Improvement Company under contract and that when he called for his deed it would have been possible for him to have the restrictions released. Such an agreement would be legal whether or not the company had previously sold their lots out of the same tract with restrictions. Counsel seems to lose sight of the fact that the case of Bower *v.* Smith, 76 N. J. Equity, 456, is an action based upon restrictions contained in a deed, which is an entirely different proposition from an agreement to convey with restrictions, as all agreements are subject to change by mutual consent between the parties.

POINT IV.

The Court erred in admitting testimony of the plaintiff against defendant's objection.

Page 34:

> "Q. Mr. Caporale, did you ever show this contract to Mr. Rubine, this Exhibit P 2?
> "Q. Do you know whether or not he read it?"

This testimony was very material, because the defendant contended that the $6,900 mentioned in the agreement was interest on a mortgage. Whereas the plaintiff contended that the $6,900 was the balance due to the Woodcliffe Land Improvement Company on this particular contract; that the defendant having read the same, knew there were restrictions, and that, no doubt, was his main reason for not raising that as an objection to carrying out the agreement.

Case cited by counsel, DeMars *v.* Koehler, 62 N. J. L., 203, is not in point because that was an action for a breach of covenant contained in a conveyance, whereas in the case under consideration, plaintiff had a contract with the Woodcliffe Land Improvement Company, which he endeavored to show the defendant had knowledge of. Our courts have held:

> "An agreement to convey is obviously not a conveyance."
>
> Wolff *v.* Meyer, 75 Law, 181, at 183.

The Court said further. referring to the last mentioned case:

> "Is it an instrument encumbering the real estate? If we adopt the view of Chief Justice Beasley in Sullivan *v.* Barry, which was ex-

> pressly approved by the Court of Errors & Appeals, that 'encumber is used in its ordinary and not technical meaning,' it is fair to say that an agreement to convey is no more an encumbrance than was the term of years in that case."

This law is merely cited to show that the courts do not place the same construction upon a contract for a conveyance they do upon a breach of covenant contained in a conveyance. Therefore, the case cited by counsel in their brief is not applicable.

We might add further that counsel tries to take very unfair advantage by saying in his brief on page 19: "And in the argument to the jury counsel laid similar stress upon this point," which we respectfully submit is without foundation. The Court in its charge fully covered the situation.

Also the refusal of the Court to charge the eleventh request for the defendant (p. 124), was very proper because there had been no time fixed for performance; the jury was to say, first, whether the default of the defendant in not appearing on May 1st had been waived, and second, had there ever been any other time subsequent to May 1st fixed for carrying out the contract. For these reasons the Court rightfully refused this request.

POINT 11.

The Court erred in permitting the witness Halpin to testify as to the value of the properties in September, 1917.

All we can say on this point will only be a restatement of what has previously been discussed, namely, that the defendant having defaulted on May 1st (the original time for performance), the jury was to say whether that default had been waived, because time was not of the essence of the contract, and if they came to the conclusion that it had been waived, then they were to find whether a definite day had been agreed upon by the parties for performance. The evidence is so conflicting that the jury had a right to say that the default occurred on May 1st, or if that had been waived it occurred in June, or if they didn't believe that the date alleged in June was for the purpose of carrying out the original contract then no time had been definitely fixed for performance, so that, when the defendant conveyed his property in September that that was the time when the real default had occurred, because the defendant had put it out of his power to carry out the contract, thereby giving the plaintiff his right of action, allowing him to show the value of the property as of that date.

We respectfully submit that the question as to the prices of the property in question in September, 1917, is very material and properly allowed by the Court.

POINT 12.

The Court erred in overruling a question asked of the witness Louis Caporale on cross examination.

> "Q. Did you ever have any other agreement with the Woodcliffe Land Improvement Company than this paper marked Exhibit P2?"

This question was properly overruled because it had no material bearing on the facts in issue. It was of no evidential value. We submit that it would not make a particle of difference whether Caporale had any other agreement with the Woodcliffe Land Improvement Company or not, because defendant was not to receive from the plaintiff an agreement with the Woodcliffe Land Improvement Company; all that had to be done was to fix a definite day for closing, and the fact that there were other agreements between the plaintiff and the Woodcliffe Land Improvement Company, or that there were not any other agreements, would have no material bearing on the case.

POINT 13.

The Court erred in overruling a question asked of the witness Charles Barbash.

> "Q. Can you tell us the value of the Rubine property on or about the 1st of May, 1917?"

Looking at the testimony of the witness Barbash on page 78, the Court will find the following questions and answers:

> "Q. Do you know the cost of building a house? A. I think I do.

"Q. And have you been in the habit of estimating from plans the cost of erecting buildings? A. I did.

"Q. And for how many years have you been doing that? A. Nine years.

"Q. Have you also heard of other sales of property in this same locality at the corner of Broadway and 30th Street? A. No, there wasn't any.

"Q. There weren't any sales? A. No.

"Q. How about the location of the Caporale property at the corner of Bergenline Avenue and 30th Street. Have you known of any sales of lots in that location? A. Yes, sir.

"Q. Have you sold any? A. No, sir.

"Q. Well, who did you get your information from? A. There is a real estate man by the name of McKenna sold three lots on 31st Street and Bergenline Avenue.

"Q. That is one block from this property? A. Yes, sir.

"Q. How does the neighborhood there compare with the property in 30th Street? A. 30th Street is considered better neghborhood.

"Q. 30th Street is? A. Yes, sir.

"Q. And any other sales that you know of in that neighborhood? A. Yes, sir, on 34th Street, northwest of Bergenline Avenue.

"Q. The northwest corner? A. Yes, 50 x 100 was sold by Chief of Police Mauss.

"Q. Do you know those sales? A. Yes."

The Court rightfully refused to allow this witness to testify as an expert on the value of the buildings because the only knowledge that he had was what somebody else had told him. He had not made any sales and when he was asked from whom he had gotten his information he said, "A real estate man by the name of McKenna," and the Court rightfully stated that knowledge gained by what someone had told him was not sufficient to qualify him as an expert

and if he had made any study at all it was simply a study of the sale of lots, because the question was asked him by counsel, "Q. Have you known of any sales of lots in that section? A. Yes, sir" (p. 78), which was followed on page 79 by the question, "Q. And made a study of it? A. Yes, sir." Meaning that he has made a study of the sale of lots, and as there were also buildings on the Rubine property he was not qualified to testify as an expert as to the value of the entire property.

And in addition to this counsel for the defendant on cross examination of William Halpin, one of the plaintiff's witnesses asked the following question (State of the Case, p. 55):

> "Q. In your opinion as an expert, Mr. Halpin, about May, 1917, you would say the Rubine property was worth about $14,800? A. Yes.
>
> "Q. And you would say that the Caporale property was worth about $10,000.00? A. Yes, sir.
>
> "Q. And those prices are about all that the fair value of these respective properties would be; is that correct? A. Yes, sir."

So that, even assuming that the question asked of the witness Barbash was admissible, it would only be cumulative, and the refusal to admit it was what would be harmless error.

See Ross *v.* Commissioners of Pal. Int. Park, 101 Alt. Rep., page 60.

POINT 14.

The Court erred in overruling questions put to the witness Rubine.

On pages 96 and 97, the defendant was asked:

> "Q. I show you a plan and also a survey, and ask you if those are the plans, and that the survey that you had made?
> "Q. Who was it called you to Caporale's place in June?"

We respectfully submit that the plans and survey which counsel for defendant offered to introduce in evidence were entirely irrelevant, incompetent and immaterial, and had not the slightest bearing upon the agreement between the parties, and was simply offered under the assumption that they had proven a new agreement when no such agreement had ever been entered into or proved. Therefore, no foundation had been laid for the introduction of evidence of this kind. The reason this transaction was never concluded or carried out was that the plaintiff refused to acknowledge his obligation to meet the taxes and interest charges. Assuming for the sake of argument that that was so, how under any circumstances could a plan and survey that had no bearing on the transaction be offered in evidence, even though that may have been their intention? The evidence in the case clearly established that the agreement had been broken by the defendant long before the matter of the plan and survey, to-wit; on the day fixed in the contract for performance, viz., May 1st, when the defendant failed to appear, but the plaintiff was at the place agreed upon, ready and willing to carry out his bargain.

> "By the English practice it is the duty of the purchaser to prepare the conveyance and tender it to the vendor for execution." Sugdem on Ven. & Pur., Am. Ed. (1836), 293, 299; Chit. on Con. (Ed. 1855), 276.

And in the recent case of Poole *v.* Hill, 6 Mees & Wells, 835:

> "It was held that it was not necessary in an action by the vendor for the non-payment of the purchase money according to the contract to aver that the plaintiff offered or tendered a conveyance to the defendant.
>
> "It was sufficient to allege that the plaintiff has always been ready and willing to execute a conveyance."

The contrary rule prevails here, and in most of the American States. Chit. on Con. 276, 277, note 2; Sugdem on Ven. & P., 293, note 158.

> "Still conceding it to have been the duty of the vendor at the time and place designated in the contract to tender a deed, the purchase price being then payable, it became the duty of the defendant then and there to except to the form of the deed, if its terms were not satisfactory."
>
> Stryker *v.* Vanderbilt, 27 Law, p. 68, at 72.

Again, we find the case of Nissel *v.* Swinley, 69 At. Rep., page 960, which was an action for breach of contract for sale of land. Justice Swayze, speaking for the Court, said:

> "The plaintiff cannot recover unless he has shown a breach of the contract by the defendant. That question is narrower than whether a contract for sale of lands under seal can be altered, as to the time of performance, by parol."

The opinion of Chief Justice Green, in Stryker *v.* Vanderbilt, 25 N. J. L., 482, is conclusive upon this Court. He there expressly approved of Lord Ellenborough's decision in Cuff *v.* Penn, 1 Maule and Selwyn, 21, 26. The reasons for holding that there is no actionable breach under such circumstances are well stated in Thomson *v.* Poor, 147 N. Y., 402, 42 N. E., 13. The Court said:

> "The rule is well understood, that, if there is forbearance at the request of a party, the latter is precluded from insisting upon non-performance at the time originally fixed by the contract, as a ground of action."

It was undisputed that the title was to be passed at the office of Halpin, a real estate agent, on May 1st, 1917. It is also undisputed that the defendant did not appear on that day and plaintiff was not given any reason for his failure until May 8th, 1917, when he was informed by Halpin that he had received word the defendant was sick. The defendant testified that his illness consisted of a cold.

Under the authority of Egbert *v.* Chew, 14 N. J. L., 446, at 454, this failure on the part of the defendant amounted to a breach on his part and relieved the plaintiff from making any tender. To quote the language of C. J. Hornblower in the case:

> "The non-attendance of the defendant, would, no doubt, if unexplained, have been a sufficient excuse for not making a tender; nay, it would in itself have been substantially a breach of the agreement *if* by the expressed or implied terms of the contract that was the designated or proper place to deliver or tender the deed and consummate the bargain. (1 Chit. on Pl., 319; Miller *v.*

Drake, 1 Caines Rep., 45; Hotham *v.* The East India Co., 1 T. R., 638)."

The office of Halpin, the real estate agent, was the proper place to consummate the bargain in the case under consideration, as is shown by the undisputed testimony of both parties.

On that date the plaintiff was there ready and willing to carry out his agreement.

The defendant did not put in any appearance. Therefore, the plaintiff was not required after that date to make a tender. He was not required to do anything, in fact; but the evidence shows that the defendant was the one who was doing all the running; he was continually after the plaintiff, calling at his place of business, trying to make new agreements, which the plaintiff refused to enter into, and insisted upon carrying out the first agreement, which the defendant never wanted to do.

As to the second question, "Who was it called you to Caporale's place in June?" We submit that the Court rightfully refused this, because no foundation had been laid for such a question, and there was nothing to connect Caporale with it; as the Court said, he didn't think it competent unless counsel could show that he was sent for by the plaintiff. This question was properly overruled.

POINT 15.

The Court erred in excluding from evidence the paper marked P1 for identification.

This was an entirely irrelevant matter and simply an attempt on the part of the defendant to bind the plaintiff by a writing which he never signed but which it was testified to had been written by the defendant's own witness, Mr. Barbash (State of the Case, p. 76, l. 36), and further this paper was not marked Exhibit P 1 for identification, but D 1 for identification, and was simply an attempt on the part of the defendant to manufacture his own evidence, and could not under any circumstances be binding upon the plaintiff, who disputed it, had not signed it, nor agreed to it.

POINT 16.

The Court erred in admitting the question asked of the witness Clarence G. Meeks.

On page 71, the witness, Clarence G. Meeks was asked:

> "Q. Is it your practice, Mr. Meeks, the practice of your company, to accept the balance of contract moneys in advance of the time specified in the contract?"

The purpose of this question was to corroborate the plaintiff's testimony that he was ready and willing to perform his agreement, and the answer to this question clearly showed that had the defendant wanted to carry out the agreement the plaintiff would have been in a position to obtain his deed and close the matter.

The answer was, "We have done so and we would be willing to do so in almost every case that tender was made us." This was very material and showed that Caporale could have carried out his part of the agreement had the defendant wanted to do so, but the whole difficulty in the case was that the defendant never wanted to carry out his agreement, but endeavored to get the plaintiff's property without letting go or transferring his own property to the plaintiff in accordance with the agreement.

Another strong point which stands out most clearly against the defendant is the fact that immediately after signing the agreement he entered into possession of the plaintiff"s property.

POINT IV.

(Under this point we will answer Points 5, 6, 7, 8, 9 and 10 of the defendant's brief, which cover errors in charging the jury and refusals to charge).

POINT 5.

The Court erred in charging the jury that the plaintiff testified that he could have conveyed without encumbrances.

This appears to be rather a technical objection which really has no foundation in view of the charge made by the Court which was very favorable for the defendant, and although the plaintiff may not have said in express words, that he could convey without encumbrances, he did say what amounted to the same thing, page 20, line 30:

"Q. And what did you meet there for, for what purpose? A. For the purpose of concluding what was on the agreement."

And in answer to the Court's question, page 23:

"The Court: You were going to convey him the land, were you?
"The Witness: Yes, sir."

And on page 24, line 20:

"Q. Well, then, what was said after that? A. Then he said, 'Nothing doing, nothing doing.' I said, 'Let us carry on the first proposition, I am satisfied to carry on the first.' He says, 'No, I can't do it.'"

Certainly evidence of this kind is tantamount to an admission that the plaintiff could have conveyed free from encumbrances.

POINT 6.

The Court erred in refusing to charge the jury the defendant's sixth request.

"It was the duty of the plaintiff to be ready, able and willing to perform his part of the contract sued upon at the time fixed for performance, and he must, at that time, have been able to give to the plaintiff a title absolutely free and clear of all encumbrances, except a debt of $6900 due to the Woodcliffe Land Improvement Company, and if he was not able to convey such title, then of course, he cannot recover in this action, and the verdict should be for the defendant."

This request, we submit, was fully covered by the Court in its charge on page 113, line 31, as follows:

> "The general rule of law is that where one party to a contract stands ready and willing to carry out his part, and the other party either refuses or neglects to carry out his part, damages can be recovered from the party in default. If both parties are in default there can be no recovery; and that is the general rule of law governing actions on contract."

This instruction to the jury was sufficient to cover the request to charge, and further, on page 116, line 37:

> "If you find the plaintiff has never been ready to carry out his part of the contract, and so informed the defendant before he conveyed the property, then he could not live up to its terms, he cannot recover."

On page 117, line 22, the Court charged as follows:

> "You are to say, from all the evidence, whether the plaintiff lost any profits by the failure of the defendant to comply with the terms of his contract, if you find he can recover anything, and if so, how much, and your verdict should be for the plaintiff for that amount. If you find, however, that the plaintiff has not established his case by a preponderance of the evidence, or if you find the contract has been rescinded, your verdict should be for the defendant."

This charge really covered nearly every point or request that counsel for the defendant could raise.

POINT 7.

The Court erred in refusing to charge the defendant's seventh request.

"The restrictions in the contract between the Woodcliffe Land Improvement Company and Rose Caporale, marked P 2, are encumbrances against the property therein mentioned, and if those restrictions were still in force at the *time fixed for the performance of the agreement* the plaintiff was not able to deliver to the defendant a title such as called for by the contract, and he would, of course, not be entitled to recover, because he himself was not able to perform the contract."

This request would have been good had the evidence showed beyond dispute that there had been a definite time fixed for the performance of the contract, but the evidence clearly shows that on the 1st of May the defendant himself was in default, and that subsequent to that time the parties had been negotiating and trying to arrange a definite day for closing. At least, the plaintiff was, but the defendant seemed to take the position that he didn't want to carry out his original contract, but tried to negotiate for the absolute purchase of the plaintiff's property, and never once during all his attempts to get the plaintiff's property did he raise an objection as to encumbrances affecting it. And, therefore, not having raised an objection at any time as to encumbrances or restrictions he certainly, under the case of Stryker *v.* Vanderbilt, 27 Law, *supra,* cannot come in at the trial and put that forth as the reason for not performing, and therefore the Court properly refused to make this charge.

POINT 8.

The Court erred in refusing to charge the defendant's eighth request.

> "The defendant was entitled, as a performance by the plaintiff, to have conveyed to him, the defendant, an estate in fee simple, of the lands required by the contract to be conveyed to the defendant, absolutely free and clear of all encumbrances, except the debt of $6,900 to the Woodcliffe Land Improvement Company, and unless he could convey such title, at the time fixed for performance, free of the restrictions mentioned in the agreement marked P 2, the defendant is entitled to a verdict even though

the defendant, without notice, sold and conveyed his property to another."

This point is answered by looking at the charge of the Court, page 115, lines 20 to 30.

> "So far as the evidence shows the matter ended at this meeting, in June, and nothing further was done by either party until September, when the defendant sold the lot and building which he had agreed to sell to the plaintiff, to some other person. The plaintiff never had title to the lots he agreed to convey. He could not fulfill his contract by assigning the agreement to convey, which the land company had made with his wife, and which she had devised or bequeathed to to him by her will; his contract was to sell and convey the lots without encumbrances, except so far as the encumbrance of $6,900. This contract of the land company called for the conveyance of the lands in question subject to certain restrictions."

Also read the defendant's testimony on cross examination, State of the Case, pages 92, 93 and 94.

And irrespective of the above, there is another reason why the Court should not have made the charge as requested, because it contained this proviso:

> "And unless he could convey such title at the time fixed for performance free of the restrictions mentioned in the agreement marked P2, the defendant is entitled to a verdict."

The whole trouble is, there was a disputed question of fact as to whether any time had been fixed by the parties for performance after May 1st.

POINT 9.

The Court erred in refusing to charge the defendant's ninth request, namely:

> "There is no evidence in the case that the plaintiff was ever able to convey to the defendant, or have conveyed to him, title to the lands by him, the plaintiff, to be conveyed, free and clear of all encumbrances, except the debt of $6,900, due Woodcliffe Land Improvement Company, and the jury's verdict must, therefore, be for the defendant."

The Court rightfully refused this request because it was not necessary to have any evidence in the case of the plaintiff being able to convey, because he was not obliged to prepare himself until he was satisfied that the defendant would meet him to carry out the agreement.

The evidence was very conflicting as to whether or not the parties had ever met to do so, the plaintiff having testified that he was always ready and willing to carry out his agreement, but the defendant never seemed to take that attitude, and never gave as a reason for his not carrying out the agreement the fact that there were restrictions.

The only reason given by the defendant was that they were never able to properly apportion or adjust the taxes and interest, which under the contract were to be taken care of, and which the plaintiff said he was willing to take care of if the defendant would only perform, but instead of wanting to perform, the defendant desired to alter it or make a new agreement, which the plaintiff refused to do, and the fact that no objection to restrictions was ever made is admitted by counsel for the defendant, in his brief, page 30, where he says, to quote his language:

> "The defendant states that he had no partner interested with him, and *that the reason why the transaction broke off was because the plaintiff refused to acknowledge his obligation to meet the taxes and interest charges.*"

And then goes on to say,

> "That the defendant called on the plaintiff on June 26th for the purpose of arranging for an outright purchase of the plaintiff's property,"

which leaves it as an undisputed fact that no objection as to restrictions was ever made.

POINT 10.

The Court erred in refusing to charge the defendant's tenth request.

> "The plaintiff must show by a preponderance of the evidence, that he was able, at the time fixed for performance, to pay the taxes, then a lien upon the property by him to be conveyed, and also the interest then accrued upon the claim of the Woolcliffe Land Improvement Company, and also the difference between the amount actually due the said company and the amount specified as due in the contract, and if the plaintiff has failed to show his ability to make such payment or to otherwise satisfy the same, the verdict should be for the defendant."

This had already been submitted by the Court on page 117, where the Court said:

> "You are to say, from all the evidence, whether the plaintiff lost any profits by the failure of the defendant to comply with the terms of his contract, if you find he can recover anything, and if so, how much, and your verdict should be for the plaintiff for

that amount; if you find, however, that the plaintiff has not established his case by a preponderance of the evidence, or if you find that the contract has been rescinded, your verdict should be for the defendant. You, gentlemen, are the sole judges as to what the evidence has been, and the weight you will give to the testimony of the various witnesses."

CONCLUSION.

One very material point in the case which it seems even the trial judge partly overlooked is the fact that the contract was to be carried out on or before May 1st, 1917. On that date the plaintiff appeared at the office of the real estate agent, Halpin, to carry out his part of the contract.

The defendant, who also had something to do, namely, to convey his property to the plaintiff, failed to appear, and didn't appear until some time after May 1st, and on this point the evidence is conflicting.

The testimony shows that the defendant instead of wanting to carry out his agreement tried to purchase the plaintiff's property for cash without making an exchange but which the parties never agreed to. And the Court will notice that on each occasion the plaintiff testified that he insisted that the first contract be carried out, so that this left it as an open question of fact as to whether a subsequent definite day for closing had been agreed upon.

And another strong point in the plaintiff's favor and which shows that the Court rightfully refused to non-suit and direct a verdict is the fact that in the complaint, State of the Case, page 3, paragraph 2, plaintiff alleges "that on the day set in the contract for closing he demanded a

deed from the defendant, and was ready and willing and offered to defendant to carry out the terms of the said contract and duly to perform all the terms of the said contract upon his part upon the like performance by the defendant."

This was traversed or denied by the defendant in his answer. (State of Case, page 7.)

> "There was an issue of fact made where, in an action involving performance of a contract, plaintiff pleaded performance and willingness to perform, which defendant traversed."

In Wilson *v.* Renner, 89 Atl. Rep., 758, on page 759, Justice Kalisch speaking for the Court of Appeals said:

> "Moreover, it appears that the plaintiff pleaded performance and a readiness and willingness to perform, which the defendant traversed, and therefore an issue of fact was presented for a jury to determine.
>
> "It is a firmly settled rule that proof of a waiver of performance by the party who is entitled to insist upon performance is tantamount to a performance."

And we respectfully submit that from the 1st of May, the date set for the performance of the contract, until some time in September, when the defendant sold his property and thus put it out of his power to carry out the agreement, the plaintiff was not obliged to do anything until some definite day had been agreed upon; and as the evidence shows that the parties were meeting from time to time, the jury had a right to say that the plaintiff had a right to wait, and expect that the defendant would come to him again and carry out his agreement.

And in September, when the defendant, without any notice to the plaintiff, sold his property, a

right of action accrued to the plaintiff for which he was entitled to be reimbursed for his loss if any.

We respectfully submit that the judgment of the Supreme Court in the above action should be affirmed, with costs.

MACKAY & MACKAY,
Attorneys and Counsel
with the Plaintiff-Respondent.

[1603]