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BILL OF COMPLAINT.

Filed April 19, 1926.

In Chancery of New Jersey

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

The complaint of Saul Aron and Jacob Wiederhorn, both of the City of East Orange, County of Essex and State of New Jersey, respectfully shows that:

1. On the seventeenth day of December, Nineteen Hundred and Twenty-five, the complainants entered into a contract, wherein the complainants agreed to purchase certain lands and premises in the City of East Orange, County of Essex and State of New Jersey, hereinafter more particularly described, and the defendants, Rialto Realty Company, a corporation of the State of New Jersey, and Benjamin Harrison, agreed to convey by deed of warranty, free from all encumbrances, except a first mortgage held by the Seneca Building and Loan Association of the City of Newark, New Jersey, in the nominal sum of Twelve Thousand Dollars ($12,000), on or before the first day of March, Nineteen Hundred and Twenty-six, for the sum of Sixteen Thousand Five Hundred Dollars ($16,500.00).

2. The complainants thereupon paid to the defendant the sum of One Thousand Dollars ($1,000), in accordance with the terms of the contract, and instructed their counsel to search the indices in the office of the Register of Essex County, and to prepare an abstract of title.

3. The said land and premises are described as follows:

BEGINNING at a point on the northerly side of Rowe street, therein distant fifty feet and five hundredths of a foot westerly from the point formed by the intersection of the same with the westerly side of Newfield street; and from thence running (1) westerly along said side of Rowe street fifty feet and five hundredths of a foot to a point distant one hundred feet and ten hundredths feet easterly from Ampere Parkway; thence (2) northerly and parallel with said Parkway seventy-eight feet and thirty-five hundredths of a foot; thence (3) easterly and at right angles to Newfield street fifty feet; thence (4) southerly parallel with the second course eighty feet and forty-seven hundredths of a foot to said northerly side of Rowe street and place of BEGINNING.

4. The abstract of title discloses that the said premises were conveyed by the East Orange and Ampere Land Company, a corporation of the State of New Jersey, to Samuel Klesner, which deed was dated May 11, 1921, and recorded May 19, 1921, in the Register's Office of Essex County, in Book Y 64 of Deeds for said county, on page 593, subject, however, to the following restriction:

"And the said party of the second part, for himself, his heirs and assigns, does hereby covenant and agree, to and with the said party of the first part, its successors and assigns, as follows: That neither the said party of the second part nor his heirs or assign shall or will erect or permit upon any portion of the said premises, any factory

building, or any other building or buildings except such as shall be substantial and erected of stone, brick, cement, or other similar materials, or any one or more of them; and that the said premises, or any part thereof, shall not be used for a livery stable, barroom, factory or any business of an offensive, dangerous or noisy kind or nature, or any business which may be considered in law a nuisance, or which shall be or may become obnoxious or detrimental to the adjoining or contiguous lands. The covenants herein contained are to be construed as covenants running with the land until January 1, 1930, when they shall cease and terminate."

Said restriction is an encumbrance upon the premises herein described.

5. On February 15, 1926, the complainants tendered to the said defendants the sum of Thirty-five Hundred Dollars ($3,500) in cash, in accordance with the terms of the contract, and demanded from the said defendants the warranty deed for the said premises, free and clear of all encumbrances, except the mortgage held by the Seneca Building and Loan Association. The defendants were unable to deliver the deed in accordance with the terms of the contract, and complainants did then and there demand the return of the One Thousand Dollars ($1,000) paid to the said defendants as deposit on the said contract, and demanded a reasonable amount, to wit: Two Hundred Dollars ($200) to cover the expenses of counsel fee in the preparation of the abstract of title.

Complainants, without adequate remedy in the courts of law, therefore pray that:

1. The defendants may answer this bill of complaint in each statement herein made;

2. The agreement dated December 17, 1925, as hereinabove set forth, be rescinded and be declared null and void, and of no effect.

3. That the defendants be decreed to return to the said complainants the amount of money paid on the said contract, together with interest from December 17, 1925, and the reasonable amount for services rendered in preparing the abstract of title.

4. That the same be considered a lien upon the said premises for the money decreed to become due to the complainants.

5. That decree may be made for the sale of the said premises to raise and to pay to complainants the amount so found due, together with interest and costs.

6. That a writ of subpoena may issue, demanding said defendants to answer this bill, and to abide by such decree as this Court may make in the premises.

ABRAHAM M. HERMAN,
Attorney of Plaintiffs.

ANSWER AND COUNTER-CLAIM.

Filed May 18, 1926.

IN CHANCERY OF NEW JERSEY.

Between SAUL ARON and JACOB WIEDERHORN, *Complainants,* *and* RIALTO REALTY COMPANY, a corporation of New Jersey, and BENJAMIN HARRISON, *Defendants.*	*On Bill.* *Answer and Counter-claim.*

The answer of the defendants, Rialto Realty Company, Inc., a corporation of New Jersey, and Benjamin Harrison, answering the bill of complaint, say that:

1. The defendant, Benjamin Harrison, denies that he individually agreed to convey the premises mentioned and more particularly described in the bill of complaint, on the contrary says that he signed the contract as president of the Rialto Realty Company, Inc., one of the defendants.

2. The defendant, Rialto Realty Company, Inc., admits the first part of the first paragraph, but denies that the said premises were to be conveyed free from all encumbrances except a first mortgage held by the Seneca Building and Loan Association of the City of Newark, New Jersey, in the nominal sum of Twelve Thousand ($12,000.00) Dollars and admits the last part of the first paragraph.

3. The first part of the second paragraph is admitted, but the defendant, Rialto Realty Company, Inc., has not sufficient knowledge or information to form a belief as to the last part of the second paragraph.

4. Paragraph three is admitted.

5. First part of paragraph four is admitted, but denies that said restrictions are an encumbrance upon the premises mentioned in the bill of complaint.

6. The entire paragraph five is denied.

SEPARATE DEFENSE.

1. The defendant, Benjamin Harrison, says that he never was the owner of the premises described in the bill of complaint, that he signed the contract conveying said premises as president of the Rialto Realty Company, Inc., and not for himself individually.

2. On December 17, 1925, complainants and defendant, Rialto Realty Company, Inc., entered into an agreement for the sale and purchase of the premises mentioned and described in the bill of complaint and the counter-claim in the above-entitled cause.

3. By the terms of said agreement, complainants were to accept conveyance of the premises in question subject to restrictions and zoning ordinances on record, if any.

4. That the complainants waived the restrictions of record by appearing at the office of the attorney for the defendant, Rialto Realty Company, Inc., and agreed to accept a deed for said

premises subject to restrictions appearing on record, but refused to accept said deed to said premises upon ascertaining that one of the stores in the meanwhile had become vacate.

5. The restrictions appearing of record are not encumbrances against said premises, in that, the premises consist of a one-story brick building containing three stores, which building is constructed of brick and other similar materials, and that the said premises are not being used for a livery stable, barroom, factory or other business of an offensive, dangerous or noisy kind or matter, or for any business that may be considered in law a nuisance or which shall be or may become obnoxious and detrimental to the adjoining or contiguous lands.

6. The complainants were well aware that the building was built upon and occupied the entire width of the premises herein above mentioned, had knowledge that the same had constructed thereon a building of three stores and two apartments in the rear thereof.

7. Before the drawing of said agreement, the complainants were orally informed that the above-described premises were to be conveyed subject to all restrictions appearing on record and zoning ordinances, if any.

8. The complainants waived the restrictions of record by performing acts and assuming ownership of said premises in negotiating new terms with one of the tenants occupying one of the stores in said premises.

9. The defendant, Rialto Realty Company says that they have always been ready, able and willing to perform their part in accordance with

the terms of said agreement in the respects above-mentioned, but complainants refused to accept the same.

WILLIAM N. BECKER,
Solicitor for Defendants,
Rialto Realty Company, Inc.,
and Benjamin Harrison.

COUNTER-CLAIM.

IN CHANCERY OF NEW JERSEY.

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

The defendant, Rialto Realty Company, Inc., a corporation of New Jersey, having its principal office in the City of Newark, County of Essex and State of New Jersey, respectfully shows that:

1. On the Seventeenth day of December, 1925, the complainants Saul Aron and Jacob Wiederhorn and the defendant Rialto Realty Company, Inc., entered into an agreement for the purchase by the complainants and the sale by the defendants, of lands and premises located in the City of East Orange, County of Essex and State of New Jersey.

2. The lands and premises herein agreed to be sold and conveyed are:

BEGINNING at a point on the northerly side of Rowe street, therein distant fifty feet and five hundredths of a foot westerly from the point formed by the intersection of the same with the westerly side of Newfield street; and from thence running (1) westerly along

said side of Rowe street fifty feet and five hundredths of a foot to a point distant one hundred feet and ten hundredths feet Easterly from Ampere Parkway; thence (2) northerly and parallel with Parkway seventy-eight feet and thirty-five hundredths of a foot; thence (3) Easterly and at right angles to Newfield street fifty feet; thence (4) Southerly parallel with the second course eighty feet and forty-seven hundredths of a foot to said northerly side of Rowe street and place of BEGINNING.

3. On the execution of said agreement, the defendant Rialto Realty Company, Inc., received from the complainant the sum of One Thousand ($1,000.00) Dollars, acknowledgment of the receipt thereof being contained in said agreement.

4. Said agreement called for the closing of title to said premises and delivery of deed on the First day of February, 1926, at the office of William N. Becker, 185 Market street, Newark, New Jersey.

5. Before the drawing of said agreement, the complainants were orally informed that the above-described premises were to be conveyed subject to all restrictions appearing on record and that the said agreement was to contain such a clause, and that by an oversight the said clause was omitted from said contract.

6. Defendant, Rialto Realty Company, Inc., was unaware of the omission of the reference to the restrictions in the contract and did not discover the same until the Ninth day of February, 1926, nine days after the date set for the closing of title, when the defendant, Rialto Realty

Company, Inc., was informed thereby by the attorney for the complainants, to whom they had contracted to convey said lands and premises.

The defendant, Rialto Realty Company, Inc., is without adequate remedy in the courts of law and therefore prays:

1. That Saul Aron and Jacob Wiederhorn, who are the complainants to this suit, may answer this counter-claim and each statement therein made.

2. That the said agreement may be reformed by adding thereto, that the premises were to be conveyed subject to restrictions, appearing on record.

3. That the complainants may be compelled to answer this counter-claim and to abide by such decree as this Court may make in the premises.

WILLIAM N. BECKER,

Solicitor for and of Counsel
with Defendant, Rialto Realty Company, Inc.

COUNTER-CLAIM.

IN CHANCERY OF NEW JERSEY.

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

The defendant, Rialto Realty Company, Inc., a corporation of New Jersey, having its principal office in the City of Newark, County of Essex and State of New Jersey, respectfully shows that:

1. On December 17, 1925, defendant, Rialto Realty Company, Inc., was seized in fee simple of all that certain lot, tract or parcel of land and

premises situated, lying and being in the City of East Orange, County of Essex and State of New Jersey.

BEGINNING at a point on the northerly side of Rowe street, therein distant fifty feet and five hundredths of a foot westerly from the point formed by the intersection of the same with the westerly side of Newfield street; and from thence running (1) Westerly along said side of Rowe street fifty feet and five hundredths of a foot to a point distant one hundred feet and ten hundredths feet easterly from Ampere Parkway; thence (2) northerly and parallel with said Parkway seventy-eight feet and thirty-five hundredths of a foot; thence (3) Easterly and at right angles to Newfield street fifty feet; thence (4) Southerly parallel with the second course eighty feet and forty-seven hundredths of a foot to said northerly side of Rowe street and place of BEGINNING.

2. On the date last mentioned, defendant Rialto Realty Company, Inc., entered into a certain agreement in writing with Saul Aron and Jacob Wiederhorn the complainants herein, wherein and whereby the defendant, Rialto Realty Company, Inc., agreed to convey the said lands and premises by Deed of Warranty on or before the First day of February, 1926, to the said Saul Aron and Jacob Wiederhorn in consideration of the payment by said Saul Aron and Jacob Wiederhorn of the sum of Sixteen Thousand Five Hundred ($16,500.00) Dollars, and the said Saul Aron and Jacob Wiederhorn agreed to pay the defendant, Rialto Realty Company, Inc., said purchase price of Sixteen Thousand Five Hun-

dred ($16,500.00) Dollars by payment of One Thousand ($1,000.00) Dollars at or before the execution of said agreement and upon the tender by the defendant, Rialto Realty Company, Inc., of said deed to said Saul Aron and Jacob Wiederhorn by the payment of Three Thousand Five Hundred ($3,500.00) Dollars in cash, including the withdrawal value of the back shares and also including all apportionment which shall be paid by the said Saul Aron and Jacob Wiederhorn to the said defendant, Rialto Realty Company, Inc., by Saul Aron and Jacob Wiederhorn assuming the mortgage at present a lien on the premises and paying the same according to the terms thereof, in the nominal sum of Twelve Thousand ($12,000.00) Dollars. Said deed to be delivered at the office of William N. Becker, Counsellor-at-Law, 185 Market street, Newark, N. J., on February 1, 1926, between the hours of nine o'clock in the forenoon and five o'clock in the afternoon.

3. Said agreement also contained a clause that the defendant, Rialto Realty Company, Inc., was to pay all assessments and public improvements completed or under construction at date of this agreement.

4. The said Saul Aron and Jacob Wiederhorn paid to the defendant, Rialto Realty Company, Inc., the said sum of One Thousand ($1,000.00) Dollars at the time of the execution and delivery of the said agreement in writing.

5. On the First day of February, 1926, between the hours of nine o'clock in the forenoon and five o'clock in the afternoon, the defendant, Rialto Realty Company, Inc., duly attended at the office of the said William N. Becker, 185

Market street, Newark, N. J., with a warranty deed covering the lands and premises herein above referred to, to the said Saul Aron and Jacob Wiederhorn; duly executed and acknowledged by the defendant, Rialto Realty Company, Inc., for the purpose of delivery of said deed to the said Saul Aron and Jacob Wiederhorn of the payment of the purchase money, pursuance to the terms of the aforesaid agreement; but the said Saul Aron and Jacob Wiederhorn did not appear at the said time and place.

6. Defendant, Rialto Realty Company, Inc., has always been ready and willing and now tender themselves ready and willing to perform their part of said agreement, and, on being paid the remainder of said purchase money with interest, to convey the said lands and premises to the said Saul Aron and Jacob Wiederhorn by a warranty deed, duly executed by the said defendant, Rialto Realty Company, Inc.

Defendant, Rialto Realty Company, is without adequate remedy in the courts of law, and therefore prays:

1. That Saul Aron and Jacob Wiederhorn, who are complainants to this suit may answer this counter-claim and each statement therein made.

2. That the said Saul Aron and Jacob Wiederhorn may be compelled by the decree of this Court specifically to perform the said agreement with defendant, Rialto Realty Company, Inc., and to pay to the defendant, Rialto Realty Company, Inc., the remainder of the said purchase money, as in and by said agreement provided, with interest from the time said purchase money should have been paid on the delivery by the defendant

Rialto Realty Company, Inc., to said Saul Aron and Jacob Wiederhorn of a deed executed by defendant, Rialto Realty Company, Inc., as in said agreement provided.

3. That in case the said complainants, Saul Aron and Jacob Wiederhorn, should, within time limited by this Court, for such performance of said contract, fail and neglect, upon the tender of said deed to pay the said remainder of said purchase money as aforesaid, that then, and in that event the said sum together with interest and cost may be and become a lien upon the said lands and premises in fee of the defendant, Rialto Realty Company, Inc., and that the said lands and premises my be sold under direction of this Court for the satisfaction of such lien so impressed on said lands and premises, and in case a deficiency should arise upon said sale, that the said complainants may be ordered by this Court to pay said deficiency together with cost and interest to the defendant, Rialto Realty Company, Inc.

4. That the complainants may be compelled to answer this counter-claim and to abide by such decree as this Court may make in the premises.

WILLIAM N. BECKER,
Solicitor for and of Counsel
with Defendant, Rialto Realty Company, Inc.

REPLICATION TO ANSWER, AND ANSWER TO COUNTER-CLAIM.

Filed July 1, 1926.

IN CHANCERY OF NEW JERSEY.

SAUL ARON and JACOB WIEDERHORN, *Complainants,* and RIALTO REALTY COMPANY, INC., a corporation of New Jersey, and BENJAMIN HARRISON, *Defendants.*	*Replication and Answer to Counter-claim.*

The complainant joins issue on the answer of the defendant.

As to the first counter-claim contained in said answer, complainant admits the first, second, third and fourth paragraphs. Denies the fifth and sixth paragraphs.

As to the second counter-claim contained in the said answer, complainant admits the first paragraph, and admit that a certain agreement in writing between complainants and defendants as specifically registered by the said instrument.

They admit the third and fourth paragraphs.

They deny the fifth and six paragraphs.

ABRAHAM M. HERMAN,
Solicitor of Complainants.

REPLICATION TO ANSWER TO COUNTER-CLAIM.

Filed July 10, 1926.

IN CHANCERY OF NEW JERSEY.

SAUL ARON and JACOB WIEDERHORN,
Complainants,
vs.
RIALTO REALTY COMPANY, INC., a corporation of New Jersey, and BENJAMIN HARRISON,
Defendants.

Replication to Counter-claim.

The defendants deny each and every allegation of new matter contained in the answer of the complainants to the counter-claim of the defendants, and join issue with the complainants in this cause.

WILLIAM N. BECKER,
Solicitor of Defendants.

TESTIMONY.

IN CHANCERY OF NEW JERSEY.

Between

SAUL ARON and JACOB WIEDERHORN,
Complainants,
and
RIALTO REALTY COMPANY, a corporation of New Jersey, and BENJAMIN HARRISON,
Defendants.

Transcript of testimony taken in the above-entitled cause before Hon. Maja Leon Berry, Vice-Chancellor, at the Chancery Chambers, Newark, New Jersey, on

Appearances:

Mr. Abraham M. Herman for complainant.

Mr. Michael Estrin and Mr. William N. Becker for the defendants.

Mr. Estrin: The defendant elects at this time to seek specific performance and waive a reformation of the counter-claim.

The Court: Then the only question at issue is the waiver. The burden is on the defendant to show the waiver. You may proceed.

Mr. Herman: I offer in evidence the contract.

(Marked Exhibit C. 1.)

WILLIAM N. BECKER, being duly sworn according to law, on his oath testified as follows:

Direct examination by Mr. Estrin.

Q You are an attorney-at-law of the State of New Jersey? A I am.

Q And did you on or about the 17th of December, 1925, represent the Rialto Realty Company? A I did.

Q And were you familiar with the transaction between the realty company and Sol Aron and Jacob Wiederhorn? A I was.

Q Was the question of restriction called to your attention after drawing of the agreement, and by whom? A It was, by Mr. Herman, the attorney for the complainant in this case, as contained in the letter of February 9th.

Q Is this the letter (showing witness letter)? A Yes, with my memorandum alongside of it.

Mr. Estrin: I offer it in evidence.
(Marked Exhibit D. 1.)

Q After that letter, was there any more correspondence between you and Mr. Herman? A Yes, I called up Mr. Herman immediately upon receipt of that letter and took up the question of the affidavits and told him that could be easily secured. He spoke about the restrictions; I told him that the building was constructed in accordance with the restrictions, and his answer to me was it wasn't a serious matter; that would be taken care of; and I therefore made a notation on that letter, "Don't apply," at the time.

Q In that letter he stated that he was going to take up the restriction with his clients? A Yes.

Q Was there any letter that you received from him after that with reference to the restrictions? A There was another letter about the 17th.

Mr. Estrin: I offer that letter in evidence.
(Marked Exhibit D. 2.)

Q Is that the letter you received (witness shown letter)? A Yes, sir.

Q And after the letter was received by you on the 17th of February, was there a meeting at your office with reference to this property? A There was, on the 23rd of February.

Q Who was present? A Mr. Herman, Mr. Wiederhorn, Mr. Hershenson, Mr. Harrison of the realty company, and myself.

Q And the question of restrictions and everything came up? A Yes.

Q Was the deed shown to him? A As soon as Mr. Herman came in, I said, "Now, it is definitely understood there is no question of restrictions?" He said, "Certainly." I said, "Well, here is the deed." He took the deed that I had prepared, which was signed on the 15th, the day originally set for closing of title and postponed it—the original date was February 1. He examined the deed, approved of it, and said it was perfectly satisfactory, and he asked Mr. Wiederhorn for a certified check, and Mr. Wiederhorn handed him a certified check, and he put the certified check on top of the deed and laid them aside. He said, "Now, let us go into the figures of cost." I gave him a yellow paper with a memorandum on it, and I drew up one myself, and I have got here a copy of the figures that we went into.

Q And were the figures gone over by both you and Mr. Herman? A Yes, simultaneously.

Q And in the presence of your respective clients? A Yes.

Q And why was it that the subject was not gone through with after you entered into the figures? A Mr. Harrison was there at first when we were going through the figures, and the question of the rent came up. I asked Mr. Harrison if he knew what the rents were. He said, "I don't; Mr. Hershenson knows." A few minutes later Mr. Hershenson walked in. About that time we came to the question of what was due to the Building and Loan, and he asked me if I had the Building and Loan book, and I said no. I asked Mr. Harrison if he had it; he said he didn't have it. Mr. Hershenson handled all that. Mr. Hershenson walked in; I asked him for the book; he said he had it at home, so Mr. Herman said, "I want that book and an assignment of the shares." With that, Mr. Hershenson left and went home for the book and came back, and when he came back we had covered all the figures except the question of rent. I asked Mr. Hershenson what was the rents, and he enumerated them. We commenced to figure. We had agreed to close as of the 15th; notwithstanding that contract called for February 1st, we were apportioning the rents as of the 15th. Mr. Hershenson said, "Why should I lose a half a month's rent?" The shoemaker had vacated the premises on the 1st. I said it had been agreed to make it as of the 15th, and he would have to lose half a month's rent. Mr. Wiederhorn said, "Well, I don't know about that; I will have to ask my partner, Mr. Aron." Then there was a conference between Mr. Herman and Mr.

Aron in the office and also outside in the waiting room, and finally came back and sat around a few minutes and said, "Well, we will have to hold this off for two days until we have an opportunity to speak to Mr. Aron about the rent." I said, "All right; everything is O. K., you know how much is due us. I will expect you back in two days." The next day I received a letter, which was dated the same day. I believe the letter is over here.

Q I show you this letter and ask you whether that is the letter you received on or about the 24th of February of last year? A February 23, it is dated; I received it on the 24th.

Q Is this the envelope in which the letter came? A Yes, posted at 8 o'clock in the evening.

(Letter offered in evidence and marked Exhibit D. 3.)

Q I show you this deed. A This is not the deed.

Q I show you this deed and ask you whether that is the deed that was offered by you? (Witness shown another deed.) A This is the deed which was offered and accepted.

Mr. Estrin: I offer it in evidence.

The Court: It will be admitted.

(Marked Exhibit D. 4.)

Q That deed was shown to Mr. Herman? A Oh, yes, he thoroughly examined it.

Q And after such examination, then the actual closing took place? A Yes, we even compared the description from my deed and from his own search.

William N. Becker, cross.

Cross examination by Mr. Herman.

Q What time of the day did this take place, Mr. Becker? A Before noon time.

Q Sure of that? A Yes.

Q And had you ever met Mr. Wiederhorn before? A Not except the first time you brought him in the office; he came in with you.

Q Had you ever seen Mr. Aron? A Not until today when I was introduced to him.

Mr. Herman: You have my letter of January 28th?

(Counsel handed letter.)

I offer in evidence letter of January 28, 1926, from A. M. Herman to William N. Becker.

(Marked Exhibit C. 2.)

Q You received that? A I received that letter.

Q Have you received my letter of February 26th? A If it hasn't already been offered in evidence, it must be in my file. I received that letter.

Mr. Herman: Letter produced from me to Mr. William N. Becker. I offer it in evidence.

(Marked Exhibit C. 3.)

Q What was the outcome of that meeting on the 23rd, Mr. Becker? A It was postponed two days on account of the rent, the vacant store.

Benjamin Harrison, direct.

Q Wasn't it postponed so that Mr. Wiederhorn would have a chance to see his partner, Mr. Aron? A No, sir.

Q Sure of that? A Yes.

BENJAMIN HARRISON, a witness called on behalf of the defendants, being duly sworn according to law, on his oath testified as follows:

Direct examination by Mr. Estrin.

Q Mr. Harrison, you are a member of the Rialto Realty Corporation? A Yes.

Q What is your office in that company? A President.

Q And were you in the office of Mr. William N. Becker on or about the 23rd of February, 1926? A Yes.

The Court: Which is it, on or about?

Q On the 23rd of February, 1926? A Yes.

Q Who was there at that time? A Counsellor at Mr. Wiederhorn—the gentleman that was supposed to take the property.

Q Do you mean Mr. Herman, the counsellor? A Yes.

Q And when Mr. Herman and Mr. Wiederhorn came in, what was done in the presence of Mr. Wiederhorn and in the presence of yourself, with reference to the deed? A We were going over the figures with reference to the deed.

Q Was the deed shown to Mr. Herman? A Yes, sir.

Q Did he state whether the deed was satisfactory, or just what did he say? A He showed

him the deed, and he said, "We will get to the figures."

Q He said get down to the figures? A Yes.

Q Was there any question there as to restrictions at the time of closing? A No, sir, I didn't hear any.

Q When did the dispute arise, if there was a dispute, in the office there? A Discussing about what?

Q What dispute was there after they sat down and figured things over? A The only dispute there was, was when Mr. Hershenson went for the book, and they wanted to know the rentals, and of course, I didn't know the rentals. Mr. Hershenson knew the rentals. And as soon as they learned that the store was moved—that one of the tenants moved out, then he said he doesn't want to take the property. Mr. Herman said that.

Q And after that came up the matter was adjourned? A Yes.

Q Was there any other dispute of any kind outside of that one question of the rent? A Not that I know of.

Cross examination by Mr. Herman.

Q What time of the day was that, Mr. Harrison? A In the morning.

Q What time? A I didn't look at the time; it was in the morning before 12 o'clock.

Q Who was there besides yourself? A Myself, Mr. Becker, you and Mr. Wiederhorn.

Q Anybody else? A I think Mr. Heshenson came in later.

Q And up to that time you hadn't heard anything about restrictions? A No, sir.

Q Never heard of that, did you? A No, didn't hear anything about the restrictions.

Q Did you know the restrictions were on? A Counsellor told me regarding your letter that you wrote to him.

Q And before that you didn't know anything about restrictions? A No, sir, my deed didn't call for it.

Q You did know when Mr. Becker told you about it? A Yes.

Q Don't you remember the question coming up at the hearing? A No, sir; positively not.

Q Nothing was said? A No, not at the time I was there.

Q Weren't you there all the time? A Yes.

Q You came in a little late, didn't you? A I can not tell you the moment I came in; I was there all the time you were there.

Q I might have been there before you came in? A That I don't know. I found you there; when I came there you were there.

Q So I was there before you came in there? A Yes.

Q When was the last time you saw Mr. Becker—

The Witness: No, pardon me, I recall you was not there. I came there first. There was no one there but me—myself and Mr. Becker, if I can make that correction.

Q And during that time you heard nothing said at all about restrictions? A No, sir. The only thing, if you want me to tell that, you said to me that being the store is empty now, the restriction counts. If you remember that, you said that to me.

Q You are sure I said that? A That is when I left. I asked you what is the trouble why don't you draw the restriction; you said "Restriction?" I said, "You waived that." You said, "That is all right, but the tenant has moved and now the restriction counts." You said that to me while I was there.

Q You said I had waived that? A I didn't say who waived it, but you said it doesn't count; now you say it counts.

Q Did you hear the word "waived" mentioned on that day? A I am telling you what you said to me.

Q I am asking you whether you ever heard the word "waived" mentioned that day? A No.

Q Did you ever hear it mentioned before that time? A I wasn't there before that day; how could I hear it?

Q Did you ever hear it at any time mentioned before that day? A During the time I was with my counsellor, my counsel told me that you waived it in three letters you wrote, and you are ready to take title. That is all I know, that you are willing to take title, and you told me so yourself, and the reason you don't take it is because there is a store vacant and you are afraid they will move. You said the technicality of the restriction counts now.

Q You are sure I said that? A Yes; you said that to me.

Q I had quite an extended conversation with you? A As far as what you said to me.

HARRY D. HERSHENSON, a witness called for defendants, being duly sworn according to law, on his oath testified as follows:

Direct examination by Mr. Estrin.

Q Mr. Hershenson, are you secretary of the Rialto Realty Company? A Yes.

Q And were you secretary in February, 1926? A I was.

Q Were you present at the office of William N. Becker when the transaction with reference to property in Rowe street, East Orange, was being taken up? A I was a little bit late that day, and when I came in the transaction was pretty well along. In fact, I think they were arriving at the figures, and Mr. Wiederhorn asked me for the Building and Loan book, and I told him I got it at home, so I went back and got the book, and when I returned back to the office, Mr. Harrison asked me about the rents, did I collect the rents; so I said I collected all but the shoemaker, who had moved. When I mentioned that the shoemaker had moved, it seemed to make a little change in the atmosphere.

Q As a result of the change in the atmosphere, as you describe it, what happened? A Mr. Wiederhorn said to his counsel that he thinks he should consult his partner, and I believe they laid off the meeting until he could see his partner.

Q What question was he to see his partner about? A In regard to the rent. If I recollect, Mr. Wiederhorn said, "Well, I don't know about that. I don't know whether we would want it with the store vacant. You will have to see the partner about it."

Q Nothing else was objected to, was there?

A Not that I know of at that time.

Q And it was at the request of Mr. Wiederhorn that you left the office and went to get the book, is that right? A It was.

Q That was in the midst of the negotiations that you left the office to get the book? A Yes.

Q And they were figuring things over? A Yes.

Q Did you notice any figures being drawn by Mr. Becker in the presence of Mr. Wiederhorn and Mr. Herman? A Yes.

Q Do you know whether this is the paper that was drawn up at that time?

Objected to.

A I don't recall exactly that paper; I know that they had arrived at figures.

Q You were there while they were figuring? A Yes. In fact, the figures were pretty near all finished, all except the accounting for the rents.

Cross examination by Mr. Herman.

Q You are the secretary of that company? A Yes.

Q And when you signed this agreement, did you affix the seal to that? A I did.

Q You affixed the seal of your company. Is this your signature? A It is.

Q That is your seal? A Yes.

Q Sure of that? A Positive.

Q You are just as sure of that as you are of the rest of your testimony? A I am.

Q What representation did you make about this rent? Did you make any to anybody at all? A What time?

Q Before you entered into this contract? A I don't quite understand your question.

Q You said that there was one store rented to a shoemaker? A Yes.

Q And that he had a lease, is that right? A Yes, the shoemaker had a lease.

Q He had to pay so much rent a week? A Yes.

Q Have you got a copy of that lease? A I believe there is a copy among our files.

Q As a matter of fact, the shoemaker was there without any rent for the first three months? A No, we collected the rent.

Q Have you receipts for that? A Yes.

Q Sure of that? A Yes, I am positive. As a point of further information, Counsellor Becker—

The Court: There is no question pending. Don't volunteer anything.

Q How much rent did you represent to the buyers you were receiving for that place?

Objected to as not material.

Objection sustained.

PHILIP GLADSTONE, a witness called on behalf of defendants, being duly sworn according to law, on his oath testified as follows:

Direct examination by Mr. Estrin.

Q Mr. Gladstone, you were interested as the agent of the property on Rowe street, East Orange? A I was.

Q And as agent were naturally interested in seeing as to when the deal went through? A Yes.

Q Did you after February 23, 1926, see Mr. Wiederhorn? A I cannot say about the date, but I saw him on the street after the title was supposed to have passed; I was interested in the commission, of course.

Q Did you have a conversation with him? A I did.

Q What did he say with reference to the property and the question of passing title? A I asked him when they are going to take title; he said "I don't know as we are going to take title at all." I said, "What is the matter?" He said, "They misrepresented the rents." I said, "Who, they"? I said, "I am the only one that represented any rents on any property to you." I said, "In what way did I misrepresent?" He said, "Well, you told us," if I remember correctly I represented one store as bringing in $70 a month, another, at $75, and the shoemaker, at $35, and I said "I myself checked up on that," and my reason for it was because Mr. Aron was then—I was then in Mr. Aron's employ, because he was the partner of Mr. Dudley, so I naturally would be careful what I offered him, but I thought it was a good speculative piece of property, and I checked them up, and they were as represented; I saw the different tenants myself. The shoemaker did complain; that is the only comment I could get. So he said, "Well, I will let my attorney take care of that."

Q Did he say anything to you about refusing to take it on any other ground outside of the grounds you stated in the conversation you had with him? A No, sir, not to me.

Cross examination by Mr. Herman.

Q You are, of course, interested in the outcome of this suit? A Certainly.

Q And if the defendants are successful, you will get the commission? A I can answer that either way I think I am entitled to a commission; I made the sale.

Q What time did you see Mr. Wiederhorn? A Sometime after the title should have passed.

Q The title should have passed on February 1st according to the contract? A It was after that date.

Q How long after? A I cannot answer that under oath. One week—it might be one week or three weeks.

Q Would it be more than three weeks? A One-half to over a month; I was rather anxious about it.

Q And did Mr. Wiederhorn mention to you something about the restrictions that were on the property? A No. But perhaps anywhere from three to five months afterwards I stopped him on the street again and tried to show him where it was as good a piece of property as I thought it was the first time, and I said, "I don't see how you can refuse to take title, because we didn't buy it subject to rents." I said, "You bought a piece of property for speculation." I said, "I don't see why you use that for an excuse," and just outside of business we argued with him. I told him I didn't think he had a leg to stand on. He said, "Besides that, you know there is a restriction." I said, "A restriction?" He said, "Yes, it is restricted against factory." I said, "That is a joke, Mr. Wiederhorn; what occasion have you to want a factory there? The build-

ing is there and it is stores and apartments," and that is about the extent of our conversation.

Q When did this conversation take place? A I am just guessing, but I think it is nearly—I would say somewhere between three and five months after the title should have passed.

Q Nothing was said to you about not— A No, the only thing he said, that the rents were misrepresented, and that one tenant moved out, and that he believed one or two others would move out.

Q You inquired about three months after as to why you didn't get your commission? A Yes, I inquired from Mr. Becker.

Q What did Mr. Becker tell you? A He said they refused to take title on technicality, and I took it for granted that that was true. I didn't even ask; Mr. Wiederhorn told me.

Q He told you what? A That the rents were misrepresented.

Q Is that the technicality? A I don't know what term you would apply to it.

Q Is that all Mr. Becker told you, that Mr. Wiederhorn didn't take it on account of technicality? A He told me it was misrepresented. Mr. Becker said—to put it accurately, I would say that Mr. Becker said something to this effect, that the buyers claimed that the property was misrepresented, and on the strength of that, they wouldn't take it; they refused to take it, or something of that nature.

ABRAHAM M. HERMAN, a witness called on behalf of defendants, being duly sworn according to law, on his oath testified as follows:

Direct examination by Mr. Estrin.

Q You are a member of the Bar of New Jersey? A I am.

Q And in your capacity as attorney, did you in February, 1926, or prior thereto, represent the complainants in this matter with reference to property on Rowe street, East Orange? A I did.

Q Whom did you represent; both Mr. Aron and Mr. Wiederhorn? A I did.

Q And any questions with reference to the property were taken up by you with Mr. Becker? A Yes.

Q You are the Mr. Herman that wrote the letters that I now show you, Exhibits—

The Court: All the letters?

The Witness: Yes, that is true.

Mr. Estrin: We rest.

Mr. Herman: I move for a decree in favor of the complainants.

The Court: That motion will be denied.

Saul Aron, direct.

SAUL ARON, one of the complainants, being duly sworn according to law, on his oath testified as follows:

Direct examination by Mr. Herman.

Q You are one of the purchasers under agreement dated December 17, 1925—the agreement involved in this suit? A Yes, sir.

Q Where were you on or about February 1st, Mr. Aron? A I was in Florida for a greater part of February.

Q Do you recall when you got back? A Pretty well toward the end of the month.

Q Was there anything ever said to you in regard to certain restrictions on the property at 22 and 24 Rowe street? A Not until you called our attention to it from the search.

The Court: When was that?

The Witness: That was after I got back.

Q You can not place definitely the exact date, before or after the 23rd? A I think it was after that.

The Court: Is there anything by which you can determine that fact?

The Witness: Not exactly; it was after Washington's birthday when I got back.

Q You say the 23rd; was it that same day? A It was toward the end of the month. No, sir; it was after that.

Q Did you authorize Mr. Wiederhorn and Mr. Herman to waive any restrictions for you? A No, sir.

Saul Aron, cross.

Q You were not present at the closing? A No, sir, I was not.

Q Did you, as a matter of fact, at any time waive the restriction in the contract? A By no means.

Cross examination by Mr. Estrin.

Q Mr. Aron, as a matter of fact, were you at all interested in the property on or about Washington's Birthday? A Most assuredly.

Q Isn't it a matter of fact that you instructed Mr. Herman to have the deed made in the name of Mr. Wiederhorn, and that you were withdrawing from the transaction? A No.

Q It is not a fact? A No, sir.

Q Who handled this transaction for you all the way through? A How do you mean handled it?

Q I mean from the time the search was made until February 23, 1926. A Mr. Herman was my representative.

Q Then the question of restrictions was brought to your attention after February 23, 1926? A I believe so, yes, sir.

Q You knew nothing whatsoever about the question of restrictions before that; is that right? A I don't recall its having been mentioned.

Q Were you aware of the fact that on the 23rd of February, 1926, Mr. Herman and Mr. Wiederhorn went down to the office of William N. Becker for the purpose of taking title to the property? A I heard of it after I returned.

Q Of course, you knew beforehand that the title was supposed to have been taken on or about February 23, 1926, or possibly prior to that time? A Prior to that, I understood.

Examination by the Court.

Q Mr. Aron, was it with your knowledge and consent that Mr. Herman and Mr. Wiederhorn were going on with the settlement during your absence? A I hadn't any idea of it; I didn't know that the arrangement to close had been made for that; I was away and I had no idea what had taken place with reference to it until I returned.

Q Mr. Wiederhorn, he was acting with you? A Yes.

Q Was he acting for you in this matter? A No, sir; he couldn't very well take title to it without me, unless he took it alone.

Q Evidently he was going to take it alone, because the deed was drawn in his favor. A I had no such idea.

Q Who was to pay the money? A Both of us.

Q Had you prepared to put up any money at this time? A Only the deposit; I put that up.

Q You mean to say, then, that if the settlement had been made on the 23rd, there would have been a settlement without your authority? A Well, we had been doing business together, Mr. Wiederhorn and I, practically as partners, and we bought and sold property with each other's consent. I don't think there would have been any question if he had done it, but I didn't know at the time that he was going to do it. It wouldn't have mattered, though.

Q If he had done it, you would have approved? A Yes.

Q So, as a matter of fact, he was acting for you, so far as your interest was concerned? A Yes, I would say so.

Q And with your authority? A Yes.

Q Why didn't you say that in the first place? A I didn't quite understand it.

ABRAHAM M. HERMAN, a witness called on behalf of complainants, being duly sworn according to law, on his oath testified as follows:

Direct examination by Mr. Milton M. Unger.

Q Whom did you represent in this case, Mr. Herman? A I represented Mr. Aron and Mr. Wiederhorn.

Q Commencing what time? A I was their attorney for quite some time. They brought the contract in question sometime in the latter part of—I would say about the middle of January, and instructed me to proceed with the search of the abstract of title. I then notified Mr. Becker, on January 28, that I represented Mr. Aron and Mr. Wiederhorn, and that Mr. Aron—

Q In writing? A By writing. The letter is already in evidence as Exhibit C. 2. I notified him that I was instructed to have the title ready February 1st, but found it impossible, as I didn't have enough time, and that Mr. Aron was about to leave for Florida on the following Monday, and I therefore asked him to set the time for closing February 15th, subject, however, to the abstract being clear. On February 9th I notified Mr. Becker that I had just received my abstract of title, Exhibit D. 1, and there were certain questions raised, and also called his attention to a certain restriction in Book Y-64 of Deeds, page

593, and told him that I had not yet had time to take the restriction up with my clients, so I couldn't tell whether they would raise any serious objection to it or not.

Subsequently, I had a conversation with Mr. Becker over the phone. I told him that Mr. Aron was still in Florida; that I didn't know just what his attitude as to the restrictions would be, but we would have to wait until he returned, and Mr. Becker, if I recall correctly, insisted that title be closed, as the date of the closing was set down for February 1st. I told him it was impossible with Mr. Aron, and then it was suggested that title be taken in the one name, and we were to send it to Mr. Aron for an assignment of his interest in order to expedite the taking of title. We arranged the closing—I don't know whether it was on the 17th or 23rd.

Q Look at this letter which I show you. A We arranged for the closing on the 23rd. At that time I hadn't—I don't think I heard from Mr. Aron, and we met at Mr. Becker's office and there were some figures drawn up, subject to Mr. Aron's approval when he got back. He was expected back that day, or in a day of two. Then there was a question of rents which came up in our closing figures, and that was another reason for the adjournment.

Subsequently, when Mr. Aron did get back—I think he got back the next day or the same day, I don't recall—we had a conference, and Mr. Aron objected strenuously to taking title subject to that restriction. On the 26th I informed Mr. Becker by letter, Exhibit C. 3, asking him to advise me by return mail what his clients intended to do about the conveyance of the property.

"As I informed you yesterday when I made you a tender of the purchase price of the said property, my clients could not accept the deed unless the restrictions were removed. As your clients evidently can not convey according to their contract, my clients have elected to rescind the contract."

Cross examination by Mr. Estrin.

Q When the question of restrictions on record came up, you communicated with your client, Mr. Wiederhorn? A Yes, I spoke to Mr. Wiederhorn about it.

Q And after you spoke to him, you wrote to Mr. Becker, is that right? A I don't know whether it was after or before; I wrote to Mr. Becker just as soon as I received my abstract of title, and that was before any one of the letters. There is a letter on the 8th or 9th.

The Court: When the matter was first taken up, and then on the 17th, and in which the 23rd of February is fixed as the date of settlement, and in that letter it is stated that time is of the essence.

The Witness: It is also stated, if the Court please, in accordance with the terms and contents of the contract, so that was always in the minds of the complainants.

Q In the former letter you were very specific with reference to the question of restrictions, were you not? A I don't know what you mean by "specific;" I pointed out the book and page number.

Q And you said you were going to take it up with your clients? A True.

Q And you did take it up with your clients; is that right? A I took it up with Mr. Wiederhorn.

Q And after you took it up with him you arranged to close title on February 23? A That is true.

Q You later appeared, in the company of Mr. Wiederhorn, at the office of Mr. Becker for the purpose of taking title? A Prepared to take title according to the terms.

Q You appeared to close title; is that so or not? A Yes.

Q And you examined the deed that was shown to you by Mr. Becker? A I don't recall that; I may have; I don't recall examining it.

Q But you actually went into the figures and calculation of various items with reference to the property; is that so? A We went into some figures, yes; we didn't get into any final figure, because at that time Mr. Hershenson wasn't present.

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

Q At what point did the figuring stop in the so-called closing; over what point did it stop? A At the time of the closing Mr. Harrison was present; Mr. Hershenson wasn't present. The question of the title was raised; it was laid aside. The decision was made that we get to our figures and leave it to Mr. Hershenson when he got in, and see what he would say about it, and leave it to Mr. Aron when he got back, and we proceeded up to a calculation of the rents.

Q What was the object of going into all these calculations and figuring it when Mr. Aron, who

as you claim, was the party who was interested in it, was not there? A The object was—we were there for the purpose of getting all the questions cleared and having all the calculations, so there was no need of getting together again.

Q As a matter of fact, you came ready to close title, did you not? A Mr. Wiederhorn had some money with him, I believe.

Q To close title? A Yes.

Q And he was authorized to take title, is that right? A I can not say.

Q Mr. Herman, isn't it a fact that you actually informed Mr. Becker to draw the deed in the name of Mr. Wiederhorn? A I suggested that.

Q Will you answer the question? A I will try to answer it.

Q The question is, did you tell Mr. Becker to draw the deed in favor of Mr. Wiederhorn? A I say I did.

Q The question of rents did come up, did it not? A Oh, yes.

Q And there was a dispute there about that shoemaker? A And about several other tenants.

BOTH SIDES REST.

The Court: This bill is filed to rescind a contract of sale entered into between the defendant as vendor and the complainants as vendees.

The agreement provided for the sale of premises located in East Orange, New Jersey, to the complainants for the sum of $16,500. The property was to be conveyed clear of encumbrances.

This bill seeks to rescind that contract and impress a lien on the property for the down money.

The ground of rescission is that the property is subject to restrictions which were not in contemplation at the time of the contract, and which restrictions constitute an encumbrance on the land. It is admitted by the defendants that these restrictions are an encumbrance on the land which would warrant the rescission of the contract, if these restrictions had not been waived.

The defendants file a counter-claim asking for specific performance of the contract as written, on the ground that they were ready and willing to perform, and able to perform in accordance with the terms of the contract, except for the restrictions, and that the restrictions were waived by the purchasers.

This submits one single question of fact to the Court for decision on this bill and counter-claim.

I will advise a decree dismissing the bill of complaint, and will advise, further, the specific performance of the contract in accordance with the counter-claim.

I think that there can be no question, in view of the conduct of the parties, that the purchasers had actually waived the question of restrictions on this property. The question of restriction was raised by the attorney of the complainants, the purchasers. Immediately upon receipt of the abstract of title, after consultation with at least one of his clients, one of the purchasers, he fixed the time for closing, and that time was of essence for the closing. The original date for closing was February 1st; the postponed date for closing in accordance with the letter of the attorney of the purchasers, was February 23rd. At that time this attorney, with

one of his clients, Mr. Wiederhorn, who was authorized by the other to act for him, and on his behalf, appeared at the office of the attorney of the defendant vendor prepared for settlement. In accordance with instructions of the purchaser's attorney, a deed had been prepared and executed by the vendor conveying the property to Wiederhorn alone.

After going over the figures necessary for the settlement, a dispute arose as to the rents, and the complainant Wiederhorn and his attorney left the office of the vendor's attorney.

Later, on the same date, the complainant's attorney wrote a letter to the defendant's attorney, advising the defendant's attorney that they would be prepared for a settlement in accordance with the terms of the contract on December 17, and again calling defendant's attorney's attention to the restrictions of record.

This is the first time the restrictions of record had been mentioned since the letter of February 9th.

I am satisfied that the restrictions did not constitute a serious objection to the purchasers to the closing of this title, and that by their conduct they had waived any question of restrictions at the date fixed for closing, and I am satisfied that this is now seized upon only as an excuse for failure to perform on their part.

These are my reasons for saying that I will advise a decree.

Exhibit C. 1.

Exhibit C. 1.

ARTICLES OF AGREEMENT, made the Seventeenth day of December in the year of Our Lord One Thousand Nine Hundred and Twenty Five BETWEEN Rialto Realty Company, a corporation of New Jersey, having its principal office in the City of Newark in the County of Essex and State of New Jersey of the First Part;

AND Saul Aron, 62 Durchard St. East Orange Jacob Wiederhorn, 362-Halstead St. East Orange of the City of East Orange in the County of Essex and State of New Jersey of the Second Part;

WITNESSETH, That the said party of the first part, for and in consideration of the sum of Sixteen Thousand Five Hundred ($16,500.00) Dollars to be paid and satisfied as hereinafter mentioned, and also in consideration of the covenants and agreements hereinafter mentioned, made and entered into by the said party of the second part, doth agree to and with the said party of the second part, that the said party of the first part, will well and sufficiently convey to the said party of the second part, their heirs and assigns, by Deed of Warranty free from all encumbrance except as hereinafter mentioned. on or before the First day of February, 1926 next ensuing the date hereof, all that lot, tract, or parcel, of land and premises, hereinafter particularly described, situate, lying and being in the City of East Orange in the County of Essex and State of New Jersey KNOWN and designated as lots numbered three and four, Block 180 B as laid down on a map entitled "Map of Ampere Section of property of the East Orange

Exhibit C. 1.

and Ampere Land Company, in the City of East Orange, County of Essex and State of New Jersey, dated Oct. 11th 1909, made by William H. V. Reimer, C. E. and filed Jan. 11th 1910 in the office of the Register of the County of Essex, more particularly described as follows: BEGINNING at a point on the northerly side of Rowe Street, therein distant fifty feet and five hundredths of a foot westerly from a point formed by the intersection of the same with the westerly side of Newfield Street; and from thence running (1) westerly alg said side of Rowe Street, fifty feet and five hundredths of a foot to a point distant One hundred feet and ten hundredths feet easterly from Ampere Parkway; thence (2) Northerly and parallel with said Parkway seventy eight feet and thirty five hundredths of a foot; thence (3) Easterly and at right angles to Newfield Street, fifty feet; thence (4) Southerly parallel with the second course eighty feet and forty seven hundredths of a foot to said northerly side of ROWE Street and place of BEGINNING.

It is distinctly understood and agreed by and between the parties hereto that the party of the first part shall not be responsible to any agent or agents for any commissions whatsoever for the consummation of this sale.

Being the same premises known and designated as 22-24 Rowe Street, East Orange, N. J. having a building thereon consisting of three stores and two apartments in the rear thereof.

The sellers are to pay all assessments and public improvements completed or under construction at date of this agreement.

Exhibit C. 1.

And the said Saul Aron and Jacob Wiederhorn for themselves, their heirs, executors and administrators, doth covenant, promise and agree to and with the said party of the first part, its successors, heirs, executors, administrators and assigns, that they the said party of the second part, will pay and satisfy or cause to be paid and satisfied, unto the said party of the first part the said sum of Sixteen Thousand Five Hundred ($16,500.00) Dollars as and for the purchase money of the foregoing described land and premises, in the following manner, that is to say:

Deposit, receipt of which is hereby acknowledged	$ 1,000.00
Subject to a first mortgage now a lien upon said premises and held by the Seneca Building and Loan Association of Newark, N. J. in the nominal sum of	12,000.00
In cash on delivery of deed	3,500.00
	$16,500.00

Including the withdrawal value of the back shares and also including all apportionments which shall be paid by the party of the second part to the party of the first part.

And it is Further Agreed, by the parties to these presents, that the said party of the second part, their heirs and assigns, may enter into and upon the said land and premises on the First day of February, 1926 next ensuing the date hereof, and from thence take the rents, issues and profits to and their use.

And it is Further Agreed, by the parties hereto, that the said Deed of Warranty shall be delivered and received at the office of William N.

Exhibit C. 1.

Becker, 185 Market Street, Newark, N. J. between the hours of 9 in the forenoon and 5 o'clock in the afternoon on the said First day of March, 1926. next ensuing the date hereof.

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

In Witness Whereof, the said parties have hereunto interchangeably set their hands and seals the day and year first above mentioned.

RIALTO REALTY COMPANY, Inc.

By Benjamin Harrison Pres
President.

Benjamin Harrison

Signed, Sealed and Delivered
in the presence of
William N. Becker,

Attest
Harry D. Hershenson
(seal) Secretary.

AGREEMENT
for the
Sale of Property.

Rialto Realty Company, Inc.
a corporation of New Jersey
to
Saul Aron and Jacob Wiederhorn
Dated December 17, 1925

Exhibit C. 2.

Law Offices,
William N. Becker,
185 Market Street,
Newark, New Jersey

Exhibit C. 2.

ABRAHAM M. HERMAN
COUNSELLOR AT LAW
308 Main Street
ORANGE, N. J.
TELEPHONE 9190

January 28, 1926.

William N. Becker, Esq.,
185 Market St.,
Newark, N. J.

Dear Sir:

Please be advised that I represent Mr. Sol Aron and Mr. Jacob Wiederhorn, who have entered into a contract with the Rialto Realty Company, dated December 17, 1925, to purchase the property at 22 Rowe Street, East Orange, N. J. I have been instructed to have the title ready by February 1, but find it impossible to do so, as I have not as yet received my Abstract from my searcher. As Mr. Aron leaves for Florida Monday afternoon for a ten day stay, I ask you to set the time for closing for February 15, subject, however, to the abstract of title being clear.

Exhibit C. 3.

Will you kindly acknowledge receipt and advise me whether the date is satisfactory.

Yours very truly,
A. M. HERMAN

H:G

Exhibit C. 3.

ABRAHAM M. HERMAN
COUNSELLOR AT LAW
308 Main Street
ORANGE, N. J.
TELEPHONE 9190

February 26, 1926.

William N. Becker, Esq.,
185 Market St.,
Newark, N. J.

Dear Sir:

Will you please advise me by return mail what your clients intend to do about the conveyance of property to Mr. Sol Aron and Mr. Jacob Wiederhorn. (As I informed you yesterday when I made you a tender of the purchase price of the said property, my clients could not accept the deed unless the restrictions were removed. As your clients evidently cannot convey according to their contract, my clients have elected to rescind the contract.)

We expect to hold the Rialto Realty Co., and Mr. Benjamin Harrison, both parties to the contract, strictly accountable for all damages caused by the breach of this contract. Will you please advise me by return mail whether we can expect to come to some settlement as to the return of our

Exhibit C. 4.

money and expenses; otherwise I am instructed to take whatever steps are necessary to best protect the interests of my clients.

Yours very truly,
H:G ABRAHAM M. HERMAN

Exhibit D. 4.

THIS INDENTURE, Made the Fifteenth day of February in the year of our Lord One Thousand Nine Hundred and Twenty Six.

BETWEEN Rialto Realty Company, Inc. a corporation duly organized and existing under and by virtue of the laws of the State of New Jersey having its principal office in the City of Newark, County of Essex and State of New Jersey of the first part,

AND Jacob Wiederhorn of the City of East Orange in the County of Essex and State of New Jersey of the second part;

WITNESSETH, That the said party of the first part, for and in consideration of One Dollar and other good and valuable considerations lawful money of the United States of America, to the Corporation aforesaid well and truly paid by the said party of the second part, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged and the said party of the first part being therewith fully satisfied, contented and paid, has given, granted, bargained, sold, aliened, remised, released, enfeoffed, conveyed and confirmed and by these presents does give, grant, bargain, sell, alien, remise, release, enfeoff, convey and confirm to the

Exhibit C. 4.

said party of the second part, and to his heirs and assigns, forever, ALL that certain tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the City of East Orange, County of Essex and State of New Jersey.

KNOWN and designated as lots numbered three and four, Block 180 B as laid down on a map entitled "Map of Ampere Section of property of the East Orange and Ampere Land Company, in the City of East Orange, County of Essex, New Jersey, dated October 11th 1909, made by William H. V. Reimer, C. E. and filed Jan. 11th 1910 in the office of the Register of the County of Essex, more particularly described as follows:

BEGINNING at a point on the northerly side of Rowe Street, therein distant fifty feet and five hundredths of a foot westerly from a point formed by the intersection of the same with the westerly line of Newfield Street, and from thence running (1) Westerly along said side of Rowe Street, fifty feet and five hundredths of a foot to a point distant one hundred feet and ten hundredths feet easterly from Ampere Parkway; thence (2) Northerly and parallel with said Parkway seventy eight feet and thirty five hundredths of a foot; thence (3) Easterly and at right angles to Newfield Street, fifty feet; thence (4) Southerly parallel with the second course eighty feet and forty seven hundredths of a foot to said northerly side of Rowe Street and the place of BEGINNING.

BEING the same premises conveyed to the party of the first part by deed dated September 30th 1925, and recorded in the Essex County Register's Office in Book R-72 Page 569.

Exhibit C. 4.

SUBJECT to a first mortgage held by the Seneca Building & Loan Association in the nominal sum of Twelve Thousand ($12,000.00) Dollars, also subject to monthly tenancies.

SUBJECT to restrictions and Zoning Ordinances on record, if any.

TOGETHER with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

AND ALSO all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in or to the above described premises, and every part and parcel thereof, with the appurtenances.

TO HAVE AND TO HOLD all and singular, the above mentioned and described premises, together with the appurtenances, unto the said party of the second part, his heirs and assigns, to own proper use, benefit and behoof forever.

AND the said party of the first part for itself, its successors in office or assigns does covenant, grant and agree, to and with the said party of the second part, his heirs and assigns, that the said party of the first part at the time of the sealing and delivery of these presents, was lawfully seized in its own right of a good, absolute, and indefeasible estate of inheritance in fee simple, of and in all and singular the above granted, bargained and described premises, with the appurtenances and has good right, full power and lawful authority to grant, bargain, sell and convey the same in manner and form aforesaid.

Exhibit C. 4.

AND that the said party of the second part, his heirs and assigns, shall and may at all times hereafter, peaceably and quietly have, hold, use, occupy, possess and enjoy the above granted premises, and every part and parcel thereof, with the appurtenances, without any let, suit, trouble, molestation, eviction or disturbance of the said party of the first part, its successors in office or assigns, or of any other person or persons lawfully claiming or to claim the same.

AND that the same now are free, clear, discharged and unencumbered of and from all former and other grants, titles, charges, estates, judgments, taxes, assessments and incumbrances of what nature and kind soever.

AND ALSO, that the said party of the first part and its successors in office or assigns, and all and every other person or persons whomsoever, lawfully or equitably deriving any estate, right, title or interest of, in or to the hereinbefore granted premises, by, from, under or in trust for it or them, shall and will at any time or times hereafter, upon the reasonable request, and at the proper costs and charges in the law, of the said party of the second part, his heirs and assigns, make, do and execute, or cause or procure to be made, done or executed, all and every such further and other lawful and reasonable acts, conveyances and assurances in the law for the better and more effectually vesting and confirming the premises hereby intended to be granted, in and to the said party of the second part, his heirs and assigns forever, as by the said party of the second part, his heirs or assigns, or counsel learned in the law, shall be reasonably advised or required.

Exhibit C. 4.

And the said party of the first part, its successors in office or assigns, the above described and hereby granted and released premises, and every part and parcel thereof, with the appurtenances, unto the said party of the second part, his heirs and assigns, against the said party of the first part, and its successors in office or assigns, and against all and every person or persons whomsoever, lawfully claiming or to claim the same, shall and will warrant and by these presents forever Defend.

In Witness Whereof, the said party of the first part hath caused its corporate Seal to be hereto affixed and attested by its Secretary, and these presents to be signed by its President, the day and year first above written.

RIALTO REALTY COMPANY, Inc.

Benjamin Harrison
President

Signed, Sealed and Delivered
In the Presence of
(seal) William N. Becker

Attest:
Harry D. Hershenson
Secretary

Exhibit C. 4.

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

Be it Remembered That on this Fifteenth day of February in the year of our Lord One Thousand Nine Hundred and Twenty Six, before me, the subscriber, a Master in Chancery of New Jersey personally appeared Harry D. Hershenson who, being by me duly sworn on his oath, says that he is the Secretary of the Rialto Realty Company, Inc. the grantor named in the within instrument; that Benjamin Harrison is the President of said corporation; that deponent well knows the corporate seal of said corporation; and the seal affixed to said Instrument is such corporate seal and was thereto affixed, and said Instrument signed and delivered by said President, as and for his voluntary act and deed and as and for the voluntary act and deed of said corporation, in presence of deponent, who thereupon subscribed his name thereto as witness.

HARRY D. HERSHENSON

Sworn and subscribed before me,
at Newark the date aforesaid
William N. Becker
M. C. C. of N. J.

DEED

Rialto Realty Company, Inc.
To
Jacob Wiederhorn
Dated February 15, 1926
Received in the Office of the
County of on the day

Exhibit D. 1.

of A. D., 19 , at
o'clock, in the noon, and Recorded
in Book of DEEDS for said
County, on page

Return to
William N. Becker,
185 Market Street,
Newark, N. J.

Exhibit D. 1.

ABRAHAM M. HERMAN
COUNSELLOR AT LAW
308 Main Street
ORANGE, N. J.
TELEPHONE 9190

February 9, 1926.

William M. Becker, Esq.,
185 Market Street,
Newark, N. J.

Re: Rialto Realty Co. to Soul Aron & Wiederhorn.

Dear Mr. Becker:

I find it impossible to close title in the above matter before February 15th, I will be ready anytime on that day suitable to you.

I have just received my abstract of title and the following question has been raised: "Were grantors in S-24-23 and T-18-525 all the heirs at law of Daniel Evertz?" Is it possible to get an affidavit from anyone of the children of Daniel Evertz, so this point might be cleared.

Exhibit D. 2.

I will also call your attention to a restriction in Book Y-64 page 593. I have not had a chance to take this restriction up with my clients so I can not tell whether they will raise any serious objection to it.

Very truly yours,
A. M. HERMAN.

AH:B
Don't apply—

Exhibit D. 2.

ABRAHAM M. HERMAN
COUNSELLOR AT LAW
308 Main Street
ORANGE, N. J.
TELEPHONE 9190

February 17, 1926.

William N. Becker, Esq.,
185 Market St.,
Newark, N. J.

Dear Sir:

My clients, Mr. Sol Aron and Mr. Jacob Wiederhorn are ready to close title of the premises known as 22-24 Rowe Street, East Orange, in accordance with the contract dated December 17, 1925. We will call at your office at three o'clock Tuesday, February 23, prepared to close title in accordance with the terms and conditions of the contract. It must be understood that time is of the essence of this agreement to postpone the date of closing.

Exhibit D. 3.

Will you please advise whether this arrangement is satisfactory, and oblige

Your very truly,

ABRAHAM M. HERMAN.

H:G

Exhibit D. 3.

Postmarked:
Orange, N. J.
Feb. 23, 1926, 8 P. M.

ABRAHAM M. HERMAN
COUNSELLOR AT LAW
308 Main Street
ORANGE, N. J.

William N. Becker, Esq.,
185 Market St.,
Newark, N. J.

Exhibit D. 3.

ABRAHAM M. HERMAN
COUNSELLOR AT LAW
308 Main Street
ORANGE, N. J.
TELEPHONE 9190

February 23, 1926.

William N. Becker, Esq.,
185 Market St.,
Newark, N. J.

Dear Sir:

I have your letter of February 19, setting a date of closing for the premises known as 22-24

Exhibit D. 3.

Rowe Street, East Orange, from the Rialto Realty Co., to Sol Aron and Jacob Wiederhorn, in accordance with the terms of the contract dated December 17, 1925. This is satisfactory to my clients, and we will be there at three o'clock on Thursday afternoon prepared to take title in accordance with the terms of the contract aforesaid.

I wish to call your attention again to the restrictions of record as set forth in Book Y 64 of Deeds for Essex County page 593. I trust that same will be cleared before we are ready to close.

Yours very truly,

ABRAHAM M. HERMAN.

H:G

OPINION OF VICE-CHANCELLOR.

Filed February 19, 1927.

IN CHANCERY OF NEW JERSEY.

Between

SAUL ARON, *et al.*, *Complainants,*

and

RIALTO REALTY COMPANY, *et al.*, *Defendants.*

On Bill, &c.

On Final Hearing.

Conclusions.

Mr. Abraham M. Herman for complainants.

Mr. Michael Estrin and Mr. William N. Becker for defendants.

BERRY, *V.-C.*

This bill is filed by the vendees under a contract of sale of lands against the vendors and seeks to impress a lien on the lands in question for the down money and search fees on the ground that the contract provides for a conveyance clear of all encumbrances and that an examination of the title showed the premises subject to certain building restrictions which have not been removed. It is admitted by the defendants that these restrictions are an encumbrance on the land, and would warrant a rescission of the contract except for the fact that the condition of the contract providing for a conveyance clear of encumbrance, so far as violated by these restrictions, has been waived by the complainants.

The defendants, the vendors, filed a counterclaim asking for the specific performance of the contract on the ground that they were ready, willing and able to perform in accordance with the terms of the contract, except for the restrictions, and that these restrictions were waived by the purchasers. At the final hearing it was admitted by all parties that there was but a single question of fact to be submitted to the Court for decision; namely, that of waiver of the building restrictions, and the case was tried on this theory.

The facts as I find them from the testimony are as follows: The contract of sale was dated December 17, 1925, and provided for settlement on February 1, 1925. On January 28th, Mr. Herman, who was acting for the complainants, the vendees, wrote to Mr. Becker, who represented the vendors, asking for an extension of the time for settlement until February 15th. There appears to have been no written reply to that letter, at least none was offered in evidence. Under date of February 9, 1925, Mr. Herman wrote to Mr. Becker advising him that it would be impossible for him to close title before February 15th, but that he would be ready on that date. In that letter he called attention to the building restrictions in question and said, "I have not had a chance to take this restriction up with my clients so I cannot tell whether or not they will raise any serious objection to it." After the receipt of this letter Mr. Becker called Mr. Herman on the telephone and had a conversation with him with respect to the building restrictions and other title exceptions mentioned in the letter. Mr. Herman then, in effect, told Mr. Becker that no objection would be made to the restrictions and Mr. Becker at that time made a note on the

margin of the letter opposite the paragraph referring to them, "Don't apply." As a consequence of this conversation Mr. Becker paid no further attention to these restrictions. Subsequent negotiations between the attorneys of the respective parties resulted in a further postponement of the day of settlement to February 23rd and by agreement time was then made of the essence of the contract. Mr. Aron, one of the vendees, was then in Florida, but he had fully authorized his partner, Mr. Wiederhorn, to act for him. Complainant's solicitor instructed defendant's solicitor to prepare the deed in favor of Wiederhorn alone. On February 23rd all parties except Mr. Aron met at Mr. Becker's office for the purpose of closing title. The deed prepared and executed in accordance with the instructions of complainant's solicitor was produced and what immediately followed is best stated by Mr. Becker in his testimony, which was uncontradicted, and which is as follows:

> "As soon as Mr. Herman came in I said, 'Now, it is definitely understood there is no question of restrictions?' He said, 'Certainly.' I said, 'Well, here is the deed.' He took the deed that I had prepared, which was signed on the fifteenth, the day originally set for closing of title and postponed it—the original date was February 1st. He examined the deed, approved of it, and said it was perfectly satisfactory, and he asked Mr. Wiederhorn for a certified check and Mr. Wiederhorn handed him a certified check, and he put the certified check on top of the deed and laid them aside. He said, 'Now, let us go into the figures of cost.' I gave

> him a yellow paper with a memorandum on it, and I drew up one myself, and I have got here a copy of the figures that we went into."

During the course of the adjustment calculations a question arose involving a half month's rent of one of the tenants, which resulted in an *impasse*. Mr. Wiederhorn then suggested a postponement of settlement for two days in order to give him an opportunity to consult Mr. Aron about this question of rent and an adjournment was taken accordingly. No other question respecting the title was raised at this meeting. The following day Mr. Becker received from Mr. Herman the following letter:

"Abraham M. Herman
Counsellor at Law
308 Main Street
Orange, N. J.
Telephone 9190

February 23, 1926.

William N. Becker, Esq.
185 Market Street,
Newark, N. J.

Dear Sir:

I have your letter of February 19, setting a date of closing for the premises known as 22-24 Rowe Street, East Orange, from the Rialto Realty Co. to Sol Aron and Jacob Wiederhorn, in accordance with the terms of the contract dated December 17, 1925. This is satisfactory to my clients, and we will be there at three o'clock on Thursday afternoon prepared to take title in accordance with the terms of the contract aforesaid.

I wish to call your attention again to the restrictions of record as set forth in Book Y-64 of Deeds for Essex County, page 593. I trust that same will be cleared before we are ready to close.

Yours very truly,

H-G. ABRAHAM M. HERMAN."

The envelope containing this letter, which was also introduced in evidence, was postmarked February 23, 1926, 8 P. M. This was the evening of the day of the meeting which resulted in an *impasse*. On February 26, 1926, Mr. Herman wrote to Mr. Becker advising him that his clients elected to rescind the contract on account of the restrictions and informed him that both of the defendants would be held strictly accountable in damages for breach of the contract.

The deed which was prepared for tender contained a provision that the conveyance was "subject to restrictions and zoning ordinances on record, if any." The building now constructed on the land in question does not violate the building restrictions, and they expire by their own limitation in 1928.

The complainants rely mainly on the case of Goldstein *v.* Erlich, 96 N. J. Eq. 52, in support of their contention that they had a right to rescind any time before final settlement, claiming the right to change their minds with respect to the restrictions on the authority of that case. There Vice-Chancellor Backes said:

"There were negotiations, and it was arranged that the complainant would take title upon the defendant giving an indemnity

bond. The complainant claims that the defendants refused to give the bond, while the defendants insist that the complainant refused to take it. I need not decide this issue of fact. The complainant was entitled to the property according to the terms of the contract. He was not bound to take the bond. If he, in fact, consented to take it in lieu of a good title, he had the right to change his mind."

This language is seized upon in support of the complainants' contention, but I do not understand that case to decide the point here in issue at all. The question of waiver was not there involved. What was involved was a new contract in substitution of the original, and the new contract was without any consideration. Of course, the parties had a right to stand on the real contract. Here no new or substituted contract is involved; there is merely a question of the waiver of one of the conditions of a contract.

Practically all other authorities cited by both complainants and defendants involved the question of estoppel and not of waiver. While the terms estoppel and waiver have been frequently and loosely used interchangeably, they are not convertible terms. 27 R. C. L. 905. "Waiver" is the voluntary relinquishment of a known right, while "estoppel" consists of a preclusion which in law prohibits a party from alleging or denying a fact in consequence of his own previous act, averment or denial. Gilbert *v.* Globe Insurance Co., 91 Oregon 59; 174 Pac. Rep. 1161; 3 A. L. R. 205. There is a further distinction and that is with respect to the right to lift the ban of a waiver or estoppel. Where a party relinquishes

a known right awarded him by contract, he can not, without the consent of his adversary, reclaim it. But the ban of an estoppel may be lifted by the party against whom it was invoked by giving the proper notice. IBID.

> "To make out a case of waiver of a legal right, there must be a clear, unequivocal, and decisive act of the party showing such a purpose or acts amounting to an estoppel on his part. A waiver, to be operative, must be supported by an agreement founded on a valuable consideration, or the act relied on as a waiver must be such as to estop a party from insisting on performance of the contract or forfeiture of the condition." 27 R. C. L. 909-10, Title "Waiver."

See also *Maier* v. *Wallace,* 211 Mo. Appeals 454; 244 S. W. Rep. 945.

At the conclusion of the hearing in this cause I announced that in my judgment the complainants had waived the question as to building restrictions and that I would advise a decree for the defendants on their counter-claim. Complainant's solicitor then requested permission to file a brief pending the submission of form of decree. Both sides have now filed briefs, and I am of the same opinion still. But a further examination of the testimony and exhibits in this cause leads me to suggest another reason for advising a decree for the defendants on their counter-claim. There would seem to be no difficulty in spelling out a consideration for the waiver of the building restrictions, as, apparently, there was considerable give and take on both sides of this controversy. For instance, several extensions of time for settlement were granted

by the defendants to the complainants and these extensions may have afforded the consideration for the waiver; but aside from that, there is, in my judgment, sufficient here to work an estoppel.

It has been held that a party to a written contract who has by some affirmative action led the other party to believe and act on that belief, that he will not be held to a strict performance of the covenants, will be estopped in equity from requiring a strict performance of that covenant. Worrell *v.* Forsythe, 141 Ill. 22, 30 N. E. 673. Becker *v.* Becker, 250 Ill. 117, 95 N. E. 70. As above indicated, the restrictions here in question were of small import. They were against factory construction. The lands here had already been built upon and the restrictions had not been violated. The restrictions will expire by their own limitation within a short period. If the vendees had not led the vendors to believe that there would be no objection because of these building restrictions, it is quite conceivable that the vendors might have had them removed prior to settlement. But from the date of the telephone conversation following the letter of February 9th, which has already been referred to, there was never any suggestion or intimation by the vendees that they objected in the slightest degree to these restrictions, and this attitude continued right up to the time the dispute arose respecting the rents. At that time the deed prepared in accordance with the directions of the vendors through their attorney had been submitted to and approved by him. After the vendor's vigilance was disarmed by what was at least an apparent waiver, this Court would become a party to a fraud to permit complainants to profit by their deception. Under these cir-

cumstances, I conceive it to be my duty to advise a decree for specific performance. It is quite apparent that the building restriction was finally seized upon as an excuse and not as a reason for non-performance.

Heard January 10, 1927.
Submitted January 25, 1927.

Decided February 11, 1927.

TAXED BILL OF COSTS.

Filed April 22, 1927.

IN CHANCERY OF NEW JERSEY.

Between
SAUL ARON, *et als.*,
Complainants,
and
RIALTO REALTY COMPANY, *et als.*,
Defendants.

COSTS OF DEFENDANT.

	S & C	Ch Clk.	Als
Ret. fee for Sol. & counsel	4.00		
Drawg and eng. answer & c. c.	11.40		
Filg answer and counterclaim		.06	
Drawg. eng. and filg. replication	.60	.06	
Counsel on hearing	4.00		
Drawg. & eng. costs	.80		
Taxg. and filg. costs and copy		.70	
	20.80	.82	
Taxed at $21.62 as between sol. and client	.82		
	$21.62		

April 22, 1927.
THOMAS BARBER,
Clerk.

A true copy.
W. N. Becker.

FINAL DECREE.

Filed May 17, 1927.

IN CHANCERY OF NEW JERSEY.

Between SOL ARON and JACOB WIEDERHORN, *Complainants,* *and* RIALTO REALTY CO., INC., a corporation of New Jersey, *Defendant.*	*On Bill, etc. Decree for Specific Performance.*

This cause coming on to be heard in the presence of Abraham M. Herman, solicitor of complainants, and William N. Becker, solicitor, and Michael Estrin, of counsel of the defendant, the Court having examined the pleadings and having taken proofs orally and in open court and heard and considered the arguments of counsel thereon; and it appearing to the satisfaction of the Court, that the defendant, Rialto Realty Co., Inc., a corporation of New Jersey were, on the 17th day of December, 1925, seized in fee simple of all that certain lot, tract or parcel of land and premises situate, lying and being in the City of East Orange, County of Essex and State of New Jersey.

BEING known and designated as lots numbered Three and Four, Block 180 B as laid down on a map entitled "Map of Ampere Land Company, in the City of East Orange, County of Essex and State of New Jersey,

dated Oct. 11, 1909, made by William H. V. Reimer, C. E. and filed Jan. 11, 1910, in the office of the Register of the County of Essex," more particularly described as follows:

BEGINNING at a point on the northerly side of Rowe street, therein distant fifty feet and five hundredths of a foot westerly from a point formed by the intersection of the same with the westerly line of Newfield street, and from thence running (1) Westerly along said side of Rowe street, fifty feet and five hundredths of a foot to a point distant one hundred feet and ten hundredths of a foot easterly from Ampere Parkway, thence (2) Northerly and parallel with said Parkway seventy eight feet and thirty five hundredths of a foot; thence (3) Easterly and at right angles to Newfield street, fifty feet; thence (4) southerly parallel with the second course eighty feet and forty seven hundredths of a foot to said northerly side of Rowe street and the place of BEGINNING.

That on the 17th day of December, 1925, the said complainants, Saul Aron and Jacob Wiederhorn, entered into an agreement in writing with the defendant, Rialto Realty Co., Inc., wherein and whereby said defendants agreed to convey the said lands and premises by Deed of Warranty, on or before the 1st day of February, 1926, to the said Saul Aron and Jacob Wiederhorn, and that said Saul Aron and Jacob Wiederhorn agreed to pay therefor the sum of Sixteen Thousand Five Hundred ($16,500.00) Dollars, by the payment of One Thousand ($1,000.00) Dollars, which was paid at the execution of said

agreement, by taking the premises subject to a first mortgage lien upon said premises held by the Seneca Building and Loan Association of Newark, New Jersey, in the sum of Twelve Thousand ($12,000.00) Dollars, and by the payment of the remainder of the purchase price upon the delivery of said Deed by payment of Three Thousand Five Hundred ($3,500.00) Dollars in cash, including the withdrawal value of the back shares of the Seneca Building and Loan Association of Newark and also including all apportionments; the said title to be passed on the 1st day of February, 1926.

And it further appearing to the satisfaction of the Court, that the said complainants have refused and failed to perform the said agreement on their part, and that the defendant has always been and is still ready and willing in all things to comply with the terms of the said agreement on its part, subject to the restrictions of record and the zoning ordinances which were waived by the complainants; and the Court being of the opinion that the defendant is entitled to the specific performance of the aforesaid agreement as prayed for by it in its counter-claim filed therein, subject to the zoning laws and restrictions of record.

And it is on this 17th day of May ORDERED, ADJUDGED and DECREED that the said agreement be in all things specifically performed by the said complainants, and that the said complainants on the 17th day of June, at the hour of ten o'clock in the forenoon, at the office of William N. Becker, 17 Academy street, in the City of Newark, County of Essex and State of New Jersey, pay to the said defendant the sum of Three Thousand Nine Hundred and Eighty-three Dollars and

Seventy-nine ($3,983.79) cents, which sum represents the amount of money due to the defendant after apportionments made as of the 1st day of February, 1926, and in addition thereto the sum of One Thousand One Hundred and Twenty-six Dollars and Seventy-four ($1,126.74) cents, which represents the additional sum due after apportionments made from the said first day of February, 1926, to the seventeenth day of May, 1927, together with the taxed costs of this suit as hereinafter allowed, and at the same time and place upon the delivery by said defendant, Rialto Realty Co., Inc., to said complainant, Jacob Wiederhorn of the Warranty Deed dated the 15th day of February, 1926, which was duly executed and acknowledged by the said defendant conveying to the said Jacob Wiederhorn the said lands and premises in fee, subject to restrictions of record and zoning ordinances, and subject to the lien of the mortgage held by the Seneca Building and Loan Association.

It is further ORDERED, ADJUDGED and DECREED, that if, at the time and place hereinbefore mentioned, the said complainants shall fail or neglect to pay the said sums of Three Thousand Nine Hundred Eighty-three Dollars and Seventy-nine ($3,983.79) cents with interest as hereinbefore mentioned, plus the sum of One Thousand, One Hundred and Twenty-six Dollars and Seventy-four ($1,126.74) cents, together with said taxed costs as hereinbefore mentioned, upon the tender of said Deed, the aforesaid sum of Five Thousand, One Hundred Ten Dollars and Fifty-three ($5,110.53) cents with interest as aforesaid together with the taxed costs of this suit as hereinbefore mentioned, shall be and become and are hereby impressed as a lien upon the said lands

and premises in fee of the said complainants to the end, that said lands and premises may be sold, pursuant to law, and under the direction of this Court satisfy such lien, and that in case a deficiency should arise upon such sale, the said complainants may be ordered by this Court to pay for such deficiency.

It is further ordered that the said complainants pay to the said defendant the costs of this suit to be taxed, including a counsel fee of Three Hundred Dollars which is hereby allowed to said defendant.

It is further ordered that true, but uncertified copies of this decree and of said taxed costs be served on the solicitor of said defendant within three days from the date hereof.
Respectfully advised,

MAJA LEON BERRY,
V.-C.

A true copy.

WILLIAM N. BECKER.

NOTICE OF APPEAL.

Filed June 3, 1927.

IN CHANCERY OF NEW JERSEY.

Between	
SOL ARON and JACOB WIEDERHORN, *Complainants,*	*On Bill, &c.*
and	*Notice of Appeal.*
RIALTO REALTY CO., a corporation of New Jersey, *Defendants.*	

The complainants Sol Aron and Jacob Wiederhorn appeal from the final decree made by the Chancellor in the above-entitled cause on May 17, 1927, on the advice of Vice-Chancellor Maja L. Berry, and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all causes.

Dated June 1, 1927.

ABRAHAM M. HERMAN,
Solicitor for and of Counsel with Complainants.

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

ABRAHAM M. HERMAN,
Of Counsel with Complainants.

PETITION OF APPEAL.

Filed June 18, 1927.

NEW JERSEY COURT OF ERRORS AND APPEALS.

SOL ARON and JACOB WIEDERHORN, *Complainants-Appellants,* *vs.* RIALTO REALTY COMPANY, INC., a corporation of New Jersey, and BENJAMIN HARRISON, *Defendants-Appellees.*	*On Appeal from the Court of Chancery.* *Petition of Appeal.*

Petitioners Sol Aron and Jacob Wiederhorn, the appellants in the above-entitled matter, respectfully show that:

1. Petitioners find themselves aggrieved by the final decree made in the Court of Chancery by His Honor Edwin Robert Walker, Chancellor of the State of New Jersey, upon the advice of Vice-Chancellor Maja L. Berry, dated May 17, 1927, in a certain cause in the said Court of Chancery, wherein the said Sol Aron and Jacob Wiederhorn are complainants, and the said Rialto Realty Company, Inc., and Benjamin Harrison were defendants, in this respect, to wit:

That the said decree adjudges that the said Sol Aron and Jacob Wiederhorn specifically perform a certain agreement dated December 17, 1925, subject however, to restrictions of record and zoning ordinances; and that the said Sol Aron and Jacob Wiederhorn pay the said Rialto

Realty Company, Inc., the sum of $3,983.79, and an additional sum of $1,126.74, and appeals from the decree of the Chancellor, which decrees as aforesaid, upon the ground that the same is erroneous in that:

1. It is against the weight of evidence.

2. It imposes upon these complainants an entirely new agreement, by specifically decreeing that these complainants purchase property subject to restrictions of record and zoning ordinances, although said terms are not in the agreement.

3. It does not dispose of the suit of these complainants asking for rescission of the contract and return of the down money.

4. It does not adjudge that these complainants be entitled to the return of the down money and the counsel fee, and that these complainants were entitled, as a matter of law to the return of the down money and of the search fees and expense.

5. The defendants-appellees did not, in their counter-claim, set up any waiver of restrictions by the complainants, and that as a matter of fact, it is specifically set out that the defendant Rialto Realty Company, Inc., has always been ready, willing, and now tender themselves ready and willing to perform their part of the contract, according to the terms thereof.

6. It is based upon the conclusion of the Chancellor that the restrictions in question, and admittedly on the premises, were of small import, and that said conclusion is not founded upon any evidence, and as a matter of law, is erroneous and prejudicial to these appellants.

7. The motion for decree in favor of the complainants at the end of the defendant's case on the counter-claim was denied.

8. The decree is erroneous in that the pleadings by the defendants seek to reform the agreement in question, and then seek, by a separate bill in the same order, for specific performance, and the Court errs in decreeing specific performance on a contract to purchase real estate where the marketability of the title depends on the establishment of the fact, and that fact is in reasonable doubt.

9. It is based on the conclusion of the Chancellor that the postponement of closing of title, spells out a consideration for the waiver of the building restriction, when, as a matter of fact and law, defendants-appellees were not ready and able to convey on February 1, 1927, the date alleged to be set for closing, or any date since.

10. The Court below admitted parol evidence to vary the terms of a written contract.

11. It is based on the conclusion of the Court below, that the extension of closing of title, was sufficient consideration to work an estoppel.

12. It is based on the conclusion that knowledge of the restrictions, and appearance at the office of the solicitor of defendants-appellees, was conduct sufficient to constitute a waiver.

13. It decrees that the complainant-appellant, Sol Aron, accept a deed conveying the property to Jacob Wiederhorn, and pay the consideration therefor, although the evidence discloses no assignments from Jacob Wiederhorn to Sol Aron.

14. Neither the complainant Jacob Wiederhorn, or the attorney, had any authority, express or implied, to change and alter the contract to the prejudice of the complainant Sol Aron.

15. It is based on the evidence that the solicitor of the complainants-appellants had a conversation on the telephone with the solicitor of the defendants-appellees, and in effect told the solicitor of the defendant that no objection would be made to the restriction; and there is no evidence that the solicitor of the complainant had any authority, express or implied, to make an arrangement binding on his principal.

16. That the amount mentioned in the decree was arbitrarily settled, without evidence or opportunity of the complainants-appellants to examine the correctness thereof.

Petitioners therefore pray that the said decree of the said Chancellor may be wholly reversed, set aside, and for nothing holden, and that the Chancellor be instructed to decree in favor of the complainants, that the defendants-appellees return to the complainants-appellants the down money, search fee and disbursements sustained by the complainants-appellants; and that the petitioners may have such other relief of the premises as to this Court shall seem proper.

ABRAHAM M. HERMAN,

Solicitor of Complainants-Appellants.

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

Between

SAUL ARON and JACOB WIEDERHORN,
Complainants-Appellants,

and

RIALTO REALTY COMPANY, a corporation of New Jersey, and BENJAMIN HARRISON,
Defendants-Appellees.

BRIEF FOR COMPLAINANTS-APPELLANTS.

Facts.

This is a suit by the complainants for the rescision of a certain contract for the purchase of property, made between the complainants and the defendants, and the return of their deposit of one thousand dollars ($1,000), together with reasonable search fees and costs. The contract called for the conveyance of certain property in the City of East Orange, County of Essex and State of New Jersey, free and clear of all encumbrances, except a building and loan mortgage. It is admitted that there are certain restrictions of record.

The defendants, in their answer, deny that the premises were to be conveyed free from all encumbrances except a first mortgage held by the Seneca Building and Loan Association (State of Case, p. 5, par. 2, answer), and further set up that the restrictions are not an encumbrance upon the premises mentioned in the bill of complaint. As a separate defense, defendants af-

firmatively allege that complainants were to accept the conveyance of the premises subject to restrictions and zoning ordinances of record, if any; and further affirmatively allege that the said restrictions appearing of record are not encumbrances against the said premises; and also allege that the complainants waived the restrictions of record by appearing at the office of the attorney of the defendants, and agreeing to accept the deed for said premises subject to restrictions appearing of record, and then allege that complainants refused to accept the said deed to said premises (State of Case, pp. 6-7, pars. 3, 4, 5).

The defendants then allege (par. 7 of the defense), that the complainants were orally informed that the above described premises were to be conveyed subject to restrictions appearing of record and zoning ordinances, if any.

Defendants then filed a counter-claim, seeking a reformation of the agreement, by adding thereto that the premises were to be conveyed subject to restrictions appearing of record (State of Case, pp. 8, 9, 10). Defendants then filed an additional counter-claim, seeking specific performance, and alleging that on the 1st day of February, 1926, between the hours of nine o'clock in the forenoon and five o'clock in the afternoon, the defendant Rialto Realty Co., duly attended at the office of William N. Becker, 185 Market street, Newark, with a warranty deed covering the lands and premises hereinabove referred to, to the said Saul Aron and Jacob Weiderhorn, duly executed and acknowledged by the defendant, Rialto Realty Co., Inc., for the purpose of delivery of said deed to the said Saul Aron and Jacob Wiederhorn, on the payment of the purchase money, pursuant to the terms of the afore-

said agreement; but that the said Saul Aron and Jacob Wiederhorn, did not appear at the said time and place. Defendants further allege that they have been ready and are willing to perform their part of the said agreement (State of Case, pp. 10, 11, 12, 13, 14). At the hearing, the defendants agreed that the defense filed by them that the restrictions were not an encumbrance, was not a good defense, and the defense was thereupon stricken out.

Under the rule of the Equity Court, defendant was then called upon to make an election as between its bill for reformation and its bill for specific performance, and chose to move its bill for specific performance (State of Case, p. 17).

The Vice-Chancellor, in his decree, decreed that the complainants specifically perform the contract, subject however, to restrictions of record and zoning ordinances.

LAW.

Complainants, Saul Aron and Jacob Wiederhorn appeal.

POINT I.

That the decree is against the weight of the evidence.

Defendants seek to prove a waiver of the agreement and an acceptance by the fact that the attorney of the complainants and one of the complainants appeared at the office of William N. Becker, attorney for the defendants, for the purpose of making a tender, and that the fact that the complainants and his attorney appeared at the office and entered into some figures, was sufficient waiver binding on the complainant,

Jacob Wiederhorn, who was present at the time, and also upon Saul Aron, who was not present. It is admitted, however, that there was a dispute, and that the deed was not accepted. It is also admitted from the correspondence, that the defendants were immediately notified of the election of the complainants to rescind the contract unless the defendants could deliver according to the terms thereof. The defendants endeavored to prove the meeting by the attorney of the defendants and both officers of the defendant corporation, though their testimony told exactly the same story, and set the time when the closing took place, in the morning of February 23, 1926. On examination, all the witnesses for the defendants were positive of the fact that the meeting was on the morning of February 23, 1926. As a matter of fact, the time for the closing, as shown by the correspondence, was set for three o'clock on Thursday, February 23, 1926, in the afternoon. (See letter in evidence, Exhibit D. 2, of Abraham M. Herman, dated February 17, 1926, and the acknowledgment of William N. Becker, dated February 19, 1926.) The complainants testified, by their attorney, that there was a meeting, with an object of closing title, subject to the defendants clearing the title, which defendants undertook to do, and that the complainants did not agree to accept title subject to the restrictions. This contention is borne out by the entire pleadings of the defendants. They have insisted from the very first that the restrictions of record were not an encumbrance (see par. 5 of the answer, State of Case, p. 7), and further insist that the complainants were to accept conveyance subject to restrictions and zoning ordinances of record, if any; and that the provisions was inadvertantly

omitted; and further assert that the complainants were orally informed that the above premises were to be conveyed subject to all restrictions appearing of record (see Separate Defense, State of Case, pp. 6-7).

It was not in the minds of the defendants or in the minds of the complainants at any time that the said restrictions were waived, but it was rather in the minds of the defendants that the restrictions were, first, *not an encumbrance;* and second, *were omitted from the contract.* Both grounds are entirely indefensible, and are not warranted by the facts.

It should be noted that all the correspondence setting the date for closing (see Exhibit D. 1, Exhibit D. 2 and Exhibit D. 3), that the complainants particularly called attention to the restrictions of record, and particularly in Exhibit D. 2, *in arranging the date to close*: "WE WILL CALL AT YOUR OFFICE AT TWO O'CLOCK TUESDAY, FEBRUARY 21st, PREPARED TO CLOSE THE TITLE IN ACCORDANCE WITH TERMS AND CONDITIONS OF THE CONTRACT."

POINT II.

It imposes upon these complainants an entirely new agreement, by specifically decreeing that these complainants purchase property subject to restrictions of record and zoning ordinances, although said terms are not in the agreement.

In the matter of *Turkington* v. *Zuber* (N. J. 4 Adv. Rep. 1616), the Court of Errors and Appeals reversed the opinion of the Chancery Court, where specific performance was sought by the complainant, complainant asserting part

performance. The Court has set down several definite principles, to wit:

> "Specific performance will not be decreed unless the essential terms of contract be clearly proven. It must be shown that the contract has been concluded. If it be reasonably doubtful whether the contract was finally closed, *equity will not interfere by decreeing a specific performance.* Nor will it interfere where the evidence leaves the agreement as to any of its essential terms in uncrtainty."

POINT III.

It does not dispose of the suit of these complainants asking for rescision of the contract and return of the down money.

POINT IV.

It does not adjudge that these complainants be entitled to the return of the down money and the counsel fee, and that these complainants were entitled, as a matter of law, to the return of the down money and of the search fees and expenses.

POINT V.

"The defendants-appellants did not, in their counter-claim, set up any waiver of restrictions by the complainants, and that as a matter of fact, it is specifically set out that the defendant, Rialto Realty Company, Inc., has always been ready, willing and now tender themselves ready and willing to perform their part of the contract, according to the terms thereof."

The counter-claim upon which the decree is based, states that the defendant was ready, willing and able to perform in accordance with the terms of the contract (see counter-claim, State

of Case, p. 15, par. 6). The defendant, in its prayer for relief, asks that the complainants be made to specifically perform in accordance with the terms of the agreement (State of Case, pp. 13-14).

The decree however, imposes upon the complainants-appellees the duty of taking this property subject to encumbrances, which at the trial the learned Vice-Chancellor deemed to have been waived. This decree was erroneous under the pleadings cited above, which prayed for specific performance on a contract in accordance with its terms.

The defendants, in their pleading, rely entirely upon the fact that complainants did not appear at the original date of closing, on February 1, 1926, between the hours of nine o'clock in the morning and five o'clock in the afternoon, at the office of William N. Becker, to close title. It has not BEEN shown that a deed as alleged in the counter-claim, was prepared on February 1, 1926, nor has one been prepared according to the terms and conditions of the contract at any time since that date. It would seem therefore, incumbent upon the Court below to have dismissed the counter-claim as being without merit in that the defendants have failed to prove a *prima facie* case.

"Relief not embraced in prayer of bill cannot be decreed, nor relief asked for be granted upon grounds not disclosed by the bill" (*Kocher Chancery Practice,* p. 433).

"Complainant will not be permitted to make on case by his bill and another by his proofs. The defendant has a right before answering, to be informed plainly and distinctly, by the bill of the complainant's cause of action. When

proofs are produced the defendant is only required to meet such of the complainant's proofs as tend to establish the cause of action alleged in the bill. Any other rule would render pleadings useless'' (*Kocher Chancery Practice,* p. 141).

Watkins v. *Milligan,* 37 Equity 435: ''As pleadings do not set up those circumstances, complainants are not entitled to any relief.''

Andrews v. *Farnham,* 10 Equity 9: ''Complainant cannot make one case by his bill, and failing to prove it abandon it and recover upon a different one established by the evidence.''

Rottenburgh v. *Fowl,* 26 Atl. 338 at 341: ''Decision rendered in 1893 by Vice-Chancellor Green. General rule, relief at hearing can only be granted on ground set forth in bill or within issue of pleadings.''

Parsons, et al v. *William Heston, et al.,* 11 Equity 155: ''Bill alleged that bond and mortgage given to Browning by Heston was fraudulent; complainant couldn't prove that. Complainant, if he recovers, must recover on the case made by his bill.''

Howell v. *Sebring,* 14 Equity 84, at pages 88-89. Bill to set aside sale of lands made by executor under power of will. Grounds alleged (1) will didn't give power exercised (2) fraud. At trial attempt to prove, lack of authority of Surrogate to issue letters testamentary with will annexed, to Sebring after estate has been settled.

Fraud alleged. Proved sale void on ground that trustee was the actual purchaser, but the bill not having raised that issue, decree cannot be made on that ground, as defendant had not opportunity to meet the charge by his answer. Fraud was found as a matter of fact.

Chandler v. *Herwick,* 11 Equity 497: Defense to foreclosure suit is payment by execution of deed to the land according to an agreement between parties. Proof showed that agreement hadn't been executed by defendants. Upon proofs of case defendant has a good defense, but upon the pleadings the complainant is entitled to a decree.

POINT VI.

''It is based upon the conclusion of the Chancellor that the restrictions in question, and admittedly on the premises, were of small import, and that said conclusion is not founded upon any evidence, and as a matter of law, is erroneous and prejudicial to these appellants.''

On page 67, State of Case, the Court below states in its opinion: ''As above indicated, the restrictions here in question were of small import. They were against factory construction. The lands here had already been built upon and *restriction had not been violated.* The building consisted of stores.'' It is conceivable that a subsequent purchaser might object to the factory restriction, as it might tend to limit the use of said buildings, and that said stores might not be available for light manufacturing.

Bier v. *Walbaum,* 4 N. J. Adv. 251, Court of Errors and Appeals, the Court defined (at p. 253) the word ''encumbrance.'' ''Encumbrance means a right to, or an interest in, an estate to the diminution of its value. A paramount claim or interest resting as a charge upon land.'' This Court said, in the case of *Simpson* v. *Klipstein,*

69 N. J. Equity 543, "the title must be such as to make it reasonably certain, that it will not be called into question in the future, so, as to subject the purchaser to the hazard of litigation with reference thereto, that is precisely the situation here, as found by the jury in the case under review."

POINT VII.

The motion for decree in favor of the complainants at the end of the defendant's case on the counter-claim was denied.

At the conclusion of defendant's case, the complainants moved for a decree in their favor, which motion was denied, as appears on page 33 of State of Case.

This decision was erroneous, as the defendants had wholly failed to prove their counter-claim, which prayed for relief according to the terms of the contract.

The defendants admitted at the trial that there were encumbrances of record. Therefore they failed to prove the allegations set forth in their counter-claim, and the complainants were entitled to a decree in their favor. See authorities cited under Point 5.

Defendants waived the counter-claim pertaining to reformation of contract, and elected to seek specific performance. It was admitted by the defendants that the restrictions are encumbrances upon the property.

The motion for a decree in complainants' favor was erroneously denied, because of the testimony that the solicitor for the complainants had waived the restrictions by parol.

The parol modification of the contract was inoperative because of the absence of authority in the solicitor to waive a condition of the contract. (See authorities cited under Point 15). It was also invalid as it was made by parol and is inoperative under the provisions of the Statute of Frauds. (See authorities cited under Point 10.)

POINT VIII.

The decree is erroneous in that the pleadings by the defendants seek to reform the agreement in question, and then seek, by a separate bill in the same action, for specific performance, and the Court errs in decreeing specific performance on a contract to purchase real estate where the marketability of the title depends on the establishment of the fact, and that fact is in reasonable doubt.

"Specific performance of a contract to purchase real estate will not be decreed if the marketability of the title depends on the establishment of a fact, and that fact is in reasonable doubt." *Doutney* v. *Lambie,* 78 N. J. Equity 277; also held in *Security Bond and Mortgage Co.* v. *Weiss,* 4 Adv. Rep. 2048.

"The principle adopted by Courts of Equity in matters of specific performance is that they will not compel a purchaser to take a title of which there is a reasonable doubt, and such doubt is held to exist if the purchaser desiring to sell the lands would be adversely affected by such doubt —so it is the uniform rule in this State to decline to decree performance where such doubt exists though rested on grounds merely debatable, but which might visit upon the purchaser litigation in that regard, and that, too, where at

law the title might in fact be declared good." *Van Riper* v. *Wickersham,* 77 Equity 232; *Goldstein* v. *Ehrlick,* 96 N. J. Eq. 52; *Schiff* v. *Alexander,* 130 Atl. Rep. 133; *Herring* v. *Esposito,* 119 Atl. Rep. 765; *Dobbs* v. *Norcross,* 24 N. J. Eq. 327; *Kohlrepp* v. *Ram,* 79 N. J. Eq. 386.

"Encumbrance means a right to or an interest in an estate to the diminution of its value. A paramount claim or interest resting as a charge upon land." *Bier* v. *Walbaum,* 4 N. J. Adv. Rep. 251.

Dobbs v. *Norcross,* 24 N. J. Eq. 327 at page 331: "He should have a title which shall enable him not only to hold his land, but to hold it in peace; and if he wishes to sell it, to be reasonably sure that no flaw or doubt will come up to disturb its marketable value.

"It becomes therefore, immaterial whether the encroachments are extensive or only slight, and whether the buildings extend beyond the lines only a few inches or many feet, for the parties to a contract clearly have the right to make such stipulations in their contract as they see fit, so long as such stipualtions do not violate the law or public policy." *Schiff* v. *Alexander,* 3 N. J. Misc. Rep. 817, at page 822.

POINT IX.

It is based on the conclusion of the Chancellor that the postponement of closing of title spells out a consideration for the waiver of the building restrictions, when, as a matter of fact and law, defendants-appellees were not ready and able to convey on February 1, 1926, the date alleged to be set for closing, or any date since.

"There would seem to be no difficulty in spelling out a consideration for the waiver of the

building restrictions as, apparently, there was considerable give and take on both sides of this controversy. For instance, several extensions of time for settlement were granted by the defendants to the complainants, and these extensions may have afforded the consideration for the waiver." *Opinion,* pages 66-67.

"Adjournments from time to time of the fixed date and hour, for the performance of a contract for the sale and purchase of real estate, have no effect to modify the contract, except in respect to time for passing title, and leave it in every other particular in full and binding force." *Green-Shrier Co.* v. *State Realty & Mortgage Co.,* 199 N. Y. 65, 92 N. E. 98, L. R. A. 1915 B-27.

POINT X.

The Court below admitted parol evidence to vary the terms of a written contract.

State of Case, pages 18-19; Opinion, pages 61-62-63:

"Q After that letter, was there any more correspondence between you and Mr. Herman? A Yes, I called up Mr. Herman immediately upon receipt of that letter, and took up the question of the affidavits and told him that could be easily secured. He spoke about the restrictions; I told him that the building was constructed in accordance with the restrictions, and his answer to me was it wasn't a serious matter; that would be taken care of; and I therefore made a notation on that letter 'don't apply' at that time.

"Q Was the deed shown to him? A As soon as Mr. Herman came in, I said 'Now, it is definitely understood that there is no question of restrictions?' He said 'certainly.' I said 'Well, here is the deed.' He took the deed that I prepared, which

was signed on the 15th, the day originally set for closing of title and postponed it—the original date was February 1. He examined the deed, approved of it, and said it was perfectly satisfactory, and he asked Mr. Wiederhorn for a certified check, and Mr. Wiederhorn handed him a certified check, and he put the certified check on top of the deed and laid them aside. He said 'now, let us go into the figures of cost.' I gave him a yellow paper with a memorandum on it, and I drew up one myself, and I have got here a copy of the figures that we went into."

The above testimony was given great stress by the Court below. It is apparent that the above testimony is based on parol statements made by the solicitor for the complainants, and therefore inadmissible, as it tends to modify a written contract required to be in writing within the terms of the Statute of Frauds by parol. *Halpern* v. *Shurkin,* 98 Equity 28, Vice-Chancellor Backes: "The parol variations is within the fifth section of the Statute of Frauds, which provides that no action shall be brought on a contract for the sale of land unless it, or a memorandum thereof be in writing." Comp. Stat. p. 2612. "A written contract for the sale of land, with parol modifications, will not, against objections, be enforced as modified." 25 R. C. L. 708 and cases—. "An executory parol agreement substituting methods of performance is within the statute and unenforcible." *Malkan* v. *Hemming,* 82 Conn. 293; *Rucker* v. *Harrington,* 52 Mo. App. 481; *Abelle* v. *Munson,* 18 Mich. 306."

"The case of contract coming within the statute of frauds is expressly excepted from the rule allowing merely written contracts to be varied by subsequent oral agreements." *Kurzner* v. *Chanin,* 98 L. 38.

It has been held under the Statute of Frauds that a purchaser who in a written contract stipulates for a good title cannot be required to accept a defective title on the ground of a verbal waiver of the stipulation as the effect is to substitute an oral contract for the sale of lands which cannot be done under the Statute.

A contract required to be in writing under the provisions of the Statute of Frauds cannot subsequently be modified by a parol agreement. This would nullify the benefit otherwise derived under the Statute. The invalidity of the oral agreement modifying the written contract leaves the latter unaffected, and proceedings can and must be carried on under it. It is immaterial whether you add to or subtract from the original contract; the alteration cannot be effected because of the bar of the Statute of Frauds. Rule has been applied and held to prevent an oral modification, upon discovery that vendor could not give good title, to deduct a certain sum from the purchase price and accept the title as it was found. L. R. A. 1917-B, p. 141.

Schapp v. *Wolf,* Wis. Sup. Ct. 17 A. L. R. 7. Material condition in a contract for sale of standing timber modified by parol.

Court said: "It is said that a contract within Statute of Frauds can, by an oral agreement, be validly changed as to a material condition therein. This is not the law."

In Note: Broad general rule is that a contract required to be in writing under Statute of Frauds cannot be modified by a subsequent oral agreement.

The plaintiff who brought the action for damages sought to excuse his non-performance of the term of the contract by an oral agreement. Held:

Contract within Statute of Frauds cannot be modified by subsequent oral agreement. 50 Mo. App. 275—17 A. L. R., p. 21.

Schwartzman v. *Creveling,* 85 Equity 402, 96 Atl. 896. A written contract for sale of land cannot be reformed so as to include the terms of a contemporaneous verbal agreement for purpose of specific performance. Parol evidence to vary terms is inadmissible and contravening the Statute of Frauds. In opinion: The policy of statute is to exclude testimony of that uncertain character with respect to transactions within its provisions. It therefore requires the substantive parts of a contract to appear in writing. To admit parol evidence of any terms of contract with respect to which memorandum is silent would open door to the very mischief the statute intended to suppress.

"The rule of evidence that, where parties have put their contract in writing, the written contract shall be the only evidence of the contract as finally concluded, and that oral testimony of what was said or done during the negotiations will not be admitted either to contradict the written contract or to supply terms with respect to which the writing is silent, is designed to enable parties to make their written contracts the only evidence of their undertakings, and to protect themselves from the hazard of uncertain oral testimony with respect to their engagements, and is a rule indispensable to the security of contracting parties."

Naumberg v. *Young,* 44 N. J. Law 331.

"A written agreement cannot be controlled by parol evidence to the effect that a different understanding existed."

Dewees & Manhatten Insurance Co., 35 N. J. Law 366.

"Until a contract is reduced to writing and executed by the parties, it is always

subject to such parol changes and modifications as the parties choose to make; but after it is put into writing and executed by the parties, the writing itself, in the absence of fraud or mistake, must be taken as conclusive evidence as to what were the ultimate intentions and purposes of the parties, and the only competent evidence of what they meant."

Parker v. *Jameson,* 32 N. J. Eq. 222.

POINTS XI AND XII.

It is based on the conclusion of the Court below that the extension of closing of title was sufficient consideration to work an estoppel.

It is based on the conclusion that knowledge of the restrictions, and appearance at the office of the solicitor of the defendants-appellees, was conduct sufficient to constitute a waiver.

The Court below declared that only questions involved in this case "that of waiver of the building restrictions, and the case was tried on this theory." See page 61 of Opinion, lines 13-14. He found, as a matter of fact and law, that extension of the closing of title is sufficient consideration for a waiver of the building restriction (see pp. 66 and 67) and that the conduct of the complainant disarmed the vigilance of the defendants so as to estop the complainant from requiring a strict performance of the contract. See page 67: "But aside from that, there is, in my judgment, sufficient here to work an estoppel. It has been held that a party to a written contract who has by some affirmative action led the other party to believe and act on that belief, that he will not be held to a strict performance of the covenants, will be estopped in equity from requiring a strict performance of that covenant. *Worrell* v. *Forsythe,* 141 Ill.

22, 30 N. E. 673; *Becker* v. *Becker,* 250 Ill. 117, 95 N. E. 70. As above indicated, the restrictions here in question were of small import. They were against factory construction. The lands here had already been built upon and the restrictions had not been violated. The restrictions will expire by their own limitation within a short period. If the vendees had not led the vendors to believe that there would be no objection because of these building restrictions, it is quite conceivable that the vendors might have had them removed prior to settlement. But from the date of the telephone conversation following the letter of February 9th, which has already been referred to, there was never any suggestion or intimation by the vendees that they objected in the slightest degree to these restrictions, and this attitude continued right up to the time the dispute arose respecting the rents. At that time the deed prepared in accordance with the directions of the vendors through their attorney had been submitted to and approved by him. After the vendor's vigilance was disarmed by what was at least an apparent waiver, this Court would become a party to a fraud to permit complainants to profit by their deception. ''

All the evidence in the case is shown by the correspondence. See letter of February 9, 1926 (Exhibit D. 1, p. 57; also letter of February 17, 1926, which set the time for closing Exhibit D. 2):

February 17, 1926.

> ''My clients, Mr. Saul Aron and Jacob Wiederhorn are ready to close the title of the premises known as 22-24 Rowe Street, East Orange, *in accordance with the contract dated December 17, 1925.* We will call at your office at three o'clock Thursday, February 23, 1926, prepared to close title *in accordance with the terms and conditions of the contract.* It must be understood that time is of the essence of this agreement to postpone the date of closing. Will you please advise me whether this arrangement is satisfactory.''

Underlined in this short letter is the significant phrase: ''in accordance with the terms and conditions of the contract,'' which appears twice, which clearly indicates that there was no intention on the part of the complainants to waive at any time the restrictions. If the Court below was right in its contention, it would constitute a precedent that I believe is contrary to the policy of the Chancery Court, and contrary to the decisions in this State, in that the mere fact of an attorney appearing prepared to make a formal tender of the purchase money, accompanied by some negotiations as to figures and a dispute as to the correctness thereof, would in itself constitute a waiver of the conditions and terms of a written agreement.

In *Goldstein* v. *Ehrlick,* 96 Equity, p. 52, upon a suit that seems to be on all fours with the present suit, the defendants agreed to sell to the complainant certain premises upon which there were certain clouds upon the title. The defendant and complainant arranged that the complainant would take title to the premises upon the defendants giving an indemnity bond. Vice-Chancellor Backes, in his opinion, said the complainant was entitled to the property according to the terms of the contract.

> ''**There were negotiations, and it was arranged that the complainant would take title upon the defendant giving an indemnity bond. The complainant claims that the defendants refused to give the bond, while the defendants insist that the complainant refused to take it. I need not decide this issue of fact. The complainant was entitled to the**

property according to the terms of the contract. He was not bound to take the bond. If he, in fact, consented to take it in lieu of a good title, he had the right to change his mind."

This case was cited with favor in *Schiff* v. *Alexander,* 3 N. J. Misc. Rep. 817, tried in our Supreme Court on an appeal from the Hudson County Circuit Court before Chief Justice Gummere and Justices Parker and Kaltenbach. This was an appeal from an order from the Hudson County Circuit Court, striking out defendant's answer and counter-claim, and directing the entry of a final judgment. This is a suit for the recovery of a deposit of two thousand dollars ($2,000) paid on account of the purchase price of four pieces of property in Jersey City. The contract contained a provision that the buildings were within the premises described in the deed, and that there were no encroachments thereon. As a matter of fact, the defects above mentioned did exist. Defendants claimed that the plaintiff waived this provision by agreeing to take two of the houses subject to existing mislocations and encroachments, in consideration of which defendants agreed to release plaintiffs from the obligation to take all four houses, and that the plaintiff was thereby estopped from asserting that they were entitled to the return of their deposit money.

In the opinion as delivered by the Court it is said:

"Assuming that the plaintiffs did agree to take two houses instead of four, the defendants did not change their position, because they were unable to convey the four houses according to their agreement, and the mere fact that plaintiffs were willing to take two houses instead of four did not produce a

change of position on the part of the defendants to their detriment, which is an essential element of estoppel, and furthermore, there was no consideration whatever for the plaintiffs in accepting two houses instead of four, because the statement of the defendants that they agreed to release the plaintiffs from this obligation to take the four houses could not be a consideration, for the reason that there is no obligation on the part of the plaintiffs to take these four houses because of the defects already mentioned, hence there was no obligation to release the plaintiffs from."

"It seems entirely clear that the defendants, by their first separate defense, are seeking to change and vary the terms of a written agreement by an oral one, which is not permissable under the authority of *Bowers* v. *Glucksman,* 68 N. J. Law 146; *Lippincott* v. *Bridgewater,* 55 N. J. Equity 208; *Kerzner* v. *Chanin,* 118 Atl. Rep. 693."

There is no evidence in this case that the position of the defendant has been changed to his detriment, which is an essential element of estoppel, and there certainly was no consideration whatever for the plaintiff in accepting the premises subject to restrictions that would greatly impair the value and cause the complainants considerable loss.

In the case of *Simpson, et al.* v. *Klipstein,* decided by our Court of Eerrors and Appeals on November 18, 1918, in 105 Atl. Rep., page 218 at 219, reversing the decision by the Court of Chancery reported in 89 N. J. Equity 229, there appears to be a much stronger case than in the case at bar. The agreement called for a good and marketable title, free and clear of all encumbrances. The vendee took possession of the premises, although he was aware that cer-

tain streets had been dedicated by a map. The Court held as follows:

> "The fact that the defendant, before making his contract, saw the map showing the paper street (of which there was no physical indications on the ground) does not constitute a waiver of objections to the title because of the public servitude created by the dedication of the street to public use by conveyance by reference to such map, or estopped the defendant from insisting upon his contract right to a 'good and marketable title free and clear of all encumbrances.' *Proper* v. *Colson,* 86 N. J. Equity 399, 99 Atl. 385; *McAndrews & Forbes Co.* v. *Camden,* 87 N. J. Law 231, 94 Atl. 627; Ann. Cas. 1917C 146; *DeLong* v. *Spring Lake,* 72 N. J. Law 125, 59 Atl. 1034; *Demars* v. *Koehler,* 62 N. J. Law 203, 41 Atl. 720, 72 Am. St. Rep. 642."
>
> "The fact that, pending the closing of title, the defendants took and retained possession of the property until the deed therefor was tendered and rejected, does not work a waiver of his contract right to a 'good and marketable title free and clear of encumbrances.'"

In the case of *DeMars* v. *Koehler,* cited in *Simpson* v. *Klipstein,* reported in 62 N. J. Law 203, an exhaustive opinion covering the question before the Court is rendered by Chief Justice Magie. This is an appeal from a judgment under review which affirmed the judgment of the Essex County Circuit Court in an action of covenant in which DeMars was plaintiff and Koehler was defendant. The record discloses that the action was brought upon a covenant against encumbrances contained in a conveyance of lands made by Koehler to DeMars, and that the breach of the covenant claimed by DeMars was based on the existence of an outstanding term in the lands made by Koehler to DeMars, and that the breach

of the covenant claimed by DeMars was based on the existence of an outstanding term in the lands by one Mutchler. The bills of exception show that upon the trial it was established that at the time of the execution and delivery of the conveyance in question, the premises conveyed were in the possession of Mutchler, who held them under an unexpired term created by Koehler. The trial Judge ruled that DeMars could not maintain his action upon the covenant *by reason of the existence of that term when he accepted the conveyance.* On this ground the jury were directed to find a verdict in favor of Koehler. The Supreme Court approved the ruling of the trial Judge, and affirmed the judgment upon the directed verdict. *DeMars* v. *Koehler,* 60 N. J. Law 314; 38 Atl. 808.

In the Court below it was urged for the defendant that the *existence of the outstanding term was known to the grantee and that he thereby waived the breach.* At page 721 Chief Justice Magie says:

> "The proposition enunciated by the Supreme Court is that the grantee cannot maintain an action upon a covenant against encumbrances contained in his conveyance, by reason of an outstanding term in the lands conveyed, *if he had notice of the existence of the term before accepting the conveyance.* I find myself unable to assent to that proposition which I deem opposed both to reason and to authority, etc., etc." This is undoubtedly the law in the State of New Jersey. "When a covenant is made against all encumbrances, without exception, knowledge of the existence of an encumbrance cannot take that encumbrance out of the general terms of the covenant, unless such was the intent of the parties. But knowledge alone does not prove such intent, for a contrary intent is consistent with it. Proof of knowl-

edge, or other proof of the intent of the parties that a particular encumbrance should be excepted from the general terms of the covenant could only be admitted by a violation of the canon of evidence which forbids parol proof to vary the terms of a written contract; etc., etc."

In the case of *Propper* v. *Colson, et al.,* heard in the Court of Errors and Appeals on November 20, 1916, and reported in 90 Atl. Rep. on page 385, Chief Justice Gummere rendered the decision. This is on an appeal from the Court of Chancery and was reversed by the Court of Errors and Appeal, and remitted to the Chancery Court for entry of decree in conformity with directions. In this case the complainant purchased one of a number of lots in the Borough of Wildwood, offered for sale at public auction by defendants Colson and Davis. By his bill he seeks to be relieved of his purchase, and to have the contract of sale cancelled and the deposit on the purchase price paid by him refunded. The primary ground upon which he bases his right to the relief sought, and the only one which we find it necessary to consider, is that public announcement was made prior to the sale by the owners, that the property would be sold free and clear of all encumbrances, and that his contract of sale, signed after the property was struck off to him, expressly so provided; whereas, in fact there were and are several restrictive covenants arising out of a general building scheme. It was further argued on behalf of the respondents that at the time of his purchase, *Mr. Propper was fully aware of the existence of the building restriction on the land which was bought in by him, and that therefore he is to be presumed to have waived any objection to the title because of them.* But knowledge by a

grantee, at the time of the delivery of the deed, that there are outstanding encumbrances upon the property conveyed is no bar to his right of action on the covenant against encumbrances, cited in *DeMars* v. *Koehler,* 62 N. J. Law, and therefore cannot estop him from insisting that he shall receive by the conveyance to him what his vendor contracted to give him; that is, a title free and clear of all encumbrance.

The above case is the exact situation of the present suit, and it is unquestionably settled law in this State.

POINT XIII.

It decrees that the complainant-appellant, Saul Aron, accept a deed conveying the property to Jacob Wiederhorn, and pay the consideration therefor, although the evidence discloses no assignments from Jacob Wiederhorn to Saul Aron.

Decree of the Court, pages 72-73: "And it is on this 17th day of May, ORDERED, ADJUDGED and DECREED that the said agreement be in all things specifically performed by the said complainants, and that the said complainants on the 17th day of June, at the hour of ten o'clock in the forenoon, at the office of William N. Becker, 17 Academy street, in the City of Newark, County of Essex and State of New Jersey, pay to the said defendant the sum of Three Thousand Nine Hundred and Eighty-three Dollars and Seventy-nine cents ($3,983.79), which sum represents the amount of money due to the defendant after apportionments made as of the first day of February, 1926, and in addition thereto the sum of One Thousand One Hundred and Twenty-six Dollars and Seventy-four cents ($1,126.74), which represents the additional

sum due after apportionments made from the said first day of February, 1926, to the seventeenth day of May, 1927, together with the taxed costs of this suit as hereinafter allowed, and at the same time and place upon the delivery by said defendant, Rialto Realty Co., Inc., to said complainant, Jacob Wiederhorn, of the warranty deed dated the fifteenth day of February, 1926, which was duly executed and acknowledged by the said defendant conveying to the said Jacob Wiederhorn the said lands and premises in fee, subject to restrictions of record and zoning ordinances, and subject to the lien of the mortgage held by the Seneca Building and Loan Association."

The above decree is erroneous, as it grants relief to the defendants upon a counter-claim, which relief had not been prayed for.

See *Watkins* v. *Milligan,* 37 Equity 435, and the other authorities cited under point 5.

POINT XIV.

Neither the complainant, Jacob Wiederhorn, or the attorney, had authority, express or implied, to change and alter the contract to the prejudice of the complainant, Saul Aron.

A waiver must be made by a person or his duly authorized agent. See opinion in *Metropolitan Life Insurance Company* v. *McGrath,* 52 N. J. L. 358, 19 Atl. 386, wherein an insurance agent, without authority, waived a forfeiture clause in an insurance policy. It was held, that there being neither actual authority nor any appearance of authority acquiesced in by the company to enable the agent to revive the lapsed policy, his conduct would not operate as a revival of the policy. See also case cited in Point 15.

POINT XV.

It is based on the evidence that the solicitor of the complainants-appellants had a conversation on the telephone with the solicitor of the defendants-appellees, and in effect told the solicitor of the defendants that no objection would be made to the restriction; and there is no evidence that the solicitor of the complainant had any authority, expressed or implied, to make an arrangement binding on his principal.

Strauss v. *Rabe,* 97 Eq. 208, Aff'd. 98 Eq. 700 at page 211:

> "And thus we are brought to the main and novel question presented in this case, to wit: Is there any implicit authority in an attorney or agent acting for a vendor, or the passing of title under a written contract, to extend the time therefor when the contract, by its terms, makes time the essence thereof? Neither in the bill of complaint nor any of the proofs is it pretended that there was any express authority conferred upon the attorney for the defendants to grant such a postponement, and, therefore, if the power existed it must be by implication of law. The authority of an attorney-at-law in matters not immediately connected with litigation, is much more circumscribed than in the conduct of litigated causes. 3 Cyc. *et seq.* In effect, the attorney represents the seller in such transactions, as the latter's agent, and his authority must be delineated by an application of the elementary rules of agency. A principal is bound by the acts of his agent, both within the authority expressly given to the latter and also by all acts performed within the apparent scope of his authority, *Borcherling* v. *Katz,* 37 Eq. 150. The acts of a special agent do not bind his principal unless the former's authority is strictly pursued, and those who deal with such an agent are charged with notice of the extent of such authority. *Cooley* v. *Perrine,*

41 Law 322, affirmed 42 N. J. Law 623; *Milne* v. *Klep,* 44 Eq. 378; *Dowden* v. *Cryden,* 55 L. 329''—and on page 213 "It is equally clear that he cannot unless expressly authorized, vary the terms of payment, or make the mortgages due at a later date, or even an earlier date, under some of the cases, because it is said that his principal may prefer to leave his money invested in an interest-bearing security." *Speer* v. *Craig,* 16 Cols. 478, 27 Par. Rep. 891; *Siebold* v. *Davis,* 67 Iowa 560, 25 N. W. Rep. 778; *Dayton* v. *Buford,* 18 Minn. 126; *Henry* v. *Lane,* 128 Fed. Rep. 243, 62 C. C. A. 625.

Thornton v. *Boyden,* 31 Ill. 200, holding that if a special agent is empowered to sell land at a public auction, at a particular time, at a certain place and on certain terms, such terms, place and time must be strictly observed. 2 C. J. 583 (foot note 9).

Persons dealing with a special agent are put on their guard by that fact, and must at their peril see that the act of the agent is authorized by the principal, and persons relying on stipulations by the agent varying printed provisions in a contract made with the agent, do so at their own peril. *Metropolitan Aluminum Mfg. Co.* v. *Lau,* 61 Misc. 105, 112 N. Y. S. 1059—cited in foot note 12—2 C. J. 585.

"The rule is general that a purchaser, buying of an agent must, at his peril, satisfy himself as to the extent of the agent's authority. *Milne* v. *Kleb,* 44 Eq. 378—14 A 646.

Under the authority conferred by a retainer, a solicitor has no authority to surrender any substantial right of his client. *Dickerson* v. *Hodges,* 43 Eq. 45—10 Atl. 111."

Complainants-appellants respectfully submit that the decree in the above matter be reversed, for the reasons stated, and that the matter be remanded to the Court below, with instructions to decree that the down money and the search

fee be returned to the the complainants-appellants, together with taxed costs and counsel fee.

ABRAHAM M. HERMAN,
Solicitor of Complainants-Appellants,

ABRAHAM M. HERMAN,
Of Counsel.

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

Between

SAUL ARON and JACOB WIEDERHORN,
Complainants-Appellants,

and

RIALTO REALTY COMPANY, a corporation of New Jersey, and BENJAMIN HARRISON,
Defendants-Appellees.

BRIEF FOR DEFENDANTS-APPELLEES.

POINT I.

That the decree is not against the weight of evidence.

The testimony of the facts of the case overwhelmingly establishes that the decree entered is not against the weight of the evidence.

The defendant proved that the attorney of the complainants and one of the complainants, on the twenty-third day of February, 1926, appeared at the office of William N. Becker, attorney for the defendant for the purpose of taking title and prepared for settlement; and in accordance with instructions of the purchaser's attorney, a deed had been prepared and executed by the defendant-vendor conveying the property to Wiederhorn alone, who was authorized by the other to act for him, which deed contained a clause that the premises were being conveyed subject to restrictions and zoning ordinances on record, if any. See State of Case, (Exhibit C. 4, p. 52). The aforesaid deed was submitted to the attorney for the complainants, who after

examining it, approved the same in the presence of one of the complainants, then financial figures necessary for settlement were tabulated when a dispute as to the rental of said premises owing to a vacancy arose, and the complainant, Jacob Wiederhorn, and his attorney left the office of the defendant's attorney with the understanding that they would return within two days to take title, after consulting with the other complainant, Saul Aron. No other question arose respecting the title at this meeting.

Later, on the same date, the complainant's attorney wrote a letter to the defendant's attorney, advising him that they would be prepared for a settlement in accordance with the terms of the contract. "It must be understood that time is of the essence of this agreement to postpone the date of closing." The envelope containing this letter which was also introduced in evidence, was post-marked "February 23rd 1926 8 P. M." (See letter in evidence D. 2 and envelope in evidence D. 3, State of Case.) This, was the evening of the day of the meeting which resulted in an impasse. It is quite evident, that the mailing of this letter by the complainants was done so as to neutralize and retract their action in appearing at the office of the attorney for the defendant, and their acceptance of the deed to the premises in question. This is further borne out by letter under date of February 26, 1926 (see letter in evidence Exhibit C. 3 of Abraham M. Herman), which was mailed three days after the meeting at the office of the attorney for the defendant, in which letter the attorney for the defendant was advised that the complainants have elected to rescind the contract and expected to hold the defendant strictly accountable for all damages caused by the breach

of the contract, and requested the return of the down money and expense.

That on the day following the twenty-third day of February, 1926, and without waiting the two-day postponement of settlement as requested, the attorney for the complainants appeared at the office of the attorney for the defendant and made tender of the purchase price of the said property, and in turn was tendered the deed that had been accepted the day before. (As stated in letter in evidence, Exhibit C. 3 of Abraham M. Herman.)

In Point 1, at the bottom of the third page of the Complainant's Brief, "the complainants testified, by their attorney, that there was a meeting, with an object of closing title, subject to the defendants clearing the title, which defendant undertook to do, and that the complainants did not agree to take title subject to the restrictions." The Chancellor found as a matter of fact, that the complainants had come prepared to take title subject to and had waived the question as to building restrictions and advised a decree of specific performance in favor of the defendant on the counter-claim.

POINT II.

The decree of the Court of Chancery does not impose upon these complainants an entirely new agreement by specifically decreeing that these complainants purchase property subject to restrictions of record and zoning ordinances, although said terms are not in the agreement.

It is not a question of making a new agreement or enforcing a new agreement, or the question of the modification of the written agreement; it is merely a question of equitable estop-

pel, the principles as set down by Vice-Chancellor Leaming in the matter of "*Mahaffey et al.* v. *Sarshik,* (No. 42) 137 Atlantic Reporter, page 887" of the Court of Errors and Appeals.

> "If one leads me to believe that I shall be privileged to do a certain thing, he cannot equitably object that I did it; or if he leads me to believe that I need not do a certain thing, he cannot object that I did not do it. So, if it be true that the purchaser of this property led the sellers to believe that it would not be necessary for them to close down the hospital business and remove the patients from the building before the day of settlement (in the case at bar the lifting of restrictions as encumbrances) he cannot equitably come before the Court at this time and justify his refusal to take the property on the ground that they did not do what they told them it would not be necessary for them to do."
>
> "But there is no doubt of the right of any party to a written contract to so demean himself as to deny himself the privilege of objecting to a condition that his own conduct has brought about."

The complainants lead the defendant to believe that the restrictions were of small import, that from the ninth until after the twenty-third of February, 1927, no further objections were made, and the subsequent approval of and acceptance of the deed prompted the Chancellor in his conclusions to say that "after the vendor's vigilance was disarmed by what was at least an apparent waiver, this Court would become a party to a fraud to permit complainants to profit by their deception" (see p. 67, State of Case).

POINT III.

The conclusions of the Court advised a decree dismissing the Bill of Complaint, and advised further the specific performance of the contract in accordance with the Counter-claim (State of Case, p. 42).

POINT IV.

The decree of the Chancellor entered in this cause, decided that the complainants had refused and failed to perform the said agreement on their part and that these complainants be not entitled to the down money and counsel fee and expenses.

POINT V.

On the question of whether or not the defendants-appellees did not, in the Counter-claim, set up any waiver of restrictions by the complainants at the trial, it was agreed that the only question at issue, was the question of waiver (see page 17, State of Case), and thereupon without any objection on the part of the complainants, that issue alone was tried by the Court, and the defendant proved its case; and the complainants were ordered to specifically perform the contract.

If there was any defect in the pleadings, it was limited by the failure on the part of the complainants to object thereto; with reference to this point, the defendant cites the case of "*Lehigh Stove Manufacturing Company* v. *Kessler,* 135 Atlantic Reporter 335" decided by the Supreme Court of New Jersey, wherein the Court held that,

> "Where the controversy was fully and fairly tried and the complaining party was not

surprised or injured, the reviewing Court will amend the pleadings to support the judgment in the interest of justice."

POINT VI.

The conclusion of the Chancellor was, that the restrictions in question and admittedly on the premises, were of small import, and were finally seized upon as an excuse and not as a reason for non-performance, as the uncontradicted testimony of Benjamin Harrison overwhelmingly establishes them (State of Case, pp. 23, 24, 25 and 26), and also the cross examination of the testimony of Philip Gladstone (State of Case, pp. 30, 31 and 32) see *(Van Syckel* v. *O'Hearn,* 50 Equity, 173) referring to that part of the Court's opinion on page 173.

"A Court of Equity will prevent parties from disregarding their promises, even when no consideration has accrued to them upon the making of the promise. If a party asking the aid of the Court waives strict performance of his contract and makes promises to the defendant upon which the latter has acted and changed his position, and it should appear to work a hardship to the defendant to allow the complainant to withdraw his waiver, a Court of Equity always applies the doctrine of estoppel. In such case, although no consideration or benefit accrues to the person making the promises, he is the author or promotor of the very condition of affairs which stands in his way; and when this plainly appears, it is most equitable that the Court should say that they shall so stand."

POINT VII.

The motion for decree in favor of the complainants at the end of defendants' case on the Counter-claim, was properly denied on the

ground of waiver and equitable estoppel (see *Plummer* v. *Keppler,* in 26 N. J. Equity, p. 481).

"The remedy by specific performance is discretionary; the question is not what must the court do, but what, in view of all the circumstances of the case in judgment, should it do to further justice."

"When the contract has been fairly procured and its enforcement will work no injustice or hardship, it is enforced almost as a matter of course."

"The sales agreement was fairly entered into in all respects and since the defendant was chiefly, if not wholly, responsible for the latter happening that led up to this litigation, it will do him no injustice to compel him to stand by his bargain, even though he be slightly out of pocket by the delay and his own shortcomings."

POINT VIII.

The decree is just, in that the pleadings by the defendant does not seek to reform the agreement in question, the marketability of the title is not involved nor is any fact in a reasonable doubt (see *Mahaffey et al.* v. *Sarshik,* #42, 137 Atlantic Reporter, p. 887).

POINT IX.

The conclusion of the Chancellor that the postponement of closing title from time to time spells out a consideration for the waiver of the building restrictions, has been approved by the Court of Errors and Appeals in the case of "*Mahaffey et al.* v. *Sarshik,* #42, 137 Atlantic Reporter, page 887," where it is held,

"That a purchaser is bound to submit to a reasonable delay, he can, if the contract is not performed by the seller on the very day, make time the essence of the contract by the process of notice, but, in the absence

of that, time will not be deemed the essence of the contract."

The complainants did by their letter (Exhibit D. 2, State of Case, p. 57) from Abraham M. Herman under date of February 17, 1926, make time of the essence, stating therein that it must be understood that time is of the essence of this agreement to postpone the date of closing at the office of the attorney for the defendant on Tuesday, February 23, 1926, at which time the complainants appeared, approved and accepted the deed tendered, entered into figures, questioned the rental, asked for a postponement, and then subsequently refused to take title.

POINT X.

The Court below in admitting the parol evidence (see State of Case, pp. 18-19; Opinion, pp. 61, 62 and 63) followed the only course and means open to prove a waiver of a known fact, for it is only by parol evidence that the doctrine of waiver or estoppel can be established. The evidence as cited above is not evidence that tends to vary the terms of a written contract nor the question of making a new agreement, or enforcing a new agreement or the question of modification of the written agreement. It was introduced merely to prove waiver of an established fact within the knowledge of the complainants and it is merely a question of waiver and of equitable estoppel, the principles as outlined in the case of (*Mahaffey, et al.* v. *Sarshik,* #42, 137 Atlantic Reporter, p. 887).

No part of the said testimony alluded to any particular part of the written contract, which was complete and therefore did not tend to modify the written contract requiring the same

to be in writing within the terms of the statute of frauds.

No evidence was introduced to add to or subtract from the original contract that would require the same to be in writing, because of the bar of the statute of frauds nor any oral modification of said written contract; purely and simply a question of waiver of restrictions was raised which the Court below found as a matter of fact, had been waived by the complainants.

POINTS XI AND XII.

The conclusion of the Court below was based upon the fact that one of the complainants and his attorney appeared at the office of the attorney for the defendant, examined, approved and accepted the deed, subject to restrictions appearing of record, placed their certified check which was the consideration, on and upon the deed and entered into financial figures for the purpose of consummating said deal, which conduct in the Court was sufficient to constitute a waiver of the restrictions that were within the knowledge of the complainants.

POINT XIII.

The decree that the complainants-appellants, Saul Aron accept a deed conveying the property to Jacob Wiederhorn and pay the consideration thereof, although the evidence discloses no assignment from Jacob Wiederhorn to Saul Aron, was just and proper because the contract was entered into between Saul Aron and Jacob Wiederhorn, and at the specific request and instructions of Abraham M. Herman, attorney for the complainants, a deed was prepared in the name of Jacob Wiederhorn, which is the same deed

that was submitted, examined, approved and accepted on the 26th day of February, 1926.

The complainant, Jacob Wiederhorn was one of the complainants who appeared with his attorney at the office of the attorney for the defendant.

Mr. Aron, the other complainant, at the trial in the court below, stated that as a matter of fact Jacob Wiederhorn was acting for him, as far as Aron's interest was concerned and with his authority (see State of Case, p. 36); and that if the deed had been accepted by Mr. Wiederhorn, Mr. Aron would have approved of Mr. Wiederhorn's action.

POINT XIV.

The complainant, Jacob Wiederhorn, and his attorney had authority, expressed and implied, to consummate the title in the name of Jacob Wiederhorn (see State of Case, p. 36).

POINT XV.

The decision in this case in the court below is not primarily based on the evidence of the conversation of the attorney of the complainants-appellants, the Court merely made reference to the said conversation, which conversation substantiated the truth of the fact that the restrictions of record were not a serious object to the consummation of the title.

Defendant-appellee respectfully submits, that the decree in the above matter be affirmed, for the reason stated, together with taxed costs and counsel fee.

WILLIAM N. BECKER,
Solicitor and of Counsel for
Defendants-Appellees.