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**Notice of Appeal (Duly Served and Filed).**

The complainant, Walter Reade, hereby appeals from the final decree made in the above entitled cause on October 26th, 1926, by the Chancellor upon the advice of Hon. M. L. Berry, Vice-Chancellor, and from the whole and every part thereof, to the Court of Errors and Appeals, in the last resort in all causes.

20

Dated November 15, 1926.

STEIN, STEIN & HANNOCH,  
Solicitors for and of  
Counsel with Complainant.

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

HERBERT J. HANNOCH,  
of Counsel with Complainant  
Walter Reade.

30

40

**Petition of Appeal (Duly Served and Filed).**

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

The petition of Walter Reade, the appellant in  
the above entitled cause, respectfully shows:

10

1. Petitioner finds himself aggrieved by a final  
decree made in the Court of Chancery of New  
Jersey, by his Honor, Edwin Robert Walker,  
Chancellor of the State of New Jersey, upon the  
advice of Maja L. Berry, Vice Chancellor bear-  
ing date October 26, 1926, in a certain cause in  
said Court of Chancery wherein the said Walter  
Reade was complainant, and the said Thomas P.  
McKenna was defendant, in this respect, to wit,  
20 that the said decree orders and adjudges that the  
bill of complainant's bill be dismissed with costs,  
and that the defendant do repay to the complain-  
ant within sixty days from the date of the decree  
the sum of \$5,000 representing a return of the de-  
posit referred to in the contract involved in said  
proceedings, and that said sum be declared to be  
a lien upon the lands and premises described in  
said contract, and that unless said moneys are  
30 so paid, that execution do issue.

30

2. That your petitioner appeals from said de-  
cree of the Chancellor, which decrees as aforesaid,  
upon the ground that the same is erroneous, in  
that

(a) The Court should have required the de-  
fendant to specifically perform the contract re-  
ferred to in the bill and amended bill of com-  
plaint, in the manner and form therein prayed  
40 for.

*Answer to Petition of Appeal.*

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

STEIN, STEIN & HANNOCH,  
Solicitors for and of  
Counsel with Petitioner.

10

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**Answer to Petition of Appeal (Duly Served and Filed).**

The answer of Thomas P. McKenna, the above named respondent, to the petition of Walter Reade, the above named appellant.

20

This respondent, not admitting the truth of all or any of the matter in the said petition of appeal contained, for answer thereto nevertheless admits that a decree was, on the 26th day of October, 1926, made and entered in the Court of Chancery of New Jersey, in the above entitled cause, for the purposes in said petition mentioned, and as therein set forth; but as to the substance and form of said decree this respondent begs leave to refer thereto when the same shall be produced.

30

This respondent is advised and believes that the said decree is agreeable to equity; and he prays that the same may be affirmed with costs to be taxed in favor of this respondent.

PERKINS & DREWEN,  
Solicitors for and of  
Counsel with Respondent.

40

## Amended Bill of Complaint.

IN CHANCERY OF NEW JERSEY.

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

10 The complainant, Walter Reade, of the Borough of Deal, in the County of Monmouth, State of New Jersey, respectfully shows:

1. That on May 9th, 1925, Thomas P. McKenna, of the City of Long Branch, County of Monmouth, State of New Jersey, entered into a certain contract in writing, a copy of which is hereunto annexed and made a part hereof, whereby he agreed to convey to complainant, for the sum of Fifty Thousand (\$50,000) Dollars, by deed which shall  
20 contain the usual full covenants and warranty, on May 25th, 1925, all that certain land and premises described in said annexed contract. The said contract, after having been duly acknowledged, was recorded in the Register's Office of said County of Monmouth.

2. That Five Thousand (\$5,000) Dollars of the consideration for said lands as mentioned in paragraph I hereof, was duly paid by complainant to the said Thomas P. McKenna, upon the execu-  
30 tion and delivery of said contract.

3. Since the execution of the said contract, complainant has had an examination of the title made, and has discovered that at the time of the signing of the said contract, and ever since thereafter, that the said Thomas P. McKenna was not seized of the whole tract, and that there were and still are numerous outstanding liens and encumbrances against the same.

*Amended Bill of Complaint.*

4. That the time for passing title has been extended from time to time to enable said Thomas P. McKenna to clear up the questions in said title.

5. Said Thomas P. McKenna has failed and refused, and still fails and refuses to convey to complainant the said lands and premises contracted to be conveyed to him, as aforesaid. 10

6. Complainant has been at all times, and is still ready, able and willing to perform said agreement on his part to be performed.

7. Complainant is desirous of obtaining a conveyance of the said lands and premises agreed to be conveyed to him, as aforesaid, or so much of said lands as the defendant, Thomas P. McKenna, shall be able to convey, with an abatement of the purchase price in such sum as shall represent the fair value of such part, interest in or encumbrance upon the title to said mentioned premises, which the defendant cannot convey. 20

8. Said Thomas P. McKenna was, at the time he entered into the aforesaid contract, and still is, to the knowledge and belief of the said complainant, the husband of Sadie O. R. McKenna, who claims an inchoate right of dower in the premises agreed to be conveyed by the said defendant to the said complainant, by the aforementioned agreement. 30

9. Complainant further says that the said defendant fraudulently induced and still continues to fraudulently induce his said wife to refuse to 40

*Amended Bill of Complaint.*

release her alleged inchoate right of dower in said premises to said complainant.

10        10. Complainant further shows that the heirs-at-law on one Deborah Herbert, who was seized of an interest in said mentioned premises, claims to have some right or interest in the premises mentioned in said agreement.

11. Complainant further shows that there are a large number of outstanding and unpaid tax liens upon and against said premises, together with other encumbrances and rights of way of said mentioned premises.

20        12. Complainant further shows that said defendant, Thomas P. McKenna, is of full age.

Complainant is without adequate remedy in the courts of law, and therefore prays:

1. That said Thomas P. McKenna, who is the defendant in this suit, may answer this bill of complaint and each statement therein made, without oath, the same being hereby expressly waived.

30        2. That the said Thomas P. McKenna, may be decreed specifically to perform the said agreement entered into by him with complainant, Walter Reade, said complainant tendering himself ready and willing, and hereby offering specifically to perform the agreement on his part.

40        3. That the said defendant, Thomas P. McKenna, may be further decreed to execute and deliver to the complainant, a bond with good and sufficient sureties, as indemnity against the in-

*Amended Bill of Complaint.*

choate right of dower of his said wife, the said Sadie O. R. McKenna, in the lands agreed to be conveyed to your complainant, or in lieu thereof, to be ordered and decreed to accept a deduction in the agreed purchase price to be paid by the complainant for said mentioned lands, as compensation for the outstanding inchoate right of dower of the defendant's said wife. 10

4. That, in the event that the said defendant, Thomas P. McKenna, shall not be able to convey the premises contracted for, an account shall be taken of the amount and value of any and all outstanding interests, mortgages, liens and encumbrances, and that he may be decreed to convey to complainant, such part and interest in the said mentioned lands, as he shall own and possess, and shall be ordered and decreed to accept therefor, a deduction in the purchase price agreed to be paid by the complainant, for such interests, mortgages, liens or encumbrances, as he shall not be able to convey or discharge. 20

5. That a writ of subpoena may issue out of this Honorable Court, commanding said defendant to answer this bill of complaint and to abide by such order and decree as the Court may make in the premises. 30

6. That complainant have such other and further relief in the premises as the nature of the case may require.

STEIN, STEIN & HANNOCH,  
Solicitors for Complainant.

### Agreement Annexed to Amended Bill of Complaint.

THIS AGREEMENT made the 9th day of May, 1925, between THOMAS P. MCKENNA, of the City of Long Branch, County of Monmouth, State of New Jersey, hereinafter described as the seller,  
 10 and WALTER READE, of Asbury Park, New Jersey, hereinafter described as the purchaser,

#### WITNESSETH :

The seller agrees to sell and convey, and the purchaser agrees to purchase, all that certain plot, piece or parcel of land hereinafter particularly described, situate, lying and being in the City of Long Branch, County of Monmouth, State of New Jersey, and more particularly bounded  
 20 and described as follows :

BEGINNING at a point on the south side of Broadway at the northeast corner of property belonging to the party of the second part adjoining the property herein described, thence (1) southwardly along lands of the party of the second part about 230 feet to the northwest corner of lands of one now or formerly Vannote, thence (2)  
 30 eastwardly along said Vannote land about 60 feet to a corner, thence (3) southwardly along said Vannote land about 80 feet to the north side of Belmont Avenue, thence (4) eastwardly along said north side of Belmont Avenue about 60 feet to an alley, thence (5) northwardly along the west side of said alley about 197 feet to the south side of another alley, thence  
 40 (6) westwardly along the south side of said last mentioned alley about 70 feet,

*Agreement Annexed to Amended Bill of Complaint.*

thence (7) northwardly about 118 feet to the said south side of Broadway, thence (8) westwardly along the said south side of Broadway, 50 feet to the point of beginning.

Together with the rights accruing to the said premises in said alleys. 10

SUBJECT, however, to a lease to one William E. Kitchell, dated January 29th, 1925.

The price is Fifty Thousand (\$50,000) Dollars payable as follows: Five thousand (\$5,000) Dollars on the signing of this contract, the receipt whereof is hereby acknowledged. Twenty thousand (\$20,000) Dollars in cash or certified check on the delivery of the deed, as hereinafter provided. Twenty-five thousand (\$25,000) Dollars by the purchaser or his assigns executing a bond in that amount, secured by a purchase money mortgage on the above described premises, conditioned for the payment of the said Twenty-five thousand (\$25,000) Dollars, together with interest at the rate of six per cent (6%) per annum, payable semi-annually, on or before two years after the date of the making of the said bond and mortgage. The said principal of Twenty-five thousand (\$25,000) Dollars shall be payable Five thousand (\$5,000) Dollars and accrued interest, twelve (12) months after the date of the making of the said bond and mortgage, and the balance of Twenty thousand (\$20,000) Dollars on or before two years. 20 30

It is understood and agreed that the mortgagor shall have the option to pay off the whole of the said mortgage at any time before its expiration.

Said bond and mortgage shall contain the 40

*Agreement Annexed to Amended Bill of Complaint.*

10 usual provisions found in a purchase money bond and mortgage. The deed shall be delivered upon receipt of the said payments at the office of Thomas P. McKenna, 42 Broadway (Suite 1744), Borough of Manhattan, City of New York, at 11 o'clock in the forenoon on the 25th day of May, 1925.

All sums paid on account of this contract and the reasonable expense of the title to said premises are hereby made liens thereon, and said liens shall not continue after default by the purchaser under this contract.

20 The deed shall be in proper statutory form for record, as provided for under the laws of the State of New Jersey, and shall contain the usual full covenants and warranty and shall be duly executed and acknowledged by the seller, at the seller's expense, so as to convey to the purchaser the fee simple of the said premises, free from all incumbrances, except as herein stated.

The deed shall also convey all right, title and interest of the seller in and to the land lying within the bounds of any public or private street or lane adjoining the property, to the center line thereof.

30 The stipulations aforesaid are to be applied to and bind the heirs, executors, administrators, successors and assigns of the respective parties.

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

THOS. P. MCKENNA L. S.  
WALTER READE L. S.

40 In the presence of  
Acknowledgment by ROSE BERNE.

### Answer to Amended Bill of Complaint.

The answer of Thomas P. McKenna to the amended bill of complaint of Walter Reade, complainant, says:

(1) Defendant admits that on the 9th day of May, 1925, he entered into a contract in writing, copy of which is annexed to the bill of complaint, whereby he agreed to convey to complainant, for the sum of \$50,000, the premises described in the bill of complaint; that by said agreement title was to close on the 25th day of May, 1925. He has no knowledge or information sufficient to form a belief as to whether said contract has been recorded in the office of the Clerk of Monmouth County. 10

(2) He admits the allegations of paragraph two. 20

(3) He denies the allegations of paragraph three.

(4) He denies the allegations of paragraph four that the time for closing was extended from time to time, to enable this defendant to clear up the questions to said title, and says, on the contrary, that in each instance when an extension was granted it was at the special request of the complainant. 30

(5) He denies the allegations of paragraph five.

(6) He denies the allegations of paragraph six. 40

*Answer to Amended Bill of Complaint.*

(7) He denies the allegations of paragraph seven.

(8) He admits the allegations of paragraph eight.

10 (9) He denies the allegations of paragraph nine.

(10) He denies the allegations of paragraph ten.

(11) He denies the allegations of paragraph eleven.

20 (12) He admits the allegations of paragraph twelve.

Further answering the complainant's amended bill of complaint, this defendant says:

30 (1) That on the 22nd day of May, 1925, three days before the day named in said contract for the passing of title, this defendant did, at the request of the complainant and the representatives of complainant, sign a stipulation that the time fixed for the passing of title under said contract be extended from May 25, 1925, to June 1, 1925. This defendant does further allege that on the 25th day of May, 1925, he was ready and willing to perform his part of the said contract.

40 (2) On the first day of June, 1925, this defendant was ready at the time and place agreed upon, as aforesaid, between the parties, to per-

form the said contract on the part of the defendant, but the complainant did not attend and did not offer to perform the said contract on his part, but by his representatives did especially request the defendant to extend the time for the passing of title under said contract from June 1st, 1925, to June 11th, 1925. In accordance with complainant's said request this defendant did so agree. 10

(3) On the 11th day of June, 1925, this defendant was ready at the time and place agreed upon between the parties to perform the said contract on his part, but the complainant did not attend and did not offer to perform the said contract on his part, but did, on the contrary, by his representatives, especially request the defendant further to extend the time for the passing of title from June 11th, 1925, to June 22nd, 1925. In accordance with complainant's said request, this defendant did so agree. 20

(4) On the 22nd day of June, 1925, this defendant was present at the time and place agreed upon for the performance of the said contract, and was then and there ready and willing to perform the same on his part. But the complainant did not attend and did not offer to perform said contract on his part. The complainant did, on the contrary, send to this defendant a messenger with the request that this defendant agree to the further extension of time for the passing of title under said contract. This the defendant declined to do, but did tender to the messenger of complainant, at the time and place agreed upon for the performance of said contract, the performance of said con- 30 40

*Answer to Amended Bill of Complaint.*

tract on the part of defendant, and did also then and there tender delivery of deed, fully executed, and complying in all respects with the terms of said contract.

10 (5) At the time of the making and execution of the original contract, as well as on the occasion of each of the requests made by the complainant, as above set forth, this defendant did expressly state to complainant, and to complainant's representatives, that this defendant did insist upon the prompt performance of said contract by complainant, and that it was essential to defendant by reason of defendant's business and financial obligations, that the said contract be promptly performed. And on the occasion of each request for further extension of time, as aforesaid, the complainant and his representatives did expressly promise and agree with this defendant that such extension was the last that would be requested. Each of said extensions was granted at the especial request of complainant, and for reasons which the complainant did not disclose to this defendant.

20

30 (6) This defendant further shows that at all times from the date agreed upon in said contract for the passing of title thereunder, *viz.*: May 25th, 1925, and until the 22nd day of June, 1925, this defendant was ready, willing and able to perform said contract and convey said title, as the complainant well knew; but the complainant, on the contrary, at no time complied with, or offered to comply with, the terms of the said contract on his part.

40

*Answer to Amended Bill of Complaint.*

(7) On the 18th day of August, 1925, the attorney of complainant did again request said defendant to further extend the time for the closing of title, that is to say, until the 1st day of September, 1925, which request this defendant declined.

10

(8) This defendant doth verily believe, and therefore alleges the fact to be, that during the period between the 25th day of May, 1925, and the 18th day of August, 1925, said complainant had foregone any intention to fulfill the said contract on his part, and had fully conceived the purpose of abandoning the performance thereof, on his part, and did abandon it, and did become in default in his performance thereof. Defendant doth further show that some time early in the month of August, 1925, the realty market in the City of Long Branch did exhibit a sudden activity, with a consequent general enhancement of realty values; that the lands and premises which are the subject of the contract between complainant and defendant became of a value greatly in excess of the price named in said contract. This defendant doth further allege that but for facts occurring subsequent to the complainant's abandonment of his said contract, and his default thereunder, as aforesaid, which facts gave to the land which he had contracted to purchase a value greatly in excess of what he had contracted to pay for it, the complainant would not have sought by this suit to revive his right in said contract.

20

30

(9) Wherefore this defendant alleges and charges the fact to be that the complainant

40

*Answer to Amended Bill of Complaint.*

defaulted on his said contract and is not entitled to the specific performance thereof.

10 Wherefore this defendant prays that complainant's bill be dismissed and that said complainant be decreed to pay the costs of the defendant in this behalf most wrongfully sustained.

## COUNTERCLAIM.

By way of counterclaim against the complainant, this defendant says:

20 (1) He repeats each and every of the allegations hereinabove set forth in the further answer to complainant's amended bill, and makes the same a part of this counterclaim as fully as if the said allegations were here repeated.

30 (2) Wherefore this defendant prays that it be decreed by this honorable Court that the said contract set forth in the complainant's amended bill be cancelled of record in the Clerk's office in the County of Monmouth, or wheresoever the same may have been recorded by the complainant.

PERKINS & DREWEN,  
Solicitors for Defendant.

### Replication.

The complainant joins issue on the answer to the amended Bill of Complaint.

STEIN, STEIN & HANNOCH,  
Solicitors of Complainant. 10

Order of Reference, Designation and Notice of Hearing duly served and filed.

---

### Defendant's Demand for Particulars (Duly Served).

The defendant demands that the complainant supply particulars of the following: 20

(1) The portion of the lands and premises in suit of which the defendant was not seized, as alleged in paragraph three of the bill of complaint.

(2) The nature and record, if any, of the numerous outstanding liens and encumbrances as alleged in paragraph three, against the lands and premises in suit; also the names of the lienors and encumbrances, so that such liens and encumbrances may be identified. 30

(3) The nature of the claim of the heirs-at-law of one Deborah Herbert to a right or interest in the lands and premises in suit, as alleged in paragraph ten of the bill of complaint.

(4) Dates and amounts of the outstanding and 40

*Complainant's Reply to Demand for Particulars.*

unpaid tax liens mentioned in paragraph eleven of the bill of complaint; and the names of the present tax lienors in each instance.

10 (5) The nature of the other encumbrances mentioned in paragraph eleven of the bill of complaint, and also the names of the persons by whom such encumbrances are held, and the record, if any, thereof.

(6) The persons by whom rights of way mentioned in paragraph eleven of the bill of complaint are claimed, and how such rights of way are claimed to have arisen.

20

PERKINS & DREWEN,  
Solicitors for Defendant.

---

**Complainant's Reply to Demand for Particulars.**

30 The complainant replying to the demand for particulars, respectfully shows:

1. The heirs-at-law of Deborah Herbert are seized of an undivided one-fourth interest in the lands and premises.

(a) Mortgages recorded in books 408, page 199, and 408, page 202, in the office of the Clerk of Monmouth County.

40

(b) Certificates for tax sales of said property

*Complainant's Reply to Demand for Particulars.*

recorded in the following books in the office of the Clerk of Monmouth County:

Two in 668, page 155	539, page 313.	
Two in 668, page 156	545, page 53.	
Two in 668, page 157	531, page 17.	
Two in 646, page 28	463, page 461.	10
Two in 646, page 29	463, page 462.	
Two in 646, page 30	442, page 301.	
646, page 25	463, page 475.	
Two in 646, page 26	463, page 476.	
Two in 646, page 27	481, page 330.	
642, page 365	481, page 331.	
554, page 148		
554, page 146		

(c) Taxes, interest and costs for the following 20 years:

1914	1920
1915	1921
1916	1922
1917	1923
1918	1924
1919	1925

3. See paragraph 1 hereof.
4. See answers to paragraph 2 hereof, amounts of liens unknown, and present holders of liens, unknown. 30
5. Right of way created by deed 892-176, McKenna to Meyers, possible right of public therein. No other encumbrances than that above set forth.
6. See answer to paragraph 5 hereof.

STEIN, STEIN & HANNOCH,  
Solicitors of Complainant.

### Notices to Produce.

The complainant duly served notice to produce the following:

1. Letters addressed by Saul Baron to defendant, dated May 22, 1925 and May 29, 1925.

10 2. Letter addressed by Stein, Stein & Hannoch to defendant, dated August 21, 1925.

Defendant duly served notice to produce the following:

Letter of Thomas P. McKenna to Saul Baron, dated May 18, 1925.

Letter written by Thomas P. McKenna to Stein, Stein & Hannoch, dated August 21, 1925.

20 Original draft of proposed stipulation, dated August 18, 1925, and signed by Stein, Stein & Hannoch as "attorneys for vendee", and enclosed with and referred to in letter of Stein, Stein & Hannoch addressed to Thomas P. McKenna, dated August 18, 1925.

Letter of Monmouth Title Company to Saul J. Baron, dated June 5, 1925, and written "Re Title No. 10773".

30 Letter of Fidelity Union Title & Mortgage Guarantee Company, written to Louis Hood, General Counsel, Fidelity Union Trust Company, signed by Edward O. Wyckoff, dated August 5, 1925, and written "In re Title No. 12947".

The original of a certain contract made by the complainant, Walter Reade, as vendor, in or about the month of August or September, 1925, for the sale by the said Walter Reade of the lands and premises described in the copy of agreement attached to and made part of the amended bill of complaint filed in this cause.

40

PERKINS & DREWEN,  
Solicitors for and of Counsel with Defendant.

### Testimony.

Transcript of Stenographer's Notes of evidence in the above entitled cause, taken before the Hon. Maja Leon Berry, Vice-Chancellor, at the Chancery Chambers, City Hall, Long Branch, New Jersey, on Thursday, the 17th day of June A. D., 1926, at ten o'clock in the morning. 10

#### APPEARANCES:

MESSRS. STEIN, STEIN & HANNOCH; Herbert J. Hannoeh, Esq. (present), Solicitors for the Complainant.

MESSRS. PERKINS & DREWEN; Randolph Perkins, Esq. (present); John DREWEN, Esq. (present), Solicitors for the Defendant. 20

Mr. Hannoeh: I offer the original agreement, dated May 9, 1925, between Thomas P. McKenna and Walter Reade, recorded in the Monmouth County Clerk's office book 1301 of Deeds for Monmouth County, page 35.

Mr. Perkins: No objection.

(Marked Exhibit C-1.)

30

CHARLES H. ANGLEMAN, a witness produced on behalf of the complainant, being duly sworn according to law, testified as follows:

*Direct examination by Mr. Hannoeh:*

Q. Mr. Angelman, you are connected with the Monmouth Title Company, Freehold, New Jersey?  
A. Yes, sir.

40

*Charles H. Angleman—for Complainant—Direct.*

Q. And a member of the bar of the State of New Jersey? A. Yes, sir.

Q. And you have at the request of Mr. Reade's representative made an examination of the McKenna property described in the Exhibit C-1?

10 A. Yes, sir.

Q. When was that examination made? A. It was made during June and July of 1925—not July, May and June; it was completed about the 1st of July.

Q. Had you, prior to that time, furnished any abstracts of the instruments of record to Mr. Baron of the New York bar? A. I had written him a kind of a memorandum report as to how the title was progressing; showing some of the defects as we had found them, and some of the encumbrances that were outstanding.

20

Q. What condition did you find the title in on May 25, 1925? A. I think it was practically completed at that time. There was an outstanding interest, the way we figured, to the heirs of one Deborah Herbert; there were several uncanceled mortgages and several tax bills that had been recorded in the County Clerk's office that had not been cancelled, and some that had been cancelled in the County Clerk's office, but were still shown as open on the Long Branch collector's books.

30

Q. What was the situation with respect to the Deborah Herbert heirs? A. Deborah Herbert's husband was the owner of an entire tract, this and adjoining property, and he died intestate leaving his wife Deborah and two sisters, Elizabeth and Hannah. Elizabeth was known as Elizabeth Wardell, she having been married. Deborah Herbert—the sisters, two sisters, and the sister-

40

*Charles H. Angleman—for Complainant—Direct.*

in-law divided the property among them so that they each had one-third.

Q. That was done by instruments? A. That was done by instruments of record, yes. Deborah Herbert leaves a will in which she speaks, or leaves the property to her sisters Elizabeth and Hannah. Neither one of them being her sister, Elizabeth having died before Deborah, we figured the devise to Elizabeth lapsed and is still outstanding in Deborah. 10

Q. Is Deborah still living? A. Not to my knowledge, not from the record.

Q. How much of an interest is outstanding? A. It figures practically a one-quarter interest.

Q. In Deborah? A. That one-quarter interest I might state is occasioned by other deeds that come in the chain of title that change the proportion, that is all. 20

Q. In whom would that outstanding one-quarter interest be? A. In the heirs of Deborah Herbert, or the State of New Jersey, I don't know which.

Q. Was that the situation in May of 1925? A. Yes, sir.

Q. And has it changed any as far as you know? A. Not as far as I know. 30

Q. Were these matters reported to Mr. Reade—just yes or no—or to his representative? A. Yes.

Q. To whom were they reported? A. Well, without looking through my correspondence, I can't tell whether they were reported to your office or Mr. Baron's office.

Q. Who was Mr. Baron? A. Mr. Baron was the forwarding attorney from New York.

Q. Now, with respect to the tax items, will you tell us in greater detail just what they were? 40

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10 A. Not without reference to my memorandum. They were tax sales made by the City of Long Branch covering the property in question, at least, this property is made up of several different lots on the tax map and consequently there was several sales for the same year and for following years.

Q. And were those sales recorded? A. They are originally recorded with the Collector of Taxes, and then a certificate is either recorded as a mortgage or as a deed. Some of them are recorded as a mortgage and some as a deed.

20 Q. How about June of 1925, were there any of those tax sales that were still open of record affecting the property? A. There were quite a number.

Q. Do you recall in general approximately how much was involved? How much they amounted to? A. Just offhand I might say it would be two or three thousand dollars.

Q. Now, were there any other liens? A. There were two mortgages, I think, two mortgages, and reference to another mortgage that came up by the recital in a deed and another mortgage I couldn't locate.

30 Q. Tell us about the mortgage that was open of record in May and June of 1925? A. What ones they were?

Q. Yes. A. I will have to refer to my report here. There was a mortgage made by Thomas McKenna and wife to Benjamin A. Levine and Jacob Meyers.

40 Q. For how much? A. The mortgage was for \$12,000, and was recorded December 1, 1910, in Book 408, page 199.

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Q. And was that open of record in May and June, 1925? A. It was.

Q. And was it so reported to Mr. Baron and Mr. Reade's representative? A. Yes, sir.

Q. Was there any question respecting a possible right of way over a portion of this property? 10

A. In one of the deeds in the chain, there was a right of way created, and this right of way was afterwards taken back into the main title, but it occurred to me in reading the matter over that the mortgages, and that to which McKenna had title of record, and the description taken verbatim from the contract of sale did not agree with the record title. It overlapped in certain points and we abandoned that description and stuck to the record of title, as Mr. McKenna received it and as the survey showed it should be. 20

Q. Did McKenna have title of record to the property described in the agreement of purchase?

A. Outside of a few discrepancies in distance, I think one along Broadway, in the rear, I would say yes.

Q. Now, what discrepancies were there? Approximately what did they amount to? A. Well, that I couldn't say, because, as I say, we abandoned that description, and stuck to the correct description. 30

Q. But there were discrepancies? A. There were discrepancies.

Q. Was a survey ordered of this property? A. A survey was ordered.

Q. Have you a copy of it there? A. This is the original survey.

Mr. Hanoach: I desire to offer the survey in evidence, if your Honor please. 40

(Marked Exhibit C-2.)

*Charles H. Angleman—for Complainant—Direct.*

Q. Now, did you at any time have any conversation with Mr. McKenna respecting these questions that were raised? A. Mr. McKenna came to our office on Saturday, I remember—

10 Q. Can you fix the time of that? A. In the early part of July, just the date, I don't know.

Q. And what conversation did you have with him then? A. We went over the report that I had made up and Mr. McKenna had a number of tax certificates with him, and we checked to see which ones had been cancelled—

Q. Did he tell you why he came down to see you? A. Not particularly, except that I imagine—he didn't tell me his reason, but I imagine he just wanted to clean up the differences.

20 Q. Did he have any record of these questions that you had raised with him? A. That I cannot say. He knew—evidently knew the questions had been raised or there would be no reason for him to come in to see me.

Q. What was the conversation? A. As near as I recall we went over the tax certificate that he had and checked off those that we could; he had some that were cancelled in the Long Branch tax office, and had been returned by the Tax Collector, and he had some that had been cancelled in the County Clerk's office, and we checked them over and got rid of some of them.

30 Q. After you got through going over his records with respect to taxes, were there still items open with respect to taxes? A. Yes, there were.

Q. Were any of them subsequently cleared up? A. Subsequent examination proved that they were, yes.

40 Q. Cleared up how? A. By cancellation of the County Clerk's record.

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Q. And as of what date? Can you refer to your records as to when they were cleaned up? A. July 21st, there seems to be two or three.

Q. What year? A. 1925. There seem to be three cancelled July 21st.

Q. That was after your conversation with Mr. McKenna? A. Yes, that was after because it was the first or second week in July when he came around there, somewhere around the 4th, I remember. 10

Q. Now, are there any of those tax items still open? A. Yes, there are some items that we set up still open.

Q. How many do they amount to, approximately, in dollars and cents? A. That would be more or less guess work. 20

Q. Approximately? A. A thousand dollars or so.

Q. Now, what conversation did you have with McKenna respecting this mortgage of Levine and Meyers? A. I called his attention to the fact that there were two mortgages on the property and are still there. One of them has since been cancelled.

Q. What did he say about the mortgage? A. Well, he seemed—he didn't know much about them. He seemed to think they had been vacated or cancelled. 30

Q. What did you do with him with respect to those mortgages? I mean, did you go over to the County Clerk's office with him? A. We went over and looked at the records.

Q. With Mr. McKenna? A. Yes, sir.

Q. Did he say anything as to what he was going to do with respect to those mortgages? 40

*Charles H. Angleman—for Complainant—Direct.*

A. My impression when he left me was that he was going to try to find the mortgages, or cancelled mortgages, seemed to think he had the cancelled mortgages.

10 Q. Now, were any of those mortgages disposed of on the record subsequent to that conversation that you had? A. The \$12,000 Levine mortgage has been cancelled—the other cancelled on July 31, 1925.

Q. Cancelled how? A. By a discharge of mortgage, satisfaction.

Q. Now, are there any of the other mortgages still open? A. Yes, there is another mortgage for \$8,500 made by Levine & Meyers to Thomas P. McKenna.

20 Q. That is a mortgage which McKenna is supposed to hold? A. Supposed to hold.

Q. What is the book and page number of that? A. Book 808, page 202.

The Court: That would merge in the title which was in McKenna?

Mr. Hanoeh: I don't think so, but they were open.

30 The Court: That wouldn't be an objection.

Mr. Hanoeh: He referred to several mortgages.

Q. What did he have to say about the Herbert interest?

The Court: See if I get this right. The whole defense is that it wasn't settled when it ought to have been settled?

40 Mr. Perkins: That isn't the whole defense now, but under their amended bill

*Charles H. Angleman—for Complainant—Direct.*

they set up we haven't got what they asked for.

Mr. Hannoch: My only object in going into this is to show why it was necessary to adjourn this matter.

Q. Was there any conversation, and if so, what was it, with Mr. McKenna respecting the Herbert interest? A. I think we discussed it because I was interested in knowing if my premise was correct, if I had sized the situation up right. 10

Q. Did he make any reference in that conversation to the fact that another title company had passed on that question? A. He told me—not in so many words—he told me that the Fidelity Title Company had guaranteed this title at the time he bought it. 20

Q. Did you subsequently have a conversation with the Fidelity?

Mr. Perkins: I object to that.

Mr. Hannoch: All right, I will withdraw the question.

Q. Was the Herbert question disposed of as a result of your conference with McKenna? A. I haven't heard of it being cleaned up. 30

The Court: Was it disposed of so far as your company was concerned?

The Witness: No; still outstanding so far as we know. Mr. McKenna gave me the address of a gentleman in Red Bank whom he said was the—he thought was the grandson of Elizabeth Wardell, something to that effect. I wrote to the ad- 40

*Charles H. Angleman—for Complainant—Cross.*

10 dress and Mrs. Cauleys replied, giving me the history of the family, that is, her mother's family, Mrs. Wardell, and as to her aunt, Hannah Herbert, I think, but there is no information received as to Deborah Herbert, or whether she left any heirs.

Q. Is there anything on the record clearing up the outstanding interest of the Deborah Herbert heirs? A. Not that I have been notified of, no.

Mr. Hannoeh: Cross examine.

*Cross examination by Mr. Perkins:*

20 Q. Mr. Angleman, the statement concerning the title that you have given relates to the title as of May 25, 1925? A. Around that date—by report—I will find out just when I did send the report in. My report is dated June 30, 1925, but it was a continuing proposition.

30 Q. The question I addressed to you is, all of the evidence that you gave with reference to the so-called defects in the title, related to a period of May 25, 1925? A. Around that date, I should say, yes.

Q. Did you or your company, on or about that date inform Mr. Reade, or his attorneys of the condition of the title as you found it? A. I think we did, yes, sir.

Q. So we have it that Mr. Reade asked for information about the time, about the 25th of May, 1925, as to the condition exhibited by your record? A. Yes.

40 Q. I assume that the evidence that you have

*Charles H. Angleman—for Complainant—Cross.*

given us is from the report of your title searches?

A. That is right, I didn't make the search myself.

Q. As a matter of fact, you don't know whether the Fidelity or any other title company actually had or had not guaranteed this title, do you? A.

I know it now; I didn't know it then.

10

The Court: What do you mean, you know they had or had not?

The Witness: I know they had because I had a conference with Mr. Wycoff and went over this Herbert situation. He agreed with my conclusions.

The Court: I didn't ask for that.

Mr. Perkins: Suppose we all move to strike it out.

20

Mr. Hanoeh: I want to have it developed—I don't care whether it is on the record or not, but the title company had guaranteed it and then they had this conference—

The Court: Congressman Perkins asked whether or not he knew the title had been guaranteed. My question followed his. Strike out the part where he says "Mr. Wycoff agreed with him as to his conclusions."

30

Q. Mr. Angleman, when did the husband of Deborah Herbert die? A. Now, I have a memoranda covering that, if I could find it. This memoranda I am reading from is from the memoranda we have in our files, and we have taken it as good in other cases, and I will have to give you it for what it is worth. I know personally nothing about it. The memoranda we have in

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*Charles H. Angleman—for Complainant—Cross.*

another title states that Jacob Herbert died intestate on or about April 1, 1874.

Q. That would be about 52 years ago? A. Just about.

10 Q. So that the objection that you raised would relate to a period of about half a century ago?  
A. No, Deborah survived him quite a while.

Q. As a matter of fact, you never knew any of the persons involved in the title yourself? A. No.

Q. And all you are endeavoring to do is to tell the Court here what one of the searchers of your company found on the records of the county? A. Yes, sir, probably that is so.

20 Q. It did say, however, in Deborah Herbert's will that Elizabeth and Hannah were her sisters?  
A. But they weren't.

Q. Well, you don't know they weren't her sisters, do you? A. Yes, the record shows that Deborah Herbert—the other records, deeds, mortgages, like that, which I looked at myself, shows Deborah Herbert was the wife of Jacob Herbert and Elizabeth Wardell was the sister. There are deeds on record to that effect.

30 The Court: The sister of whom, of Jacob?

The Witness: Sister of Jacob.

Q. You would rather take the other records which say that Elizabeth was the sister of Jacob than the will which says that Elizabeth and Hannah are sisters of Deborah? A. I don't catch the first part of your question.

40 Q. Well, the records would be a little contradictory. One record you have referred to, but not told us where it is, says, Elizabeth Wardell

*Charles H. Angleman—for Complainant—Cross.*

was the sister of Jacob? A. Yes, that is right.

Q. And the will of Deborah Herbert says Elizabeth was her sister? A. That is right, it says that, but it isn't so.

Q. Of course, you didn't know any of them, and you don't know anybody that ever did know any of them? A. Oh, yes. I have conversed with people who did know them? 10

Q. Whatever information you have has been merely handed down by word of mouth? A. Yes.

Q. Those people lived about half a century ago? A. Yes, but other people could corroborate.

Q. But they are not in the Court here today? A. No.

The Court: Is there any real question about that, whether she was a sister or sister-in-law? 20

Mr. Perkins: I don't know.

The Witness: She was a sister-in-law, I have proven that to my satisfaction, from corroborative evidence on the outside.

Q. I thought you took the statement in her will that she was her sister? A. I took the statement in her will that she considered her her sister.

Q. As a matter of fact, you don't know who the heirs at law of Deborah were? A. No. 30

Q. Don't know whether she ever had any or not? A. All the records would seem to disclose that Jacob Herbert had no children and that Deborah Herbert had no children.

Q. So far as your information goes, you don't know whether Deborah had any heirs or not? A. No.

Q. Yet, it is your testimony that there would be a one-quarter interest? A. That is right. 40

*Charles H. Angleman—for Complainant—Cross.*

The Court: These two ladies that were referred to as sisters, they both pre-deceased Deborah?

The Witness: No. Elizabeth Wardell pre-deceased Deborah Herbert.

10

Q. As a matter of fact, you don't know that personally, you just say that from some records in your office? A. From records in the Surrogate's office.

Q. But you can't identify these individuals with those individual records, can you? A. Not any more than you could identify one person. How can you identify a particular deed, for instance?

20

Q. What I am getting at, it is purely a conclusion of the searcher that they were the same people? A. But I think the conclusion is correct.

Q. Satisfactory to you, but no one knows whether the records in the Surrogate's office, referring to Elizabeth and Hannah are the Elizabeth and Hannah involved in this case, do they? A. I think that there are people who do.

30

Q. You don't know? A. Yes, we have had it explained to us in other matters that those are the same people.

Q. That is, somebody told you? A. My idea is answering you this way Mr. Perkins, I haven't assumed this was so; we have gone on the outside to corroborate as far as we could that the assumption was correct.

Q. The evidence you are giving in this case is a conclusion you have drawn from conversations with persons? A. Yes.

40

Q. When did you begin the examination of the

*Charles H. Angleman—for Complainant—Cross.*

title for Mr. Reade? A. I will have to look at the correspondence to find out when I got the order. It was some time prior to May 1st. My first letter is from Stein, Stein & Hannoch. I don't seem to have the order here.

Q. Well, was the examination made at the request of some firm of solicitors? A. Yes. 10

Q. And that firm was Stein, Stein & Hannoch? A. Yes.

Q. When you say May 1st, you mean 1925? A. 1925, yes.

Q. So by May 25th, you had made a report disclosing to Stein, Stein & Hannoch the objections which you have mentioned in your direct testimony? A. I guess that is about right, yes.

Q. You had before you the description in the contract for sale? A. Yes, I think the contract was sent to us and we put it on record. 20

The Court: June 5, 1925, it was recorded.

The Witness: We didn't put it on record until afterwards.

The Court: The contract was dated May 9, 1925. 30

Q. Will you refer to the contract which appears to be dated May 9, 1925, between Thomas P. McKenna and Walter Reade, which contract it appears, as shown by the endorsement, was recorded June 5, 1925. That is the contract referred to? A. Yes.

Q. And you think the description in there is an incorrect description? A. It doesn't quite agree with the title description. 40

*Charles H. Angleman—for Complainant—Cross.*

Q. When you say the title description, just what do you mean? A. It would be the title—description of the matters down through the deeds in the chain of title.

10 Q. In your direct testimony you said that some deed referred to a mortgage that was not disclosed on record. What was that reference? A. If I said deed, I was wrong there. A second mortgage. The mortgage made by Levine to McKenna recites in that mortgage that the said mortgage provided the McKenna mortgage would be subordinated to another mortgage to go on. I tried to find that mortgage but couldn't do it. It was in that mortgage, instead of in a deed.

20 The Court: It wasn't on, it didn't affect it—

Mr. Perkins: Apparently it wouldn't.

Mr. Hannoeh: That is the one about the merger that was referred to.

30 Q. What was your objection by reason of some right of way? A. The right of way had been created in the rear of the property and then the property split up into different titles. You see, the title came into Mr. McKenna in about 1901, somewheres around there, and then by various conveyances went out from Mr. McKenna and eventually came back to Mr. McKenna. In the meantime the right of way was created over the piece of property which was out of Mr. McKenna's possession at the time, and afterwards came back. This mortgage was bounded on the north by this right of way. My objection there was if the mortgage was a good mortgage and in existence

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*Charles H. Angleman—for Complainant—Cross.*

the mortgagees might claim some right in that right of way.

Q. Which mortgage are you referring to? A. The first one, the \$12,000 Levine mortgage made by Mr. McKenna to Benjamin Levine.

Q. Upon the cancellation of that mortgage all rights of the mortgagee would cease to exist? A. Yes, surely. 10

The Court: Is that the mortgage to which the second mortgage was to be subordinated?

The Witness: No, this is the first mortgage made by Mr. McKenna.

The Court: Was that mortgage afterwards cancelled of record? 20

Mr. Hannoeh: That is the one that was cancelled later on in July.

The Court: When was it cancelled?

The Witness: July 31, 1925.

Q. Mr. Angleman, is there anything in your record to show when some one connected with your company actually did the work on this examination of title? A. No. I know personally that it was done between the first week in May and the end of June. There were three or four different ones working on it. Some of them left the company. Then I rather sort of supervised the work myself. 30

Q. The contract which is annexed to the bill seems to bear date the 9th day of May, 1925, called for performance on the 25th of May, 1925, and your direct testimony indicated that you made a report to the complainant or his solicitors on 40

*Charles H. Angleman—for Complain't—Re-direct.*

the 25th of May, 1925? A. Somewheres around that time we made a report.

10 Q. Now, you spoke of a conversation you had with Mr. McKenna, I think, in July. Was that upon an occasion when he had come in to see Mr. McDermott about some matter other than the one involved here? A. He might have come to Freehold to see Mr. McDermott. Mr. McDermott is no longer connected with our company, and he saw me. We spent all Saturday morning practically going over this proposition.

Q. Mr. McKenna is in and out of your company quite frequently? A. Oh, quite often.

20 Q. Mr. McKenna told you that he had had his title guaranteed by the Fidelity Company? A. Yes, he told me that.

Q. And you afterwards found that that was an incorrect statement? A. That is right, yes.

Mr. Perkins: That is all.

*Re-direct examination by Mr. Hannoch:*

30 Q. Your report that you made to Mr. Baron was submitted to him from time to time, was it, or all in one lump? A. This memoranda which I have here, and which is a copy of it was submitted all in one lump, but I gave him memorandum statements of title as we went along. The reason for that probably might be explained by the fact I was receiving letters asking how we were getting along and what turned up—

40 Mr. Perkins: I object. I don't think it is material to put before this Court the reasons why the title company did anything. What they found is all right, but their reason I ask be stricken out.

*Charles H. Angleman—for Complain't—Re-direct.*

The Court: I don't know that it is going to do any hurt, and I do not—

Mr. Perkins: You never can tell.

The Court: Well, I won't strike it out, I will allow it to stand. It may or may not be material.

10

Q. So that there had been reports made to Mr. Baron prior to May 25, 1925, that is what I had in mind? A. Prior to May 5th?

Q. May 25th. A. Just whether there had or not, I don't know. I would have to look through the correspondence to give you the date. We had several telephone conversations, and I find a letter to your firm dated May 27th, in which you— I report several other things. On June 5th I wrote a very lengthy letter to Mr. Baron.

20

Q. And were these all supplemented by telephone calls? A. Also on June 1st. Yes, these were all supplemented and explained by telephone calls.

Mr. Hanoach: Now, may I just make this statement? I don't know whether it means anything to your Honor—but the question of the Fidelity report has been brought out on cross examination. When I brought it out you said it might not be material. I want to bring out by this witness that as the result of the conferences which he had with the Fidelity when the records were gone over and it developed that the Fidelity had reached an erroneous conclusion. As the record stands now, it would appear that the title was guaranteed.

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*Saul J. Baron—for Complainant—Direct.*

The Court: That was the representation made by Mr. McKenna and this witness found that that was true. Whether or not the Fidelity made a mistake is perhaps one of the things to be decided by the Court.

10 Mr. Hannoch: That is my offer.

The Court: It is not material.

Mr. Perkins: Inasmuch as you have made reference to Mr. Baron sending that long record to Mr. Reade, wouldn't it be well to have it go on the record, so we will know what Mr. Baron was informed? I would like to see that long letter. I am not offering them in evidence, but inasmuch as reference was made to them, I am leaving it up to counsel in the case.

20 Mr. Hannoch: I will offer them, if you have no objection.

(Letter bearing date June 15, 1925, marked Exhibit C-3.)

(Letter bearing date July 1, 1925, marked Exhibit C-4.)

30 (Letter bearing date July 21st, 1925, marked Exhibit C-5.)

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SAUL J. BARON, a witness produced on behalf of the complainant, being duly sworn according to law, testified as follows:

*Direct examination by Mr. Hannoch:*

Q. Mr. Baron, you are a member of the New York bar? A. I am.

*Saul J. Baron—for Complainant—Direct.*

Q. And you were counsel for Mr. Reade in New York and handled this particular McKenna matter? A. I did.

Q. What did you have to do with the preparation of the agreement? A. Why, I believe Mr McKenna came to my office, which was then at 32 Nassau Street—that was some time before May 1, 1925. He had a draft of a contract. We went over that draft, and then later we prepared—

Q. Did you fix the time? A. Yes, some time before May 1, 1925. I then moved my office to 342 Madison Avenue, Canadian Pacific Building, which address I am now, and some time on or about May 9th, a contract was finally drawn and executed between the parties.

Q. Were you present at the execution? A. I was not.

Q. Do you know where it was executed? A. It was executed at Mr. Reade's office.

Mr. Perkins: I object, if he wasn't present.

Q. It wasn't executed in your office?

The Court: What difference does it make?

Mr. Perkins: Not the slightest.

Q. It wasn't executed in your presence? A. No.

Q. The consideration money was not paid in your presence? A. It was not.

Q. What did you next have to do with it? When did you first see the contract after it was executed? A. It was sent over to me by Mr. Reade.

*Saul J. Baron—for Complainant—Direct.*

Q. Did you have any conversation with Mr. McKenna respecting the contract? A. Why, yes, Mr. McKenna was to have the contract signed by his wife and later—

10           Mr. Perkins: I object unless the time be fixed.

A. Some time after May 9th, possibly the very next day, within a couple of days thereafter, and Mr. McKenna was to do that and take care of that—and we were to exchange copies.

20           Mr. Perkins: I am objecting because the witness is giving his conclusions, rather than the conversation.

Q. You will have to forget you are a lawyer for a few minutes. Just tell us what the conversation was with reference to that. A. Mr. McKenna was to have the contract—

The Court: You have said that four times. What did Mr. McKenna say to you or what did you say to Mr McKenna?

30           The Witness: Mr McKenna said he would have the contract signed by his wife, and also said that he wanted the mortgage referred to in the contract drawn to his wife and later sent me a letter in which he gave me her full name

Q. Now, come back to that letter when we sort of get it in a sort of chronological sequence. At that time, what was the situation with respect to the examination of the title? A. Why, your

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*Saul J. Baron—for Complainant—Direct.*

office had, I think, it was the Monmouth Title Company, search the property and sent either to you to forward to them the contract, or sent the contract directly to them.

Q. Were you receiving reports as to the results of the examination of the title? A. Yes, from time to time, I would receive letter reports. 10

Q. Now, then, did you have any conversations with Mr. McKenna respecting the various questions that were raised?

Mr. Perkins: I object unless the time be fixed.

Mr. Hannoeh: I will fix the time.

Q. Will you fix the time of the first of those, as best you can? A. It was some time around the 20th of May, I think, when I got my first report from the title company. I had several telephone communications with them, and I think they sent me a letter. 20

Q. Well, did you then have a conversation with Mr. McKenna? A. Not only had a conversation, but I sent him a copy of your letter with the objections stated.

Q. Well, now, did you have a conference with Mr. McKenna? A. I did, I had a conference at my office with Mr. McKenna. 30

Q. When was that? A. Some time prior to May 25th.

Q. Will you tell us what that conference—or just tell us what transpired at that conference? A. We took up the objections stated in the letter, and we consented to adjourn the closing of the title. 40

*Saul J. Baron—for Complainant—Direct.*

Q. And is this the stipulation that was signed adjourning the matter? A. Yes.

10 The Court: All of the adjournments were consented to, as I understand, all except the last one which was requested, according to the answer. You may offer them, if you want to.

Mr. Hannoeh: I want to offer them. I offer three stipulations respecting adjournments.

(Marked Exhibit C-7.)

Q. Now, why were these adjournments had?

20 Mr. Perkins: I object. That is giving the conclusion of the witness. He can tell us what was done.

Q. Why didn't you close title?

Mr. Perkins: Isn't that his conclusion?

The Court: Which question are you pressing?

30 Q. Why were these titles adjourned? Why was the closing adjourned? A. In each instance, the title company were raising these objections to title, and I wasn't going to advise my client to close unless these objections were cleared.

40 Q. Will you fix the time? A. Why, in each instance prior to the adjournment, either Mr. McKenna would come to my office, or I would go to his and we would take up these various questions. The very first question we took up was the question of the description. The title com-

*Saul J. Baron—for Complainant—Direct.*

pany had reported that the title of record did not conform with the description in the contract. I went over that with Mr. McKenna. We then took up the question of the mortgage. That I took up in his office. We took up the question of these outstanding tax liens. In each instance, as the time for closing of title would approach we had them being removed. I would take them up with him over at my office or at his office, and in each case we immediately consented to adjourn. 10

Q. Let us take up two or three of these different items. Was anything discussed concerning these taxes that were open? A. Well, Mr. McKenna had a number of cancellations, some of which had been recorded, and others of which had not been recorded and he undertook to say that those that were unrecorded were reported in the search and would be disposed of. 20

Q. And what was said with respect to the Levine and Meyers \$12,000 mortgages? A. Mr. McKenna said that that had been satisfied and he showed me what appeared to be a satisfaction piece. That satisfaction piece was not acknowledged, and I said to Mr. McKenna that I didn't care how he discharged his mortgages, and as he explained to me, there was two ways in the State of New Jersey to satisfy a mortgage, either by filing the mortgage itself with some kind of a receipt by the mortgagee, or recording of this satisfaction, and he was to take care of that, but he did show me a satisfaction purporting to be signed by this Levine and Meyers. 30

Q. But it wasn't acknowledged at that time?  
A. It wasn't acknowledged at that time. 40

*Saul J. Baron—for Complainant—Direct.*

Q. Now, what was said with respect to the Herbert interest, outstanding Herbert interest?

A. Mr. McKenna took the position that there was nothing to that objection, and he referred me to somebody in Red Bank, a Mr. Goff, whom  
 10 he said would satisfy the title company and myself that there was nothing to the objection. I communicated with the title company—

Q. You transmitted that information to the title company? A. Yes.

Q. Don't tell us what your conversation with them was. What then happened when you got down to June 22nd? What was the condition of the title at that time? A. I asked for a further adjournment, and Mr. McKenna took this  
 20 position, that in view of these objections—

Mr. Perkins: I object to what position he took.

A. (continuing). This is what Mr. McKenna said. He said that in view of the fact that these objections were outstanding that he wouldn't enter into a formal stipulation fixing a date, but he would cooperate with the title company and then he would fix a date and I let it  
 30 go at that until June 22nd, when I made another attempt through a representative in my office to get a formal stipulation.

The Court: When was this conversation?

The Witness: This was on June 20, 1925, just a couple of days before the adjourned date of closing.

*Saul J. Baron—for Complainant—Direct.*

Q. When did you go to Europe? A. I went to Europe on July 25th.

Q. And who endeavored to handle the matter after you left? A. You handled the matter, Mr. Hannoeh.

Q. At any of these conversations or conferences with Mr. McKenna prior to June 22nd, was a deed exhibited to you for this property? 10  
A. No.

Q. A deed signed by Mr. McKenna? A. I think—I am not sure, but Mr. McKenna had a whole batch of papers in his office, and my recollection is that he did say he had the deed all prepared, but I cannot recall whether I saw it.

Q. He told you that? A. Yes.

The Court: Do you know whether that was executed or not? 20

The Witness: I do not, Judge.

Q. You didn't see it yourself? A. No. I am inclined to think it was in the batch of papers that he had.

Q. What was his conversation respecting the fact as to whether or not Mr. McKenna had joined in that deed? A. If my memory serves me right, he said he had the deed executed by himself and wife, but I do not recall seeing the deed. 30

Q. You referred to a letter giving the name of his wife. I show you the letter and ask you if that is this? A. Yes.

The Court: That was given to him for the purpose of drawing the mortgage?

The Witness: Yes. 40

*Saul J. Baron—for Complainant—Direct.*

Mr. Hanoeh: I would like to offer the letter in evidence.

(Marked Exhibit C-8.)

10 Q. How many times did you take up with McKenna the question of having Mrs. McKenna sign the contract? A. Not over once or twice. Right from the start, when he took the contract with us on May 9th, the date it was executed, but when he went over the draft of the contract, he was to get his wife to sign it, and then I sent that contract over to Mr. Reade's office through a messenger from my office and the moneys passed there, and I wasn't there.

20 Q. When you saw the contract and found it wasn't signed by Mrs. McKenna, how many times after that was the question of her joining in the contract discussed? A. In my office at the time that Mr. McKenna was in and suggested that the mortgage go direct from Mr. Reade to Mrs. McKenna, instead of as the contract provided to him, we discussed it then. At that time, I asked Mr. McKenna whether he had the bond and mortgage prepared, and he then stated to me that under the practice in 30 his State, New Jersey, that it was customary for the purchaser to draw the bond and mortgage, which was quite different in our jurisdiction. I have since learned, within the last week, that it is the same. It was at that conversation that we again discussed the signature of Mrs. McKenna.

40 Q. Can you in any way connect up the time, or can you fix the time? A. Yes, it was some time prior to the sending to me of that letter.

*Saul J. Baron—for Complainant—Cross.*

Q. When was it with respect to the time when he spoke to you about the deed? A. Why, I spoke to him about the deed a few days before May 25th, in his office, when I went down with the objections of the title company, and we were checking up. I had my report before me, and I checked up these tax liens with him and these other questions. 10

The Court: What is the date of that letter?

Mr. Hannoeh: The letter is May 18th. All right; cross examine.

*Cross examination by Mr. Perkins:*

Q. Mr. Baron, the contract of which specific performance is sought was drawn in your office, wasn't it? A. I think that that was drawn up in my office. 20

Q. Can you make up your mind when you look at the paper and see the endorsement on it? A. Yes, it was drawn in my office, Mr. Perkins. Mr. McKenna had another draft, and I wasn't sure.

Q. So your office drew the contract between Thomas P. McKenna and Walter Reade? A. That is correct. 30

Q. Nothing was said about the wife in the contract? A. No.

Q. When did you first make request for a search of the property? A. Why, some time prior to May 1st.

Q. That is to say, more than eight days before the date of the contract? A. It may have been, yes, sir. 40

*Saul J. Baron—for Complainant—Cross.*

Q. Well, you said some time before—— A. I don't know whether it is eight days, it may have been ten days.

Q. If it wasn't before the 1st of May, and the contract was dated the 9th of May—— A. Oh, yes.

10 Q. Then you made a request for a search more than eight days before the contract? A. That is correct.

Q. You actually had an examination of the title at the time you made the contract? A. No.

Q. Didn't you have some sort of a certificate of that title? A. No.

Q. You mean to tell us you knew nothing about the title? A. I don't mean to say any-  
20 thing of that sort. I mean to say that the search I put in prior to May 1st was to find out whether McKenna was the record owner of the property.

Q. Well, then you did not know that he was the record owner of the property? A. Oh, yes.

Q. So you had an examination of some sort made? A. Oh, yes.

Q. You weren't present at the time of the execution and delivery of the contract, were you?  
30 A. I was not.

Q. After the execution and delivery of this contract, did you have the first thing to do with it? A. I had something to do with it continuously.

Q. When did it reach your hands? A. I had something to do with the property referred to in the contract, even prior to the actual execution of it.

Q. Don't you see, you are not answering my  
40 question. I am asking this, please, after the

*Saul J. Baron—for Complainant—Cross.*

contract that you want to have specifically performed was executed and delivered, when did you next have anything to do with it? A. Immediately thereafter.

Q. What do you mean by immediately? A. The next day or two days. I am not trying to bind myself down as to the actual hour. I immediately set the title company in action with respect to searching, and making a complete search of the property. 10

Q. But you already had some sort of a report in your hand? A. I had what we call in New York City, the last record owner's name. What I wanted to find out then was whether or not Mr. McKenna was the record owner. 20

Q. I didn't ask you that? A. You asked me what kind of a search we had.

Q. You knew, of course, that the title was to be closed on the 29th of May, didn't you? A. 25th of May.

Q. 25th? A. Yes, sir.

Q. You have heard Mr. Angleman's testimony that he gave you a complete report on the 25th of May? A. I did.

Q. That report set out the objections to the title? A. Prior to May 25th. I got some kind of a report prior to May 25th. 30

Q. I am only referring to the complete report? A. I don't know what you mean by a complete report. This is still in search, as I do not consider I have got a complete report as to the title. We are still searching and still trying to remove these objections. 40

*Saul J. Baron—for Complainant—Cross.*

Mr. Perkins: I move that the whole answer be stricken out as not responsive. It is just prolonging the examination.

The Court: Strike out the last part.

10 Q. On the 25th of May, the date the contract was to have been closed, you had knowledge of the objections that Mr. Angleman has recited to the Court today? A. That is correct.

Q. Are you the gentleman who authorized the filing of the bill of complaint for specific performance? A. I had nothing to do with the filing of the bill of complaint, nothing to do with the subsequent litigation.

20 Q. You imparted to Mr. Reade, I assume, by the 25th of May, what the objections to the title were? A. Oh, yes.

Q. So that you are able to tell the Court that on the 25th of May, Mr. Reade knew about the objections that Mr. Angleman has recited today? A. Correct. That is, I reported to him these objections as raised. I assume that he understood that they were those objections. I made my report to him, and I think he understood.

30 Q. Now, upon the date of closing, did you call at Mr. McKenna's office, or did he call at yours? A. I don't recall.

Q. Do you remember where the contract was to be closed according to the contract? A. I think at his office.

Q. Isn't it a fact that you came to his office that day? A. No, I arranged for my stipulation for adjourning prior to the close.

40 Q. Did you arrange it by telephone? A. I

*Saul J. Baron—for Complainant—Cross.*

think so, and I sent the stipulation down to his office.

Q. At the time you sent the stipulation, did you send a letter with it? A. I may have.

Q. I show you a letter bearing date May 23, 1925. Is that signed by you? A. Correct. 10

Mr. Perkins: May I have this marked for identification?

Mr. Hannoeh: Put it right in.

(Marked Exhibit D-1.)

Q. Mr. Baron, the first stipulation adjourned the closing to—. A. Some time in June.

Q. The 1st day of June? A. I think so, yes. 20

Q. In between the 25th of May and the 1st of June, did you have any further conversation with Mr. McKenna about adjournment? A. Yes, sir.

Q. Did you write this letter and send it? A. Yes, that is my signature.

Mr. Perkins: I offer that.

(Marked Exhibit D-2.)

Q. The second stipulation adjourned the closing to the 15th of June, is that right? A. I don't recall the exact date, whatever the stipulation says. 30

Mr. Perkins: There seems to be one missing.

Mr. Hannoeh: To the 9th of June.

The Witness: There were several adjournments.

Mr. Perkins: The first was adjourned 40

*Saul J. Baron—for Complainant—Cross.*

to the 1st of June, then to the 9th of June, then to the 15th of June and the 22nd.

Mr. Hanoeh: I guess you are right.

Mr. Perkins: The first stipulation adjourned to the 9th of June, then to the 15th of June, then to the 22nd of June.

10

Mr. Hanoeh: The only thing I have are the three stipulations.

The Court: The bill shows weekly adjournments until the 22nd, practically every week.

The Witness: It was about that.

Mr. Perkins: It may be I have misinformed the Court. May I ask that there actually be stricken out the date of the 9th?

20

The Court: All right.

Q. So there really were three adjournments?

A. There were three or four, I don't recall.

Q. Now, as a matter of fact, you requested those adjournments, didn't you? A. Why, I wouldn't say that I did. I was trying to co-operate with Mr. McKenna in getting his title in condition for closing.

30

Q. He didn't ask for the adjournment? A. I asked for the adjournment.

Q. You asked for each of those adjournments? A. In each instance I wanted it adjourned.

Q. Now, you had a conversation with Mr. McKenna on the 20th of June, 1925, didn't you? A. That is correct, on the 20th.

Q. That was in view of the fact that two days later the last stipulation would expire? A. Closing of it on the 22nd.

40

*Saul J. Baron—for Complainant—Cross.*

Q. Where was that conversation? A. That was—I think it was a telephone conversation, it may have been in person, I don't recall.

Q. Did Mr. McKenna say that he wouldn't consent to any further adjournment? A. Mr. McKenna said—

10

Q. I didn't ask you that. A. No, he did not.

Q. Did you send anyone to his office on the 22nd of June? A. I did.

Q. Who did you send? A. I sent Mr. Joseph, who is in court.

Q. Where did you depart for on the 20th of June? A. I think I went to Cleveland.

Q. So you were not in this vicinity on the 22nd of June? A. I don't think I was.

Q. Mr. Joseph is connected with your office? A. Yes, he is the managing clerk. 20

Q. Now, Mr. Baron, from the 20th of June to the time you went to Europe, you didn't have anything to do with the matter? A. Oh, yes, a great deal continuously.

Q. Did you have any further conversation with Mr. McKenna? A. Not with Mr. McKenna, but with the title company.

Q. So far as Mr. McKenna is concerned the last conversation previous to your trip to Europe was on the 20th of June? A. I think that is right. 30

Q. You went to Europe on the 25th of July? A. 25th of July.

Q. When did you return? A. August 26th.

Q. When did you speak to McKenna after August 26th? A. I don't believe I have had a conversation with Mr. McKenna—oh, yes, I did, some time later.

Q. The 14th of October, wasn't it? A. I can't

40

*Saul J. Baron—for Complainant—Cross.*

say whether it was in October or not, but I did have a conversation with Mr. McKenna some time in the fall of last year.

10 Q. Then we have it clear that from the telephone conversation which took place on the 20th of June between you and Mr. McKenna—you didn't communicate with Mr. McKenna until the fall of the year? A. That is correct.

Q. You were representing Mr. Reade? A. Yes, sir.

Q. Did you not have a conversation with Mr. McKenna on the 14th of October, 1925? A. I couldn't state whether it was the 14th.

Q. Wouldn't that be about? A. About, some time in the fall, I couldn't fix the date.

20 Q. Now, you have already told us that you had nothing to do with the litigation? A. That is with the preparation of any papers or petition to be filed or otherwise, but I have been in conference with Mr. Hannoeh right along.

Q. I mean, did you order the suit brought? A. No, I think the suit was the result of a conference between Mr. Reade and Mr. Hannoeh.

30 Mr. Perkins: I object to that. His answer is not responsive to my question.

The Court: Strike it out.

Q. Representing Mr. Reade did you order the suit brought? A. I did not.

Q. So far as actually pushing the suit, you haven't had anything to do with it? A. Mr. Hannoeh's office has been taking care of it.

40 The Court: The bill was filed while he was in Europe.

*Rudolph Joseph—for Complainant—Direct.*

Q. You still represent Mr. Reade? A. I do.

Mr. Perkins: That is all.

*Re-direct examination by Mr. Hanooh:*

Q. What was this conversation in the fall of 1925? A. In an attempt to pacify both parties, I was trying to see whether we couldn't settle this whole thing. 10

Mr. Perkins: Of course, I object to it because he was merely stating what his conversation was.

The Court: I will let it stand. You brought out the fact that there was a conversation and he now says it was an attempt to settle the matter. 20

Mr. Perkins: I don't object to the conversation, I object to him saying he was trying to do the thing.

The Court: Let it stand.

Mr. Hanooh: That is all.

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RUDOLPH JOSEPH, a witness produced on behalf of the complainant, being duly sworn according to law, on his oath testified as follows: 30

*Direct examination by Mr. Hanooh:*

Q. Mr. Joseph, you are now a member of the bar of New York? A. I am.

Q. In June, 1925, you were employed by Mr. Baron? A. I was managing clerk in the office. 40

*Rudolph Joseph—for Complainant—Cross.*

Q. Did you, on June 22nd, call at Mr. McKenna's office? A. I did.

Q. And you met Mr. McKenna? A. I did.

10 Q. Will you tell us what your conversation was on that day? A. I told Mr. McKenna, pursuant to Mr. Baron's orders, that I was putting in a formal appearance, and I wanted to know whether he had decided upon what date he was going to adjourn the closing, and if he had decided upon a date, if he would give me a written stipulation or that he sign the stipulation that I had. I don't recall; and Mr. McKenna told me at the time that there were certain matters that he had to clear up, and he couldn't decide any definite date, but he would call up Mr. Baron as he told him  
20 over the telephone.

Q. What did you do? A. I left, as far as I know.

Mr. Hannoeh: Cross examine.

*Cross examination by Mr. Perkins:*

30 Q. Mr. Joseph, did you produce a paper to be signed? A. I don't recall whether I had the stipulation or whether Mr. McKenna was to draw one up. I may have had one.

Q. Please only answer what I ask. I asked merely did you produce the paper? You can say yes or no, or you don't remember? A. I don't remember.

Q. You said pursuant to Mr. Baron's instructions, you were making a formal appearance? A. Yes.

Q. You were? A. I was.

40 Q. But you knew when you came there that the

*Rudolph Joseph—for Complainant—Cross.*

contract was to be closed on the 22nd of June?

A. No, I didn't know it was to be closed, I was told it was to be adjourned.

Q. You knew the papers called for it to be closed? A. That I cannot say I knew either. I knew nothing about the entire transaction.

10

Q. What was the formality about your appearance? A. Mr. Baron told me there had been a closing set for the 22nd of June at eleven o'clock, and I was supposed to be there at eleven o'clock.

Q. You knew that there had been a closing set for at a certain hour on a certain date at a certain place, and you were making a formal appearance there, weren't you? A. Yes.

Q. Now, when you made the formal appearance there, didn't Mr. McKenna show you certain papers? A. No one showed me anything.

20

Q. He didn't show you any papers at all? A. No, Mr. McKenna showed me no papers at all. He asked me if I knew anything about the whole transaction, and I said no.

Q. Didn't Mr. McKenna make a tender of performance to you? A. No, Mr. McKenna made nothing.

Q. What did you do when you went there? A. I wanted to have a definite statement of when the contract could be fulfilled.

30

Q. That is all you went for? A. That is all I went for.

Q. Nothing took place except you said you wanted a definite date? A. That is all.

Q. Mr. McKenna said he wouldn't give you a definite date? A. He said he couldn't.

Q. Did he say he couldn't or wouldn't? A. He said he couldn't.

40

*Leon Cubberley—for Complainant—Direct.*

Q. As a matter of fact, didn't he exhibit a deed all signed and executed by himself and wife?

A. No, he did not.

10 Q. When he told you he couldn't or wouldn't give you a definite date, you departed? A. I departed.

Mr. Perkins: All right, that is all.

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LEON CUBBERLEY, a witness produced on behalf of the complainant, being duly sworn, according to law, on his oath testified as follows:

20 *Direct examination by Mr. Hannoch:*

Q. You are a practicing architect? A. Yes, sir.

Q. In New York and Jersey? A. Registered in the State of New Jersey.

Q. And you at Mr. Reade's request prepared plans for a building to be erected on this Broadway property that we have been talking about this morning? A. Yes, sir.

30 Q. Can you give us the date on which you started your work? A. About April 14th.

Q. What year? A. 1925.

40 Q. And the building was to cover what property? A. Two plots. One plot was on the four lots that I understood at that time belonged to Mr. Reade, and the fifth lot belonging to Mr. Reade, we were going to make out an alley or street, and the two lots adjoining his property, which as I understood at that time he had taken from Mr. McKenna, purchased from Mr. Mc-

*Leon Cubberley—for Complainant—Cross.*

Kenna, we made a separate building on that lot.

Q. That work was started by you, the plans for this work were started when? A. About April 14, 1925.

Q. And how long were they continued? A. Up until about the 1st of July. 10

Q. Were they finished at that time? A. Yes, sir, put out for figures.

Q. You actually went out and got bids? A. We got five or six bids.

Q. What sort of a building, just a general description? A. We made quite a number of sketches, and finally decided on a row of one-story stores.

Mr. Hanooh: Cross examine. 20

*Cross examination by Mr. Perkins:*

Q. Mr. Cubberley, you began your work for Mr. Reade on about 14th of April? A. Yes.

Q. At that time you understood he owned all of the property that was to be covered by the buildings that you were preparing the description for? A. He told me he owned four properties, and was buying the other property from Mr. McKenna.

Q. That was on the 14th of April that he said that? A. No, it was the 14th of April that he told me to make the plans. 30

Q. The plans contemplated a building to cover the entire tract owned by Reade and owned by McKenna? A. Yes, sir.

Q. And you started to make the plans on the 14th of April? A. Yes, sir.

Mr. Perkins: That is all. 40

*R. Joseph—for Complainant—Recalled—Cross.*

*Re-direct examination by Mr. Hannoeh:*

Q. Where is this property with respect to the Broadway Theatre? A. The first plot was adjoining the Broadway Theatre and ran fifty feet.

10 Q. That was the McKenna property? A. That was supposed to be the McKenna piece. Then the next lot I took for a street and the next lots, they were for stores.

Q. The building on the McKenna piece stood between the other property of Mr. Reade and the Broadway Theatre? A. Yes, sir.

---

20 RUDOLPH JOSEPH, recalled for further cross examination:

*By Mr. Perkins:*

Q. Mr. Joseph, referring to the date of the 22nd of June, when you called at Mr. McKenna's office and made a formal appearance, didn't Mr. McKenna ask you your name? A. I don't recall whether he did or not.

30 Q. Did you know Mr. McKenna before that date? A. No, I had never met him.

Q. Did he know you before that date? A. I don't believe he did.

Q. When you were there, did you have with you these stipulations which have been signed? A. I said I don't remember whether I brought the stipulations to be signed, or whether Mr. McKenna was to draw them up.

40 Q. Do you remember Mr. McKenna having the

*R. Joseph—for Complainant—Recalled—Cross.*

contract there that day? A. I don't remember Mr. McKenna having anything.

Q. Now, as a matter of fact, when you came there didn't Mr. McKenna ask you what your name was? A. No, there was some tall clerk outside and I announced that I was from Mr. Baron's office, Mr. Joseph, and he walked into Mr. McKenna's office. 10

Q. Please refer to the time you were speaking to Mr. McKenna. Didn't Mr. McKenna ask you what your name was? A. I don't recall.

Q. And didn't he write on this paper—did you see this paper in his hands? A. No, I don't recall that I did.

Q. Now, as a matter of fact, didn't he say—I beg your pardon, I got the wrong one. Now, as a matter of fact, didn't Mr. McKenna ask you what your name was and you said, "Mr. Joseph", and then Mr. McKenna wrote "Mr. Joseph, June 22, 1925, exhibited deed to him, default by Reade". A. No, sir. 20

Q. You don't recall that? A. No, sir, I did not.

Mr. Perkins: That is all.

Mr. Hannoeh: We have heard about the deed. I will call for the production of the deed. 30

Mr. Perkins: I don't think we are required to produce anything on a call of this kind. A call for evidence is to support an offer of evidence on their part, if they have offered evidence that we have a deed or intend to produce a deed and we deny it, then they have the right to call for it, but when there is no evidence of any kind on their part, merely to call upon us to 40

*Walter Reade—Complainant—Direct.*

produce some document which we may or may not have, I do not think it proper.

10 The Court: The situation with respect to that deed is now that Mr. Perkins asked Mr. Joseph if Mr. McKenna didn't exhibit to him the deed which had been executed by both Mr. McKenna and his wife, and Mr. Joseph said no. There is nothing else to indicate that there is such a deed in existence.

Mr. Hannotch: Other than Mr. Baron's general statement that Mr. McKenna told him there was such a deed.

The Court: I know.

20 Mr. Hannotch: For the time being I will dispose of these other witnesses and then discuss that.

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WALTER READE, the complainant, being duly sworn according to law, on his oath testified as follows:

*Direct examination by Mr. Hannotch:*

30 Q. Mr. Reade, you are the complainant in this case? A. Yes, sir.

Q. And are the person who signed Exhibit C-1? A. Yes, sir.

Q. Were you ready and willing to take title to this property on May 25, 1925? A. Yes, sir.

Q. And at all times subsequent to that? A. Yes, sir.

40 Q. And were you able to pay for it in accordance with the terms? A. Yes, sir.

*Walter Reade—Complainant—Direct.*

Q. Why wasn't the title closed? A. You and Mr. Baron wouldn't let me.

Q. That is as good an answer as any.

The Court: I think that is a good answer. You mean on advice of your counsel? 10

The Witness: Yes, sir.

Q. Was this contract ever abandoned by you?  
A. No, sir.

Mr. Perkins: I object.

Mr. Hannoeh: Probably that is a conclusion of law.

The Court: Strike it out. 20

Q. Where is this McKenna property located?  
A. It is 50 feet of land adjoining the present Broadway Theatre, Long Branch, and adjoining some land which I own on the other side.

The Court: You mean it lies between the two?

The Witness: Yes, sir.

Q. You also own the Broadway Theatre property? A. Yes, sir. 30

Q. Or your company? A. Yes, sir.

Q. Did you ever order any plans made for improving this property? A. Yes, sir.

Q. Mr. Cubberley is the architect? A. Yes, sir.

Q. And these plans that he has referred to are the plans that were ordered by you? A. Yes, sir.

Q. Did you do anything with respect to the mortgage loan on that property? A. Yes, sir. 40

*Walter Reade—Complainant—Direct.*

Q. And did you arrange such loans?

Mr. Perkins: That is wholly immaterial what this man's financial arrangements are.

10

The Court: I think it is material in view of the answer, which reads, "There was never any intention after June 22nd on Mr. Reade's part to close the title until the market had taken a boom."

Q. From whom was that mortgage arranged?

A. Why, it was a building and loan company in Newark, the exact name I have forgotten, except I did pay a fee to a party by the name of Ginsberg of \$500 to secure the loan.

20

Mr. Perkins: I object to that.

The Court: So far as the payment of the fee to anybody in connection with the loan is concerned is immaterial, and may be stricken out.

Q. The Warranty Building and Loan, does that refresh your memory? A. Yes, sir, that is the name of the company.

30

Q. Are you still ready and willing to take title to this property? A. Yes, sir.

Mr. Hannoeh: Cross examine.

The Court: Mr. Cubberley, they are the bids which you received on this building?

Mr. Cubberley: I think that they were received by Mr. Reade. I ordered them made.

40

Mr. Hannoeh: I offer as one exhibit six

*Walter Reade—Complainant—Cross.*

bids referred to by Mr. Cubberley, the earliest being dated July 30th, 1925, and the latest August 20, 1925.

(Marked Exhibit C-9.)

*Cross examination by Mr. Perkins:*

10

Q. Mr. Reade, when did you first give instructions to anyone to make a plan for the building?

A. I had been in negotiation for the purchase—

The Court: No, that isn't the question.

A. (Continued) Oh, possibly fifteen—twenty days or four weeks previous to giving Mr. McKenna a check for \$5,000.

20

Q. When did you first instruct anyone to make a search on that property? A. Possibly six weeks before I gave Mr. McKenna my check for \$5,000.

Q. That is the same five? A. The same five; only one five.

Q. Now, you don't mean to tell the Court here that you are willing to take a deed for the property as described in the contract, do you? A. Well, I don't know exactly what you mean by that.

30

Q. Just what I said. A. As described in the contract?

Q. Yes. A. It has been reported to me that there are some—

Q. You are not answering my question. You are just taking a little excursion. A. I don't know exactly how to answer that.

Q. Then don't answer it. A. Repeat the question.

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*Walter Reade—Complainant—Cross.*

Mr. Hanoeh: That is all right, let it stand just the way it is.

Mr. Perkins: If Mr. Hanoeh will get on the stand I will examine them both at once.

10 Mr. Hanoeh: I may have to go on; I don't know.

Q. You mean to tell the Court that you are willing to take the deed for the property as described in the contract? A. Yes.

Q. Then you waive any discrepancies that are mentioned by Mr. Angleman?

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

Mr. Perkins: We have got to know where he is at.

Mr. Hanoeh: Yes, we will take it in accordance with the terms of the contract.

The Court: He has said that he would accept the deed for the property as described in the contract.

Mr. Hanoeh: Described, yes.

30 The Court: Now, Congressman Perkins asks him if he is willing to waive the objections with reference to the description which are raised by the title company. I think it is a perfectly competent question, but whether it is very material or not I do not know.

Mr. Perkins: We can't always get a very material one, you know; we have got to get a little one wedged in once in a while that isn't so very material.

40

*Walter Reade—Complainant—Cross.*

Q. If you don't know I won't press it too far.  
 A. Well, I don't think it is very material. I think it just laps over on some portion that isn't quite so valuable. The description in front is accurate. The rear part isn't just according to the engineer's survey I had made of the rear. 10

Q. You received a report of the title company about the 25th of May? A. I never received one.

Q. When Mr. Baron received one he received it for you? A. Yes.

Q. Do you remember when you first ordered this bill of complaint to be filed? A. Yes, sir.

Q. When? A. Well, I can't remember the exact date, except that I had been in constant communication with Mr. Hannoeh, and he had told me about these continuous objections— 20

Q. You are not answering my question. A. I am trying to.

The Court: Just don't think aloud, that is all.

A. It was immediately after a telephone communication with Mr. Hannoeh as the result of a real estate broker reporting to me that Mr. McKenna had placed this property in his hands for sale, and I reported to Kremar that I had a contract. 30

Q. Fix the time. A. It is some time during the summer, possibly July, possibly in August, possibly the early part of September. It was when it was breaking down there.

Q. Which is a wide possibility. A. It is only about sixty days.

Q. July, August and September. A. Not until the early part of September. 40

*Walter Reade—Complainant—Cross.*

Q. As a matter of fact, do you know when the bill was filed? A. No, sir, I do not.

Q. Well, the subpoena which was served upon the defendant appears to be dated on the 21st of August? A. Well, that is the date then.

10 Q. Well, will that help you to fix the time when you told your lawyer to go through? A. Yes, sir.

Q. How much before was that? A. Two hours.

Q. So your lawyers were right on the job? A. I was right on the job myself.

Q. You want us to know that when you told the lawyers to start a suit you told them to start it right away? A. Yes, sir, they did.

20 Q. And he did do that, didn't he? A. I don't know whether they did or not.

Q. You think it was within two hours? A. I know I recorded it within two hours after that, and sent it to Freehold myself.

Q. What did you send to Freehold? A. A copy of the contract with Mr. McKenna.

Q. You misunderstood me. I am not talking about the contract.

30 The Court: He is not technical on these things. He says he told Mr. Hannoeh to begin suit about that time.

The Witness: I told Mr. Hannoeh to commence suit for specific performance, and as per the instructions of Mr. Hannoeh, he told me to have the contract recorded immediately. I know I assisted the local sheriff in locating Mr. McKenna to serve him.

40 Mr. Perkins: I guess he means the lis pendens.

*Herbert J. Hannoch—for Complainant—Direct.*

Q. According to your understanding, suit was instituted a very short time after you gave instructions? A. Yes.

Q. So you gave instructions for the institution of this suit very shortly before the 21st of August, 1925? A. Yes, sir.

10

Q. Tell us what you personally did, not by counsel or solicitor, what you personally did after signing the contract, towards its performance? A. After the contract was executed with Mr. McKenna and myself, I hounded Mr. Baron constantly both through the mail and through telephone communications in an effort to get him to hurry the title company up so that I could proceed with the building—

Q. I mean that question was directed to what you did as far as McKenna was concerned. Did you see McKenna after that? A. Yes, sir.

20

Q. When did you next see McKenna after the signing of the contract? A. No, I guess I am wrong. I don't believe I ever did.

Q. As a matter of fact, from the 9th of May, 1925, until—this is the 17th of June, 1926, you never saw Mr. McKenna at all, did you? A. I don't believe so.

Mr. Perkins: That is all.

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HERBERT J. HANNOCH, a witness produced on behalf of the complainant, being duly sworn according to law, on his oath, testified as follows:

The Witness: I was first brought into this title for the purpose of having a search ordered.

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*Herbert J. Hannoch—for Complainant—Direct.*

The Court: Let it appear on the record—

The Witness: I am a member of the bar.

10 The Court: And solicitor of record in this case.

The Witness: Yes. And I ordered a search, and the reports sometimes came direct to me and sometimes they came direct to Mr. Baron in New York, who had forwarded the matter to me, and I did nothing with the matter excepting transmit these reports to him until Mr. Baron went to Europe. Mr. Baron told me something, and as a result of what he told me, I continued taking the matter up from that point on with the title company at Freehold—I am trying to keep out hearsay. I then had a conversation with Mr. Reade during the month of August, and as a result of that conversation I sent a letter to Mr. McKenna requesting a formal extension of closing, there having been none in my files beyond June 22nd, and I received it back with a letter from Mr. McKenna, which came back unsigned. I will get the letter in a minute. I then had another conversation with Mr. Reade—

20

30

Mr. Perkins: In order that it be proper, just give us the letter that you sent.

The Witness: You have got the original of that.

Mr. Perkins: We will give it to you.

40 The Witness: This is the letter I sent Mr. McKenna dated August 18, 1925, and then I received a reply from McKenna,

*Herbert J. Hannoch—for Complainant—Cross.*

dated August 21, 1925, and the two proposed stipulations attached to the letter of August 21st, are the enclosures which I sent in my letter of August 18th. After the receipt of Mr. McKenna's letter—as I recall, the letter came in in the afternoon— 10  
I had a conversation with Mr. Reade, and as a result of that conversation I immediately drafted a bill for specific performance and I don't recall now whether I sent it down by messenger to the clerk for filing, or whether I sent it to the sergeant at arms at Newark for filing, and I immediately drew up a *lis pendens*, which I requested Mr. Reade to do something with, 20  
and I then issued process in the matter, and from that time on I have proceeded with this cause, and I have also been having conferences with the title company, endeavoring to clear up these questions.

(Letter of August 18, 1925, marked Exhibit C-10.)

(Letter of August 21, 1925, with two stipulations attached marked Exhibit C-11.) 30

*Cross examination by Mr. Perkins:*

Q. Mr. Hannoch, the first communication, and the only communication that you ever had with Mr. McKenna concerning the matter before the Court is your letter of August 18, 1925, marked in evidence in the case? A. Yes, sir.

Q. Will you please tell the Court the date of the first connection with the search that you had? 40

*Herbert J. Hannotch—for Complainant—Cross.*

A. Well, I can't tell you the exact date. I know what I did and I will try to fix it.

10 Q. Approximately—roughly. A. It was several weeks, as I recall it, prior to the date of this contract. I had the adjoining property at the same time, so I cannot fix the exact time of it. I ordered an abstract of the title.

Q. Did you have before you the report of the title company Mr. Angleman spoke of that was made on the 25th of May, 1925? A. Well, I don't know whether I have or not. I had a complete report from him which is a summing up of all the previous reports, dated June 30th, which contains his previous letters, and everything else.

20 Q. So that on June 30th you knew of all the questions that were raised by Mr. Angleman, didn't you? A. Well, I don't think that I had those reports for the purpose of examination. I was sending them right to Baron; I didn't get them from Baron until he went to Europe.

Q. He went on the 25th of July? A. July, but I didn't examine any of these reports then. I just sent them on to Baron.

30 Q. Now, Angleman said he made a report on the 25th of May which set forth the objections to the title? A. If I had sent it on to Baron, I never examined it myself. You see, there were two pieces of property somewhat similar—

Mr. Perkins: That is all.

Mr. Hannotch: Suppose I make my request for the deed on the record. I request counsel to produce the deed that he referred to in his cross examination of the witness Joseph.

*Colloquy of Counsel.*

Mr. Perkins: Counsel says that no such demand has ever been served upon him for any such deed, and furthermore, there is no evidence before the Court that there is such a deed existing sufficient to justify a man——

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The Court: Do you wish the Court to understand there is no such deed in existence?

Mr. Perkins: Oh, no. I am entirely silent on the question. I don't think that under the circumstances they have a right to pry into the papers that we have. I wouldn't tell the Court—I don't think they have a right to ask us for the production of a paper that there is no evidence that it exists.

20

The Court: Yes, they have a right to ask for the production of it for this reason. In your answer you said you made tender of performance.

Mr. Perkins: I will take it all back. I will just produce it. I produce warranty deed made and executed by Thomas P. McKenna and Sadie O. R. McKenna, his wife, of Long Branch, to Walter Reade, which was executed and delivered apparently—

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pardon me—executed and acknowledged on the 18th of June, 1925, and which is produced in response to the call of the solicitor of the complainant, as being the deed which was tendered by Mr. McKenna on the 22nd of June, 1925.

Mr. Hannoeh: I offer that deed in evidence.

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*Thomas P. McKenna—Defendant—Direct.*

(Marked Exhibit C-12.)

The Court: I suppose that eliminates the question of the wife's signature in the event of a decree.

10 Mr. Hannoeh: That is all.

(At this time the hearing was adjourned until 1:45 P. M.)

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AFTERNOON SESSION.

20 THOMAS P. MCKENNA, the defendant, produced as a witness on his own behalf, being duly sworn according to law, on his oath testified as follows:

*Direct examination by Mr. Perkins:*

Q. You are the defendant in the case? A. Yes, sir.

Q. And a member of the Bar? A. Yes, sir.

Q. Mr. McKenna, after the making and delivery of the contract, how many extensions were stipulated for by you? A. Three.

30 Q. They are the three that are marked in evidence? A. My recollection is three.

Q. By the last stipulation it appears that the closing was adjourned until the 22nd day of June, 1925, at the same time and place provided in the contract? A. Yes, sir.

Q. Just previous to the 22nd of June did someone speak to you about this matter? A. Yes, sir.

Q. Who was it? A. Mr. Baron.

40 Q. State to the Court the conversation? A. Mr.

*Thomas P. McKenna—Defendant—Direct.*

Baron asked me if I would give another extension, that he had to go away, and I told him no, I would not. I said that "At the last extension you said you wouldn't ask for any more and we at that time both agreed that that should be the last extension". He said, "Yes, I know it, but I have got to go to Cleveland"—or Cincinnati or some place—and he said, "I would like to have another extension as a personal favor". I said, "I can't grant it as a personal favor. This contract was closed with me at this reduced price upon Mr. Reade's statement that I would be paid in cash the full amount, and that later the cash was cut in half to \$25,000," and I said, "I have explained to you several times that I am losing valuable opportunities for investment of this money and that I will not grant any further adjournments". Mr. Baron said, "Well," he said, "McKenna, I don't think it makes any difference". He says, "Mr. — I am sure Mr. Reade can buy the property from you later at a reduced price. You have held it for over thirty years and you weren't able to sell it". I said, "Be that as it may, I won't grant any further extensions. You can send somebody else down to close the title; you don't have to be here".

Q. What happened on the 22nd of June, 1925?  
 A. The 22nd of June this gentleman came into my office and said he was from Mr. Baron's office. He had two or three sheets of paper with an extension typewritten on them and asked me if I wouldn't give an extension to him. I said, "I have told Mr. Baron I will not give any more extensions". I said, "Are you here as his representative?" He said, "Yes". I said, "What is your name?" He said, "Josephs". I said, "Mr.

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10 Joseph, I now tender to you the deed and exhibit to you the satisfaction of the mortgage that was spoken of by Mr. Baron, and my tax certificates, and I demand closing of title," and I took the contract—I asked him what he could do about it. He said, "I don't know anything about it. I came down to see whether you would give another extension," and I said, "Here is the contract, and I am noting onto it the fact that you have appeared and that the closing of title is not performed, and I call a default on the closing of the title and exhibit to you the deed and these papers".

Q. At that time did you make any writing on your copy of the contract? A. Yes, sir, I made that writing.

20 Q. Read it.

The Court: Isn't that what he just read?

A. "Mr. Joseph. June 22nd, 1925. Exhibited deed to him. Default by Reade." Initials, "T. P. McK".

30 Q. Now, Mr. McKenna, when next after that event did you hear from Mr. Baron or anyone else respecting the property? A. On about July 10th.

Q. What occurred? A. Mr. Baron came to my office and he said—

Mr. Hannoeh: July 10th?

40 A. About that time, I won't say precisely. He said, "I understand that you wouldn't give my man an extension". I said, "No, I told you I wouldn't grant any more extension," and he said, "My man says you exhibited—tendered to him certain papers, deed and other papers". I said,

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"Yes". He said, "May I look at them?" I said, "Yes". So I took out the bundle, the contract and deed, discharged mortgage and a bundle of tax certificates, and put them on the desk, and he looked at them.

Q. Was there any other conversation between you and Mr. Baron there about the matter then? 10

A. No, sir.

Q. Now, from that date which you say was on or about the 10th of July, 1925, when did you next hear anything with reference to this contract?

A. It was a letter that I received from Stein, Stein & Hanocho about August 19th, or an article appearing in the Long Branch Record, I have forgotten which one first; I think both about the same day. 20

Q. I show you Exhibit C-10, being a letter addressed to you by Stein, Stein & Hanocho, dated August 19th, 1925, and ask you if that is the letter you have just referred to? A. Yes, sir, that is the letter just referred to.

Q. Then between the 10th of July, when you exhibited the papers to Mr. Baron that you had tendered on the 22nd day of June, to the 18th or 19th of August, did you hear from anybody about this matter at all? A. Not one word. 30

Q. In connection with the performance of the contract? A. No, sir.

Mr. Perkins: Did your Honor read that letter? It might be interesting just to see the cause of that letter.

Q. When did you next hear about any question of performance of this contract? A. Service of the subpoena. 40

*Thomas P. McKenna—Defendant—Direct.*

Q. Now, which happened first, the reading of the newspaper or the talk about this specific performance suit, or the service of the subpoena?

A. The reading of the newspaper article occurred first, just a day or two before I was served with the subpoena.

10 Q. Is that the article you referred to (exhibiting clipping to witness)? A. Yes, sir.

Q. In what paper and what date? A. Long Branch Record, date of Saturday, August 22nd.

Q. There has been offered in evidence a letter written by you to Stein, Stein & Hannoeh, dated August 21, 1925, and marked C-11. Was that letter mailed by you or not? A. Yes, sir, that letter was mailed by me.

20 Q. From what post office? I don't mean details, was it New York or Long Branch? A. I think it was New York.

Q. And to them at Newark? A. At Newark, yes, sir.

Q. Can you tell by reference to the date whether it was mailed on August 21st? A. It is dated August 21st, and my opinion would be in my course of business it was mailed on that date.

30 Q. The newspaper article appeared on the following day? A. Yes, sir.

Q. Can you tell what time, afternoon or morning that this letter of yours was mailed?

Mr. Perkins: May I see the original bill for a moment, your Honor?

A. I can't say as to time, but as the Record article is Saturday, August 22nd, this date of August 21st would be a Friday, so my opinion would be it

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was mailed at the close of business on August 21st.

Q. I call your attention to the fact that the bill was filed with the Clerk in Chancery on August 21, 1925? A. Yes, sir.

Q. Now, can you tell whether or not from the dates that are before you, whether the bill was filed on the same day that you returned the proposed stipulation to Stein, Stein & Hannotch? 10

Mr. Hannotch: According to the records that is obvious.

Mr. Perkins: It is obvious.

A. I commented on that, I think, on the fact when I brought the matter to your office for attention. 20

Q. What did you enclose in your letter of August 21st? A. I returned the two stipulations, proposed stipulations, which Stein, Stein & Hannotch's letter forwarded to me.

Q. Mr. McKenna, when was the next time you heard anything concerning the contract by anybody? A. A telephone call from Mr. Baron on August 14th.

Q. What did he say and what did you say, if anything? A. Mr. Baron said that he went to Europe and was over there all summer and that he learned, when he came back that a firm of lawyers in Newark had brought litigation against me in regard to the Long Branch property; and it wasn't authorized by him, and he had no knowledge of it until he got back, and asked me if I couldn't forget the litigation, and if I wouldn't go through with the contract. I said, "No, my position is exactly the same as when I talked to 30 40

*Thomas P. McKenna—Defendant—Direct.*

you over the telephone on June 20th; I can't close on this contract". I told him that the conditions at Long Branch had changed, there was a large enhancement of values of property in the meantime.

10 Q. Mr. McKenna, after the 22nd of June, 1925, the time you tendered the deed, did you do anything with reference to the disposition of the property to others? A. Yes, sir.

Q. Please state to the Court what, if anything?

Mr. Hannoeh: I suppose that I may object to that, your Honor, as immaterial to this issue?

20 The Court: No, I think it is material, just as material as your testimony with reference to what your client did.

Mr. Hannoeh: I suppose that is right, in view of that issue. All right.

A. Right after this, I saw all the other brokers in Long Branch and wrote some of them letters also, placing the property again in their hands for sale. I had several of them call upon me.

30 Q. Do you recall seeing Mr. Angleman any time around July, 1925? A. Yes, sir.

Q. Can you fix about the date? A. Yes, sir, it was on a Saturday, about the 1st of July.

Q. How did it happen that you saw Angleman?  
A. I went down to Freehold; I had a number of matters at Freehold at that time, and generally went there on Saturday, and I went in to see Joe McDermott. Joe McDermott is County Clerk, and generally in the office opposite the Court House, which is also the office of the Monmouth Title

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Company. I went in, and this gentleman, Mr. Angleman—while I was there Mr. Angleman said, “You are just the man I wanted to see”. And then he started some conversation about this matter.

Q. Had you ever spoken to Mr. Angleman about this matter before that? A. Never did. 10

Q. Or about the examination of the title? A. Nor about the examination of the title; I didn't even know he knew anything about it.

Q. Who opened the conversation between you and Angleman? A. Mr. Angleman.

Q. Did you have any papers in your possession that day with reference to the property? A. Yes, sir.

Q. What were they? A. I had my bundle of tax certificates and the discharge of the mortgage on this property, and I was going to speak to Mr. McKenna about the discharge of the mortgage, and that is why I went in. 20

Q. Mr. McDermott, is he officially connected with the title company? A. He is County Clerk, and over in the County Clerk's office in talking about the discharge of the mortgage they referred me to Mr. McDermott.

Q. Did that have any connection with the proposed passage of the title? A. None whatever. 30  
When we arranged for the passing of title, I had arranged with Mr. Baron that if this mortgage was not satisfactorily cancelled at the time of closing title on May 25th, or if the tax certificates, tax matters were not satisfactorily disposed of to his satisfaction at that time, that he could retain so much of the purchase money until it was done.

Q. Well, as a matter of fact, do you know that 40

*Thomas P. McKenna—Defendant—Direct.*

it is customary? A. He said it was entirely satisfactory, that that was the practice. So that the title not having closed on June 22nd, I was down in Freehold, so then I was going to have the tax certificates cancelled of record.

10 Q. Did you afterwards receive information about an offer to sell the property on the part of Mr. Reade? A. Yes, sir.

Q. Do you know whether or not the boom struck Long Branch about that time? A. Yes, sir, it struck Long Branch about August 10th.

Q. What year? A. 1925.

Q. Have you knowledge of values in Long Branch? A. Yes, sir.

20 Q. For how long have you been a real estate owner here? A. I have been a real estate owner here for upwards of thirty years, having owned this property for nearly thirty years, and owned a great deal of property here.

Q. What can you tell us with reference to the increase in values here? A. Well, the values on Broadway have increased from two to three hundred per cent. in the last year and thereabouts, from August 10, 1925, to the present time.

30 Q. Was there any rapid rise up to August or August 10th? A. Yes, sir.

Q. You don't get my question. Previous to that was there any boom here? A. No, sir.

Q. When did the boom start? A. It was about August 10, 1925.

Q. The increase in value has taken place before or after August 10th? A. It took place about August 10th up to the present time.

40

Mr. Perkins: Cross examine.

*Thomas P. McKenna—Defendant—Cross.*

*Cross examination by Mr. Hannoch:*

Q. When did the boom boom? A. The boom, as we speak of it, was about August 10th, from that time until the 1st of November, 1925.

Q. Before it stopped? A. No, it hasn't stopped, and values are still—it isn't as active a market as it was during those two or three months, but prices have been changed. 10

Q. There was lots of speculation going on, was there not, at that time in August? A. Yes, sir, it started at that time.

Q. And you participated in that by offering this property to other brokers, you say? A. Yes, sir.

Q. At what price? A. The price was about \$100,000 to \$125,000. 20

Q. Now, I may not have understood you correctly, but you went down to Freehold without any idea of seeing Mr. Angleman about this title? A. Yes, sir.

Q. You had all the papers relating to this title with you? A. No, sir.

Q. A part of the papers relating to the questions in the title which Mr. Baron had raised with you? A. No, sir, Mr. Baron hadn't raised any questions in the title, but what we had disposed of in my conference with Mr. Baron. 30

Q. Do I understand that Mr. Baron never raised with you any questions about the title to this property? A. No, sir, he raised no questions in regard to the title.

Q. Just what questions did he raise? A. He raised the question first with regard to the description.

Q. What other one? A. One minute. Just one 40

*Thomas P. McKenna—Defendant—Cross.*

at a time. And I pointed out to him that the description as contained in the contract covered all the property between the monuments mentioned in the description and that any overlapping of Mr. Van Note's property, was not within the property which was to be conveyed to him, and that the description was entirely complete as to all that was to be covered by the sale, and the mere fact that the distances between the monuments named in the description might have been different by a foot or two did not change the correctness of the description for the purposes of the contract.

10 Q. Do you recall when that conversation took place? A. Yes, sir, that conversation took place about between the 5th and 10th of June, and he had a letter from the Monmouth Title Company, dated June 5th, is my recollection, and we discussed the points in that letter.

20 Q. And do you remember going over the letter with him? A. Yes, sir.

Q. What other questions were disposed of, do you know, or were discussed? A. There was a question of the mortgage of \$12,000 held—given by me to Levine & Meyer. That was open of record. I showed him a discharge of the mortgage, as he stated this morning, and the acknowledgment had not been taken, and I told him—

30 Q. Had not been taken at that time? A. It had not been acknowledged, and I told him that I would get it acknowledged, if it was necessary, but I thought probably the County Clerk or Mr. McDermott could arrange for the cancellation of the mortgage without that, but I said, "If it isn't properly cancelled at the time of the closing of

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*Thomas P. McKenna—Defendant—Cross.*

title, you can retain the amount of it out of the closing.”

Q. When did you get it acknowledged? A. I got it acknowledged in July.

Q. Who took the acknowledgment? A. If you will let me—

10

Q. I haven't got it? A. It was acknowledged on July 29, 1925.

Q. May I just see it for a moment? Do you know who the clerk is who took this acknowledgment, Anna Pariser? A. I know the general location of her office, I don't know her personally.

Q. Where is the general location of her office? A. In the theatrical district around 45th Street. Some friends of Mr. Levine took me to some office there where he was known to the notary, and he had it acknowledged before her.

20

Q. Were you there while it was being done? A. Yes, sir.

Q. You want us to understand that on the 29th of July, 1925, you were present in the office of Anna Pariser and that Jacob Meyers and Benjamin A. Levine were there, and acknowledged this instrument? A. Yes, sir, and that was the cause of my going there.

30

Q. Now, then, you went over to Mr. McDermott— A. Do you want me to finish the different points?

Q. I was going to take them up with you. Did you follow up this question of the mortgage that you have referred to and the way it was disposed of was the way you have indicated it to us? A. I haven't said how it was disposed of.

Q. How was it disposed of? A. It was disposed of by getting Mr. Levine and Mr. Meyer together,

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*Thomas P. McKenna—Defendant—Cross.*

and by getting them to reacknowledge this mortgage which they had passed over to me when they passed this property back to me—the acknowledgment was apparently overlooked, and I got them to reacknowledge it, and we had it cancelled.

- 10 Q. What was the occasion of going to see Mr. McDermott? A. I went into the County Clerk's office with this satisfaction of the mortgage in my hand about July 1st, and I wanted to know if the County Clerk's office would not cancel the mortgage without having to have the discharge acknowledged. I had taken this up with Mr. Baron and Mr. Baron said that they probably would, but the County Clerk told me that if I had the mortgage itself together with a discharge
- 20 for it, even though it wasn't acknowledged, they would cancel it. I said, "I cannot find the original mortgage." Well, they said—the young man in the County Clerk's office said that he had no authority, but I might see Mr. McDermott, so I went across the street to see Mr. McDermott. That is how I came to go over there.

- Q. How did you and Mr. Baron in your talk dispose of the matters of the tax bills? A. I showed him my large bundle of tax certificates, and I said, "Do you want me to have them cancelled before the closing, or deliver them at the closing?" He said, "Why, it is entirely proper to deliver them at the time of closing." I said, "If there is any tax claims that then remain open, why, you could retain the amount of them." He said, "That is customary."
- 30

- Q. When did you record all you had of record? A. Why, when I commenced to resell the property about July 1st.
- 40

*Thomas P. McKenna—Defendant—Cross.*

Q. Did you cancel the tax certificates about the same time? A. It was during the month of July.

Q. So it was the same time that you placed the discharge of mortgage on record? A. No, it was before the discharge of mortgage was placed on record.

Q. You do think that you first had to place them on record? A. No, I didn't place them on record at that time, because I didn't know whether I had some of them or not, but it seemed that they had to be cancelled in the tax office here in Long Branch. 10

Q. Do you know approximately how many of them are still open and pending, yourself? A. Yes, sir, there is none of them outstanding.

Q. Mr. Angleman is wrong when he says that there are? A. I am sure that there is none outstanding. 20

Q. What other questions of title were discussed by you and Mr. Baron? A. When I sold the property to Meyer and Levine, I was to subordinate a mortgage which was referred to in the papers, and they never went through with the transaction; they didn't build the building, they never got the prior mortgage, and therefore there was no second mortgage to be subordinated. I explained that to him. There was a mortgage given to me which was open of record, and he said that that was one of the questions raised by the title company, so I said, "Well, that is the mortgage, and my title and doesn't require it." He said, "Well, that is quite self-evident." 30

Q. Wasn't all that the title company wanted was to have a formal election by you that this mortgage should merge with your legal title? A. 40

*Thomas P. McKenna—Defendant—Cross.*

Yes, sir, and I remember that I said that the mere fact that I had signed the contract, a contract agreeing to sell the property free and clear, was the best evidence I would exercise my election. Then there was the question of the right of way, which was referred to in the deed of Levine and Meyer, and they reconveyed the property back to me including the right of way, and he also said that that was self-evident; there was nothing further open.

10

Q. Were there any other questions that you discussed? A. No, sir, no other questions, not that I recall.

20

Q. How about the Herbert—outstanding Herbert interest? A. The outstanding Herbert interest was never discussed with me at that time.

Q. At any time? A. Not until I was down to Freehold.

30

Q. Mr. Angleman then discussed it? A. Mr. Angleman said this, he said that he wanted to get an affidavit that this property had been in the possession of the Herberts and myself for upwards of sixty years, and he said in going "I was thinking of going to get an affidavit from Ben Morris." I said, "Well, George Goff knows about the people." He said, "Could you get an affidavit from George Goff?" I said, "No, I said this matter was completely defaulted on June 22nd, and I am not going to participate in any discussion about the title."

Q. You told that to Mr. Angleman at that time? A. Mr. Angleman, he said then he would write a letter to Mr. Goff.

40

Q. Do I understand that Mr. Baron then never

*Thomas P. McKenna—Defendant—Cross.*

told you anything about this outstanding Herbert interest? A. No, sir.

Q. Did you ever tell Mr. Baron that the Fidelity had guaranteed this title? A. Yes, sir.

Q. When did you tell him that? A. I told Mr. Baron that along in about—shortly after we had made the contract, we were talking about the delays of the title search, and I said the Fidelity had guaranteed my title. 10

Q. How many years before? A. About ten years before, and he took down the number of the title policy. He said, "If the Monmouth Title doesn't get a jump on them, I will go over and get the Fidelity."

Q. That was discussed, that fact that the Fidelity had issued a title policy? A. Yes, sir. 20

Q. Do you still insist that the Herbert situation was never discussed by Mr. Baron and you? A. No, sir.

Q. So the only questions you knew about the title are the ones you have— A. If that covers all the questions in that letter of June 5th, if there are any other questions in that letter, we discussed them.

Q. That letter appears to be signed by Mr. Angleman, do you notice that? A. No, sir. 30

Q. That is the gentleman whom you didn't understand knew anything about this title?

Mr. Perkins: I object. He didn't say any such thing as that.

Mr. Hannoeh: What did he say?

Mr. Perkins: That is on the record.

Q. Did you not tell us that when you saw Mr. Angleman, you spoke to him in words to this 40

*Thomas P. McKenna—Defendant—Cross.*

effect, that this is the first time I ever knew you had anything to do with this report? A. No, I never said anything of the kind.

The Court: No, no.

10 A. When I came to Mr. Baron's office, he had a letter from the Monmouth Title Company which he recapitulated to me some of the objections in the letter. I didn't receive the letter.

Q. What were Mr. Baron's reasons for wanting to adjourn this title from week to week?

Mr. Perkins: I object; that is purely a question of Mr. Baron's psychology.

20 Q. What did Mr. Baron say to you?

Mr. Perkins: That is different.

30 Q. Why did Mr. Baron say he wanted to adjourn this title from week to week? A. The first adjournment was because he was closing some other matter for Mr. Reade—my recollection is, on the—either at Plainfield or Perth Amboy, and that he was not able to take care of this matter at that time, and another reason was that he was a referee here in New York, in some reference matter in New York, that conflicted with the date, and asked me for an extension, and on June 20th, he had to go to Ohio and asked for an extension.

Q. Weren't these extensions requested for the purpose of enabling him to clear up all these questions which were being raised in the title? A. Never was reported to me.

40 Q. Never was stated to you by Mr. Baron? A. No, sir.

*Thomas P. McKenna—Defendant—Cross.*

Q. He gave no other reason for wanting these adjournments excepting those you have stated here? A. Yes, my recollection is that for the date of May 25th, that he had sent the papers over to a firm of lawyers in Newark, and they were to prepare the bond and mortgage and they hadn't sent the papers over to him. That was—I think that was the adjournment from the date of May 25th to some other date. What was the date after that? 10

Q. June 1st? A. That was the reason for the adjournment from May 25th to June 1st.

Q. Now, this tender that you have referred to as having been made to Mr. Joseph, how on June 22nd, had you arranged to cancel the Levine and Meyers mortgage? A. By delivering at the time of closing, the discharge of the mortgage, if they considered it satisfactory, and if not, they should retain the amount of that mortgage out of the purchase money. 20

Q. Now, the discharge was not at that time acknowledged? A. No, sir, it was not acknowledged.

Q. And you suggested to them that they withhold the amount of that mortgage plus interest on it? A. No, sir, I didn't suggest it, I brought this mortgage, the question of the discharge of this mortgage, to Mr. Baron's attention in May, and he said it was always customary to retain the amount of any encumbrance out of the purchase money. 30

Q. There apparently was open of record a \$12,000 mortgage dated the 1st of December, 1910. How much did you want them to keep out of this purchase price until that mortgage was cancelled? A. Whatever Mr. Baron thought was 40

*Thomas P. McKenna—Defendant—Cross.*

10 necessary to protect him on that mortgage. I showed him a discharge, and there was no question about the fact that the mortgage was not a valid lien against the property, it was only a question of getting the acknowledgment, and I gave him permission to retain the full amount of the mortgage, if he wanted to.

Mr. Hannoeh: I offer discharge of mortgage, Levine and Meyers, to McKenna, recorded—dated July 12, 1911.

Mr. Perkins: Your Honor will note it is dated 1911.

Mr. Hannoeh: Recorded in book 11 of discharges of mortgages, page 21.

20

(Marked Exhibit C-13.)

The Witness: I did the same about tax claims.

Q. And the deed you tendered to them is the deed which we now have offered in evidence, Exhibit C-12? A. Yes, sir. I might say that the paper you sent over to Mr. Ginen—

30

The Court: Mr. McKenna, this contract provides for the payment of \$5,000 to you at the time of signing it, and I understand it was paid?

The Witness: Yes, sir.

The Court: I understand also that you say on the 20th of June, you told Mr. Baron that the 22nd was the last date for settlement, that settlement had to be made on.

40

*Thomas P. McKenna—Defendant—Cross.*

that day, or words to that effect? That is correct?

The Witness: No, he simply asked me if I would give another extension from the 22nd of June, and I told him I would not.

The Court: There was nothing further said except that you wouldn't give any further extension? 10

The Witness: Yes, we had the conversation—he personally had told Reade he was paying me too much for the property and he said it really didn't make any difference if Reade went through with the title or not, that he was sure he could buy it from me for less money later.

The Court: That was the last conversation until after his return from Europe? 20

The Witness: No, I had a conversation with him about July 10th. He came down and said that Mr. Joseph of his office told him on his return from Ohio that I had tendered to him some papers, and he would like to see them. I said, "All right, here they are."

The Court: There was nothing said then about the deal being on or off? 30

The Witness: No, sir, he didn't ask me for any extension. There was nothing said about that further than what I am just saying.

The Court: Did you ever offer to return the \$5,000?

The Witness: No, sir.

Q. You stated to us that you were a member of 40

*Thomas P. McKenna—Defendant—Cross.*

the bar, Mr. McKenna. Of what bar? A. New Jersey.

Q. You have been reinstated in New Jersey?

Mr. Perkins: I object to that.

10

The Witness: No.

Mr. Perkins: That is absolutely improper.

The Court: He says he is a member of the bar. I don't know of anything else. This is cross examination. He has got a right to ask him any questions which may affect his credibility, if he wants to.

20

Mr. Perkins: That is a member of the bar. Now, his next question had an implication not based on any evidence in this case. This is very much like the question "have you stopped doing so and so"?

Q. Were you not disbarred from practice in New Jersey, Mr. McKenna? A. There was an order restraining me from practice until those proceedings were disposed of, and the proceedings were disposed of, and I am entirely free from them.

30

The Court: There is no restraint on your practicing now?

The Witness: No, sir.

Q. You were disbarred from the practice of law in the State of New York? A. The same proceedings brought over there, and the same proceedings are pending over there.

40

Q. Pending? A. Yes, sir, we have appealed to the Court of Appeals, the same as we did here.

*Thomas P. McKenna—Defendant—Cross.*

Q. Is there not now in effect in New York a decree entered in the New York Supreme Court on February 6, 1925, restraining you from the practice of law in New York? A. Yes, sir.

Q. That decree is still in effect? A. No, sir we have an injunction against the effect of the decree while we carried on the proceedings in the Court of Appeals. 10

Q. Those proceedings are still pending in the Court of Appeals? A. I don't know whether they are strictly pending or not. The Court, as I understood it, made an intimation that they wouldn't go into the question, in effect, relegated us back to the Appellate Division.

Q. Your appeal was dismissed? A. I don't know whether it was formally dismissed or not. Mr. Benedict told me that seemed to be the disposition of the Court at that time. 20

Q. You don't know whether a formal order was made dismissing that or not? A. I don't know whether it was or not.

Q. What do I understand you say the situation is in New Jersey? A. The situation in New Jersey is that I am entirely free of that claim in New Jersey. The opinion of the Court, I will get it for you. 30

Q. Are you certain that there was an appeal taken to the Court of Appeals, or did you not say, or in effect, all you were permitted to do was to file an exception to the report? A. No, I will give you the opinion.

Q. Just what papers are they? I suppose the records would speak for themselves. A. Let us get it straight now. 40

*Thomas P. McKenna—Defendant—Cross.*

Mr. Perkins: Put them in. We don't object to anything.

The Court: If you want to offer the file, offer it.

Mr. Hannoeh: It is an enormous file.

10 The Court: I can't help it.

Mr. Hannoeh: May I put it this way: offering them in evidence, I may have to leave them there. May I ask you to take judicial notice of the records of the Supreme Court?

The Court: You can offer them in evidence, if you want to, and I will examine any part of the files to which my attention is called.

20 Mr. Hannoeh: All right, I will do it that way. I offer the file in the case entitled "In the matter of the application for a rule to show cause why Thomas P. McKenna should not be disbarred. File No. 7903."

(File returned to Clerk of Supreme Court and not marked in evidence.)

30 Mr. Perkins: Now, I am going to object to that. I don't think this is proper. He has a right to cross examine on the question of credibility, and—but he has never been indicted, this isn't a question of conviction.

The Court: I am going to permit Mr. McKenna to explain this, if he wants to.

The Witness: We filed exceptions, and the exceptions were disposed of, and the opinion is right there. It is a short

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*Thomas P. McKenna—Defendant—Cross.*

piece of paper, not over half a sheet long.

Q. Suppose you pick it out? A. (Witness leaves the witness stand.) Well, you haven't got them all here. You have got the exceptions to the report, the exceptions which we filed. 10

Q. I never saw them until a few minutes ago?  
A. I have got a certified copy of it here.

The Court: Your statement is that so far as the proceedings in New Jersey, that you are out of it, and that you have been restored to practice, is that correct? 20

The Witness: Yes, sir.

The Court: Were you ever suspended from practice except during the pendency of the proceedings?

The Witness: Just during the pendency of the proceedings.

The Court: At the close of the proceedings were you restored to your former position at the bar?

The Witness: Yes, sir. 30

(Discussion off the record.)

The Witness: We filed exceptions to that and upon that we were successful in the matter of reinstatement.

Q. Subsequent to that order? A. Yes, sir.

Q. I call your attention to the fact that the matter of your New York proceedings are reported in Volume 211, App. Div. Reports, page 646? A. Yes, sir. 40

*Thomas P. McKenna—Defendant—Re-direct.*

Q. And that was affirmed by the Court of Appeals subsequently? A. I don't know that it has been affirmed by the Court of Appeals, whether the proceedings have progressed that far.

10

Mr. Hannoeh: I think that is all.

*Redirect examination by Mr. Perkins:*

Q. Was the same matter involved in both matters? A. Yes, sir, the same matter.

Q. Mr. McKenna, by the way, previous to the payment of anything on account of this contract, had Mr. Reade had a search of that property made? A. Yes, sir.

20

Q. Had there been a conversation about payment of \$5,000 previous to making the search? A. Yes, sir.

Q. Between whom? A. Between Mr. Reade and myself and Mr. Baron and myself.

30

Q. What was said? A. Mr. Reade said he would pay \$50,000 for the property, and first, he had asked me what I would take for the property. I said, \$60,000. He said he would give me \$50,000 all cash, and pay \$5,000 down, and finally I agreed to accept the \$50,000, providing it was all paid in cash. He then said: "Go over and see my lawyer, Mr. Baron, and prepare a contract." So we then made an appointment with Mr. Baron, and I brought up to Mr. Baron my deed, and Mr. Baron said that Mr. Reade had sent word about closing on this sale with me and to pay \$5,000 to me. He said: "Mr. McKenna, upon reflection, we don't want to pay you \$5,000. I can't let Mr. Reade

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pay \$5,000 to anybody on the closing of a con-

*Thomas P. McKenna—Defendant—Re-direct.*

tract." He said: "We don't know if you own the property," and he says: "I will recommend to Mr. Reade that he put \$5,000 in the bank to hold as security until we ascertain whether you own the property." I said I wouldn't sign any such contract as that. I said: "You might get the \$5,000 tied up in the bank and the property tied by recording the contract." So I said I wouldn't enter into any such arrangement. Now, I said: "You go and examine the title, and when you are satisfied then talk to me." Well, he said: "That is a good suggestion. We will have the title examined," and he says: "If it then turns out that you have good title to the property, we will then close the sale." On about the first week in May Mr. Baron called me up and he said he had received the search and that I had title to the property and wanted to know if I would come up to his office. So I went up to his office, and he said that he had received the search, showed me the search—I didn't examine it—showed it to me that he had received the search, that I had good title to the property, and he said: "I want to have my friends in Newark——" he said, "I am not a New Jersey lawyer, and I would like to have them prepare the papers," and he said "instead of closing title, I would like to have a contract for thirty days. We will pay you the \$5,000, with a contract for thirty days while they prepare the papers." I said: "All right, under those circumstances, I will do that." He said: "I will take the matter up with Mr. Reade." So, in a few days Mr. Reade called me on the telephone, and said Mr. Baron has notified him that

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*Thomas P. McKenna—Defendant—Re-direct.*

they had gotten the title search in and that I had a good title to the property, and would like to have me take lunch with him. I said I didn't care to take lunch, but I will come up. I went up to Mr. Reade's office. I think it was on May 6, 1925, and he said: "Now, Tom, under our original arrangement, I was to pay you \$50,000 in cash," and he said, "I have been buying a theatre here on 34th Street," he said, "and I have been using up a great deal of my money," and he said, "if you don't mind, I would like to pay \$25,000, and a mortgage for \$25,000," and he said, "we will close promptly." And after a little discussion, I said: "All right, I will do that," and he sat down and dictated a memorandum to his stenographer of our arrangement, and said: "I will send this memorandum over to Mr. Baron. You go over to Mr. Baron's now and close the contract." In a day or two Mr. Baron called me up and stated that he had received this memorandum from Mr. Reade, and was ready to close the contract. So I came up to his office with my papers and he prepared the contract which is in evidence.

10  
20  
30 Q. The contract was dated May 9th, and provides for its closing on the 25th? A. The 25th of May.

Q. I show you what appears to be a carbon copy of a letter dated May 6, 1925, addressed to Saul J. Baron and signed "Walter"? A. Yes, sir.

Q. Is that a copy of the letter which was sent? A. Yes, sir, that is the copy of the letter I have just referred to, and it is a carbon copy of the same letter.

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*Thomas P. McKenna—Defendant—Re-direct.*

Mr. Perkins: I call the Court's attention to the last part particularly: "I am also enclosing abstract of title which you sent me to read, and I wish you would prepare the papers, as we can close any time this afternoon or tomorrow morning, if possible." 10

(Marked Exhibit D-3.)

Q. In this last paragraph of Mr. Walter Reade's letter to Mr. Baron, dated May 6, 1925, which letter has been marked Exhibit D-3, and says: "I am also enclosing abstract of title which you sent me to read, and I wish you would prepare the papers so we can close any time this afternoon or tomorrow morning, if possible. Please call Mr. McKenna on the 'phone as soon as you receive this note." I call your attention to those paragraphs. What, if anything, was said about immediately closing the title? A. Well, it was supposed that the title would be closed immediately. 20

The Court: How is that material, Congressman, inasmuch as there was afterwards a contract made which provided for closing on the 25th? 30

Mr. Perkins: I think in this respect, the circumstances surrounding the making of the contract may show that time was of the essence, while the contract itself may not specifically say time is of the essence.

The Court: The circumstances sur- 40

*Thomas P. McKenna—Defendant—Re-direct.*

rounding it may have some bearing on it.

Mr. Perkins: If it has bearing upon it, then it would be material.

10 The Court: I do not think that anything that took place before the signing of the contract took place, which would, in effect, fix a time different from that fixed in the contract, would be admissible.

20 Mr. Perkins: I agree fully with your Honor, and the purpose of the question was not to alter or amend the contract, but to show the surrounding circumstances which might indicate that the time of closing was to be the time of closing and essential.

The Witness: Will I answer that?

Q. Yes.

The Court: What is the question?

Q. What, if anything, was said between you and Mr. Reade with respect to the importance of closing at the time fixed in the contract?

30 Mr. Hannoeh: I object to that.

The Court: Objection sustained. It doesn't make any difference, Congressman, what was said, because the date of closing was fixed as the 25th of May, and time was not made of the essence by the contract, and even that time was extended.

40 Q. Mr. McKenna, was there any conversation between you and Mr. Reade with reference to the importance of your getting the money at any particular time?

*William P. Kirsch—for Defendant—Direct.*

Mr. Hannoeh: I object to that as being immaterial.

The Court: I don't know.

A. Yes, sir.

Q. Will you please state what it was? A. I told Mr. Reade that I had an opportunity to buy some property in New York, adjoining property to mine, on 88th Street, and that I wanted the matter closed immediately for that purpose, otherwise I would lose that opportunity. 10

Mr. Perkins: That is all.

Mr. Hannoeh: That is all.

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WILLIAM P. KIRSCH, a witness produced on behalf of the defendant, being duly sworn, according to law, on his oath, testified as follows: 20

*Direct examination by Mr. Perkins:*

Q. What is your business? A. Real estate.

Q. Where do you live? A. Hollywood Avenue, West End.

Q. Where is your business conducted? A. 53 Raritan Avenue, West End. 30

Q. How long have you been engaged in business? A. Three years.

Q. Do you know the value of property in Long Branch? A. I imagine I do.

Q. Do you or don't you?

The Court: We don't care whether you imagine it or not, we want to know whether you do or whether you do not.

A. I do. 40

*William P. Kirsch—for Defendant—Cross.*

Q. Did you know the value of properties there previous to the 1st of August, 1925? A. I do.

10 Q. Will you please tell the Court whether there was a quick and sudden rise in values around August, 1925? A. There certainly was.

Q. What per cent of a general rise was there? A. Between 25 and 40 per cent.

Q. And how far did that eventually go? A. Just what do you mean by that?

Q. I mean to say, how high did these values eventually get with reference to their original valuation? A. They went as high as 50 per cent.

Q. An increase of 50 per cent? A. Yes.

20 Q. Do you know the property that is involved in this suit? A. I do not. Mr. McKenna called me on the telephone—

Q. Do you know whether that was a general rise along Broadway? A. It was a general rise along Broadway, at least 30 per cent.

Q. Affecting all property? A. Affecting all properties.

Mr. Perkins: That is all.

30 *Cross examination by Mr. Hanoach:*

Q. When did it drop? A. It dropped about two weeks after—about the 20th of August.

Q. It lasted about ten days? A. It lasted about ten days.

Q. And was caused by a flock of operators from Rockaway coming in here and spending the summer in Long Branch and having a little amusement for themselves? A. Rockaway, New  
40 York, and in general throughout the country.

*Howard Green—for Defendant—Direct.*

The Court: You mean to say it dropped back to its former condition?

The Witness: It dropped back to normal, but values since then have been at least 15 to 20 per cent more.

The Court: Sort of a reaction.

Mr. Hannoeh: All right.

10

HOWARD GREEN, a witness produced on behalf of the defendant, being duly sworn according to law, on his oath testified as follows:

*Direct examination by Mr. Perkins:*

Q. How long have you been in the real estate business around here? A. About thirty years. 20

Q. Do you know anything about it? A. A little.

Q. Do you know the values of property in Long Branch? A. Some of them, yes, sir.

Q. Do you know the property involved in this suit? A. I know the property, yes.

Q. Do you know whether or not there was a general and sudden rise of property in August, 1925? A. Yes, there was, very much. 30

Q. What do you say about it? A. I say it went up at least 50 per cent right then and there.

Q. When did it start? A. The early part of August, I couldn't say the exact date.

Q. How long did it continue? A. Practically through August.

Q. How do values now compare with those in August, 1925? 40

*Howard Green—for Defendant—Cross.*

Mr. Hannoch: I object to that as being immaterial.

A. Just about the same. I think they held the advance.

10 Q. Do you know the property involved in this case? A. Yes, sir.

Q. Have you had anything particularly to do with it? A. No, sir, nothing.

Mr. Perkins: That is all.

*Cross examination by Mr. Hannoch:*

Q. Where is the property? A. It is on Broadway, near Second Avenue.

20 Q. How much of it is involved in this suit? A. You have about 150 feet, I should judge—I am only guessing now.

The Court: I don't suppose I can take judicial notice of the fact, but I do know that there was a very sudden rise in Long Branch which was very productive of specific performance suits.

30 Both sides rest.

**Exhibit C-1.**

Original contract between Thomas P. McKenna and Walter Reade, recorded June 5, 1925, in Book 1301, of Deeds for Monmouth County, page 35. (A copy being attached to the amended bill of complaint, it is not re-printed here.)

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**Exhibit C-2.**

Survey of the property dated June 3, 1925, and made by Throckmorton and Morris, Civil Engineers, Long Branch, N. J. (Not being involved herein, the survey is omitted.)

20

**Exhibit C-3.**

(On letterhead of Monmouth Title Company.)

June 5, 1925.

Re Title No. 10773

Mr. Saul J. Baron,  
Counsellor at Law,  
342 Madison Ave., New York City.

30

Dear Sir:—

In re title No. 10773, McKenna-Reade, Broadway, Long Branch, we have your favor of June 4th, enclosing abstract of title and contract of sale in the above title. The contract has been filed as of to-day.

We received a letter from Mr. Hannoeh the

40

*Exhibit C-3.*

first of the week, ordering survey, and we immediately placed an order for the same. We are just in receipt of copy of the survey and are enclosing you herewith blue print copy of the same, together with the comments of the surveys, relative to same.

10

You will note that in the contract the first course runs 230 feet to the northwest corner of lands now or formerly of Van Note; the distance as shown on the survey is 228 feet; 230 feet would encroach on Van Note's property 2 feet.

The second course 60 feet coincides with the survey.

20

The third course along Van Note's about 80 feet to the north side of Belmont Avenue, you will see by the survey runs 77.43 feet. If we follow the contract description overlapping Van Note 2 feet and run 80 feet along this distance, we would encroach 4.57 feet on Belmont Avenue.

The distance along Belmont Avenue Easterly is given in the description 60 feet, the survey shows 59.67 grry.

30

The fifth course running northerly along the west side of an alley 197 feet to the south side of another alley shows in the survey 194.18 feet. Following the over-lap on Belmont Avenue and taking the distance given in the contract, we would fall short of reaching the alley 1.75 feet.

The sixth course, westerly along the south side of the last mentioned alley, distance in the description given about 70 feet, the surveyor runs this 73.31 feet to make a right angle turn, as explained in his letter, to give the distance in the last course 50 feet along Broadway.

40

If we still adhere to the description in the contract and run a distance of 70 feet, we would fall

*Exhibit C-3.*

short 2 feet of reaching a point on Broadway fifty feet from the beginning. If we run along the line of the alley as shown on the survey 70 feet, the distance to the point on Broadway would seem to be on a bias line 118 feet. But in that case, we would overlap the property on the east some 3.31 feet and this would necessitate examination of the title to this property, which was not included in our previous examination, as we had presumed that the two lots making a frontage of fifty feet on Broadway, were the only ones intended to be covered by the description in the contract. 10

Will the description, as delineated in the survey be used in the deed, or will the distances given in the contract description be used? 20

You can readily understand from the description in the contract and the actual physical conditions, that the survey discloses, that the survey was needed for an intelligent reading and passing of the title.

I have designated in red, on the enclosed copy of survey, the discrepancies in the contract distances and the survey, while the comments of the surveyor's letter are explained by the markings in yellow. 30

The surveyor's bill for this examination is \$50.

I have also designated in green a right of way created by Thomas P. McKenna and Sadie O. R., his wife, by deed recorded in Book 892 of Deeds for Monmouth County, page 176, across part of the premises in question, which were known as lot No. 24, on the map of Hannah W. Herbert Estate. The Surveyor undoubtedly had no knowledge of this right of way and evidently the same does not show up in the physical condition of 40

*Exhibit C-4.*

the ground. As a matter of record, it should be brought to your attention.

Yours truly,

CHARLES H. ANGLEMAN,  
Title Officer.

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CHA/VT

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**Exhibit C-4.**

(On letterhead of Monmouth Title Company.)

July 1st, 1925

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re Title No. 10773

Mr. Saul J. Baron,  
342 Madison Avenue,  
New York City.

Dear Sir:—

30

We enclose you herewith report on title No. 10773 premises on south side of Broadway, Long Branch, as referred to in contract of sale between Thomas P. McKenna and your client Walter Reade.

40

We have enclosed you copy of the tax search, returned by the City of Long Branch, and transcript of the tax sales made by the City of Long Branch, that are recorded in the County Clerk's office. I have cross-referenced these so that you can see that some of the sales that are recorded in the County Clerk's office are still open on the records of the City of Long Branch and some sales, recorded in the county clerk's office are

*Exhibit C-4.*

cancelled in the tax office of the City of Long Branch. There are others that are open in both places. These sales should all be cancelled in each office.

Mr. McKenna called at this office Saturday morning and submitted several cancelled certificates which enabled me to check out and annotate the sales, recorded in the Clerk's office, as I have done on the report. 10

You will also notice that there are two open mortgages, one for \$12,000, which seemed to surprise Mr. McKenna greatly, when called to his attention, he being under the impression that this mortgage in some way merged, but it does not, as the part of the premises, covered by this mortgage, was never owned by Benjamin A. Levine and Jacob Myers. The other mortgage would undoubtedly merge, if Mr. McKenna, who was the owner of the mortgage according to the record and also the property title owner, should elect to have it merge, but it would be necessary for him to declare such an election before we can pass this mortgage. Contained in this mortgage you will note that there is a reference to another mortgage to be executed and to which this mortgage is to be subordinated. We find no subordination agreement on record, neither do we find a mortgage, which we can identify as the one referred to in this mortgage. However, we are of the opinion that this is sufficient notice to require proof that such mortgage never existed, or if the same is in existence to have the cancelled mortgage produced. 20 30

We have not as yet received the searches from the United States District Court and the New Jersey Supreme Court, but over the telephone this 40

*Exhibit C-4.*

afternoon, were advised that there is a bankruptcy proceeding filed October 8, 1909, against Jacob Myers. Jacob Myers was one of the owners of a part of the premises in question in 1910. Proof should be produced that this bankruptcy was not

10

against the party in our title. We have followed the description of the survey and not attempted to set up anything affecting the Van Note property, nor property on the south side of Broadway lying east of property shown in the survey, known as lot 3 on the Herbert Map or lot No. 9 on the tax map. There are several tax sales against this lot No. 9.

20

Your attention is particularly called to my former letter, which is made a part of this report, and which goes into detail regarding the matters shown on the survey.

30

I discussed with Mr. McKenna on Saturday the matters set up under "Objections to title" in reference to Hannah Herbert and Elizabeth Wardell. The only information that I received was that a relative of Elizabeth Wardell by the name of George Goff, resided at 54 Washington St., Red Bank, N. J. and could probably furnish an affidavit, which would clear up this question. If you desire us, we will take this matter up with Mr. Goff, although we feel that this is a matter, which should be taken care of by Mr. McKenna.

We regret the seeming delay in getting this report to you, but as you can readily see the matter has been very voluminous as well as tedious and exacting.

40

If there are any matters in the report which have not been made clear, if you will communicate with us we will be glad to go into the matter in full detail.

*Exhibit C-5.*

I would suggest that when the title is closed that you annotate on the settlement certificate, attached to the report, how the matters set up in the report were disposed of, also have Mr. McKenna execute the affidavit in this report and return same to us so that we can be in a position, without further delay, to issue guaranty of title. 10

Yours truly,

CHARLES H. ANGLEMAN,  
Title Officer.

CHA/VT  
Enc.

---

**Exhibit C-5.** 20

(On letterhead of Monmouth Title Co.)

Mr. Saul J. Baron,  
342 Madison Ave.,  
New York City.

Re title No. 10773, McKenna-Read  
Long Branch.

Dear Sir:— 30

We have noted the contents of your letter of July 14th, relative to this matter, and have written Mr. Goff for such information as he may be able to give us regarding Deborah Herbert and Elizabeth Wardell. I do not see how we can close this title without some information as to who were the heirs of Elizabeth Wardell and the date of her death and also as to who were the heirs of Deborah Herbert. 40

*Exhibit C-5.*

10 The record title would seem to show an outstanding one-fourth interest in the heirs of Elizabeth Wardell, provided she survived Deborah Herbert, under whose will she was entitled to a one-fourth interest in our property. If she did not survive Deborah Herbert, the record title would seem to stand in the heirs of Deborah Herbert to the extent of one-half of the fee. Being unable to ascertain who the heirs of Deborah Herbert are we are unable to search the records in any other name to ascertain if they have made any conveyances to vest the title in Hannah Herbert under whose will, by her executors' conveyance, Mr. McKenna obtains title.

20 I do not think the guaranty made by the Fidelity to which you refer covers the same state of facts as to title which is involved in the property we are examining.

Most of the adjoining property coming out of the Herbert map was conveyed by the Herberts and Elizabeth Wardell during their life time. Consequently the questions arising in this title would not arise.

30 You might come out to the office with Mr. McKenna any day but Saturday and it may be possible that we can close the matter in escrow, or in such a manner that you will be satisfied to leave it before sailing for Europe.

Yours truly,

CHARLES H. ANGLEMAN,  
Title Officer.

CHA/VT

40

**Exhibit C-6.**

(There is no such exhibit.)

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**Exhibit C-7.**

THOMAS P. MCKENNA

10

to

WALTER READE.

In re: Broadway, Long Branch,  
New Jersey Property.

It is hereby stipulated and agreed that the date fixed for closing of the title under the contract between Thomas P. McKenna and Walter Reade, and dated the 9th day of May, 1925, be adjourned to the 22nd day of June, 1925, at the same time and place.

20

All adjustments to be as of the original date of closing.

Dated, New York, June 11th, 1925.

THOS. P. MCKENNA,

Vendor.

SAUL BARON,

Attorney for Vendee.

30

THOMAS P. MCKENNA

to

WALTER READE.

In re: Broadway, Long Branch, N. J.  
Property.

It is hereby stipulated and agreed that the date fixed for closing of the title under the contract

40

*Exhibit C-7.*

between Thomas P. McKenna, and Walter Reade and dated the 9th day of May, 1925, be adjourned to the 15th day of June, 1925, at the same time and place.

10 All adjustments to be as of the original date of closing.

Dated, New York, May 29th, 1925.

THOS. P. MCKENNA,  
Vendor.

SAUL BARON,  
Attorney for Vendee.

20 THOMAS P. MCKENNA  
to  
WALTER READE.

In re: Broadway, Long Branch, N. J. Property.

30 IT IS HEREBY STIPULATED AND AGREED THAT the date fixed for closing of the title under the contract between Thomas P. McKenna and Walter Reade and dated the 9th day of May, 1925, be adjourned to the 1st day of June, 1925, at the same time and place.

All adjustments to be as of the original date of closing.

Dated, New York, May 22nd, 1925.

THOMAS P. MCKENNA,  
Vendor.

40 SAUL BARON,  
Attorney for Vendee.

**Exhibit C-8.**

(Letterhead of Thomas P. McKenna.)

Mr. Saul Baron,  
342 Madison Ave.,  
New York City.

*Re:* Long Branch Property. 10

Dear Mr. Baron:

I beg to advise you that my wife's name is Sadie O'R. McKenna, and our residence City of Long Branch, County of Monmouth and State of New Jersey.

If there are any questions raised in the title report, kindly bring the same to my attention as soon as received.

20

Yours respectfully,

THOMAS P. MCKENNA.

TPK :G.

---

**Exhibit C-9.**

(On letterhead of I. R. Taylor & Co. Incorporated,

Asbury Park, N. J.)

30

July 30th, 1925.

Mr. Walter Reade,  
112 West 34th St.,  
New York City.

Dear Sir:—

In reply to your favor of the 29th inst. relative to the twelve stores adjoining the Broadway The- 40

*Exhibit C-9.*

10 atre, Long Branch, N. J., which you contemplate erecting, as per plans and specifications prepared by Leon Cubberley, Architect, beg to say that we tried to get in touch with Mr. Cubberley this morning on the telephone at his N. Y. Office and he being out, it will be impossible for us to get the plans etc., until tomorrow (Friday) by calling for same at his residence, and if the work is not too complicated, we will be able to let you have our proposal in ten days as requested.

Thanking you for your kind consideration and assuring you that we will endeavor to complete our proposal in time, we beg to remain,

Most respectfully yours,

20

I. R. TAYLOR & CO.,  
By I. R. TAYLOR.

IRT/M

---

August 7th, 1925.

Mr. Walter Reade,  
Savoy Theatre,  
34th St.,  
New York City.

30

(Re—Stores at Long Branch, N. J.)

Dear Sir:—

We propose to furnish all materials and labor necessary to erect and complete the proposed stores at Long Branch, N. J., as per plans and specifications prepared by Leon Cubberley, Architect, Long Branch, N. J., for the following prices:—

40

*Exhibit C-9.*

*Plot No. 1*, the sum of FIFTY-ONE THOUSAND, FIVE HUNDRED AND SIXTEEN (\$51,516.00) DOLLARS.

*Plot No. 2*, the sum of TWENTY-THREE THOUSAND, FIVE HUNDRED AND NINETY-EIGHT (\$23,598.00) DOLLARS.

10

Respectfully submitted,

IRT/M

I. R. TAYLOR & CO.,  
By I. R. TAYLOR, Pres.

(On letterhead of Amsterdam-Building Company,  
441 Lexington Avenue, New York City.)

August 10th 20  
1925

Re: Reade Group of Stores  
Long Branch, N. J.

Mr. Walter Reade,  
112 West 34th Street,  
New York City.

Dear Sir:

We hereby submit our tender for the group of stores on Broadway, Long Branch, New Jersey, as follows: 30

Our estimate to furnish all labor and materials in strict compliance with your architect, Mr. Leon Cubberley's plans and specifications is:

For group of stores on Plot #1.....\$48,083.00

For group of stores on Plot #2.....\$23,264.00

Relative to alternate estimate required for substituting concrete walls and girder, in lieu of steel shown, it is not quite clear to us just what 40

*Exhibit C-9.*

you intend as trenches, so we have not made an alternate price on substituting concrete.

We have gone into this estimate carefully and trust you will find same satisfactory.

Respectfully submitted,

10

AMSTERDAM BUILDING COMPANY, INC.  
 THM THOS. H. MAXWELL  
 G President

(On letterhead of Perth Amboy Construction Company, 61 Madison Avenue, Perth Amboy, New Jersey.)

August 12, 1925.

Mr. Walter Reade,  
 20 112 West 34th St.,  
 New York City, N. Y.

Dear Sir:

We hereby propose to furnish all labor and materials for the erection and completion of twelve (12) stores on Broadway, Long Branch, N. J. according to plans and specifications of Mr. L. Cubberly, 347 Madison Ave., New York City, N. Y. Architect, as follows:

30 First Plot—8 Stores—For the sum of Forty Two Thousand Eight Hundred (\$42800.00) Dollars.

Second Plot—4 Stores—For the sum of Twenty Thousand Seven Hundred Fifty (\$20,750.00) Dollars.

Trusting our estimate meets with your approval, we remain

Very truly yours,

40

PERTH AMBOY CONSTRUCTION CO.  
 g/w By L. GUTMAN

*Exhibit C-9.*

(On letterhead of Harry M. Steelman, 1212 Fifth Avenue, Asbury Park, New Jersey.)

August 12, 1925.

Mr. Walter Reade,  
112 W. 34th St.,  
New York.

10

Dear Sir:—

I agree to erect Store Buildings in the City of Long Branch in accordance with plans and specifications prepared by Leon Cubberly, Architect, for the following sums:

Group of 8 stores—Fifty-three Thousand Dollars, (\$53,000.00).

Group of 4 stores—Twenty-six Thousand Dollars, (\$26,000.00). 20

Very truly yours,

H. M. STEELMAN.

(On letterhead of I. R. Taylor & Co., Incorporated  
Asbury Park, N. J.)

30

August 20, 1925.

Mr. Walter Reade,  
112 West 34th Street,  
New York City.

(Re—Stores at Long Branch, N. J.)

Dear Sir:

We propose to furnish all materials and labor necessary to erect and complete the proposed 40

*Exhibit C-10.*

stores at Long Branch, N. J., as per plans and specifications prepared by Leon Cubberly, Architect, Long Branch, N. J., for the following prices:

Plot No. 1, the sum of Forty-eight Thousand, Nine Hundred (\$48,900.00) Dollars.

19 Plot No. 2, the sum of Twenty-two Thousand, Four Hundred (\$22,400.00) Dollars.

Respectfully submitted,

I. R. TAYLOR & CO.,  
I. R. TAYLOR, Pres't.

IRT/B

**Exhibit C-10.**

20

STEIN, STEIN & HANNOCH  
Counsellors at Law  
Essex Bldg—31 Clinton St.,  
Newark, N. J.

August, 1925.

Mr. Thomas P. McKenna,  
#42 Broadway,  
New York City.

30

RE: Reade Broadway Property.

Dear Sir:

During the absence of Mr. Baron in Europe, Mr. Reade has asked me to arrange to close the above matter.

The Title Company have been advising me daily that they expect to close the matter within a  
40 short time, and I was advised by them on Friday

*Exhibit C-11.*

that we could probably close the title the first of next week.

I am writing to you at this time so that in the event that you have any vacation plans that may be able to advise me.

Very truly yours,

10

STEIN, STEIN & HANNOCH,

By H. J. HANNOCH.

HJH/FVM

P. S. I find that you and Mr. Baron have from time to time extended the time for closing, and accordingly I hand you herewith further extension to September first. I am assured by the Title Company, however, that the title will be absolutely disposed of before that time.

20

---

**Exhibit C-11.**

(On Letterhead of Thomas P. McKenna, 42  
Broadway, New York.)

Stein, Stein & Hannoch,  
Essex Building,  
31 Clinton Street,  
Newark, N. J.

30

Gentlemen :-

Re: *Broadway Property—Long Branch.*

Replying to yours of the 18th inst., I beg to return the papers you sent me.

Yours very truly,

THOS. P. MCKENNA.

TPK:G

ENCL.

40

**Exhibit C-12.**

THIS INDENTURE, made the eighteenth day of June, nineteen hundred and twenty-five

BETWEEN

10 Thomas P. McKenna, and Sadie O. R. his wife of the City of Long Branch, County of Monmouth and State of New Jersey, parties of the first part,

and

Walter Reade

of the city of Asbury Park, County of Monmouth and State of New Jersey, party of the second part.

20 WITNESSETH, That the said parties of the first part, for and in consideration of the sum of Fifty thousand (\$50,000) Dollars, lawful money of the United States of America, to them in hand well and truly paid by the said party of the second part, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said parties of the first part, therewith fully satisfied, contented and paid, have given, granted, bargained, sold, aliened, remised, released, enfeoffed, conveyed and confirmed, and by these presents do give, grant, bargain, sell, 30 convey and confirm to the said party of the second part, and to his heirs and assigns forever.

All that certain piece or parcel of land and premises, hereinafter particularly described, situate, lying and being in the City of Long Branch in the County of Monmouth and State of New Jersey.

40 BEGINNING at a point on the south side of Broadway at the northeast corner of property belonging to the party of the second part adjoin-

*Exhibit C-12.*

ing the property herein described, thence—1—  
 southwardly along lands of the party of the  
 second part about 230 feet to the northwest corner  
 of lands of one now or formerly Vannote, thence  
 —2—eastwardly along said Vannote land about  
 60 feet to a corner, thence—3—southwardly along  
 said Vannote land about 80 feet to the north  
 said of Belmont Avenue, thence—4—eastwardly  
 along said north side of Belmont Avenue about  
 60 feet to an alley, thence—5—northwardly along  
 the west side of said alley about 197 feet to the  
 south side of another alley, thence—6—west-  
 wardly along the south side of said last mentioned  
 alley about 70 feet, thence—7—northwardly about  
 118 feet to the said south side of Broadway,  
 thence—8—westwardly along the said south side of  
 Broadway, 50 feet to the point of Beginning.

10

20

Together with the rights accruing to the said  
 premises in said alleys and all right, title and  
 interest of the seller of in and to any property  
 adjoining or adjacent to the above described  
 premises.

TOGETHER with all and singular the tenements,  
 hereditaments, and appurtenances to the same be-  
 longing or in anywise appertaining, ALSO all the  
 estate, right, title, interest, property, claim and  
 demand whatsoever of the said parties of the  
 first part, of in or to the above described prem-  
 ises, and to every part and parcel thereof, with  
 the appurtenances,

30

TO HAVE AND TO HOLD all and singular the above  
 described piece or parcel of land and premises,  
 with the appurtenances, unto the said party of

40

*Exhibit C-12.*

the second part, his heirs, and assigns, to his and their own proper use, benefit and behoof forever,

10 AND the said parties of the first part for themselves, their heirs, executors and administrators, do covenant and grant to and with the party of the second part, his heirs and assigns, that they the said parties of the first part are the true, lawful and right owner of all and singular the above described land and premises, and to every part and parcel thereof, with the appurtenances thereunto belonging; and that the said land and premises, or any part thereof, at the time of the sealing and delivery of these presents are not encumbered by any Mortgage, Judgment or Limitation or by any encumbrance whatsoever, by which 20 the title of the said party of the second part, hereby made or intended to be made for the above described land and premises, can or may be changed, charged, altered or defeated in any way whatsoever, AND ALSO, that the said parties of the first part now have good right, full power, and lawful authority, to grant, bargain, sell and convey the said land and premises, in manner aforesaid.

30 AND ALSO, that the said parties of the first part will WARRANT, SECURE AND FOREVER DEFEND THE SAID land and premises, unto the said party of the second part, his heirs and assigns forever, against the lawful claims and demands of all and every person and persons freely and clearly freed and discharged of and from all manner of encumbrances whatsoever.

40 IN WITNESS WHEREOF, the said parties of the

*Exhibit C-12.*

first part have hereunto set their hands and seals  
the day and year first above written.

THOMAS P. McKENNA (L. S.)  
SADIE O. R. McKENNA (L. S.)

Sealed and delivered in the presence of  
WILLIAM A. SMITH.

10

State of New York,  
County of New York—ss.:

BE IT REMEMBERED, that this 18th day of June,  
Nineteen hundred and Twenty-five before me At-  
torney at Law of New Jersey personally appeared  
Thomas P. McKenna and Sadie O. R. McKenna,  
his wife who, I am satisfied, are the grantors in  
the within Deed of Conveyance named, and I  
having first made known to them the contents  
thereof, they did acknowledge that they signed,  
sealed and delivered the same as their voluntary  
act and deed, for the uses and purposes therein  
expressed.

20

AND the said Sadie O. R. McKenna, wife as  
aforesaid, being by me privately examined, sepa-  
rate and apart from her said husband did further  
acknowledge that she signed, sealed and delivered  
the same freely, as her voluntary act and deed,  
without any fear, threats or compulsion of or  
from her said husband.

30

WILLIAM A. SMITH,  
Att'y at Law of N. J.

40

**Exhibit C-13.**

10 THIS IS TO CERTIFY, that a certain indenture of mortgage, bearing date the 23rd day of November, 1910, made and executed by Thomas P. McKenna, of the City of Long Branch, County of Monmouth and State of New Jersey, to Benjamin A. Levine and Jacob Myers, of the City of New York, County of New York, and State of New York, to secure the payment of Twelve Thousand Dollars, and recorded in the office of the Clerk of Monmouth County, in Book 408 of Mortgages, on page 199, on the first day of December, 1910, at eight o'clock in the forenoon, has been PAID AND SATISFIED, and may be discharged of record.

20 Witness our hands and seals this twelfth day of July, One Thousand Nine Hundred and Eleven.

JACOB MYERS (L. S.)

BENJ. A. LEVINE (L. S.)

Witness:

ANNA PARISER.

State of New York,  
County of New York—ss.:

30 Be it remembered, that on this 29th day of July, in the year One Thousand Nine Hundred and Twenty-five (1925) before me a—Notary Public—of the State of New York, personally appeared Benjamin A. Levine and Jacob Myers, who, I am satisfied are the persons named in and who executed the within instrument, and I having first made known to them the contents thereof, they acknowledged that they signed, sealed and

40

*Exhibit C-13.*

delivered the same as their voluntary act and deed.

ANNA PARISER,  
Not'y Public.

Certificate of the County  
of New York attached.

10

(Over)

(Endorsement)

## DISCHARGE OF MORTGAGE

(5998)

BENJAMIN A. LEVINE

and

JACOB MYERS

-to-

THOMAS P. MCKENNA

42 Broadway,  
New York City.

March 31, 1911.

20

Received and recorded in the Monmouth County  
Clerk's Office.

July 31, 1925.

at 4 o'clock P. M. in book 11 of Dis. Mtgs. Page  
21 &c.

30

*Joseph McDermott*  
Clerk.

40

**Exhibit D-1.**

SAUL J. BARON  
Counselor at Law,  
Canadian Pacific Building,  
342 Madison Ave.,  
New York.

10

May 22nd, 1925.

RE: McKenna-Reade CLOSING  
Broadway, Long Branch, N. J., Property.

My dear Mr. McKenna:

I am herewith enclosing stipulation adjourning  
the date of closing of the McKenna-Reade con-  
tract to the 1st day of June, 1925, same time and  
20 place, as arranged between us on the wire today.  
Will you kindly sign the enclosed stipulation and  
return to me?

I am,

Very truly yours,

SAUL J. BARON.

MR. THOMAS P. MCKENNA,  
42 Broadway,  
New York City.

30 B-S  
Encs.

40

**Exhibit D-2.**

SAUL J. BARON  
 Counselor at Law  
 Canadian Pacific Building  
 342 Madison Avenue  
 New York.

10

May 29th, 1925.

Mr. Thomas P. McKenna,  
 42 Broadway,  
 New York City.

Dear Sir:

*Re: Broadway, Long Branch N. J. property.*

In accordance with our arrangement made between us this morning, I am herewith enclosing stipulations adjourning the closing of the title in the above matter to the 15th day of June, 1925. 20

Very truly yours,

SAUL J. BARON.

SB:BM

Enc.

**Exhibit D-3.**

30

May 6th, 1925.

Mr. Saul J. Baron,  
 Canadian Pacific Bldg.  
 Madison Ave. & 43rd St.,  
 New York City.

My dear Saul:-

Mr. McKenna is in my office now and we have agreed upon the following terms in connection with the property. 40

*Exhibit D-4.*

10 A contract is to be closed as of April 1st, 1925 and all rents accruing from the existing tenant for the lunch wagon until the end of his lease are to belong to Mr. McKenna and I am to receive no part of them. It is distinctly understood however, that the lease on this lunch wagon expires on January 23, 1926.

20 The only change now in addition to the whole thing is that I am to give Mr. McKenna \$25,000 in cash and he is to take back a mortgage of \$25,000 for twenty-four months with interest at the rate of 6% and after the expiration of twelve months of this mortgage I am to reduce it \$5,000 and shall have the right to pay Mr. McKenna the full amount of any time during the term of the mortgage.

I am also enclosing abstract of title which you sent me to read and I wish you would prepare these papers so we can close any time this afternoon or tomorrow morning if possible.

Please call Mr. McKenna on the phone as soon as you read this note.

Very truly yours,

30

WR:RB

WALTER.

**Exhibit D-4.**

(This exhibit is contract attached to amended bill and hence is not reprinted.)

40

### Opinion of Berry, V. C.

This is a bill for specific performance of a contract for the sale of land. The complainant is the vendee and the defendant the vendor. The contract is dated May 9th, 1925, and provides for the sale by the defendant to the complainant of certain lands in the City of Long Branch for the consideration of \$50,000, \$5,000 of which was paid on the execution of the contract and the balance was to be paid \$20,000 in cash at the settlement and \$25,000 by the execution and delivery of a purchase-money mortgage in that amount. Under the terms of the contract settlement was fixed for May 25th, 1925. Time was not, in so many words, made of the essence of the contract, but it is apparent from the dealings between the parties that prompt action was intended. The complainant was represented by a Mr. Baron, a New York attorney, who prepared the form of contract, and defendant is himself a lawyer, so that the parties dealt "at arm's length." The day of settlement fixed by the contract was postponed by written stipulation to June 1st, to June 15th, and finally to June 22nd, 1925. The last stipulation is dated June 11th.

On June 20th, Baron, Reade's attorney, applied to McKenna for a further extension, which was refused. Baron's version of what occurred at that time is as follows:

"He said that in view of the fact that these objections were outstanding that he wouldn't enter into a formal stipulation fixing a date, but he would co-operate with the title company and then he would fix a date, and I let it go at that until June

*Opinion of Berry, V. C.*

22d, when I made another attempt through a representative of my office to get a formal stipulation."

The defendant's version of what took place between him and Baron is as follows:

10

"Mr. Baron asked me if I would give another extension, that he had to go away, and I told him no, I would not. I said that 'at the last extension you said you wouldn't ask for any more and we at that time both agreed that that should be the last extension.' He said, 'Yes, I know it, but I have got to go to Cleveland'—or Cincinnati or some place—and he said, 'I would like to have another extension as a personal favor.' I said, 'I can't grant it as a personal favor. This contract was closed with me at this reduced price upon Mr. Reade's statement that I would be paid in cash the full amount, and that later the cash was cut in half to \$25,000,' and I said, 'I have explained to you several times that I am losing valuable opportunities for investment of this money, and that I will not grant any further adjournments.' Mr. Baron said, 'Well,' he said, 'McKenna, I don't think it makes any difference.' He says, 'Mr. \* \* \* I am sure Mr. Reade can buy the property from you later at a reduced price. You have held it for over thirty years, and you weren't able to sell it.' I said, 'Be that as it may, I won't grant any further extensions. You can send somebody else down to close the title; you don't have to be here.'"

20

30

40

*Opinion of Berry, V. C.*

Baron was in Court when this testimony of the defendant was given, and did not take the stand in rebuttal, and made no denial of this testimony except as made in his direct testimony above quoted.

I am inclined to believe Mr. McKenna's version of what took place at the meeting on June 20th, as it seems to be corroborated by the later acts of the parties and their representatives. On June 22d a Mr. Joseph, of Mr. Baron's office, went to Mr. McKenna with a proposed written stipulation extending the time for settlement to a definite date, but Mr. McKenna refused to sign it. Joseph says that nothing else occurred on that occasion except that he requested McKenna to sign the stipulation, and McKenna refused; but McKenna says he first inquired of Joseph if he represented Mr. Baron, and on receiving an affirmative reply, tendered to Mr. Joseph a deed for the property, which was the subject of the sale, which Mr. Joseph refused, and that he, McKenna, then made a note of this tender on the papers. The note referred to appears on one of the exhibits. Joseph denies that any tender was made, but I am unable to accept that denial, as it is undisputed that on July 10 Baron saw McKenna and asked to be shown the papers tendered to Joseph. If Joseph spoke the truth, why did Baron ask to inspect the papers? Baron did not deny that such a request had been made by him, and if McKenna had said, as Baron claims, that they would hold the matter of settlement in abeyance without day until the title objections had been cleared up, why was there any necessity for sending Joseph to McKenna on

10

20

30

40

*Opinion of Berry, V. C.*

June 22d? Baron left for Europe on July 25th and did not return until late in August. During his absence the complainant was represented by his solicitors of record, but it is admitted that neither the complainant nor any of his attorneys  
10 communicated with defendant in any way between June 22d and August 18th, except for the call of Baron on McKenna on July 10th, when he asked to be shown the papers which had been tendered to Joseph. In the meantime, the defendant, assuming that the complainant had abandoned the contract, listed his property for sale with various real estate agencies. About August  
20 10th, 1925, a real estate boom struck Long Branch and vicinity, and the value of the property in question went up from \$50,000 to \$100,000 or \$125,000. Complainant alleges this as the reason for McKenna's refusal to perform while McKenna counters with the charge that this is the defendant's excuse for attempting to revive the abandoned contract. Complainant alleges numerous defects in defendant's title as the cause of the delay. It appears that the parties had been negotiating with reference to this property for some  
30 weeks before the contract was eventually signed, and that Baron had had an examination of the title made prior to the preparation of the contract in order to determine whether or not McKenna was the record owner. The abstract submitted by the title company on this application was offered in evidence and it appears to be practically complete. Later, however, a more complete search and abstract was made, the final report on which reached Baron early in June. If time  
40 was not, in so many words, made of the essence

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of this contract, as originally prepared, the circumstances are strong that time was intended to be of the essence, and this is evidenced by the short settlement date fixed in the contract and the three short adjournments.

In *Orange Society v. Konski*, 94 N. J. Eq. 632 (at p. 633), Vice-Chancellor Backes said:

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“The law is that a day fixed in a contract for closing title, without more, is merely formal; but if it is stipulated that time is of the essence, or the circumstances are persuasive that that is the case, prompt performance is essential, and it is also the law that where the time fixed is regarded as a formality only, and the period has gone by, or where time is of the essence and there is a waiver, that time may nevertheless be made of the essence by formal demand that the title be closed by a given day; but the time given must be reasonable.”

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But it is unnecessary for me to decide here whether or not time was originally of the essence (and as I have already said, the circumstances indicating this are strong), because I think that both parties intended to make time of the essence when the last extension to June 22d was given. If I accept McKenna's statement as to what occurred on June 11th when this extension was arranged (and I have already indicated that I do accept that statement), it was then understood by both McKenna and Reade that no further extension was to be granted and it was not as a

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*Opinion of Berry, V. C.*

matter of right, but as a personal favor, that Baron later asked for a further extension which was refused. In my judgment time was then made of the essence if it had not been so before, and the only question now is whether or not the time then fixed as the final date for closing was, under the circumstances, reasonable. The only matter suggested by complainant requiring additional time was the clearing up of title objections and defects. Obviously, no time was required by the complainant for this purpose because it was not complainant's business to clear up these objections or to remedy the defects. That was the defendant's job. It is therefore pertinent to inquire what were the title objections required to be removed. First, outstanding certificates of tax sale, most, if not all of which McKenna had in his possession ready for cancellation at settlement; (2) the \$12,000 mortgage, unacknowledged and unrecorded satisfaction piece for which McKenna had, and exhibited to Baron; (3) outstanding Herbert interest, if any. As to this it may be said that McKenna had a policy of title insurance from the Fidelity Trust Company of Newark, guaranteeing perfect title in him and on which he had a right to rely. Further than this, he had been in peaceable possession of the property for over thirty years; (4) discrepancies in property lines which complainant himself says were of no considerable importance. But McKenna's testimony was that he told Baron that if any of the title objections were not satisfactorily cleared up at the settlement, sufficient of the purchase price might be withheld at settlement to cover all the uncanceled items, if necessary. This was a prac-

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tical solution of the difficulties, if any existed. But I am not convinced, nor am I called upon here to decide, that there is any outstanding so-called "Herbert interest" in this property. The evidence on this point is merely that one title examiner, representing a responsible title company, out of an abundance of caution, perhaps, set up this question of outstanding interest as one of the things to be disposed of on settlement; but as against this we have the fact that another equally responsible title company has already guaranteed the defendant's title. Under these circumstances, and coupled with the fact that an examination of this title had been made at Baron's request prior to the execution of the contract, report of which he had in his possession at the time, the time fixed for final closing was reasonable. The instant case is similar to that of *Barry v. Ruskin*, 4 N. J. Adv. R. 1042, recently decided by me, where I held that time not originally of the essence of the contract had been subsequently made of the essence by agreement of the parties. In the instant case it is apparent that there was a complete agreement between Baron and the defendant on June 11th that June 22d was to be the final date.

The complainant himself had very little to do with the negotiations with respect to this contract. Correspondence and other exhibits, together with the testimony of the architect, are persuasive that complainant did not understand that the contract had been abandoned; but Baron admittedly acted for the complainant and with his full authority. It may be that Baron thought he was taking no chances, and that Reade could

*Opinion of Berry, V. C.*

buy the property later at a less price, as McKenna said Baron declared. If Baron was gambling he was playing with Reade's chips, and Reade must stand Baron's losses. Both sides lay considerable stress in the argument on the letter of August 18th, 1925, addressed by complainant's solicitor to the defendant, but this letter, as I view it, is an attempt to restore a lost cause. Considerable space is also taken up in complainant's brief by the argument respecting defendant's credibility as a witness. It is unnecessary for me to make any comment on this point except to say that there is ample corroboration of defendant's testimony with respect to the vital points in this case to warrant its belief. I shall, therefore, advise a decree dismissing the bill of complaint, but as defendant has offered to return to complainant the \$5,000 deposited on the execution of the contract, the decree will so provide.

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**Final Decree.**

IN CHANCERY OF NEW JERSEY.

Between

WALTER READE,

Complainant,

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—and—

THOMAS P. MCKENNA,

Defendant.

This cause coming on to be heard in the presence of Messrs. Stein, Stein and Hannoeh, solicitors for the complainant, and Messrs. Perkins & Drewen, solicitors for the defendant; and the pleadings having been read and proofs taken, and the arguments of the respective counsel having been heard and considered, and it appearing to the court that the complainant is not entitled to specific performance of the contract set out in the bill of complaint, for the sale of lands and premises situated in the City of Long Branch, County of Monmouth, and State of New Jersey, which contract bears date the 9th day of May, 1925, and was made between Thomas P. McKenna of the City of Long Branch, Monmouth County, New Jersey, and the complainant, Walter Reade,

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And it further appearing that the complainant is not entitled to the relief prayed for in his bill of complaint;

It is, on this 26th day of October, 1926, by Edwin Robert Walker, Chancellor of the State of New Jersey, ordered, adjudged and decreed, that the complainant's bill be and the same is

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*Final Decree.*

hereby dismissed with costs, and that there be allowed to Messrs. Perkins & Drewen of counsel with the defendant a counsel fee of \$500, same to be taxed as part of the cost of said defendant and collected accordingly.

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IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant, Thomas P. McKenna, do pay to the complainant, or his solicitors, within sixty days from the date hereof, the sum of \$5,000 representing a return of the deposit referred to in the contract hereinabove more particularly set forth, and that said sum, and the same is hereby declared to be, a lien upon the following lands and premises mentioned and described in said contract, that is to say:

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ALL that certain plot, piece or parcel of land hereinafter particularly described, situate, lying and being in the City of Long Branch, County of Monmouth, State of New Jersey, and more particularly bounded and described as follows:

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BEGINNING at a point on the south side of Broadway at the northeast corner of property belonging to the party of the second part adjoining the property herein described, thence (1) southwardly along lands of the party of the second part about 230 feet to the northwest corner of lands of one now or formerly Vannote, thence (2) eastwardly along said Vannote land about 60 feet to a corner, thence (3) southwardly along said Vannote land about 80 feet to the north side of Belmont Avenue,

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thence (4) eastwardly along said north

*Final Decree.*

side of Belmont Avenue about 60 feet to an alley, thence (5) northwardly along the west side of said alley about 197 feet to the south side of another alley, thence (6) westwardly along the south side of said last mentioned alley about 70 feet, thence (7) northwardly about 118 feet to the said south side of Broadway, thence (8) westwardly along the said south side of Broadway, 50 feet to the point of Beginning. 10

Together with the rights, accruing to the said premises in said alleys, and all right, title, and interest of the seller of in and to any property adjoining or adjacent to the above described premises.

and

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IT IS FURTHER ORDERED, ADJUDGED AND DECREED that unless said moneys are so paid to the complainant, or his solicitors, within the time above mentioned, that execution do issue therefor without further order of this Court, in accordance with the practice and rules of this Court in such case made and provided.

Respectfully advised,

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MAJA LEON BERRY,

V. C.

E. R. WALKER.

A true copy.

THOMAS BARBER,  
Clerk.

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## New Jersey Court of Errors and Appeals

*Between*

WALTER READE,  
*Complainant-Appellant,*

*and*

THOMAS P. MCKENNA,  
*Defendant-Respondent.*

*On Appeal  
from  
Chancery.*

*(BERRY,  
V.-C.)*

### BRIEF OF APPELLANT.

#### Statement of Issues.

This matter is before the Court upon an appeal from a decree of the Court of Chancery (Berry, V.-C.) denying the prayer of a bill for specific performance and dismissing the bill.

The bill, as amended, prayed for specific performance of an agreement dated May 9, 1925, whereby McKenna agreed to sell to Reade property located on Broadway, Long Branch, New Jersey, for the sum of \$50,000.00, the conveyance to be by warranty deed, free and clear of all encumbrances (Exhibit C. 1). The bill alleged that the title to the property was subject to certain outstanding liens and interests, and asked that the purchase price be abated by sums sufficient to satisfy such outstanding claims.

The answer alleged that McKenna was vested with a title sufficient to comply with the terms of the contract, and resisted the plea for specific performance on the ground that the contract had been *abandoned* by Reade.

The replication put in issue the defenses urged by the answer.

The Vice-Chancellor concluded that the parties, by agreement, had adjourned the passing of title from May 25, 1925, the date fixed in the agreement, to June 22, 1925, and time had been made of the essence of the closing at the last-mentioned date. He further found that the complainant did not perform on the adjourned date and was thereby not entitled to relief, and therefore did not pass upon the question of abatement. We shall urge:

1. That Reade was entitled to a decree for specific performance; and

2. That either the purchase price should be abated by the value of the outstanding interests or that Reade should be indemnified against loss by reason of any such claims.

**Complainant was entitled to decree for specific performance.**

The contract was dated May 9, 1925, and provided for the passing of title on May 25, 1925. By mutual consent and written stipulation (Exhibit C. 7), the time for the closing was adjourned to June 1, 1925, and on that day was again adjourned to June 15, 1925, and, on the last-mentioned date, was again adjourned to June 22, 1925.

The reasons for the adjournments are disputed. As stated by Mr. Baron, Reade's New York counsel, the title was not passed because an examination of the title, which was made by the Monmouth Title Company, disclosed the following questions:

A. A large number of outstanding tax liens and sales were open and unsatisfied of record (p. 22, l. 27; p. 24, l. 19). *That these liens did*

*exist was not denied by McKenna.* He discharged some of them on July 21, 1925 (p. 27, l. 3), a month after the date which the Vice-Chancellor concluded was the last day on which the title could be passed. Others, totaling about \$1,000.00, were still open at the time of the hearing in June, 1926 (p. 27, l. 21). McKenna contended that he offered to permit the retention out of the purchase price of a sufficient sum of money until these liens were satisfied. Assuming that such an offer would constitute a proper fulfillment of the contract by McKenna—a thing which we deny as will appear in greater detail hereafter—we simply here point out that these questions in the title were open and undisposed of on the various dates to which the closing was adjourned, and particularly were still open on June 22, 1925.

B. A mortgage of \$12,000.00 dated December 1, 1910, and executed by McKenna to Messrs. Levine and Meyers, covering the property to be sold, was open of record (p. 24, l. 38). McKenna stated that an *unacknowledged*, and therefore *unrecordable*, satisfaction piece of this mortgage was in his possession at the time of the various adjournments. Baron states that he told McKenna that unless the satisfaction piece was either properly acknowledged or the original mortgage receipted for cancellation, the instrument could not be cancelled of record, and McKenna undertook to arrange for the proper satisfaction on the records. McKenna, however, was unable to procure a proper satisfaction piece until *July 29, 1925* (Exhibit C. 13), on which date it appears that the acknowledgment of Levine and Meyers was procured. The discharge of the mortgage was not recorded until July 31, 1925, about five weeks after June 22, 1925. Mc-

Kenna claims to have offered to permit the withholding of moneys out of the purchase price sufficient to cover this mortgage (p. 94, l. 11). With interest, the sum needed to be withheld would have exceeded the cash which was to have been paid upon the closing of title. Here, again, it must be pointed out that such offer is not, in our opinion, a proper tender of performance, by a person who has agreed to convey free of encumbrances. It was, therefore, not disputed that on the days to which the various closings were adjourned and, in particular, on June 22, 1925, this mortgage was open and unsatisfied of record.

C. A right of way existed over a portion of the lands in favor of the mortgagee mentioned in the \$12,000.00 mortgage (p. 25, l. 11). This right would have terminated upon a cancellation of the mortgage, but, inasmuch as the mortgage was not cancelled of record until July 31, 1925, an outstanding right of way existed on the date on which title was to have closed.

D. The description of the land, as contained in the agreement of sale, differed from the land actually possessed by McKenna under the record title (p. 25, l. 17). In other words, McKenna did not have record title to all of the land agreed to be sold by him. Reade, however, at the hearing (p. 68, l. 15) stated that he was satisfied to take according to the description contained in the agreement.

E. An undivided one-fourth interest in the property was outstanding in favor of the heirs at law of one Deborah Herbert. That interest has never been acquired, and was still outstanding at the time of the hearing (p. 30, l. 13).

Baron stated that as reports were received by him from the Title Company, he would discuss them with McKenna, and inasmuch as the points were not being disposed of, the closing of the title was adjourned from week to week. On June 20th, two days before the last adjournment, Baron stated that he spoke to McKenna, telling him he would be out of town on the 22nd and discussing a further written stipulation for adjournment, but that McKenna stated it was not necessary to adjourn to a fixed date, that the adjournment should be indefinite and that when the questions had been cleaned up, a new date could be fixed. However, on the 22nd, Baron being out of town, Mr. Joseph, a clerk in his office, called upon McKenna, stating that he was calling at Baron's request and asked McKenna for a written stipulation adjourning the passing of title without date. Joseph says that McKenna stated that he, McKenna, had discussed the matter with Baron and that such a stipulation was unnecessary.

McKenna tells a different story. He admits that Baron discussed with him the various questions in the title above referred to, but states that no adjournment was ever requested for these reasons. According to his testimony, the reasons for the adjournments were Baron's personal convenience and the questions in the title had nothing whatever to do with the adjournments. In his amended answer (p. 14, l. 25) McKenna states, "each of said extensions was granted at the special request of complainant and *for reasons which complainant did not disclose to this defendant.*"

McKenna stated further that on June 20th, he told Baron that he would not grant any further adjournments, but insisted upon the passing of

title on June 22nd. On that date, he claims to have tendered to Joseph a deed for the property, and Joseph, not being ready to accept title, he, McKenna, noted his default, and refused to pass title at any time thereafter.

We shall, for the purpose of this portion of our argument, assume that McKenna's story is to be believed in its entirety. Nevertheless, we respectfully submit that his position was untenable in a court of equity.

*Time was not of the essence of this contract, nor was it made so by agreement of the parties.*

Time is not of the essence of an agreement to sell real property, unless so stated in the agreement, and the agreement in controversy here does not so state.

*Gerba v. Mitruske*, 84 N. J. E. 141, Appeals 1914;

*Orange Society v. Konski*, 94 N. J. E. 632, affirmed 95 N. J. E. 254.

In *Gerba v. Mitruska*, *supra*, Chief Justice Gummere, speaking for the Court of Appeals, stated, at page 143,

“As a general rule, in equity, time is not of the essence of the contract unless the parties have expressly so treated it, or it necessarily follows from the nature and circumstances of the contract; and so equity will enforce the specific performance of agreements after the time fixed for their performance has been suffered to pass by the party asking for the intervention of the Court, unless the facts submitted show that the parties to the contract intended that time so fixed should be of its essence.”

Even if time were of the essence in the original contract, it was waived by the extensions admittedly granted.

In *Kobrin v. Drazin*, 128 Atl. 796 (Backes, V. C., 1925), time was not stipulated to be of the essence of the contract, but the Vice-Chancellor felt that the circumstances were such as to make time of the essence. This fact, however, had been waived by the parties in their subsequent negotiations. At page 796, the Vice-Chancellor stated:

“While I have no question that, originally, in the circumstances and by the conduct of the parties, the time fixed for the transfer became and was of the essence of the contract (the properties were bought for homes, citing cases), the plea cannot be sustained as a bar, because it appears to have been waived by subsequent negotiations, and later rejection of the contract, on the ground of the existence of the liens.”

Although time is not of the essence in an agreement to sell, it can be made so by either party, by giving notice to that effect, and fixing a *reasonable* time thereafter for the performance. *Strauss v. Rabe*, 97 N. J. E. 208, affirmed 98 N. J. E. 700.

In *Orange Society v. Konski*, *supra*, Vice-Chancellor Backes said at page 635:

“The law is that a day fixed in a contract for closing title, without more, is merely formal; but if it is stipulated that time is of the essence, or the circumstances are persuasive that that is the case, prompt performance is essential, and it is also the law that where the time fixed is regarded as a formality only, and the period has gone by, or where time is of the essence, and there is a waiver, that time may nevertheless be made of the essence by formal demand that the title be closed by a given day; but the time given must be *reasonable*.”

In that case, the Court held that *seven* days' notice was too short.

The conclusion of Vice-Chancellor Backes was followed by Vice-Chancellor Bentley in *Strauss v. Rabe, supra*.

In the case at bar, McKenna claims to have given *two days'* notice of the fact that time would be of the essence of the agreement and it is respectfully submitted that this was not reasonable. In view of the cases, therefore, we submit that time was not made of the essence of this agreement.

*McKenna's alleged tender was insufficient.*

Assuming even that time had been made of the essence, nevertheless, we submit that the alleged tender of the deed was not a sufficient tender.

As has been pointed out before, on June 22, 1925, the following defects in the title existed:

A. The outstanding certificates of tax sale and the \$12,000.00 mortgage hereinbefore more particularly referred to, were still open and unsatisfied.

The Vice-Chancellor refers to these (at p. 140), as follows:

“First, outstanding certificates of tax sale, most, if not all, of which, McKenna had in his possession ready for cancellation; (2) the \$12,000 mortgage, unacknowledged and unrecorded satisfaction piece for which McKenna had and exhibited to Baron. \* \* \* But McKenna's testimony was that he told Baron that if any of the title objections were not satisfactorily cleared up at the settlement, sufficient of the purchase price might be withheld at settlement to cover all the uncanceled items, if necessary. This was a practical solution of the difficulties, if any existed.”

The testimony disclosed that on June 22, 1925, a large number of tax items were open, some of

which were not cancelled until July 21, 1925, and some of which, amounting to about \$1,000.00, were still open at the time of the hearing. These items represented not only liens to the municipality, but sales of the property for unpaid taxes.

The mortgage was dated November 23, 1910 (Exhibit C. 13). In order to be properly protected, the full amount of principal and interest would have had to be retained. The principal was \$12,000 and interest on the mortgage calculated to June 22, 1925, amounted to \$10,500. Adding to this the outstanding tax titles of about \$1,000.00, the sum of \$23,500 was required to be withheld. The agreement in question provided for a cash payment of \$20,000.00, so that there was not sufficient cash to be withheld, even assuming that such solution was proper.

But further than this, we submit that the offer to permit Reade to retain these moneys was not a compliance with an agreement to convey free of lien. We submit that it is incumbent upon the vendor to clear up his title himself and have it in proper condition at the time fixed for the passing of title.

In *Kobrin v. Drazin, supra*, it appeared that certain judgment liens might exist against the property, which vendor was endeavoring to compel the vendee to take. The complainant insisted that title be taken and offered to permit sufficient moneys to be withheld to cover the amount of the alleged liens. At page 797 of the opinion in that case, Vice-Chancellor Backes stated:

“They (complainant) took the stand, payment in full or no possession, save that they offer to put in escrow a sufficient sum to discharge the judgments, if and when they were declared to be liens, *which was brushed aside as leading to vexatious litigation, and*

*all the while interfering with defendant's free alienation of the property."*

The bill was dismissed.

We respectfully submit that the offer to permit a withholding of the moneys was anything but a practical solution, because, as Vice-Chancellor Backes stated, one would never know when, if ever, McKenna could produce the duly executed cancellation satisfaction piece and in the meantime a prospective purchaser, or a mortgagee, might not be willing to accept the title with these liens open, notwithstanding the fact that funds for the purpose of satisfying them might have been withheld. A purchaser is entitled to have a marketable title and not a title encumbered by liens, even though he has funds in his possession with which to satisfy them.

B. The interest in the heirs of Deborah Herbert was still outstanding.

Concerning this, the Vice-Chancellor (p. 140) stated:

"As to this, it may be said that McKenna had a policy of title insurance from the Fidelity Trust Company of Newark guaranteeing perfect title in him and on which he had a right to rely. Further than this, he had been in peaceable possession of the property for thirty years. \* \* \* But I am not convinced, nor am I called upon here to decide that there is any outstanding so-called Herbert interest in this property. The evidence on this point is merely that one title examiner representing a responsible title company, out of an abundance of caution, perhaps, sets up this question of outstanding interest as one of the things to be disposed of on settlement; but as against this, we have the fact that another equally responsible title company has already guaranteed the defendant's title."

There was definite testimony by Mr. Angelman, who was examining the title for the Monmouth Title Company, that there was an outstanding one-fourth interest in favor of the heirs of Deborah Herbert, due to the fact of a lapsed devise under her will (p. 23, ll. 4-30). The Vice-Chancellor apparently disposed of this matter by assuming that inasmuch as the Fidelity Trust Company had guaranteed the title, it probably was a sufficient title.

We submit that whether or not a Title Company has guaranteed a title does not establish the fact that the title is marketable, particularly in the face of specific testimony *not denied*, that there was a defect in the title.

Counsel for appellant, however, at the hearing, anticipating that the fact that the Fidelity Trust Company had guaranteed the title might have a bearing in the Vice-Chancellor's mind, offered to prove that the Fidelity Trust Company had themselves realized their error in guaranteeing the title, and were then refusing to guarantee adjoining property in which the same title question was involved.

On page 39 of the record appears the following:

“Mr. Hannoeh: Now, may I just make this statement? I don't know whether it means anything to your Honor—but the question of the Fidelity report has been brought out on cross examination. When I brought it out you said it might not be material. I want to bring out by this witness that as the result of the conferences which he had with the Fidelity when the records were gone over and it developed that the Fidelity had reached an erroneous conclusion. As the record stands now, it would appear that the title was guaranteed.”

“The Court: That was the representation made by Mr. McKenna and this witness found that that was true. Whether or not the Fidelity made a mistake is perhaps one of the things to be decided by the Court.

“Mr. Hannoeh: That is my offer.”

“The Court: Is is not material.”

Notwithstanding the fact that the Court, at the hearing, stated that such testimony was immaterial, the Vice-Chancellor used the fact of the issuance of such policy as a reason for concluding that there was no outstanding interest in favor of the Herbert family.

We respectfully submit that the Vice-Chancellor was in error concerning this, and that he should have found that there was an outstanding interest.

C. There was no rescission of the contract on the part of McKenna, nor did he ever offer to return the \$5,000 deposit, except at the hearing (p. 95, l. 37). Excepting the alleged conversation with Baron, there is no testimony of any unequivocal refusal to perform. McKenna's reply to Hannoeh (C. 11) simply returns his letter and does not state anything about an abandonment or default.

For the foregoing reasons, we respectfully submit that McKenna alleged tender was not sufficient to declare Reade in default.

*Vendee's delay caused by a reasonable objection to vendor's title will not bar his right to specific performance, even though time be of the essence.*

In *Keim v. Lindley*, 30 Atl. 1063 (not reported in New Jersey Reports) it is stated:

“A defendant vendor—cannot set up as a defense to a suit for specific performance the delay of the vendee to bring suit, where such delay has been due to the inability of

the vendor to make good title and the vendee has been at all times willing and ready to complete and the vendor has not repudiated or attempted to rescind the contract."

This case was reversed in 54 N. J. E. 418 on grounds which do not affect the rule laid down.

In *Bourgeois v. Edwards*, 104 Atl. 447 (not reported in the New Jersey Reports), the Vice-Chancellor had a similar question before him. The bill was filed to compel the performance of a contract to assign certain judgments. The vendor refused to perform on the ground that time was of the essence of the contract. The Court dismissed the defense, stating:

"It lacks merit if for no other reason than that the delay was brought about by Smythe, the attorney of Edwards, the vendor. At the time fixed for the transfer and payment of the balance, a few days before the expiration of the period, Smythe had not provided himself with an assignment and time was given to him to obtain it."

A similar question has been before the Maryland Court of Appeals in *Budocz v. Friedman*, 126 Atl. 220. That case dealt with an agreement for the sale of real estate in which time was specifically made of the essence. A cloud on the title was discovered in the form of a prior contract to sell the same land. There was considerable negotiation and, twenty-three days after the date set, the vendee wrote stating that he would take title if given thirty days more. The vendor did not reply. Two months and sixteen days after the day set for performance, the vendee filed his bill for specific performance and relief was granted to him. The Court said:

"The doubt existing as to this title was considerable and rational, and was not based on captious, frivolous, and astute niceties, but was such as would produce real bona

vide hesitation in the mind of the Chancellor. The condition of the title and the doubt as to its validity was caused by the act of the appellants (vendors) of which the appellee had no knowledge at the time he entered into the contract. To excuse his delay, it is not essential that the appellee be in such a position as to enable him to successfully resist a decree of specific performance in behalf of the appellants. The appellee (vendee) did all that equity should require of him to remove the doubt existing as to the title, and the appellants alone were responsible for its existence."

In *Kopeyka v. Woodstron*, 137 N. E. 137, the Supreme Court of Illinois passed upon this question. In that case, also, the contract was a contract for the sale of real estate and time had been made of the essence of the agreement. A question in the title held up the closing and finally the vendee offered to waive all objections and offered to take title. The vendor refused to perform for several reasons, among which was vendee's laches. Specific performance was, however, decreed, and with reference to the question of laches, the Court said, at page 138,"

"Failure on the part of the vendee to perform within the time required in the contract will not forfeit his rights thereunder where he has sought to perform within such time and has failed through the fault of the vendor or where the delay was at the request of the vendor."

To the same effect will be found the cases of *Price v. Immel*, 48 Colo. 163 (Supreme Court, 1910) *Saverance v. Lockhart*, 35 S. E. 505 (Supreme Court, S. C. 1900). *Watson v. Coast*, 14 S. E. 249 (West Virginia Appeals).

We, therefore, submit that for all of the foregoing reasons, Reade had never been placed in default.

Our argument has thus far proceeded on the premise of the correctness of McKenna's story of why the title closings were adjourned.

We respectfully submit that his story is not to be believed and that the evidence supports the testimony of the complainant to the effect that the adjournments were necessary by reason of the condition of the title and that the last adjournment was taken, *sine die*, in order that the title might be cleared up before a new time for closing was fixed.

*McKenna's testimony should not have been given the same weight as the testimony of Baron.*

McKenna has been disbarred from the practice of law by the Courts of New York for the reasons, to quote the Court's opinion:

"The referee's report concludes—"I find the respondent guilty of converting to his own uses the sum of \$10,000 belonging to his client, Mrs. Viola F. Biedler."

Clark, *P. J.*—"We are satisfied that respondent for his own purposes made an improper use of his client's money, and thereby converted the same to his own use."

(In *re McKenna*, 208 N. Y. S. 127). His appeal was dismissed by the New York Court of Appeals. (240 N. Y. 703.)

He was also disbarred by the New Jersey Supreme Court (p. 98).

Thereafter, however, and on February 19, 1921, a memoranda was filed by the Court, the salient portion of which is as follows:

"The conclusion of the Court now is that the findings of the Board of Examiners are sustained by the evidence, and that said Thomas P. McKenna was shown guilty of unprofessional conduct requiring substantial disciplinary action by the Court, in that he

made improper use of moneys belonging to clients without their knowledge or consent; but inasmuch as it appears that said clients have sustained no financial loss thereby, the Court does not consider his offense to call for absolute disbarment. Suspension for the term of two years is deemed sufficient punishment, and as that period, reckoning from the argument of the exceptions, will have elapsed on February 19, 1921, a rule may be entered on that date, reinstating said McKenna as an attorney and counsellor-at law.”

McKenna's explanations to the Court in this cause of the status of these various disbarment proceedings does not add to the weight to be given to his testimony. He sought to give the impression that the appeal in New York was still pending (pp. 99-100). He stated at page 99, that he was only suspended from practice in New Jersey during the pendency of the proceedings, whereas it appears that he had been entirely disbarred, but that subsequently, there was a change in punishment.

With these facts before the Court, all doubts respecting unsupported testimony coming from McKenna should have been resolved against him.

We shall now discuss the testimony.

McKenna's statement in his answer to the effect that no reason was advanced for the adjournments (p. 14, l. 27), and his testimony on the stand to the effect that the questions in the title had nothing to do with the adjournment, but that the adjournments were due solely to Mr. Baron's personal convenience (p. 93, l. 22-p. 94, l. 14), are almost inherently unbelievable. McKenna takes the position that the questions in the title had nothing to do with the closing, although in the same breath he admits that these

were discussed with him. With the Court's personal familiarity with the manner and method in which questions arising in connection with the examination of title of real estate are disposed of, we respectfully submit that McKenna's testimony with respect to this should be disregarded as being improbable and that the story of Baron be believed to the effect that the adjournments were necessary in order to dispose of the title questions.

It should also be noted that early in July, 1925, after the alleged default—McKenna called upon Angelman of the Title Company at Freehold, and took up with him the very questions above referred to (p. 28, l. 33; p. 29, l. 20). Surely this is inconsistent with McKenna's story that these questions had nothing to do with the adjournments. Why go to Freehold and interview the man in charge of the title examination, if there were no questions raised? *Why go to Freehold at all if the title was sufficient and had been abandoned?*

*Reade had every reason for performing the contract and had no reason whatsoever for refusing to perform.*

A. He needed title to this particular parcel in order to complete his ownership of a large plottage. Reade controlled the Broadway Theatre, which property adjoined the property in controversy on the west (p. 65, l. 30). He had acquired title to the property directly to the east (p. 65, l. 23). The McKenna property, with its frontage of 50 feet, completed Reade's ownership of the entire plottage. It was, therefore, most to his interest to complete the purchase and it is most improbable that he would have abandoned the contract.

B. He was planning to build on the property in question and the adjoining land, and plans had already been begun on April 14, 1925, and had been completed on July 1, 1925. The plans provided for a building covering the land involved in these proceedings and adjoining lands (p. 61, ll. 1-10). Between July 30 and August 20, 1925 (the date the bill was filed), bids had been obtained for the work (Exhibit C. 9). All of these bids were received before the alleged boom in real estate to which reference will hereafter be made. Certainly, if Reade had conceived the idea of abandoning the contract in June, 1925, as alleged by McKenna, he would not have continued his efforts to obtain bids as late as August.

C. Reade negotiated a mortgage loan covering the property from the Warranty Building and Loan Association (p. 66, ll. 15, 28).

D. Reade's counsel were engaged in clearing up the title to the property. Reports were being received by them from the Title Company throughout the months of June and July. The title had not been cleared up even at the hearing and it appeared that the questions were still being investigated.

All of these matters, we respectfully submit, support entirely the testimony of the complainant to the effect that he was at all times anxious to take title to the property and that he had never abandoned it and was simply waiting approval of the title by counsel (p. 65, l. 2); nor had he ever been in default.

*Vice-Chancellor's reasons for accepting McKenna testimony is not supported by proofs.*

The Vice-Chancellor reached the conclusion that time had been made of the essence of the agreement, by stating that he believed the story of McKenna and not that of Baron. The reasons for this conclusion, as stated in his opinion, are two-fold:

First, the Vice-Chancellor said that Baron did not deny McKenna's testimony, except in his direct testimony. Baron's version of the conversation which took place on June 20th, as related in his direct testimony, and under vigorous cross examination, differed diametrically from that of McKenna. The Vice-Chancellor felt, however, that Baron should have again taken the stand and categorically rebutted the testimony instead of merely allowing his original testimony to remain without any further additions thereto. The Vice-Chancellor said (after quoting some of the Baron and McKenna testimony, p. 137), that although Baron was in court when this testimony of the defendant was given, he did not take the stand in rebuttal.

He overlooked the following:

"Q Now, you had a conversation with Mr. McKenna on the 20th of June, 1925, didn't you? A That is correct, on the 20th.

Q That was in view of the fact that two days later the last stipulation would expire?

A Closing of it on the 22nd.

Q Where was the conversation? A That was—I think it was a telephone conversation, it may have been in person, I don't recall.

Q Did McKenna say that he wouldn't consent to any further adjournment? A No, Mr. McKenna said \* \* \*

Q I didn't ask you that. A No, *he did not.*"

Thus Baron had denied directly and as positively as he could McKenna's story that he had made time of the essence.

The Vice-Chancellor's second reason for accepting McKenna's story as against Baron's was that McKenna stated that on *July 10th*, Baron had called at his office and had examined the deeds which it was alleged had been tendered on June 22nd. The Vice-Chancellor said (p. 137):

"Joseph denies that any tender was made, but I am unable to accept that denial, as it is *undisputed* that on July 10th Baron saw McKenna and asked to be shown the papers tendered to Joseph. If Joseph spoke the truth, why did Baron ask to inspect the papers? Baron did not deny that such a request had been made by him, and if McKenna had said, as Baron claims, that they would hold the matter of settlement in abeyance without day until the title objections had been cleared up, why was there any necessity for sending Joseph to McKenna on June 22nd?"

It will be noted that the Vice-Chancellor said that it was "*undisputed*" that Baron had called on McKenna on July 10th. The Vice-Chancellor overlooked entirely the following testimony given by Baron under cross examination (p. 55):

"Q Now, Mr. Baron, from the 20th of June, to the time you went to Europe, you didn't have anything to do with the matter?  
A Oh, yes, a great deal continuously.

Q Did you have any further conversation with McKenna? A *Not with Mr. McKenna*, but with the title company.

Q So far as McKenna is concerned the last conversation previous to your trip to Europe was on the 26th of June? A I think that is right.

Q You went to Europe on the 25th of July? A 25th of July.

Q When did you return? A August 26th."

We thus have testimony that after June 20th, Baron had no conversation with McKenna. This denies that Baron called on McKenna on July 10th and inspected the deeds. The Vice-Chancellor was therefore in error in stating that it was undisputed that Baron had examined the deeds.

We respectfully submit that the Vice-Chancellor was clearly in error in feeling that McKenna's testimony was corroborated by undisputed facts.

*McKenna's real reason for refusing to perform was the real estate boom at Long Branch.*

There was, however, a fact in the case which should have had considerable weight in the Court's mind and which should have led him to look through the sham reasons given by McKenna.

It appeared that in August, 1925, there was quite a boom in real estate in Long Branch. McKenna then offered the property for sale at \$100,000 to \$125,000 (p. 85, ll. 17-20), although he had agreed to sell to Reade for \$50,000. The bill was filed as soon as Reade heard of this fact (p. 69, l. 27), and when McKenna returned Mr. Hannoeh's request for a formal continuance (Exhibit C. 11). This boom was the real cause for McKenna's refusal to sell.

McKenna replies to this argument by saying that Reade decided to perform only when the boom began. But we have shown the extent of Reade's preparation for building, obtaining loans, &c., long prior to the boom, so that McKenna's argument on this score fails to have any weight.

The Vice-Chancellor in his opinion (p. 141) refers to the case of *Barry v. Ruskin*—

“The instant case is similar to that of *Barry v. Ruskin*, 4 N. J. Adv. R. 1042, recently decided by me, where I held that time not originally of the essence of the contract had been subsequently made of the essence by agreement of the parties.”

It is respectfully submitted that the two cases are quite dissimilar on the material facts. In *Barry v. Ruskin*, there was only one extension of closing, and that one was given for one week only after the complainant had requested a two weeks' extension. Moreover, the defendant wrote complainant as follows: “I will not grant any further extension to you for the passing of title of the property.” Thirdly, immediately after the default, defendant wrote complainant, repudiating and rescinding the contract, in clear and express terms. Lastly, the vendee was guilty of great laches in that case; with the time for closing set three months from the date of the contract, *he delayed two months before beginning his search on the property.*

The Vice-Chancellor himself recognized these points when he said (p. 1045):

“The long delay of complainants in ordering searches in this case was responsible for their not being ready to close the title on September 1st. At that time conditions in the real estate market were such that further delay might be prejudicial to the interests of the vendor, and I am of the opinion that she was within her rights in refusing to extend time for settlement beyond September 8th; but irrespective of the reasonableness or unreasonableness of this extension, it is clear that such an extension fixing the final date for settlement at September 8th, and beyond which it was understood no further extensions would be al-

lowed, was agreed upon between the parties.”

It is quite apparent from the above that the Vice-Chancellor was convinced that the failure to close title on the date set in that case was due to the fault of the vendee and his great laches. In the case at bar the complainant was particularly free from fault or laches, and we respectfully submit, therefore, that that case cannot be considered as an authority for the denial of specific performance in the instant case.

It is, therefore, respectfully submitted:

A. Assuming that McKenna's story is accepted in its entirety, nevertheless:

1. Time was not made of the essence.
2. McKenna was never able to perform.
3. Reade was never in default.

B. Considering the testimony in its entirety, the testimony of complainant should have been accepted and a decree for specific performance granted.

The Court below having decided that complainant was not entitled to performance, did not consider the questions of law as to whether or not Reade was entitled to an abatement in the purchase price. Should, however, the Court determine that complainant is entitled to a decree, we respectfully submit that an abatement of the purchase price should be granted.

Our courts recognize the doctrine that if a vendor has agreed to convey an absolute title free and clear of all encumbrances, and is unable so to do, the vendee is permitted to obtain specific performance of it either by an abatement

of the purchase price or indemnity against loss by reason of any outstanding interest.

We shall now discuss the various outstanding interests as they existed at the time of the hearing herein and indicate our thoughts respecting each.

*Inchoate Dower of Said McKenna.*

All questions respecting any interest in favor of Mrs. McKenna were dispelled at the hearing when there was produced in evidence (Exhibit C. 12) a warranty deed duly executed by McKenna and his wife to Reade for the property in question. We indicated our willingness to accept this deed, even though it did not have the New York County Clerk's certificate required by our recording act and even though the description therein contained did not correspond with the survey.

In *Luczak v. Mariove*, 92 N. J. E. 377, affirmed 93 N. J. E. 501, it was held that the fact that a wife has executed a deed to be delivered in a proposed performance of an agreement for a sale of real estate indicates a willingness on her part to perform. McKenna is, therefore, in a position where he, having agreed to convey a sufficient title free and clear of all encumbrances, cannot urge that his wife is unwilling to sell. In fact, it must be admitted that such a defense was not urged by him at the hearing.

In the case of *Hollander v. Abrams*, 132 Atl. 224, there was offered in evidence before your Honor a deed executed by a husband and wife and the Court directed that the very deed in evidence be delivered by the parties. We urge that this be done in this cause.

*Tax Liens.*

There are still open of record a number of tax liens (p. 10). McKenna alleges that they have been satisfied. In *Thomas v. Flanagan*, 4 A. R. 534, Vice-Chancellor Bentley recognized that the amount of liens against a property could be deducted from the purchase price or satisfied out of the purchase price. We urge that with respect to these items, the Special Master under whose direction the title should pass shall be authorized to satisfy the amount of any unpaid liens from the purchase price.

To the same effect is *Coltinik v. Hockstein*, 95 N. J. E. 513.

*Interest of Heirs of Deborah Herbert.*

Mr. Angelman, the title officer of the Title Company, has established that an undivided one-fourth interest in the premises exists in favor of the heirs of Deborah Herbert. McKenna has not denied such testimony. Complainant is desirous of acquiring the full interest of McKenna in the property and as he has not a complete title, then that allowance should be made from the purchase price, or an indemnity should be given to complainant against claims made on behalf of said heirs.

In the case of *Triplett v. Evans*, 93 N. J. E. 202 (Court of Appeals, 1921, affirming the opinion of Vice-Chancellor Leaming, without additional comment), the vendor agreed to sell the fee simple in land. It developed that he only owned a life estate. This Court referred the matter to a special master to ascertain the value of the life estate and order a conveyance thereof upon payment of the amount so ascertained.

In *Farrell v. Bork*, 76 N. J. E. 615 (affirmed upon the opinion of Vice-Chancellor Leaming, whose decision is not reported in the New Jersey reports, but may be found reported in 79 Atl. 897), it appeared that a vendor had contracted to convey real estate. Upon an examination of title, it developed that he owned only three-fourths thereof, the balance being vested in certain heirs of a former owner whose whereabouts could not be ascertained. (The facts are identical with these at bar.) The vendee concluded to take title to the interest held by the vendor, and asked for an abatement of the purchase price. The Vice-Chancellor held (bottom of p. 899):

“So on this branch of the case, so far as I have gathered it, it seems to me entirely clear that the complainant is entitled to a decree for specific performance requiring the defendant to convey to him his undivided three-fourths interest in the land, with an abatement of a proportionate amount of the purchase money; that is to say, the purchase money mortgage will be one-fourth less than the amount agreed upon, \$2,700, and the total amount of \$1,000 cash to be paid will be abated one-fourth, so that there will be a proportionate abatement of the purchase money mortgage and cash.”

We respectfully submit that the same practice should be followed in the case at bar.

We therefore respectfully submit that the Chancery decree should be reversed and a decree for specific performance with abatement should be entered.

Respectfully submitted,

STEIN, McGLYNN & HANNOCH,  
Solicitors of Appellant.

HERBERT J. HANNOCH,  
Of Counsel.

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

## New Jersey Court of Errors and Appeals

February Term, 1927.

*Between*

WALTER READE,  
*Complainant-Appellant,*

*and*

THOMAS P. MCKENNA,  
*Defendant-Respondent.*

*On Appeal  
from  
Chancery.*

(BERRY,  
V.-C.)

### REPLY BRIEF.

Pursuant to the permission granted appellant by the Court, this reply brief is filed. The topics will be considered in the sequence adopted in respondent's brief.

*The "undisputed chronology" set forth on page 4 of respondent's brief is disputed.*

On page 4 of the brief appears what is said to be their "undisputed chronology." The following items in this chronology are seriously disputed as follows:

(a) "Property searched for Reade prior to May 1, 1925." Baron testified (p. 50) that this search was only "to find out whether McKenna was the record owner of property," and that at the time of the execution of the contract he had only in his possession "what we call in New York City, the last record owner's name" (p. 51).

(b) "The tender of deed by McKenna and default noted on contract June 22nd." Mr. Joseph, the person to whom it is alleged tender was made, denies that any such tender was made (p. 59).

(c) "Reade's attorney examines papers tendered July 10th." Baron testifies that from June 20th, to the fall of the year he did not communicate with McKenna in any way (p. 56).

From the foregoing it will appear that the chronology is seriously disputed in numerous ways.

*The fact that complainant filed an amended bill should not militate against him.*

Mr. Hannoeh's testimony discloses that the bill was hurriedly drawn, when he learned that McKenna had placed the property for sale with brokers (p. 73); later on a more carefully prepared bill was filed and permission of the Court obtained to the filing thereof.

Appellant is accused of bad faith with respect to his allegations concerning the failure of Mrs. McKenna to join in the deed. Reference to the testimony (pp. 74 to 76) will disclose that the production of the deed alleged to be tendered on June 22nd was a complete surprise, and that the production thereof for the Court's inspection was resisted by McKenna's counsel (pp. 63 and 74) and the deed was offered only after argument and adverse ruling by the Court.

It is submitted that the fact that appellant was thus shown to have no knowledge of the existence of the deed is damaging evidence that the deed was not tendered on June 22nd.

*Comparison of Baron's and McKenna's testimony.*

This has been fully discussed in the main brief and is therefore not referred to.

*Time was not of the essence of the contract.*

An attempt has been made to create a background of haste in the execution of the instruments in an effort to show that time had been made of the essence by reason of the circumstances. This assumption is unsupported by any testimony other than that of McKenna and is completely negated by the subsequent conduct of the parties and the extensions granted.

Had time been of the essence of the agreement to the extent that McKenna alleges, McKenna, having been a member of the bar, would certainly have had appropriate clauses inserted in the contract or in the subsequent stipulations. Having failed so to do, must militate against his argument that time was of the essence.

*Exhibit C. 10 (Mr. Hanocho's letter).*

Much comment is made in the respondent's brief upon the letter written August 18, 1925 by Mr. Hanocho to Mr. McKenna. Hanocho explains the circumstances surrounding the writing of this letter (p. 72). An examination of that testimony will disclose that reasons and conversations which he had, which resulted in his writing the letter, were barred because they were hearsay testimony. Mr. Reade testified however that when he learned McKenna was endeavoring to sell the property to others, he communicated that fact to Mr. Hanocho (p. 69). In view of the fact that it had been agreed to postpone the time for closing until the questions were cleared up, Mr. Hanocho wrote for a formal extension. When the extension was not forthcoming, a bill was hastily prepared the same afternoon that McKenna's letter was received, and filed, process issued, and *lis pendens* filed.

On pages 20-21 of the reply brief it is argued that this letter misrepresented the facts. When the letter was written, the \$12,000 mortgage had been cancelled. The amount due on the taxes, about \$1,000, could have been paid at the time of closing. McKenna had stated that the Fidelity Trust Company could satisfy the question of the outstanding Herbert interest, and of course if that were done the Monmouth Title Company were ready to close. The explanation was not forthcoming however from the Fidelity, but on the contrary Mr. Wyckoff of that company agreed with Angelman's conclusion (p. 31; although this testimony was ordered stricken out, as being immaterial).

We therefore submit that this letter was written in good faith and does not bear any of the characteristics attributed to it by counsel.

We have dealt with the points raised in respondent's brief principally to answer the allegations of bad faith, laches and default. Our purpose has been to show that complainant is in equity with clean hands.

In the last analysis the various matters raised by respondent are entirely beside the point. Assuming respondent's various contentions to be true, nevertheless the case can be disposed of upon the following point:

*At no time either at the date set for the closing of the title, or at any other adjourned dates, was McKenna able or ready to pass title in accordance with the terms of the contract.*

It was not until July 31st that the \$12,000 mortgage was cancelled. There was testimony to the effect that substantial defects in the title existed at all times. There was no testimony to the effect that these defects were not real or substantial. They had all been brought to McKenna's attention, as he himself admitted on cross examination (pp. 86-90). McKenna cannot urge any default on the part of Reade for the reason that he himself was always in default.

It is respectfully submitted that the decree in Chancery should be reversed.

Respectfully,

STEIN, McGLYNN & HANNOCH,  
Counsel for Complainant-Appellant.

NEW JERSEY COURT OF  
ERRORS AND APPEALS

REPORT OF THE COURT

FOR THE YEAR 1900

ASSEMBLED AT THE COURTHOUSE

AT TRENTON, NEW JERSEY

ON THE 15TH DAY OF JANUARY

1901

BY THE COURT

IN OPENING COURT

AT TRENTON, NEW JERSEY

ON THE 15TH DAY OF JANUARY

1901

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NEW JERSEY COURT OF  
ERRORS AND APPEALS

~~In Chancery of New Jersey~~  
FEBRUARY TERM 1927.

Between

WALTER READE,  
Complainant-Appellant,

and

THOMAS P. MCKENNA,  
Defendant-Respondent.

On Appeal From  
Chancery  
(BERRY V. C.)

**BRIEF FOR DEFENDANT-RESPONDENT.**

This is a specific performance case, arising out of the Long Branch real estate boom of August, 1925. Complainant was the contract vendee. The boom roused him to litigation.

Complainant's original bill prayed for straight performance of the contract. It was filed August 21, 1925, and was promptly answered by defendant.

*Eight months later* an amended bill of complaint was filed, not seeking specific performance—but performance with an abatement of price “for such interests, mortgages, liens or encumbrances, as he (defendant) shall not be able to convey or discharge”.

We shall later make some observations on the complainant's bills.

**Statement of Facts.**

The facts are not complicated. The disputed facts are few.

For thirty years, or so, defendant owned and was in undisputed possession of a plot of vacant land on Broadway, Long Branch. Reade was in-

terested in a corporation owning a moving picture house adjoining. (See case of *Reade v. Broadway Theatre Co.*, 132 Atl. 477.)

For some time previous to making the contract, Reade had been negotiating for the purchase of the vacant land. Presumably these negotiations extended from about April 1st, 1925, for in his letter of instructions to his attorney (Ex. D-3) complainant indicated that the title was to close as of April 1st. Be that as it may, it is undisputed that complainant had a search made, and an abstract of McKenna's title in his possession when the terms were finally agreed upon, for on May 6th he wrote to Baron, his attorney (Ex. D-3, p. 133):

“Mr. McKenna is in my office now, and we have agreed upon the following terms in connection with the property. The contract is to be closed as of *April 1st, 1925.* \* \* \*

“*I am enclosing abstract of title which you sent me to read, and I wish you would prepare these papers so that we can close any time this afternoon or tomorrow morning, if possible. Please call Mr. McKenna on the phone as soon as you have read this note.*”

As a result of these instructions Baron, Reade's New York attorney, drew the contract for the sale. It was dated and executed on May 9th, 1925, and provides for closing title sixteen days later, May 25th, and as of April 1st, more than one month prior to date of contract.

The reason for the short time to close appears on page 105 (top):

“I told Mr. Reade that I had an opportunity to buy some property in New York, adjoining property to mine, on 88th Street, and that I wanted the matter closed *immediately for that purpose, otherwise I would lose that opportunity.*”

This is not denied by Reade, but in fact, rather corroborated by his letter (D-3) to his attorney in returning the abstract of title, where he says:

“I wish you would prepare these papers so we can close at any time this afternoon or tomorrow morning, if possible. Please call Mr. McKenna on the phone as soon as you read this note” (p. 134; l. 22).

With the unusual situation of making a search and having an abstract of title of the property in his possession before making the bargain to purchase, Reade, the purchaser, in the presence of the seller, *indicates that time is essential*, and instructs his attorney to prepare the papers so that they can close “this afternoon or tomorrow morning if possible” and directs his attorney to call the seller “on the phone as soon as you read this note”. This was done at the interview when the bargain was struck and when McKenna said to Reade “I have an opportunity to buy some property in New York, adjoining property to mine on 88th Street, and that I wanted the matter *closed immediately for that purpose, otherwise I would lose that opportunity*”.

Thus, the contract drawn by Reade’s attorney three days later, May 9, provided for closing on May 25th, and as of April 1st.

There were three adjournments of the closing, all of which carried the matter from May 25th, the date fixed in the contract, until June 22nd when the complainant defaulted.

The first dispute in the evidence is as to the reason for the three short adjournments for closing title.

Mr. Baron says that the adjournments were occasioned by objections to the title. Mr. McKenna tells an entirely different story.

The evidence on this subject will be discussed later. Here we are endeavoring to give the outstanding facts that are not in dispute.

On May 22, complainant's attorney wrote (Ex. D-1) enclosing stipulation adjourning to June 1st—7 days.

On May 29, complainant's attorney wrote (Ex. D-2) enclosing stipulation adjourning to June 15—14 days.

Later complainant's attorney prepared another stipulation which McKenna signed, adjourning to June 22—7 days. These adjournments were each at request of complainant's attorney. The attorney's representations on which they were given are stated by McKenna as later shown.

The undisputed chronology is interesting, and runs thus:

Property searched for		
Reade prior to.....	May	1, 1925
Reade has abstract and		
strikes his bargain.....	May	6,
Contract is prepared and		
executed .....	May	9,
Title to close.....	May	25,
Adjourned to.....	June	1,
Adjourned to.....	June	15,
Adjourned to.....	June	22,
Tender of deed by Mc-		
Kenna and default		
noted on contract.....	June	22,
Reade's attorney exam-		
ines papers tendered....	July	10,
No extension asked and		
no communication from		
complainant until REAL		
ESTATE BOOM HITS LONG		
BRANCH .....	August	10,

Exhibit C-10, asking for conveyance written by Reade's attorney.....	August 18,
Bill for straight specific performance, sent by messenger for filing, before receipt of answer to C-10.....	August 21,
<i>Lis Pendens</i> also sent by messenger for filing	August 21,
Notice of motion to file amended bill for abatement of price and indemnity and charging fraud, filed.....	Apr. 13, 1926

## I.

### Complainant's bills of complaint.

The original bill of complaint is a straight bill for specific performance. The prayer is for conveyance of the land upon payment of the full price. Eight months later, and after defendant answered, a new and amended bill was filed, which, after setting forth contract, alleges:

- Par. (3) Since executing of contract complainant has had title examined and has discovered that at signing of contract and ever since McKenna was not seized of the whole tract and that there exist numerous outstanding liens.
- Par. (4) The time to pass title was extended from time to time to enable defendant to clear up questions of title.
- Par. (7) Complainant wants conveyance of the lands, or so much as McKenna can convey, with abatement of price.

- Par. (9) That defendant fraudulently induced and still continues to induce his wife to refuse to release her inchoate right of dower in the lands.
- Par. (10) The heirs of Deborah Herbert are seized of an interest in the lands.
- Par. (11) There are a large number of tax liens and other encumbrances and rights of way against the lands.

The alleged defects of title were known at the time of filing the original bill. Indeed complainant's attorney Baron asserts now that the adjournments were due to his knowledge of these so-called objections. Complainant knew no more about the matter when he made the charges in his amended bill than was well known to him when he filed his original bill.

On Page 52, at top, Baron says that on May 25th he had knowledge of the objections to title that Angleman, the Title Company's representative, recited, and that by May 25th he had informed Reade of them.

It is fair to argue that either the complainant was first asking for something he knew the court could not give, or else he has since been experimenting with the court.

We think the real explanation is that, as argued later in this brief, complainant was in default and had abandoned any idea of performance, when suddenly the boom struck Long Branch, and there was a great rush on his part to file a bill and get the property tied up by *lis pendens*. Eight months later, when the disingenuousness of the letter C-10 was apparent, the solicitors surveyed the situation and framed an entirely different bill based upon fraud and alleged defects of title.

It is the increase in the value of the land that renewed complainant's activity.

On the 22nd of June McKenna tendered a deed for the lands (Ex. C-12, p. 126) fully executed by himself and his wife. Baron examined this deed on July 10th at McKenna's office, and departed without even asking for another extension.

Baron does not deny that when he asked a fourth adjournment on June 20th and was refused, he said to McKenna:

“He personally had told Reade he was paying me too much for the property and he said it really didn't make any difference if Reade went through with the sale or not, that he was sure he could buy it from me for less money later” (McKenna, p. 77).

In the face of these undisputed facts, we find in the amended bill the following charge of fraud:

“Complainant further says that the said defendant fraudulently induced and still continues to fraudulently induce his said wife to refuse to release her alleged inchoate right of dower in said premises to said complainant.”

Not a word of evidence was introduced to substantiate this ugly charge, there was not a word of truth in it to the knowledge of the complainant; and it doesn't seem like coming into court with clean hands; the allegation was at least designed to impose upon the court.

Or, more charitably, perhaps the solicitors in an effort to present a good-looking case, and noticing that the contract was not signed by defendant's wife, put it in for what it might be worth, not knowing that Baron had actually examined the fully executed deed July 10th, the day he modestly retired from the scene without asking for an extension of time, and three weeks after saying that “It really didn't make any difference if Reade went through with the sale or not, that

he was sure he could buy it from me for less money later" (p. 77).

The allegation of fraud in the amended bill, and the production of the deed in evidence, at least accentuate the fact of defendant's absolute good faith and intention to carry out the contract on June 22, and that he was not evading, but was actually insisting upon performance on the day fixed to close.

The execution of the deed by the wife, and tender by the defendant, now speak volumes to the court, *as to the intentions of the parties at the time the contract was to have been performed.*

## II.

### **Complainant was the defaulting party on June 22.**

Mr. Baron would have the Court believe that the adjournments were occasioned solely because of objections to title, and says that on the 20th of June Mr. McKenna said: "In view of the fact that these objections were outstanding that he wouldn't enter into a formal stipulation fixing a date but would co-operate with the Title Company and then he would fix a date" \* \* \* (p. 46).

McKenna's version of the conversation of June 20, accepted by the Vice-Chancellor, is found on p. 77:

"Mr. Baron asked me if I would give another extension, that he had to go away, and I told him, 'No, I would not.' I said that 'at the last extension you said you wouldn't ask for any more,' and we at that time both agreed that that should be the last extension. He said, 'Yes, I know it, but I have got to go to Cleveland \* \* \*. I would like to have an-

other extension as a personal favor'. I said, 'I won't grant it as a personal favor. This contract was closed with me at this reduced price upon Mr. Reade's statement that I would be paid in cash the full amount, and that later was cut in half to \$25,000. I have explained to you several times that I am losing valuable opportunities for investment of this money, and that I will not grant any further adjournment'. Mr. Baron said, 'Well, McKenna, I don't think it makes any difference'. He said, 'I am sure Mr. Reade can buy the property from you later at a reduced price. You have held it for over thirty years and you were not able to sell it'. I said, 'Be that as it may, I won't grant another extension. You can send somebody else down to close the title, you don't have to be here.'"

Did, or did not, the conversation related by McKenna take place? Mr. Baron is a lawyer and knows law and real estate. He was in the courtroom and heard the testimony above quoted. He did not deny the following statements made in McKenna's testimony:

- (A) "At the last extension you said you wouldn't ask for any more, and we at that time both agreed that that should be the last extension."
- (B) "Yes, I know it, but I have got to go to Cleveland."
- (C) "I would like to have another extension as a personal favor."
- (D) "I cannot grant it as a personal favor. This contract was closed with me at this reduced price, etc."
- (E) "I have explained to you several times that I am losing valuable opportunities for investment of this money, and that I will not grant any further adjournments."

- (F) Baron said: "Well, McKenna, I don't think it makes any difference \* \* \*. I am sure Mr. Reade can buy the property later from you at a reduced price. You have held it for over 30 years, and you were not able to sell it."
- (G) McKenna: "Be that as it may, I won't grant any further extension."

This is not a question of credibility between the two witnesses, as brief for the complainant seems to argue. Baron heard this testimony and did not deny the above statements made by McKenna. What possible explanation can the complainant make for the failure of Mr. Baron to deny McKenna's assertion that he (Baron) said:

"Well, McKenna, I don't think it makes any difference, I am sure Mr. Reade can buy the property later from you at a reduced price. You have held it for over thirty years, and you were not able to sell it."

There is no explanation. There is no denial that Baron said this to McKenna, and it is exceedingly probable because it was true that McKenna held the property for about thirty years, and it was also true that Baron did actually leave for Cleveland on June 20th. Baron says so (p. 55, l. 18). How did McKenna know that unless Baron had told him?

Why didn't Baron deny that McKenna said:

"At the last extension you said you wouldn't ask for any more, and we at that time both agreed that that should be the last extension."

Again, if the conversation did not end that way why didn't Baron ask McKenna for an extension when he saw him on July 10th? Did Baron testify that he asked for an extension on July 10th? or later than June 20th? No, he did not.

Baron went to McKenna's office on July 10th and requested permission to examine the papers which had been tendered by McKenna on June 22nd to Joseph, Baron's clerk. If the situation had been left open on June 20, as Baron would have the Court believe, why didn't he ask McKenna to sign a further extension on July 10th? Why did he abandon the effort to close and go to Europe without requesting another extension?

That McKenna tendered a deed on June 22nd is confirmed by the appearance of Baron on July 10th, and his request to be permitted to examine the papers tendered. That McKenna refused on June 20th to grant a further extension is confirmed by the fact that Baron never asked an extension after June 22nd, that he didn't ask an extension when he saw McKenna on July 10th, and that he departed on a trip to Europe *more than a month after the default was claimed without asking for a time to be fixed to close the title or for a further extension*. And most important, Baron does not deny the conversation he had with McKenna June 20th. Undoubtedly, he believed that Reade was paying too much for this vacant land, which had yielded McKenna its annual crop of tax sales, and that Reade could get it later for less—so that it didn't "make any difference if Reade went through with the sale or not, he could buy it for less money later".

Before quitting this head, it is well to say a word relative to the so-called issue of fact as between Baron and McKenna. It should be noted that in McKenna's testimony he quotes the conversations he had with Baron with such fullness of particularity and circumstances with reference to what Baron had said concerning his (Baron's) own personal affairs that a single departure by McKenna in his testimony would have enabled Baron to nail it at once. This is especially true

concerning McKenna's testimony as to the reasons given by Baron for his asking for the three adjournments. Baron says that the adjournments were granted by McKenna in the face of objections to the title and to enable McKenna to cooperate with the title company to clear them up. On the other hand this is what McKenna says (p. 92, l. 23 to p. 93, l. 15):

“A. The first adjournment was because he was closing some other matter for Mr. Reade—my recollection is, on the—either at Plainfield or Perth Amboy, and that he was not able to take care of this matter at that time, and another reason was that he was a referee here in New York, in some reference matter in New York, that conflicted with the date, and asked me for an extension, and on June 20th he had to go to Ohio and asked for an extension.

Q. Weren't these extensions requested for the purpose of enabling him to clear up all these questions which were being raised in the title? A. Never was reported to me.

Q. Never was stated to you by Mr. Baron?

A. No, sir.

Q. He gave no other reason for wanting these adjournments excepting those you have stated here? A. Yes, my recollection is that for the date of May 25th, that he had sent the papers over to a firm of lawyers in Newark, and they were to prepare the bond and mortgage and they hadn't sent the papers over to him. That was—I think that was the adjournment from the date of May 25th to some other date. What was the date after that?

Q. June 1st? A. That was the reason for the adjournment from May 25th to June 1st.”

To all of this not a word of denial comes from either Baron or from the “firm of lawyers in Newark” (probably Mr. Hannoeh's firm). If Baron had not had any engagement for Reade at

Plainfield of Perth Amboy; if Baron had not had an engagement as a referee in New York that interfered with the closing on June 20th; if he did not go to Ohio on or about June 20th; if he had not sent the papers to a firm of lawyers in Newark, etc., it would have been perfectly easy to show that all or some of this detail in McKenna's testimony was invented and to that extent at least to destroy the force of the testimony, but no one contradicted a single detail of what McKenna said.

The opinion shows how the Vice-Chancellor, with the witnesses before him, regarded the force and effect of the testimony.

### III.

#### **Time was of the essence of the contract.**

The contract was drawn by Reade's attorney. Time was not expressly made the essence of the contract, but that it was of the essence is established by the circumstances:

- (a) Previous search of title by Reade.
- (b) His possession of abstract at time of striking of bargain.
- (c) Reade writing D-3 at the time, (and in presence of McKenna) the purchase price and terms were agreed upon.
- (d) Reade's instructions to Baron to prepare the papers "so we can close any time this afternoon or tomorrow morning if possible."
- (e) Closing to be as of April first prior.
- (f) Instructing his lawyers to call McKenna on phone "as soon as you read this note".

- (g) McKenna's statement to Reade that he had an opportunity to buy property adjoining his on 88th Street "and that I wanted the matter closed immediately for that purpose; otherwise I would lose that opportunity."

NO DENIAL OF THIS BY READE.

- (h) Short time in the contract for closing—only 16 days.
- (i) In sum, all of the circumstances surrounding the making of the contract, as well as the specific, definite continuances in writing, about which there is not the slightest dispute.

"Time will be deemed of the essence when such intention appears from the nature of the subject matter, or the object of the parties, *or by parol proof*, that it was so considered at the time of the making of the contract. A NEW AGREEMENT EXTENDING THE TIME IS EVIDENCE THAT THE PARTIES CONSIDER THE TIME MATERIAL."

*King vs. Ruckman*, 20 N. J. Eq., 317.

In the case of *Watchung Realty Co. vs. Llewellyn Holding Corporation*, 126, Atl. p. 326, Vice Chancellor Backes said:

"The principal contention of the complainant is that time was not of the essence of the contract, and that the final call to perform was too abrupt. Time was not expressly made the essence of the contract, but that it was of the essence is *inferable from the circumstances*. The defendant had made a contract to purchase the land, which in effect, it turned over to the complainant at a slight profit. The conveyances to and from it were to concur. Its purchase price was to be supplied by the complainant and that it was to be timely furnished was essential to the defendant's

due performance of its contract with its vendor. Prompt performance was waived but time was again made of the essence by the extension to October 10th, and again by the extension to December 10th, and again by its extension to January 11th."

And a quotation from the opinion in the same case (126 At. 326) is apt here: "The forbearance of the defendant did not imply that the time was not of the essence. Graciously extending the time of performance over and over again was not a license to presume on good nature."

Before taking up the facts relative to the making of the last adjourned date, we submit that the circumstances attending the entire transaction from the beginning show that by reason of these it must be said that the parties made a contract in which time was of the essence. In those cases where time is not by express term in the contract itself made of the essence, our Courts have held that where the circumstances show that the parties "considered time of performance as a matter of importance", time will be regarded as essential.

*Gerba v. Mitruske*, 94 At. 34.

Likewise, where the "circumstances are persuasive that time is of the essence."

*Orange Soc. v. Konski*, 121 At. 449.

Or "where it follows by necessary implication from the nature of the transaction."

*Cramer vs. Mooney*, 59 N. J. E. 170.

*King vs. Ruckman*, 21 N. J. E. 599.

*Bulloch vs. Adams Executors*, 20 N. J. E. 371.

*Houghwout vs. Murphy*, 22 N. J. E. 531.

Or where it is shown "by the circumstances proved in the case."

*Saldutti vs. Flynn*, 72 Eq. 157, at 160

#### I V .

#### **Both parties again made time of the essence when the last extension was given.**

In the opinion of the Court below this is expressly stated (p. 139, bottom).

There is no escape from this conclusion if the undisputed evidence in the case is to have its weight.

Keeping in mind the circumstances surrounding the making of the contract, what do we find transpired with reference to the extensions to close:

- (a) All were requested by Baron.
- (b) All were stipulated in writing. Stipulations drawn by Baron.
- (c) The first extension was for seven days.
- (d) The second extension was for fifteen days.
- (e) The third extension was for seven days, expiring June 22.
- (f) On June 20, Baron requested a further extension "*as a personal favor*" because he had to go to Cleveland.
- (g) McKenna replied "No". *Not denied by Baron.*
- (h) McKenna said "at the last extension you said you would not ask for any more and we at that time agreed that that should be the last extension." *Not denied by Baron.*

- (i) McKenna said "I have explained to you several times that I am losing valuable opportunities for investment of this money and that I will not grant further adjournments". *Not denied by Baron.*
- (j) Baron said "Well, McKenna, I don't think it makes any difference". \* \* \* "I am sure Mr. Reade can buy the property from you later at a reduced price. You have held it for over thirty years, and weren' table to sell it". *Not denied by Baron.*
- (k) McKenna said "Be that as it may, I won't grant any further extension". *Not denied by Baron.*
- (l) Baron sent Joseph to the place of closing June 22 to request further extension.
- (m) McKenna tendered deed and cancellation of mortgages and tax certificates.
- (n) McKenna noted default on contract.
- (o) Baron on July 10th inspects papers tendered to Joseph by McKenna on June 22nd. *Not denied by Baron.*
- (p) Baron does not ask for further extension and makes no claim that contract is still in force.
- (q) Without any further communication with McKenna, Baron goes to Europe July 25, nearly five weeks after default, and makes no further requests for extensions or for closing.

After the final refusal to extend the time for closing, nearly three weeks elapse; Baron goes over to inspect the papers tendered; satisfies his curiosity; says nothing about extensions or performance or Reade's rights; walks out; about five weeks later goes to Europe. Not a word; not a letter; not a communication of any kind is sent by Reade, Baron, or anyone for them to McKenna.

About August 10th, real estate speculators move to the scene of their operations from Long Beach, Long Island to Long Branch, New Jersey. Long Branch real estate had been dormant for years and suddenly wakes up. In the characteristic phrase of Mr. Reade "It was breaking down there" (p. 69, l. 35). When things "broke" Reade awoke. He had not seen McKenna since they signed the contract on May 9th—more than three months before and eight weeks after the default on June 22.

This is a long hiatus and must be bridged and at once, and what happens? Reade's new attorney, Mr. Hannoeh, writes Exhibit C-10 (p. 124).

## V.

**Exhibit C-10, written by complainant's attorney to defendant on August 18, shows clearly, among other things, that complainant was then conscious that he had permitted his contract to lapse, and that some action on the defendant's part was necessary to revive it.**

This epistolary masterpiece springs across the void. According to well known laws of ballistics, to travel a long distance without creating too much friction the missile must not be too blunt; the forward part of the missile (missive) must make an easy opening of the way. So,

"During the absence of Mr. Baron in Europe Mr. Reade has asked me to arrange to close the above matter".

Not a word, sign or move, on the part of Reade or anyone for him since tender of deed to his representative on June 22 (save inspection of papers tendered) and out of the clear springs C-10.

Gentle and unobtrusive and bearing in its every part a design to reopen the negotiations and rehabilitate Mr. Reade's position.

First. The date "August 18". We need not repeat the date of the beginning of the boom, but we know that "it was breaking down there" when Reade ordered the bill of complaint to be filed (p. 69). But a bill of complaint right out of the blue would never do in a case like this.

So, the entering wedge must be a communication that assumes that negotiations are still pending and draws forth a response—*perhaps an admission against interest*. The bill of complaint and the *lis pendens* are to follow in the quickest succession.

Second. "During the absence of Mr. Baron in Europe."

Mr. Baron sailed July 25, and returned August 26th (pp. 55, 30). The "August" modestly mentioned at the top of the letter is August 18th, as shown by Ex. C-11 (p. 125).

"During the absence of Mr. Baron in Europe." Neither Reade nor anyone else was asking or expecting McKenna "to arrange to close the above matter". But when Mr. Baron had taken shipping from Europe, or was about to, and the great land boom "was breaking", then Reade stood up and took notice and directed his solicitors to "get that property".

Third. "The Title Company have been advising me daily that they expect to close the matter within a short time."

Interesting, if true. Which Title Company? Nobody had been advising McKenna anything daily, weekly, or monthly. The record contains no evidence of a letter or communication of any kind between the Title Company and anyone after Baron left for Europe.

The writer of C-10 never had any previous communication with McKenna concerning the matter (Hannoch, p. 73, l. 35); and had a complete report from Angleman, the Title officer, dated June 30, "Which is a summing up of all previous reports" (Hannoch, p. 74).

Mr. Angleman was called by complainant, and Mr. Hannoch offered himself as a witness and not one word of evidence supports C-10 in saying "The Title Company have been advising me daily that they expect to close the matter within a short time."

Did this letter—written for the purpose of either opening up negotiations or of making a record for the suit,—did it speak the truth?

If it speaks truth it is an important piece of evidence for the complainant.

But if it does not speak truth—if it falsifies, if it was written at that late date merely as a trick or device, then it is a damning piece of evidence against the complainant.

If C-10 bears witness to the court of truth and equity and honesty—it weighs in favor of complainant; but if it carries one word that is false or dishonest, it puts complainant out of the court of Equity.

"The Title Company have been advising me daily that they expect to close the matter within a short time."

That is what C-10 said on August 18th, and three days later *before defendant had a chance to answer C-10* a bill for specific performance was filed—carried by messenger.

Angleman's evidence is a complete refutation and denial that the Title Company expected to close the matter within a short time.

The statement in this letter that the Title Company had been advising Mr. Hannoch daily that

they expected to close within a short time, is naive to say the least. IT IS IN UTTER CONTRADICTION OF THE WHOLE THEORY OF COMPLAINANT'S CASE. That theory is that the contract was not carried out by complainant because there were a number of things concerning the defendant's title that it was necessary for the *defendant to take care of*; and that McKenna had promised Baron on June 20th to *cooperate with the Title Company*, and then fix a date for the closing, etc. But the record shows nothing to have been done subsequent to June 22nd by either the defendant, the complainant or the complainant's attorneys. And if the complainant honestly relies upon his theory of the case that the whole cause of the delay was the presence of objections which *only the defendant* could remove, what was it that the *Title Company* had done (as stated in C-10) to permit them to "expect to close the matter within a short time?" C-10 does not call upon Mr. McKenna to do anything concerning his title. The letter was not written in good faith. It was a disingenuous feeler.

We discuss C-10 at length because it is an index to the state of mind of the complainant or of those who were handling the matter for him. Did they or did they not really believe that when C-10 was written in August they had been placed by their own action and inaction—beginning with the 20th day of June previous,—in the position of having actually abandoned the contract and forfeited their rights under it? C-10 provides the answer. Why do the statements in C-10 so plainly misrepresent the facts to the defendant unless those who were dealing with the defendant knew that they must get him to make some commitment which would establish their position anew?

From the report Angleman made on May 25, Reade's attorneys knew about all of his objections

and that they were not cleared up. And we say that C-10 bore false witness when it said "The Title Company have been advising me daily that they expect to close the matter within a short time".

Fourth: "I was advised by them on Friday that we could probably close the title the first of next week."

From the 25th of May, 1925, to the time of giving his evidence Angleman, right or wrong, has never changed his opinion nor wavered in it, that the heirs of Deborah Herbert have a one-fourth interest in the premises and that McKenna is seized in only three-fourths. Representing the Title Company, he has never budged an inch from this position. He put it in his reports and testified to it on the witness stand.

The evidence from the Title Company is conclusive that they did *not expect to close the title the "first of next week" or the first of any week.*

So, we come to:

Fifth—the Post Script. A post script is put on a letter as an afterthought—something inadvertently omitted in the body of the letter—or occurring to the writer after the main theme is closed.

How about this post script? Is it an honest post script? Or was the letter written merely as a leader-up for the post script?

"P. S. I find that you and Mr. Baron have from time to time extended the time for closing, and accordingly I hand you herewith further extension to September first. I am assured by the Title Company, however, that the title will be absolutely disposed of before that time".

This post script at such a time and under such circumstances, needs no comment.

There is another equally significant point to be made concerning C-10. If the author of that letter really believed that things were as stated in the letter and that it was simply a matter of having McKenna fix a day for closing, why didn't they wait at least for a reply to that letter before filing the Bill and Lis Pendens? C-10 was written August 18th. McKenna replied on August 21st. The reply was mailed in New York at the *close of business on August 21st*, addressed to Stein, Stein & Hannoeh in Newark (p. 80, l. 25, *et seq.*). The bill of complaint was sent by messenger and actually filed with the Clerk during the day of August 21st (p. 81, ll. 1-20).

And on the very heels of this letter comes the complainant into the Court of Equity—where he must show clean hands—and prays that the Court, out of its good conscience, may decree the specific performance of the contract which he abandoned months before, when his attorney said, after his failure to get “*a personal favor*” in the form of another adjournment:

“Well, I don't think it makes any difference \* \* \*. I am sure Mr. Reade can buy the property from you later at a reduced price.”

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Complainant's brief is substantially an effort to bolster up a case by means of the objections which they claim to have made to defendant's title. These are considered in the opinion of the court below. And it must be borne in mind in this connection that what defendant tendered on June 22nd were:

A Deed executed by defendant and wife.  
Tax certificates.  
Satisfaction of Mortgage.

All the testimony in the case as to the presence of unsatisfied tax liens on the property and as to

the so-called outstanding Herbert interest is alike hearsay and altogether fanciful (p. 31 l. 1 to p. 34 l. 40).

The witness Angleman did not make the search himself (p. 31, l. 2). The tax liens had been satisfied. McKenna held them prior to the tender of deed and they were tendered with the deed (p. 88, l. 30).

And complainant's brief is clearly in error when it asserts that some of these liens were still open at the time of the hearing (p. 89, l. 20).

The quibble as to the description of the land is dispelled by the testimony of Reade that he was willing to take the property as described in the agreement (p. 68, l. 15); though, as clearly explained in the testimony of the defendant, this objection could hardly have been seriously made.

McKenna's testimony completely explains away all these so-called objections to the title.

But regardless of all that, the defendant was at least entitled to be reasonably apprised of any substantial question which the complainant's search revealed. And the testimony clearly shows that such was never brought to his notice. And the complainant, *with the search in his possession before the contract was made, had ample time in which to do it, if necessary.*

*Barry vs. Ruskin*, 133 Atl. 528.

Under the ordinary tests in specific performance cases as laid down in *Rabinowitz vs. Rooney*, 128 Atl. 82, we respectfully submit that the complainant-appellant should not prevail:

“Specific performance is only to be exercised in the sound discretion of the court, and is not a matter of right.

To warrant specific performance the proof must be clear and convincing.

If the proof is substantially evenly balanced, or if the court is left in doubt because of the lack of clearness of it, it denies specific performance and leaves the parties to their remedy at law. *Lindly vs. Keim*, 54 N. J. Eq. 418, 34 A. 1073."

**The Court below did equity between the parties and its decree should be affirmed.**

Respectfully,

PERKINS & DREWEN,  
Counsel for Defendant-Respondent.





