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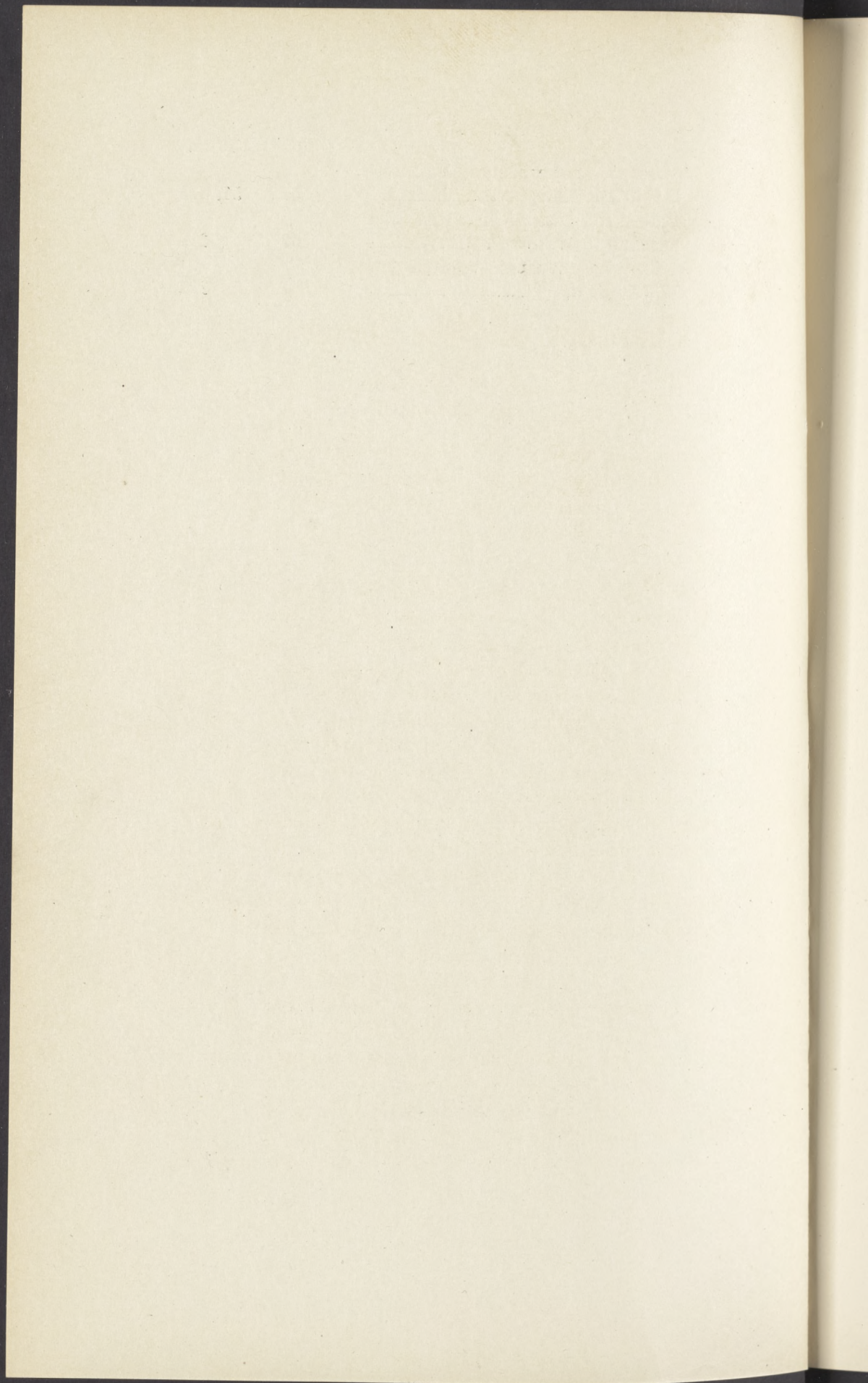
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Bill of Complaint.

BILL OF COMPLAINT.

Filed September 30, 1925.

In Chancery of New Jersey

To the Honorable Edwin Robert Walker, Chan- 10
cellor of the State of New Jersey:

The complainants Walter F. Barry of the Town
of West Orange, County of Essex and State of
New Jersey and Louis Beller of the City of
Newark in the said County and State, respectfully
show that:

1. On June 5, 1925, Anna Ruskin, the defend-
ant hereto entered into a certain contract in
writing with the complainant Walter F. Barry,
a true copy of which is hereto annexed and made 20
a part hereof, whereby she agreed to convey to
the said complainant his heirs and assigns, for
the sum of \$25,312.50 by deed of warranty free
from all encumbrance on or before the first
day of September next ensuing the date thereof
all that lot, tract or parcel of land and premises
hereinafter described situate, lying and being in
the City of Newark, in the County of Essex and
State of New Jersey: 30

BEGINNING in the easterly line of Washington
street at a point therein distant one hundred
and forty-six feet, and forty six hundredths of
a foot northerly from the northerly line of Hill
street from thence running along Washington
street north twenty-four degrees thirteen minutes
east twenty-six feet and sixteen hundredths of
a foot to line of land now or formerly belonging
to Martin Rowan; thence along that line south
sixty-two degrees thirty-nine minutes east one 40

Bill of Complaint.

hundred and one feet and seventy-eight hundredths of a foot; thence south twenty-seven degrees thirty-six minutes west twenty-four feet and fifty hundredths of a foot; thence north sixty-two degrees twenty-six minutes west seventy-one feet and eight hundredths of a foot; and thence north sixty-six degrees twenty-one minutes west twenty-nine feet and twenty-five hundredths of a foot to Washington street and place of BEGINNING.

This description is taken from an actual survey of the premises, made by Edward G. Kempf, Surveyor, dated February 3, 1913.

Being the same premises conveyed to the said Anna Ruskin by deed of Rudolph Pollak, and recorded in the Essex County Register's office in Book M-68 of Deeds, at pages 36-37.

2. The said contract after having been duly acknowledged was on the first day of September, 1925, duly recorded in the Register's office of the County of Essex in Book of Deeds for said County at page .

3. The sum of \$700.00 of the consideration for said lands as mentioned in Paragraph 1 hereof was duly paid by the said complainant Barry to the said defendant upon the execution and delivery of said contract.

4. On July 22, 1925, the complainant Walter F. Barry for a good and valuable consideration did assign by an instrument in writing the afore-said contract and all his rights thereunder subject to all conditions therein mentioned to the complainant Louis Beller.

5. The complainants had caused a search to be made of the title of the said defendant to the

Bill of Complaint.

aforesaid premises and were proceeding with all reasonable dispatch therein and prior to the first day of September, 1925, informed the defendant that a search thereof had revealed certain discrepancies or defects therein and requested the defendant to extend the time for closing title for a period of about 15 days, in order that the defects so appearing might be removed and the title made to appear satisfactory to counsel for the complainants; that pursuant to said request said defendant did inform this complainant Barry that she had extended the time to take title to September 8, 1925, and further stated that she would not grant any further extension for passing title; that complainants were not able to clear up the defects appearing within the time limited; that it became necessary among other things to determine the alleged single status of the said defendant, in order to establish her ability to make conveyance of said premises as required by said contract; that said defendant did not nor would aid complainants in establishing her status as a single woman and in order to determine the same, complainants and their counsel were obliged to have recourse to the records of a foreign state.

6. On September 14, 1925, complainants advised the solicitor of the said defendant that they were ready to take title and requested that conveyance be made to the complainant Beller and requested defendant to fix a time for closing title; that complainants were thereupon informed by solicitors for defendant that the defendant considered that the complainant Barry had broken his contract and that his deposit had been forfeited; that again on September 17, 1925, complainants advised the solicitors of the defendant

Bill of Complaint.

that complainants had been prepared for some time to close the said title; that on September 22, 1925, the said defendant by her solicitor informed complainants' solicitor that the defendant has considered since the last date set by her for closing said title, that the contract has been
 10 abrogated and all the rights of said complainant Barry thereunder have been forfeited.

7. That the complainants have at all times since the clearing of the said title and since September 14, 1925, been ready and willing to close title and to pay over the balance of the consideration money upon receipt of the deed for the premises as required by the said contract; and the defendant, well knowing that the complainants have at all times since the execution
 20 of the said contract been anxious to consummate the said purchase, has particularly since the first day of September, 1925, attempted to deprive the complainants of the benefit of their said contract.

8. The complainants are now desirous of obtaining a conveyance of the said lands and premises but the said defendant has refused and still refuses to convey to the complainants or either of them the lands and premises contracted to be conveyed to this complainant Barry, all of
 30 which is contrary to equity and good conscience.

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

1. That the said Anna Ruskin, who is the defendant to this suit, may answer this bill of complaint and each statement therein made.

2. That the said defendant may be decreed specifically to perform the said agreement entered into by the said defendant with the complainant Walter F. Barry, the complainants ten-
 40

Bill of Complaint.

dering themselves ready and willing and hereby offering specifically to perform said agreement on the part of the said complainant Barry.

3. That a writ of subpoena may issue commanding said defendant to answer this bill of complaint and to abide by such decree as this Court may make in the premises.

10

(signed) LUM, TAMBLYN & COLYER,
Solicitors for and of Counsel
with Complainants.

ARTICLES OF AGREEMENT, made the fifth day of June, in the year of Our Lord One Thousand Nine Hundred and Twenty-five, BETWEEN Anna Ruskin, (widow), of the City of Newark, in the County of Essex and State of New Jersey, party of the first part, and Dr. Walter F. Barry, of the City of Newark, in the County of Essex and State of New Jersey, party of the second part:

20

WITNESSETH, that the said party of the first part, for and in consideration of the sum of Twenty-five Thousand Three Hundred and Twelve Dollars and Fifty Cents (\$25,312.50) 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 she, the said party of the first part, will well and sufficiently convey to the said party of the second part, his heirs and assigns, by Deed of Warranty, free from all encumbrance, on or before the 15th day of July, next ensuing the date hereof, all that lot, tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in

30

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Bill of Complaint.

the City of Newark, in the County of Essex and State of New Jersey.

10 BEGINNING in the easterly line of Washington street at a point therein distant one hundred and forty-six feet and forty-six hundredths of a foot northerly from the northerly line of Hill street from thence running along Washington street north twenty-four degrees thirteen minutes east twenty-six feet and sixteen hundredths of a foot to line of land now or formerly belonging to Martin Rowan; thence along that line south 2) sixty-two degrees thirty-nine minutes east one hundred and one feet and seventy-eight hundredths of a foot; thence south twenty-seven degrees thirty-six minutes west twenty-four feet and fifty hundredths of a foot; thence north sixty-two degrees twenty-six minutes west seventy-one feet and eight hundredths of a foot; and thence north sixty-six degrees twenty-one minutes west twenty-nine feet and twenty-five hundredths of a foot to Washington street and place of BEGINNING.

This description is taken from an actual survey of the premises made by Edward G. Kempf, surveyor, dated February 3, 1913.

30 Being the same premises conveyed to the said Anna Ruskin by deed of Rudolph Pollak and recorded in the Essex County Register's Office in Book M-68 of Deeds, at pages 36-37.

40 AND the said Dr. Walter F. Barry, for his heirs, executors and administrators, doth covenant, promise and agree to and with the said party of the first part, her heirs, executors, administrators and assigns, that he, 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 Twenty-five Thou-

Bill of Complaint.

sand Three Hundred and Twelve Dollars and Fifty Cents (\$25,312.50) as and for the purchase money of the foregoing described land and premises, in the following manner, that is to say:

On execution of this agreement for which this is also a receipt	\$ 700.00	
On delivery of deed, cash	24,612.50	10
	<hr/>	
Total consideration	\$25,312.50	

Commissions to be paid upon the delivery of the deed pursuant to real estate board schedule by the party of the first part, to George F. Hewson Co., George F. Hewson and H. W. Pitman & Co. jointly, it being understood and agreed that party of the first part is to pay to the above named, three agents, commissions in the sum not to exceed \$812.50. 20

This property is sold subject to existing tenancies.

This contract is entered into upon the knowledge of the parties as to the value of the land and whatever buildings are upon the same, and not on any representations made as to character or quality.

AND IT IS FURTHER AGREED, by the parties to these presents, that the said party of the second part, his heirs and assigns, may enter into and upon the said land and premises on the first day of September, next ensuing the date hereof, and from thence take the rents, issues and profits to his and their use. 30

AND IT IS FURTHER AGREED, by the parties hereto, that the said Deed shall be delivered and received at the office of Lane, Lynch & Smith, Prudential Building, 763 Broad street, Newark, N. J. between the hours of nine in the 40

Bill of Complaint.

forenoon and five o'clock in the afternoon on the said first day of September, next ensuing the date hereof.

10 The rents of said premises, insurance premiums, water rents, taxes and interest on mortgage, if any, shall be adjusted, apportioned and allowed as of the day of delivery of said deed.

Gas and electric fixtures, gas stoves, hot water heaters and chandeliers, carpets, linoleum, mats and matting in halls, screens, shades, awnings, ash cans, heating apparatus, if any, and all other personal property appurtenant to or used in the operation of said premises is represented to be owned by seller and is included in this sale.

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

In case the premises shall suffer injury beyond the ordinary wear and tear, the party of the first part, shall repair the damage before the date set for delivery of said deed or make an appropriate deduction from the purchase price herein stated.

30 It is understood and agreed that the buildings upon said premises are all within the boundary lines of the property as described in the deed therefor, and that there are no encroachments thereon and that the buildings comply with municipal ordinances and regulations and the provisions of the New Jersey State Tenement House Act as enforced by the State Board of Tenement House Supervision, to be shown by the report of the department or board enforcing the same where such ordinances, regulations and said act apply.

40 It is expressly understood and agreed that the title to the land and premises hereby agreed to

Bill of Complaint.

be conveyed is not derived from any Martin Act proceedings or any Act for the Sale of Land for non-payment of the municipal taxes or assessments, nor depends upon adverse possession.

The premises above described are sold subject to restrictions appearing of record, if any.

It is hereby agreed that all assessments are to be paid by party of second part, except such assessments as are a lien on the date hereof, which party of the first part agrees to pay. 10

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

(Signed) ANNA RUSKIN,
(Signed) WALTER F. BARRY.

Signed, sealed and delivered in the presence of (Signed) 20
G. NELSON KLING.

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

BE IT REMEMBERED, that on this fifth day of June, in the year of Our Lord One Thousand Nine Hundred and Twenty-five, before me, the subscriber, an attorney at law of New Jersey, personally appeared Anna Ruskin, who I am satisfied, is the grantor mentioned in the within instrument, to whom I first made known the contents thereof, and thereupon she acknowledged that she signed, sealed and delivered the same as her voluntary act and deed, for the uses and purposes therein expressed. 30

(Signed) JOHN J. CLANCY,
Attorney at Law of New Jersey. 40

Answer.

closing of title until the 8th day of September, 1925; that it was agreed between the parties that time was of the essence and defendant did then and there notify complainants that no further extension of time would be given and that at the time an extension was given it was agreed that in consideration of the extension granted by the defendant, that time should be of the essence and said complainants accepted said extension upon condition that time was of the essence; that upon the 8th day of September, 1925, defendant appeared at the time and place fixed for the closing of title, prepared to deliver a deed in accordance with the provisions of her said contract, and that the said complainants did not appear at such time and place, and did not at any time during the 8th day of September, 1925, appear and tender to defendant the consideration for said lands and premises; that thereupon on the 9th day of April, 1925, defendant informed complainant, Walter F. Barry, and complainant, Louis Beller, if in fact said contract had been assigned to said Louis Beller through his agent, Walter F. Barry, duly authorized in that behalf, that because of the failure of complainants to take title on the said 8th day of September, 1925, the said contract had become null and void and the deposit forfeited. The statements contained in paragraph 5 not herein specifically admitted are denied.

6. Defendant says that on the 14th day of September, 1925, defendant's attorney received a letter from complainant's attorney, a copy of which is hereto annexed and made a part hereof and marked Exhibit 1; that defendant's attorney thereupon replied to said letter, a copy of which is hereto annexed and made a part hereof and

Answer.

10 marked Exhibit 2; that thereafter complainant's attorney communicated with the attorney for defendant and requested defendant's attorney to endeavor to induce defendant to make the conveyance; that defendant's attorney did take up the matter with this defendant, and as a result of the conference between this defendant and her attorney, defendant's attorney sent to complainants' attorney a letter, a copy of which is hereto annexed and made a part hereof and marked Exhibit 3. Otherwise than as herein admitted the contents of paragraph 6 of the bill are denied.

7. Defendant denies the contents of paragraph 7.

20 8. The statement contained in paragraph 8 that defendant refused to convey to complainants the lands and premises referred to in the bill of complaint is admitted. The remaining statements contained in paragraph 8 are denied.

30 Defendant further answering the bill of complaint says that by the express act of the parties, time was made of the essence of the closing of title and the date fixed was the 8th day of September, 1925; that on said date, although defendant attended and was able, willing and ready to convey, complainants did not attend and did not tender performance, and defendant further says that complainants have never tendered performance.

Defendant prays that the bill may be dismissed.

LANE, LYNCH & SMITH,
Solicitors for and of Counsel with Defendant.

*Answer.***EXHIBIT I.**

LUM, TAMBLYN & COLYER
 Firemen's Insurance Bldg.
 Newark, N. J.

September 14, 1925.

Joseph L. Smith, Esq.,
 763 Broad Street,
 Newark, N. J.

10

Dear Sir:

We have received the following description of the Washington street premises from the Fidelity Union Title & Mortgage Guaranty Company, with a request that the same be used in the deed from Mrs. Ruskin conveying her Washington street property:

20

BEGINNING in the easterly line of Washington street at a point distant one hundred forty-six feet and forty-six hundredths of a foot northerly from the northerly line of Hill street, from thence running along Washington street North 24 deg. 13' East twenty-six feet and sixteen hundredths of a foot to line of land now or formerly belonging to Martin Rowan; thence along that line South 62 deg. 39' East one hundred and one feet and seventy-eight hundredths of a foot; thence South 27 deg. 36' West twenty-four feet and fifty hundredths of a foot; thence North 62 deg. 26' West seventy-one feet and eight hundredths of a foot, and thence North 62 deg. 21' West twenty-nine feet and twenty-five hundredths of a foot to Washington street and point or place of BEGINNING.

30

We would greatly appreciate it if this conveyance could be made direct to Louis Beller of

40

Answer.

the City of Newark, but are willing, if it be more convenient for you, to have the conveyance made to Dr. Walter Barry of the Town of West Orange.

Will you kindly advise us when you think we may close this matter, and oblige,

10

Yours very truly,

(Signed) LUM, TAMBLYN & COLYER.

JSF:M

EXHIBIT II.

September 15, 1925.

20 Lum, Tamblyn & Colyer, Esqs.,
Firemen's Insurance Building,
Newark, N. J.

Gentlemen:

We have your favor of the 14th instant enclosing description you desire inserted in a deed from Mrs. Ruskin to Dr. Barry.

30 We beg to respectfully call your attention to the fact that Mrs. Ruskin, on account of Dr. Barry's failure to take title to this property at the time heretofore fixed, has advised you that she considered that Dr. Barry had broken this contract, and that his deposit had been forfeited.

We are,

Very truly yours,

Answer.

EXHIBIT III.

September 22nd, 1925.

Charles M. Lum, Esq.,
Firemen's Bldg.,
Newark, N. J.

Ruskin to Barry title.

10

Dear Mr. Lum:

I conferred with Mrs. Ruskin on Monday, September 21st, 1925, and she tells me that she feels, on account of Dr. Barry not having lived up to the terms of his agreement, which caused a loss to her on account of her not having received the moneys due from Dr. Barry, that she will not convey, as she has heretofore advised Dr. Barry, the property in question to him.

20

She feels that Dr. Barry kept putting off the closing of her title awaiting the turn of events in connection with Washington street property, and that he waited to see how the other properties on that street would go.

Therefore I beg to advise that Mrs. Ruskin, as heretofore stated, has considered since the last date set for closing for this title that the contract has been abrogated and all rights of Dr. Barry thereunder have been forfeited.

30

With kind personal regards, I beg to remain,

Very truly yours,

We consent to the filing of the within answer as in time.

(Signed) LUM, TAMBLYN & COLYER,
Solicitors for Complainants.

40

Replication.

REPLICATION.

Filed December 30, 1925.

IN CHANCERY OF NEW JERSEY.

59-163.

10

Between

WALTER F. BARRY, *et al.*,
Complainants,

and

ANNA RUSKIN,

Defendant.

On Bill, etc.

Replication.

20

The replication of Walter F. Barry and Louis Beller, complainants, to the answer of Anna Ruskin, the defendant in the above cause.

The complainants join issue on the answer of the defendant.

LUM, TAMBLYN & COLYER,
Solicitors for and of Counsel with
Complainants.

30

We consent to the filing of the within replication as in time.

Solrs. for Deft.

Order of Reference.

ORDER OF REFERENCE.

Filed January 5, 1926.

IN CHANCERY OF NEW JERSEY.

59-163.

Between

WALTER F. BARRY, *et al.*,
Complainants,

and

ANNA RUSKIN,
Defendant.

On Bill, etc.
Order of
Reference.

10

The solicitors for the defendant consenting hereto:

20

It is on this 5th day of January, 1926, on motion of Lum, Tamblyn & Colyer, of counsel with the complainants, ORDERED that the above-stated cause be referred to Honorable M. L. Berry, one of the Vice-Chancellor, to hear the same for the Chancellor and to report thereon to him and advise what order or decree should be made therein.

E. R. WALKER,

30

C.

We consent to the entry of the above order.

LANE, LYNCH & SMITH,
Solicitors for Defendant.

40

Dr. Walter F. Barry, direct.

IN CHANCERY OF NEW JERSEY.

10	WALTER F. BARRY, <i>et al.</i> , <i>Complainants,</i> <i>and</i> ANNA RUSKIN, <i>Defendant.</i>
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Transcript of testimony taken in the above-entitled cause before Hon. Maja Leon Berry, Vice-Chancellor, at the Chancery Chambers, Newark, New Jersey, on Wednesday, April 14, 1926, at 10 A. M.

Appearances:

20 Mr. Ralph Lum for complainants.

Mr. Merritt Lane and Mr. Joseph L. Smith for defendant.

DR. WALTER F. BARRY, sworn for complainants.

Direct examination by Mr. Lum.

30 Q Dr. Barry, are you the Dr. Walter F. Barry referred to in the contract of June 5, 1925, with Anna Ruskin? A I am.

Q Did you assign that contract to Louis Beller? A I did.

Q I show you an agreement dated the twenty-second day of July, 1925; is that your signature?

A Yes.

Q And is this the agreement? A Yes.

Mr. Lum: I offer this contract in evidence.

40

(Marked Exhibit C. 1.)

Dr. Walter F. Barry, cross.

Q Was the sum of \$700, referred to in Exhibit C. 1, paid at the time the contract was signed? A I really don't remember, Mr. Lum, whether it was or not; it is so long ago, but I believe there was some such payment as that made at the time.

Mr. Lane: It is conceded.

10

Q Are you personally familiar with any further details of the matter, of your own knowledge? A I am not very, to be perfectly frank. You see I am not very familiar with the details at this time, because I haven't gone over them at all of late, and it is so long ago that I have lost track of them.

Q May I ask if this agreement with Belier correctly states the consideration that you were to receive? A Yes.

20

Q And the difference between what you were to pay Anna Ruskin and what you were to receive from Belier was how much, A That I cannot really say at this time.

Q It is shown in these papers? A As shown in the contract.

Cross examination by Mr. Lane.

30

Q At the time you made this contract with Mrs. Ruskin, on the fifth of June, 1925, there was considerable speculation in land on Washington street in the immediate vicinity of this property, was there not? A I believe so.

Q That speculation had commenced as early as March of 1925, had it not? A I haven't the slightest idea when it started.

Q You were familiar with it, however? A I knew there was some activity in the Washing-

40

Dr. Walter F. Barry, cross.

ton street property, but as to when it started, I hadn't any idea.

Q That was because of the proposed widening of Washington street by the City? A Yes.

Q And at the time you purchased this property, you purchased it for speculative purposes, did you not? A Yes.

10 Q And that resulted in the making by you of your contract to sell the property to Mr. Belier on the twenty-second of July, 1925? A I don't quite understand your question.

Q And as a result of that speculation you sold it to Belier? A Yes.

Q On the twenty-second of July, 1925? A Surely.

Q You knew, did you not, that Mr. Belier was purchasing the property for speculation? A I haven't the slightest idea what Mr. Belier was doing.

20 Q Who was Mr. Beller? A This gentleman here.

Q What is his business? A I haven't any idea.

Q At the time you sold this property to Mr. Belier you sold other contracts to him which you had purchased for speculation? A I believe there were three parcels together that I sold Mr. Belier; that is why all three of them—

30 Q How did you come, doctor, to sign this letter which I show you, if it be your signature, dated— A May I read this? Without going over this thoroughly, I may answer this question by saying that as I remember, when the title was being searched, there were some questions brought up.

Q I am asking you how did you come to sign it physically; were you sent for, or how did you

40

Dr. Walter F. Barry, cross.

come to sign that letter, the physical fact? A I was not sent for; I was merely asked to sign the letter, in view of the facts incorporated in this letter, which met with my approval, by Mr. Lum.

Q You signed the letter at the request of Mr. Lum, did you not? A After reading the statement of facts as contained in the letter. 10

Q As a matter of fact you don't know anything about the facts contained in the letter; it is a lawyer's letter? A I believe it is.

Q It goes into the record title, about which you know nothing, did you? A I didn't sign anything about the search except what Mr. Lum told me, and I believed his statements.

Q Who was Mr. Lum representing at that time? A I believe he was representing the people who bought the contract of sale from me. 20

Q That is as much as you know as to whom he represents; you believe that to be so? A I believe that to be so.

Mr. Lane: I ask that this letter be marked for identification, being letter of September 8, 1925.

(Marked Exhibit D. 1 for identification.)

(Letterhead of Lum, Tamblyn & Colyer.) 30
"September 8, 1925.

Mrs. Anna Ruskin,
350 Washington Street,
Newark, N. J.

Dear Madam:

I wish to advise you that I am ready to take title to premises known as No. 350 Washington street, Newark, N. J. but there appears on record in the Register's Office of Essex County the following mortgages: 40

Dr. Walter F. Barry, cross.

10 1. David Rosenbaum, widower, and Rudolph Pollak, widower, to the Court House Building & Loan Association of the City of Newark dated August 16, 1920, and recorded in the Register's Office of Essex County in Book W-42 of mortgages, pages 245-247, to secure \$4,000.00;

2. David Rosenbaum, widower, and Rudolph Pollak, widower, to the Court House Building & Loan Association of the City of Newark dated August 16, 1920 and recorded in the Register's Office of Essex County in Book W-42 of mortgages, pages 247-249, to secure \$4,000.00;

20 3. Anna Ruskin, widow, to Rudolph Pollak and David Rosenbaum dated April 23, 1923 and recorded in the Register's Office of Essex County in Book W-47 of mortgages, pages 531-533, to secure \$5,000.00;

I also find of record a recognizance in the United States District Court in the amount of \$2,000.00, entered November 24, 1924, which you entered into as surety.

30 There is also a question against the title arising from the fact that I have been unable to obtain proof that the proceeds of the sale of this property were ever paid over to the proper trustees named in the will of Theodora Prieth, deceased. The conveyance in question was by deed from Anna Faber and husband, Theodora Thielan and husband and Bertha Frick to Joseph Okin, dated February 4, 1913 and recorded in Book H-52 of deeds for Essex County.

40 The Fidelity Union Title & Mortgage Guaranty Company has requested more de-

Dr. Walter F. Barry, cross.

tailed information from you in this matter, which I would appreciate your furnishing.

I, therefore, feel that you are not in a position to convey a marketable title at this time, but trust that these objections may be taken care of so that title may pass on September 15, 1925.

Yours very truly,
Walter F. Barry.

JSF:M''

10

Q Did you receive a letter from Mrs. Ruskin, a copy of which I show you—

Mr. Lane: Have you the original of the letter of September 1, 1925, Mr. Lum?

Mr. Lum: We have not, nor ever have had it; we have a letter of September 9th.

20

Q I show you a copy of what purports to be a letter of September 1, 1925, and ask you whether you received the original of that letter?

A I believe I did receive this letter. I am not certain of it, but I believe I did.

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

(Marked Exhibit D. 2 for identification.)

30

(Copy)

“September 1st, 1925.

Dr. Walter F. Barry,
516 Broad Street,
Newark, New Jersey.

Dear Sir:—

I beg to herewith advise you that pursuant to a contract made under date of June 5th,

40

Dr. Walter F. Barry, cross.

10 1925 between you and myself relating to the sale of the property situate at 350 Washington Street, Newark, New Jersey, that I have extended the time for you from September 1st, 1925 to Tuesday, September 8th, 1925 for you to perform this contract and take title pursuant to the terms and provisions of the said contract of the property therein referred to and further be advised that I will not grant any further extension to you for the passing of title of the property.

I am,

Yours very truly,

Anna Ruskin Abrams,

Owner."

20 Q Don't you remember that a young man served that letter on you, from our office, on September 1st? A I remember a young man coming to the office with several letters, but I do not remember the dates that I received them.

30 Q What did you do with the letter that you did receive? A I cannot tell you what I did with it at the time. I know when I received the letter, if I remember correctly, I notified Mr. Kling, or someone who was interested in the transfer of the property, but I really cannot say just who I did notify at the time, or what I did with the letters.

Q You paid no attention to them personally; you turned them over to someone else? A Yes, the people whom I had sold the contract to.

Q You received the letter of September 9th, did you not? A I believe I did receive that letter from Mr. Smith.

40 (Letter produced by Mr. Lum, and marked Exhibit C. 3.)

Dr. Walter F. Barry, cross.

“September 9th, 1925.

Dr. Walter F. Barry,
516 Broad Street,
Newark, New Jersey.

Dear Sir:—

I herewith beg to advise that the contents
of your letter of September 8th, 1925 do not 10
set forth correctly the status of property
owned by me known as premises #350 Wash-
ington Street, Newark, New Jersey.

You were under contract to purchase the
property from me by articles of agreement
made June 5th, 1925.

I extended your time for taking title to
the property in my letter to you of Septem-
ber 1st, 1925, wherein I wrote you as fol-
lows:

‘I beg to herewith advise you that pursuant 20
to a contract made under date of June 5th,
1925 between you and myself relating to
the sale of the property situate at 350 Wash-
ington Street, Newark, New Jersey, that I
have extended the time for you from Sep-
tember 1st, 1925 to Tuesday, September 8th,
1925 for you to perform this contract and
take title pursuant to the terms and pro-
visions of the said contract of the property 30
therein referred to and further be advised
that I will not grant any further extension
to you for the passing of title of the prop-
erty.’

This letter of September 1st, 1925 in ex-
tending the time of closing of this title made
time the essence thereof in that I advised
in extending the time for closing, as of your
request that title must close on yesterday,
September 8, 1925. On Tuesday, September 40

Dr. Walter F. Barry, cross.

8, 1925, I was ready, willing and able to convey said premises to you pursuant to the aforesaid contract and a warranty deed covering said premises was ready for delivery to you upon completion by you of the terms and conditions of the aforesaid contract. Your failure to comply with the terms and conditions of the aforesaid contract has aggregated and nullified the aforesaid contract. Your deposit made thereunto has been forfeited.

Yours very truly,
 ANNA RUSKIN ABRAHMS,
 Owner.
 (Signed) Anna Ruskin Abrams."

20 Q You know you received it; you produced it here this morning. A I know I received it; I said, I think, I received it.

Q Who produced this letter? A Mr. Lum. I couldn't receive it; that was signed by me; I believe I signed it; it is my signature on it.

Q It is addressed to you? A I beg your pardon; I had that confused with the other letter that I signed.

30 Q And that you turned over to Mr. Lum?
 A I believe I turned it over to Mr. Kling, the real estate man, I am not sure; I may have given it to Mr. Lum, but I do not remember; I think I gave it to Mr. Kling, or called his attention to it.

Q You note in this letter that it refers to the letter of September 1st, and quotes it? A Yes, I noticed that.

40 Q You didn't write back that you had never received any letter of September 1st? A I believe I did not.

Charles N. Macknet, direct.

Q Was there a written extension of the time?
A Yes.

CHARLES N. MACKNET, sworn for complainants.

10

Direct examination by Mr. Lum.

Q By whom are you employed, Mr. Macknet?
A Fidelity Union Title and Mortgage Guaranty Company.

Q And have been for some time? A Yes, sir.

Q In what capacity? A Reader.

Q Do you recall the title for the Ruskin property on Washington street? A I do.

20

Q Did you read that title? A I did.

Q Have you the records before you showing the title? A Yes, sir.

Q What did you discover? A Well, I discovered a surety bond given by a person by the name of Anna Raskin, a will of Theodora Prieth, which had to be submitted to our solicitor, and necessary proof regarding certain items in that will had to be obtained. There were three questions regarding the survey, boundaries, etc., which were unanswerable without the survey.

30

Q When was the survey ordered? A August 12.

Q When was the survey received? A September 9th.

Q Was your office hampered at all during that August by the vacation season? A It was.

Q Was your office ordinarily busy or unusually busy? A It was unusually busy in August.

40

Charles N. Macknet, direct.

Q Was there any delay by your office that could have been avoided in connection with the clearing up of this title, any unnecessary delay?

A No unnecessary delay.

Q Was the matter in the works, so to speak, at all times? A At all times there was something being done.

10 Q And was an affidavit prepared for Mrs. Ruskin to clear up? A It was.

Q Did she co-operate and facilitate things promptly? A She did not.

Q This contract was signed by her under the caption of widow. Do you know whether a question arose whether or not she was a widow? A The question did arise as to her marital status.

Q And was it necessary to obtain a record covering this out of the State? A It was.

20 Q Did that also consume some time? A It did.

Q Was it a physical possibility for your company to have this title ready for closing on the 1st of September? A It was not.

Q How soon thereafter were you ready for closing? A I think September 10th.

Q And did you immediately notify Lum, Tamblin & Colyer thereof? A I did.

30 Q I show you a letter dated September 19, to Lum, Tamblin & Colyer, referring to title No. 63314; is that the number that this took? A Yes.

Q Is that your signature? A It is.

Mr. Lum: I offer that in evidence.
(Marked Exhibit C. 4.)

Charles N. Macknet, direct.

“September 10, 1925.

Title No. 63314.

Messrs. Lum, Tambllyn & Colyer,
Firemen's Building,
Newark, N. J.

Dear Sirs:

Supplementing our report of recent date, 10
Items Nos. 10, 11 and 12 have been canceled.
We have not received the affidavit of Anna
Ruskin that the recognizance stated as No.
8 was not given by her. A copy of the affi-
davit, however, is enclosed, which you may
have her execute at the closing.

Survey made by Lehlbach Bros. has just
been received, a blue print of which is en-
closed herewith. Description in the proposed
deed should be as follows: 20

All that certain tract or parcel of land
situate, lying and being in the City of New-
ark, County of Essex and State of New
Jersey:

BEGINNING in the Easterly line of Wash-
ington street at a point distant 146.46 feet
Northerly from the Northerly line of Hill
street, from thence running along Washing-
ton street North 24 degrees 13 minutes East
26.16 feet to line of land now or formerly 30
belonging to Martin Rowan; thence along
that line South 62 degrees 39 minutes East
101.78 feet; thence South 27 degrees 36
minutes West 24.50 feet; thence North 62 de-
grees 26 minutes West 71.08 feet and thence

Charles N. Macknet, direct.

North 66 degrees 21 minutes West 29.25 feet to Washington street and BEGINNING.

Yours very truly,

FIDELITY UNION TITLE AND
MORTGAGE GUARANTY COMPANY.

By C. N. Macknet.

10 CNM/MNC
Inc.”

The Court: When was the title policy ordered?

Mr. Lum: On the 10th of August, 1925. The contract was dated June 5th and was signed by Mr. Barry, not to be closed until September. We will show that that September date, a long way off, was requested by Mrs. Ruskin.

20

The Court: Why wasn't title examination ordered immediately?

Mr. Lum: Because a long time was requested by Mrs. Ruskin. I don't know what Dr. Barry did or why he did it, but I presume if he had—he said he expected to dispose of the title; that is probably the practical answer, but if as another practical reason he had had a search made immediately he would have had to have a continuance before he completed it.

30

The Court: It appears that the title company was two days late in furnishing a settlement certificate. They were not ready by two days to certify as to the title on September 8th, the extended time of settlement. If the title examination was not ordered until the tenth day of August that was a lapse of over two months from the time the

40

Charles N. Macknet, direct.

contract was executed. Has not any delay which occurred in the examination of the title been assumed by the complainant, the purchaser?

Mr. Lum: I should say that under ordinary circumstances a title ordered on the 10th of August would have been very ample for the Fidelity Company with their own records. We are met here by things which wouldn't ordinarily have been anticipated. She signed this under the name of Anna Ruskin, which wasn't her name; her name was Abrams. That being called and coming to the attention of the company required an examination of records out of the State, obtaining certified copies and so forth; unusual things, in other words, occasioned an abnormal delay, which would not ordinarily have been expected.

I ask for letter of September 8th to Mrs. Anna Ruskin.

Mr. Lane: It is the one I marked D. 1 for identification

Mr. Lum: I offer this in evidence.

(Marked Exhibit C. 5.)

I offer in evidence a letter from Lane, Lynch & Smith, of September 15, 1925, to Lum, Tamblyn & Colyer.

(Marked Exhibit C. 6.)

Charles N. Macknet, direct.

“September 15, 1925.

Lum, Tambllyn & Colyer, Esqrs.,
Firemen's Insurance Building,
Newark, N. J.

Gentlemen:

10 We have your favor of the 14th instant
enclosing description you desire inserted in
a deed from Mrs. Ruskin to Dr. Barry.

We beg to respectfully call your attention
to the fact that Mrs. Ruskin, on account of
Dr. Barry's failure to take title to this prop-
erty at the time heretofore fixed, has advised
you that she considered that Dr. Barry had
broken this contract, and that his deposit
has been forfeited.

20 We are Very truly yours,
LANE, LYNCH & SMITH.”

Mr. Lum: I ask for the letter of Lum, Tam-
blyn & Colyer to Joseph L. Smith, dated
September 14, 1925, to which this is a reply.

Mr. Lane: Letter produced.

Mr. Lum: I offer this in evidence.

(Marked Exhibit C. 7.)

30 “September 14, 1925.

Joseph L. Smith, Esq.,
763 Broad Street,
Newark, N. J.

Dear Sir:

40 We have received the following description
of the Washington street premises from the
Fidelity Union Title & Mortgage Guaranty
Company, with a request that the same be
used in the deed from Mrs. Ruskin conveying
her Washington street property:

Charles N. Macknet, direct.

BEGINNING in the Easterly line of Washington street at a point distant one hundred forty-six feet and forty-six hundredths of a foot Northerly from the Northerly line of Hill street, from thence running along Washington street North $24^{\circ} 13'$ East twenty-six feet and sixteen hundredths of a foot to line of land now or formerly belonging to Martin Rowan; thence along that line South $62^{\circ} 39'$ East one hundred and one feet and seventy-eight hundredths of a foot; thence South $27^{\circ} 36'$ West twenty-four feet and fifty hundredths of a foot; thence North $62^{\circ} 26'$ West seventy-one feet and eight hundredths of a foot and thence North $66^{\circ} 21'$ West twenty-nine feet and twenty-five hundredths of a foot to Washington street and point or place of BEGINNING.

We would greatly appreciate it if this conveyance could be made direct to Louis Beller of the City of Newark, but are willing, if it will be more convenient for you, to have the conveyance made to Dr. Walter Barry of the Town of West Orange.

Will you kindly advise us when you think we may close this matter, and oblige,

Yours very truly,

LUM, TAMBLYN & COLYER.

JSF:M''

Mr. Lum: I ask for a letter from my firm to Joseph L. Smith, dated September 17, 1925.

Mr. Lane: We have no such letter:

Mr. Lum: I offer in evidence a copy of said letter.

(Marked Exhibit C. 8.)

Charles N. Macknet, direct.

“September 17, 1925.

Messrs. Lane, Lynch & Smith,
763 Broad Street,
Newark, N. J.

Attention: Mr. Smith.
Re: Ruskin-Barry Title.

10

My dear Mr. Smith:

20

We are pleased to advise you that Mr. Barry is willing to divide the profit in connection with the purchase of property No. 350 Washington street, Newark, N. J., with Mrs. Ruskin. The purchase price of the property was \$24,500.00 and the property was sold by Mr. Barry for \$26,000.00, leaving an apparent profit of \$1,500.00, but Dr. Barry, in addition to the purchase price, was required by the terms of the contract with Mrs. Ruskin to pay commissions of \$812.50 in connection with the sale to him, leaving a net profit of \$687.50.

30

We are, therefore, in a position to say that Mrs. Ruskin will receive, when the matter is closed, \$343.75 in addition to the purchase price. We hope your kind suggestion to us that the plan to divide the profit might be satisfactory to Mrs. Ruskin can be consummated.

Kindly advise us as soon as possible, as we have been prepared for some time to close this matter.

Yours very truly,

CML:M”

I also offer in evidence letter from Lane, Lynch & Smith to Lum, Tamblyn & Colyer, dated September 18, 1925.

(Marked Exhibit C. 9.)

40

Charles N. Macknet, direct.

“September 18, 1925.

Lum, Tamblyn & Colyer, Esqrs.,
Firemen’s Building,
Newark, N. J.

Attention: Mr. Charles M. Lum.
Ruskin-Barry Title.

Gentlemen:

10

We beg to acknowledge your favor of the 17th inst. in reference to the above matter, and have submitted same to Mrs. Ruskin and await her advice relative thereto.

We will advise you as soon as we hear from her.

With kind personal regards, we are,

Very truly yours,

LANE, LYNCH & SMITH.”

20

The Court: I noticed in the answer, I think it must be a mistake as to the date, that complainant did not appear at said time and place, and did not at any time during the 8th of September, 1925, offer and tender the consideration for said lands and premises, and that thereupon the 9th of April, 1925—that should be September, should it not?

Mr. Lane: Yes.

30

Mr. Lum: I offer in evidence letter of September 22, 1925, from Joseph L. Smith to Charles M. Lum, Ruskin to Barry Title.

(Marked Exhibit C. 10.)

40

Charles N. Macknet, direct.

"September 22, 1925.

Charles M. Lum, Esq.,
Firemen's Building,
Newark, N. J.

Ruskin to Barry Title.

Dear Mr. Lum:

10 I conferred with Mrs. Ruskin on Monday,
September 21, 1925, and she tells me that
she feels, on account of Dr. Barry not having
lived up to the terms of his agreement, which
caused a loss to her on account of her not
having received the moneys due from Dr.
Barry, that she will not convey, as she has
heretofore advised Dr. Barry, the property
in question to him.

20 She feels that Dr. Barry kept putting off
the closing of her title awaiting the turn of
events in connection with Washington street
property, and that he waited to see how the
other properties on that street would go.

Therefore I beg to advise that Mrs. Rus-
kin, as heretofore stated, has considered
since the last date set for closing for this
title that the contract has been abrogated
and all rights of Dr. Barry thereunder have
been forfeited.

30 With kind personal regards, I beg to re-
main,

Very truly yours,
JOSEPH L. SMITH."

Q Your company needs how much time, as a
general rule, to secure a survey for centrally
located property such as this? A It all depends
upon the length of time that the surveyor finds
it necessary to complete the work.

40 Q As a general rule, I mean what is the rea-
sonable time? A I should say about three
weeks.

Charles N. Macknet, cross.

Q And did this take longer? A It did.

Q You say you did need the survey? A We did need the survey to dispose of those three questions which arose. The surveyors were just as much rushed in August as we were, and that is the reason, perhaps, for their not sending their work in inside of a month.

10

Q Was that an unusually busy time in the real estate world in this city? A It was an unusually busy time.

Cross examination by Mr. Lane.

Q What did you need the survey for? A Deed Book H-52, page 512, deeds of adjoining owners, indicate our point of commencement should be 146.59 north from Hill street, and not 146.43. I think that is sufficient, without taking the rest.

20

Q You have got their search 62526; that is the adjoining land on the south of what? A Premises in question. See deed No. 114, dated June 25, 1925, which will have our guarantee, although a survey appears to have been waived in that title. Then this is a note by our surveyor who examined the survey submitted in disposing of this objection.

30

Q What is the note? A The note is, "See point in deed B-49, page 239, in deed adjoining premises in question on the north. See boundaries in deed adjoining premises in question on the south, 62526, deed to W. F. Barry et al. Survey waived in 62526. O. K. F. W. B."

Q Where is the survey? A (Producing same.)

Q When was that survey delivered to you?
A September 9.

40

Charles N. Macknet, cross.

Q It is dated the 14th of August. A It was ordered on the 12th.

Q What is the significance of the date; where is the memorandum of yours that you received it on the 9th of September? A Right there on the requisition for survey.

10 Q Did you direct the attention of Mr. Smith or anyone else to this survey, or rather to the question which you say you wanted settled by a survey? A I directed the attention of the surveyor who is employed by our company to the survey, and he checked the survey to see that it was O. K., and made his notations on this sheet and returned the same to me.

Q And found it O. K.? A And found it O. K., subject to the objection to title, because
20 steps, cornice and trim encroached on Washington street; objection to title because the building on the land herein described encroaches on Washington street. I thereupon sent a letter to Messrs. Lum, Tamblyn & Colyer, which has been referred to.

Q This letter of September 10th? A Yes.

Q Hadn't you been in communication with the surveyors prior to the receipt of this actual sketch, and hadn't they told you prior to that
30 time that the survey was O. K.? A That happened in connection with the surveyor.

Q Hadn't he told you that he had made the survey and that it was O. K., but that the actual paper had been mislaid in his office? A I don't recall that.

Q What is the memorandum on the back of this sheet, in someone's handwriting, "Survey mislaid"? A That is the handwriting of one
40 of the young ladies in our place.

Charles N. Macknet, cross.

Q Do you know anything about what it means? A Only what it says there, that it was mislaid.

Q You have no personal knowledge of it? A No.

Q Then apparently someone else in your office was doing something with respect to this title and this survey? A A great many people do things about every title. 10

Q So you don't know as a matter of fact whether you got information before September 8th that this survey was O. K. or not? A You cannot work on information of surveyors that it is O. K., without seeing the thing in our hands.

Q What else was there in this title that you wanted to clear up by the survey? A This title came through the will of Theodora Prieth, which was quite a complicated instrument, and I submitted it to our solicitor. 20

Q That had nothing to do with the survey, had it? A No.

Q When did you submit that to your solicitor? A Very shortly after; I should say about the 27th or 28th of August, 1925.

Q Does your record show when you first read this title? A I received this title on the 26th of August, and I read it that day or the succeeding day. 30

Q You received it on the 26th? A I did.

Q Who had had it before? A The surveyor and the examiner getting out the deed slips and the wills, sending them to the Court House for verification.

Q That recognizance was not against Anna Ruskin at all, was it? A It was against Anna Raskin.

Q That isn't Anna Ruskin? A It might be. 40

Charles N. Macknet, cross.

The Court: Did you determine whether it was or was not?

The Witness: We were unable to get an affidavit from Mrs. Ruskin, one way or the other.

10 The Court: Why did she refuse to give you an affidavit?

The Witness: She did.

The Court: When did you ask her for it?

The Witness: I don't recall.

The Court: Was it before or after the 8th of September?

The Witness: I don't know.

Q You never asked her for it, did you? A No.

20 Q Then why did you say you asked her for it, a few moments ago? A When I said "I," I meant that the company.

Q Where is there any memorandum—what personal knowledge have you that the company ever asked her for it? A I asked the representative of the clearing department, who does clearing work for me, to go to this woman and get the affidavit. This I recall; I think there is 30 testimony which can be produced on that.

Q You don't know anything about that personally, do you? A No.

Q Did you ever see this paper (witness shown paper)? A I have a copy of it here in the affidavit.

Q Where did you get the affidavit? A From Messrs. Lum, Tamblyn & Colyer.

Q When? A On September 2nd. Their letter enclosing it to me is September 2nd; I 40 believe I received it the 3rd.

Charles N. Macknet, re-direct.

Q Did they say where they got it? A They did not.

Q Didn't they tell you that Mr. Smith took it over to them on September 2nd; sometime before September 2nd, and showed them a certified copy of this decree? A They did not.

Q You made the general statement that Mrs. Ruskin did not co-operate; just tell me what you know of your own personal knowledge as to her lack of co-operation? A I only know that I was told by Mr. Foster or our clearing representative— 10

Q I am not asking for what you were told— of your own personal knowledge. A I don't know anything.

Q That calls for communications either made personally with Mrs. Ruskin or made personally with someone representing Mrs. Ruskin? A I have none. 20

Q Have you any communication from Lum, Tamblyn & Colyer or from Mr. Barry telling you that the date fixed for the closing of this title was September 8th, and that Mrs. Ruskin would not grant any further adjournment, and that you must have that search done by that time, or words to that effect? A I believe that knowledge was brought home to our company. 30

Q Any communication, I asked you. A No.

Re-direct examination by Mr. Lum.

Q When you discovered that this woman's name was not Ruskin, but Abrams, did that make necessary further searching? A It did.

Q Did an entire search have to be made in the name of Abrams, as though it was a new matter? A Yes. 40

Charles N. Macknet, re-cross.

Q When did you discover that her name was Abrams instead of Ruskin? A I imagine about the 27th or 28th of August.

Q Can you give us anything except your imagination? A I will say the 28th of August.

Q How did you acquire that knowledge? A I don't recall accurately.

10 Q Do you recall it was someone in our office?

A Yes.

The Court: How much delay was due to the fact that you had her name incorrect on the start?

The Witness: I should say three days.

Re-cross examination by Mr. Lane.

20 Q Where is your judgment search in this case? A County or Trenton?

Q Either. A Here is the county (producing same); that is clear; the recognizance is in Trenton.

Q Where is your judgment search against Abrams? A Right here. I don't see it; well, I don't believe that any was made, as indicated from here.

30 The Court: If no such search was made, how then was any delay caused?

The Witness: Anna Michaels, was that her name?

The Court: No, Abrams.

The Witness: I have a search here of Anna Michaels; evidently, there was no particular delay caused by that, but the delay at this point, September 2nd and 3rd, as you will note, was caused by this divorce decree;

40

Charles N. Macknet, re-cross.

we received it on the 3rd; their letter is dated September 2nd.

The Court: Whose letter?

The Witness: Of Lum, Tamblin & Colyer, dated September 2nd.

Then it was submitted to our title officer on the 3rd, and there is no date on his notation that we may pass it. I presume that was the next day or the day thereafter. 10

Q Which is all still before the 8th of September? A But at that time our survey had not been received.

Q Then you go back to your survey? A Yes.

The Court: The real delay which resulted in delaying the settlement certificate after the 8th was due to a survey? 20

The Witness: Yes. That is one thing. I would like to amend my answer, to say that I think there was a question on the will of Theodora Thielen still to be disposed of.

Q That was reported on August 28, 1925; title to close August 31, 1925? A Yes.

Q And according to your solicitor's report— 30
 "I think we should have proved that Theodora Thielen's share of the proceeds of sale was paid over to the trustee named in the will. I believe the devise in fee to her when joined in connection with the following terms of her will and the absence of a power of sale in the executrix required that the power of sale be exercised by her;" what did you do in reference to that? A I immediately turned that over to our claim representative to get that proof, and we have a letter here, 40

Charles N. Macknet, re-cross.

dated August 31, to Carl A. Feick, asking for that proof.

Q And then what? A Then he answered on September 2nd.

10 Q And then what? A Then I submitted that answer to our solicitor, and he stated that we might rely on the letter of Carl Feick in passing that question.

Q That was September 2nd? A It was September 2nd when this letter was dated, and received by us the 3rd, I imagine.

The Court: And when did it go to your counsel?

The Witness: I imagine the day thereafter.

20 Q When did you get an answer from him? A There is no date on his answer. He was likewise rushed, and it might possibly have been one or two days, possibly more.

Q You state "Supplementing our report of recent date, items Nos. &c."; where is the report referred to in your letter to Lum, Tamblyn & Colyer? A I have produced that.

30 Q Is this the report; if so, why is it dated August 13th? A That is our report; it is dated August 13th, because that is the date of our search.

Q Where is the letter which transmitted that, and indicating the date that was actually sent out? A There is no letter of transmittal, but our carbon copy states that it was mailed September 3rd.

Mr. Lane: I would like to mark the report for identification.

40 (Marked Exhibit D. 3 for identification.)

Michael S. Precker, direct.

Q Do you know whose handwriting this is "omit, omit, omit"? A I think it is Mr. Foster's.

Q Who is Mr. Foster? A Clerk in Lum, Tambllyn & Colyer's office.

10

MICHAEL S. PRECKER, sworn for complainants.

Direct examination by Mr. Lum.

Q Mr. Precker, what is your profession? A I am a lawyer.

Q Do you represent Mr. Beller? A I do.

Q Are you familiar with the contract of July, 1925, under which he took over the Barry contract? A The contract of July 22nd, yes, I am. 20

Q What did you do with reference to the title thereafter? A At the time I represented Mr. Beller in connection with that particular assignment of the contract to him, and he directed me to search the property. I knew from my personal talks with him that it would be necessary for him to procure a mortgage on the property, and I therefore delayed for a short time the ordering of my various title papers, in order to give him an opportunity or to myself have an opportunity of procuring the mortgage. I did that with the idea and through a recommendation to him that the mortgagee would wish his own counsel to search the property, and that if I immediately ordered a search, there would be a duplication of searches on the property. He made application through me to one of my Building and Loan As- 30 40

Michael S. Precker, direct.

sociations for a mortgage, and as soon thereafter as I discovered that the Association was not in a position to entertain the application, I immediately and on August 7, 1925, ordered that a complete search be made for me on the particular property.

10 Q Whom did you order that from? A I ordered it from the lawyer who does my title searching, Mr. Carl J. Downack. Simultaneously I ordered my tax search, which I note from my file this morning was completed for me and returned to me by the authorities.

Q On what date? A It was completed for me, it appears from the search itself, on August 10, 1925.

20 Mr. Lum: I offer that in evidence.
(Marked Exhibit C. 11.)

Q Did Mr. Beller get a mortgage? A Mr. Beller ultimately procured his mortgage through one John Vliet, who was a client of Lum, Tamblyn & Colyer, and who requested Lum, Tamblyn & Colyer to make the search for him.

30 Q And that was on the 10th of August? A That was as nearly as I can remember, between the 7th—my records would show that it was somewhere between the 7th and the 15th, because I ordered my title search on the 7th, and cancelled it on the 15th, so that there would not be a duplication.

40 Q It is in evidence that an application was made to the Fidelity, signed the 10th of August, through the office of Lum, Tamblyn & Colyer. A I have seen that application, and am familiar with it, and therefore believe that the search ordered by Lum, Tamblyn & Colyer on the loan

Michael S. Precker, direct.

granted at that time must have occurred, as nearly as I can fix it, on August 8th.

Mr. Lum: I offer the entire record of the Fidelity Union Trust Company covering the title, in the envelope, in that form, if you have no objection, subject to striking out anything that you wish. 10

The Court: It will be admitted subject to counsel's right to move to strike out any particular portions of it.

(Marked Exhibit C. 12.)

Q When did you first learn that this woman's name was not as she had signed it, Ruskin, but was Abrams? A I procured the information almost at the end of the month of August. 20

Q Did you know shortly after the 22nd or soon after the 22nd of July as you made your application to the Building and Loan, did you have any reason to doubt that it would make the loan and have the funds? A No, I had every reason to believe that he would get the loan.

Q And were you busy with the matter at all times up until the Vliet mortgage was obtained? A I did everything I possibly could; I had done a great deal in connection with the title, as will appear from my voluminous file here, and I at all times kept in touch with Mr. Charles M. Lum, who was handling the matter at that time. 30

Q I am referring more particularly to the time between the 22nd of July and the 10th of September. A You have what in mind?

Q I have in mind during that time were you busy with the matter at all times? A Oh, yes. I had given the matter a great deal of attention. 40

Michael S. Precker, cross.

Cross examination by Mr. Lane.

Q You own the property with Mr. Beller, don't you? A No, I do not, and never did.

10 Q Did you engage in any speculative purchases of real estate with him? A No, sir; I am his personal counsel; I have had nothing to do with him other than that.

Q You are very familiar with this property? A No more this particular one than I am with any other that I ever represent a client in.

Q What did Mr. Beller come to you for? A For me to represent him in the assignment of this particular contract from Dr. Barry to him.

20 Q Is that all? A In this particular matter, yes, that is all, up to that point, except that as soon as he had the assignment, he immediately went into conference with me on a discussion as to how he would finance the property, and my suggestion to him at the time was, use a Building and Loan mortgage, and in view of the fact that my office has five such institutions, I encouraged him to make his application that way.

Q Was there an application made to the Building and Loan? A There was.

30 Q When? A Immediately upon the taking of the assignment by him.

Q What happened to that application? A That is the application I referred to; it was discovered that there were not sufficient funds in the association to handle the application.

Q When did you know that? A As soon as I was able to call a meeting of the directors.

40 Q When was that? A That was sometime between July 22nd and August 7th, but the exact date I don't recall.

G. Nelson Kling, direct.

Q In the meantime did you talk with Mr. Beller about selling this contract? A No, I never discussed sale of contracts with clients.

Q What? A I do not discuss sales of contracts with my clients.

Q I know; did he tell you when he came in to see you, that he would like to sell it, or words to that effect; wasn't there anything spoken about that he possibly would sell the contract? 10

A No, I am certain that there was not.

Q Nothing of the kind? A No, sir.

Q He bought three other pieces of property about the same time? A No, he bought the two adjoining properties, one on each side of this one; Dr. Barry had contracts for the three, or rather had their three contracts by assignment.

Q What is Mr. Beller's business? A He is in the electrical business. 20

Q Where? A 90 Camp street, Newark.

G. NELSON KLING, sworn for complainants.

Direct examination by Mr. Lum.

Q What is your business, Mr. Kling? A Real estate salesman. 30

Q Were you concerned with this Ruskin title? A No.

Q With the contract? A With the contract of sale, yes.

Q And were you present at Mr. Smith's office when the contract was made? A Yes, sir.

Q Referring to Exhibit C. 1, which appears to state in the first part of the contract, that the date of the conveyance by warranty deed re- 40

G. Nelson Kling, cross—re-direct.

ferred to, is on or before the 15th of July. Do you recall that there was any discussion about that date? A Yes, at the request of Mrs. Ruskin, she wanted it extended until September, some time in September.

10 Q And then in that same contract was the date of September 1st, at the office of Lane, Lynch & Smith, inserted? A Yes, I think the secretary did that; the girl in Mr. Smith's office.

Q Did Mrs. Ruskin say why she wanted this long time from the 15th of July until the first of September? A She wanted time to look around and get another piece of property, and she didn't want to pay rent there if she gave title before or around the time signed.

20 Q Did Dr. Barry consent to that extension?
A Yes.

Cross examination by Mr. Lane.

Q What do you mean by consent to an extension? When the contract was originally signed, the date for closing was September 1st, wasn't it? A If I recall properly, the contract was not signed on that date of July 15; it was changed before it was signed by either party.

30 Q Then there was no extension; that was the agreement between the parties as to when the contract was to be closed; Mr. Barry was willing to close it on the 15th, and Mrs. Ruskin was not willing to close until September 1st? A Yes.

Q That is right? A Then the contract was made, yes.

Re-direct examination by Mr. Lum.

40 Q The original term discussed contemplated closing the title on the 15th of July, did it not?
A That is true.

G. Nelson Kling, re-direct.

Q And the contract as originally drawn and as it remained provided that the warranty deed should be passed on the 15th of July, didn't it?

A Yes.

Q And the change from the 15th of July to the first of September, which date was put in at the end, was at whose request? A Mrs. Ruskin's. 10

The Court: I don't see that it makes any difference, Mr. Lum; the fact is that they agreed on the first of September.

Mr. Lum: I offer in evidence letter of November 19, 1925, from Lane, Lynch & Smith to Lum, Tamblyn & Colyer.

(Marked Exhibit C. 12.)

“November 19th, 1925. 20

Lum, Tamblyn & Colyer,
Firemen's Building,
Newark, N. J.

Barry v. Ruskin.

Gentlemen:

We beg to advise that pursuant to Mr. Smith's recent telephone conversation with Mr. Charles Lum, we have conferred with our client, Mrs. Ruskin, who advised us that she would accept \$35,000 for the property in question. This offer of course, is made without prejudice. 30

Awaiting your advice,

We are

Very truly yours,

Lane, Lynch & Smith.”

40

G. Nelson Kling, re-direct.

The Court: That was after the suit was started.

Mr. Lum: I ask for the reply to that letter, of November 21, 1925.

(Letter produced, and marked Exhibit C. 13.)

10

“November 21, 1925.

Messrs. Lane, Lynch & Smith,
763 Broad Street,
Newark, N. J.

Barry v. Ruskin.

Gentlemen:

20

We are just in receipt of your favor of yesterday in which you state that pursuant to Mr. Smith's recent telephone conversation with Mr. Charles Lum, you have conferred with your client Mrs. Ruskin who advised you that she would accept \$35,000 for the property in question.

Mr. Charles Lum does not understand this matter at all. He has never, directly or indirectly, made inquiry as to what Mrs. Ruskin would accept for property which she agreed to sell and convey to our client.

30

If anyone has made inquiry of Mrs. Ruskin or you as to what Mrs. Ruskin would accept, it is without our knowledge and we certainly would not have suggested such action.

Yours very truly,

Lum, Tamblyn & Colyer.

CML/E”

40

I also offer letter of August 28, 1925, to Lum, Tamblyn & Colyer.

(Marked Exhibit C. 14.)

Joseph L. Smith, direct.

“August 28, 1925.

In re title No. 63314.

(L. Bellen)

Messrs. Lum, Tamblyn & Colyer,
Firemen's Building,
Newark, N. J.

Dear Sirs:

10

We have completed our examination of the record in connection with search of title to premises known at 350 Washington street, Newark, and search is now in the hands of one of our readers. We will send out the report on title as soon as we have received the survey and tax search, disposed of a Trenton recognizance, and cleared a question arising under the last Will and Testament of Theodora Prieth.

20

Very truly yours,

Fidelity Union Title and Mortgage
Guaranty Company,
A. Metcalf.

AM/MC”

Mr. Lum: We rest.

JOSEPH L. SMITH, sworn for defendant.

30

Direct examination by Mr. Lane.

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

Q And you represented Mrs. Ruskin in this title matter? A Yes, and had for a great many years.

Q You were present at the time the original contract was signed? A Yes.

40

Joseph L. Smith, direct.

Q Did you see at any time anyone in the office of Lum, Tamblyn & Colyer with respect to the title and Mrs. Ruskin's marriage, etc.?

A Yes, sir, there had been an inquiry made from me by Lum, Tamblyn & Colyer as to whether or not I had a copy of the decree of divorce between Mrs. Ruskin and her husband,
10 Mr. Abrams, and pursuant to that request I gave Lum, Tamblyn & Colyer a certified copy of that Ohio decree of divorce between Mrs. Ruskin and her husband, one Mr. Abrams.

Q Is this the decree, or certified copy, rather?

A Yes, that is the decree.

Mr. Lane: I offer it in evidence.

(Marked Exhibit D. 4.)

20 Q At the same time that you had a talk with them about the decree did you have a talk with them with respect to some recognizance against the property? A There are four of them there.

Q Whom did you talk to? A My recollection is, Mr. Lane; that there was an inquiry made from me by someone from that office relative to the recognizance, and I asked Mrs. Ruskin about it, and she advised me that she had not signed
30 any recognizance piece and I so advised that office that she was not the person in that recognizance.

Q Were there any other inquiries made of you by anyone connected with the office of Lum, Tamblyn & Colyer as to this title prior to the receipt of the letter of September 10th from Lum, Tamblyn & Colyer, marked Exhibit D. 1?

A Is that the letter that sets up the objection to the title?

40 Q Yes. A I have no recollection of any.

Joseph L. Smith, direct.

Q About the time—about September 1st was there a request made for an adjournment of this title closing? A Yes, Mr. Charles Lum requested that we adjourn it.

Q I show you an agreement not executed and ask you whether that was an agreement submitted to you for execution by Mr. Lum? A 10
Yes, sir, that was submitted to me by Mr. Lum, but not executed.

Mr. Lane: I ask to have that agreement marked.

(Marked Exhibit D. 5.)

“THIS AGREEMENT, made this first day of September, Nineteen Hundred and Twenty-five, by and between ANNA RUSKIN, of the City of Newark, County of Essex and State of New Jersey, party of the first part, and LOUIS BELLER, of the City of Newark, County of Essex and State of New Jersey, party of the second part. 20

WHEREAS, the party of the first part did enter into an agreement under date of June 5, 1925, with Walter F. Barry, of the Town of West Orange, County of Essex and State of New Jersey, wherein and whereby the party of the first part agreed to convey the premises at No. 350 Washington street, in the City of Newark, County of Essex and State of New Jersey, to the said Walter F. Barry on the first day of September, 1925; and 30

WHEREAS, the said Walter F. Barry did, by an agreement dated July 22, 1925, assign the said agreement of sale to the aforesaid Louis Beller, and 40

Joseph L. Smith, direct.

WHEREAS, the parties hereto are desirous of adjourning the time of closing;

10 Now, THEREFORE, it is mutually agreed by and between the parties hereto that the time for closing title be adjourned to the eighth day of September, 1925, at eleven o'clock in the forenoon at the offices of Lane, Lynch & Smith, Prudential Building, No. 763 Broad street, Newark, N. J.

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

Witness: (SEAL)
(" ")

20 Q Did you decline to execute the agreement and send the letter of September 1st to Mr. Barry personally, Exhibit D. 2 for identification?
A Yes.

Mr. Lane: I offer that in evidence.
(Letter now marked Exhibit D. 2.)

30 Q After the sending of the letter of September 1, 1925, and until the receipt of the letter from Lum, Tamblyn & Colyer, of September 10, 1925, did you receive any word about this title?
A I think, Mr. Lane, I received a letter from Lum, Tamblyn & Colyer on September—under date of September 8th.

Q That is the one I mean. Until the receipt of that letter did you receive any word whatever from Lum, Tamblyn & Colyer? A Not that I recall.

40 Q Were you prepared to close this title on the 8th of September? A Yes, sir, we were prepared to close the title.

Joseph L. Smith, direct.

Q Did you have the papers executed? A Yes, sir, they were executed.

Q I show you two deeds and ask you whether both of those deeds were executed and ready for delivery at that time? A Yes, sir, they were.

Q And did you have the revenue stamps purchased for the purpose of annexing to the deeds when they were delivered? A Yes, sir, they were. 10

Q And have they been together like that since the 8th of September? A Yes, sir.

Mr. Lane: I offer them in evidence.

(Marked Exhibits D. 6 and D. 7.)

The Court: Why were two deeds necessary?

The Witness: We wanted to avoid any question with respect to her, so we had one executed by her alone, and also one was executed by her and her husband, which had been procured in preparation for closing title prior to this decree for divorce. 20

Q Was Mrs. Ruskin present at the office of Lane, Lynch & Smith during that day for the purpose of closing the title? A Yes. 30

Q Did you hear anything from the purchaser during that day? A I think late that afternoon, Mr. Lane, I had delivered to me a letter bearing that date from Lum, Tamblyn & Colyer.

Q That is the letter of September 8th? A Yes.

Q To which you replied by the letter of September 9th? A I would have to see my letter of September 9th. I immediately acknowledged their letter of September 8th. 40

Joseph L. Smith, direct.

10 Q You say you had that delivered to you late that day. Is your recollection that it was delivered by a representative of Mr.— A My recollection as to how I received that letter of September 8th is that the original letter of September 8th, from Lum, Tamblyn & Colyer, addressed to Mrs. Ruskin and sent to her special delivery, was received by some tenant of Mrs. Ruskin's, and then Mrs. Ruskin subsequently brought it in to us, but on that date Lum, Tamblyn & Colyer had sent me a copy of their letter that they had mailed special delivery to Mrs. Ruskin.

20 Q Special delivery, registered? A Yes; so it was the copy of that letter which I received from Lum, Tamblyn & Colyer late that afternoon, as I recall.

30 Q There have been two letters introduced in evidence—in November. Will you tell me what the genesis of the letter that you wrote to Lum, Tamblyn & Colyer was and how that letter came to be written? A May I see that letter? (Witness shown letter.) In November some time I had had the pleasure of meeting Mr. Charles Lum, who, as we frequently did when we met, discussed this question, and as I understood Mr. Lum, he still wanted to know if there wasn't some way that we could close this matter, and pursuant to my understanding with him I sent for Mrs. Ruskin and asked her what she would agree to do about her property, and she said she would take \$45,000 for it, and I wrote Mr. Lum that in my letter of November 19, 1925, to which he replied under date of November 21, 1925.

40

Joseph L. Smith, cross.

Cross examination by Mr. Lum.

Q Mr. Smith, this information regarding the divorce was requested from our office at what time? A I cannot answer that; I don't know exactly when.

Q About the end of August? A I think it was the latter part of August; it may have been before then; I really don't remember when. 10

Q You do remember that it was about the time for closing? A No, I wouldn't say if it was about the time for closing or if it wasn't some time before that when you first advised me that your firm was interested in the title.

Q Who advised you as to that? A I think I used to speak on the phone to—I cannot tell you. I would know his name if I heard it. 20

Q Mr. Foster? A Foster.

Q You cannot attempt to fix any specific date on which you advised Mr. Foster or any one else regarding this decree of divorce, can you? A I know that it was not later than the latter part of August; it may have been some time before that.

Q Whom did you speak to about the recognition? A I wouldn't say definitely whether it was Mr. Foster or Mr. Charles Lum. 30

Q You did not have any conversation with anyone in the office except one of those two, did you, with reference to this title? A No, sir; they are the only two gentlemen I conferred with.

Q You know that the affidavit was prepared for the signature of Mrs. Ruskin, did you not? A I don't just recall that, Mr. Lum—ever having received that affidavit; I don't seem to have it in my file, or a copy of it, and I haven't any personal recollection of having received it. 40

Joseph L. Smith, cross.

Q Do you recall seeing an affidavit similar to this at any time in connection with this matter?

A I just cannot recall that particular affidavit; I wouldn't say that I had not seen it.

Q You do recall that Mrs. Ruskin never did sign any affidavit in connection with the matter?

10 A Yes.

Q You say you were prepared to close this title on the 8th of September, do you? A Yes.

Q You knew at the time that the taxes of 1924 were unpaid, didn't you? A Yes.

Q And that there were three bonds and mortgages still of record at that time, didn't you? A I thought there were two.

Q Do you recall that there were three; two in one name of \$4,000, and a third, of \$5,000? A
20 There was a building and loan mortgage and a Pollak mortgage, as I recall.

Q Those mortgages, whether two or three, were still open of record? A Yes.

Q And your client was very desirous of taking advantage of the boom on Washington street and get considerably more money for her property, wasn't she? A She was willing to sell the property under the contract.

Q At \$35,000, you mean? A Under the con-
30 tract price, \$24,500.

Q You were informed by our office that our client was at all times desirous of taking the title, and that it was merely a matter of the physical work being done by the Fidelity, were you not? A After the last date set for closing, at least after what I considered would be the last date set for closing, I so inferred from Mr. Charles Lum that your client would still like to take title, but we didn't feel that he was entitled
40 to it.

Joseph L. Smith, cross.

Q You understood in the meantime that the work was going forward, that effort was being made to clear up questions that had arisen, and that at all times the client was anxious and willing to take the title as soon as it could be certified to, and it was cleared? A No, I cannot say that I was; I understood that there were two things holding up the taking of this title: One was that the Fidelity wasn't ready at the time that was made of the essence for closing, and the second thing that held it up, that Mr. Beller did not have the money available to close the title. 10

Q Time being made of the essence, you refer solely to the letter, I presume? A Yes.

Q In which you fixed a certain date beyond which you wouldn't go? A Yes.

Q And you just yourself arbitrarily fixed that date as the eighth, rather than the third or the eighteenth, didn't you? A No, I think the law fixes that. 20

The Court: Is this (D. 2) in reply to a letter requesting an extension of time?

Mr. Lane: It is not a reply to a letter; it is in reply to a request made orally, which was accompanied by the delivery to Mr. Smith of Exhibit D. 5 for execution. She refused to execute this document, D. 5. 30

The Witness: The extension of September 8th was made on an oral request to me from Mr. Charles Lum.

Mr. Lane: In order to have no question about the receipt of the letter, Exhibit D. 2, of September 1st, counsel now produces from his files the original letter, September 1, 1925, and I offer it. 40

Joseph L. Smith, cross.

(Original letter also marked Exhibit D. 2.)

Mr. Lum: I offer this on behalf of the complainant.

(Marked Exhibit C. 15.)

Mr. Lane: A copy was offered before.

10 Q Before fixing this arbitrary date of the eighth, did you make any attempt to determine whether the survey had been received? A None whatsoever.

Q Or whether it was a physical possibility to close at that time? A The extension for one week, Mr. Lum, was granted by me on the oral request of Mr. Charles Lum, and I believe I so advised Mr. Lum that I would only adjourn it for a week, and then followed it up with this
20 letter of September 1st.

The Court: It appears by the form of extension agreement which was submitted by counsel for the purchasers, that September 8th was the date to which a request was made that the matter be adjourned.

The Witness: That is my recollection.

30 The Court: So that the extension that was asked for was granted, except that it was not granted by means of a supplemental agreement.

Q You recall that the request you had from our office was for time until the fifteenth of September, and that you said that Mrs. Ruskin would not grant until the fifteenth; do you recall that? A Yes, I think your office did request an extension for a longer period of time than we finally both agreed should be extended. Mr.
40 Lum and I both agreed on one week instead of

Joseph L. Smith, cross.

two weeks, and Mr. Lum sent me a stipulation to that effect, carrying out our understanding, and instead of using his stipulation I used my letter.

Q You said that your client wouldn't consent to the signing of this extension any further than the eighth?

The Court: The extension agreement, you mean? 10

Mr. Lum: Yes.

Q Your client wouldn't sign this typewritten paper, would she? A Mrs. Ruskin was very loath to sign any legal instrument, Mr. Lum.

Q And she wouldn't sign that one? A I think I advised her that it wasn't necessary, on account of my letter of September 1st.

Q Did you consider there was a different legal effect between that agreement and your letter? A I don't think I considered the legal effect of this agreement particularly. 20

Q You do recall that you were informed of the difficulties that were being met, and that we requested until the fifteenth of September; you do recall that, don't you? A I don't recall that I was advised of the difficulties on the way, other than what had been submitted to me in the communication. 30

Q You did know that the purchaser was at all times anxious to have the title as soon as it could be certified, didn't you? A I didn't have any definite knowledge of that.

Q Didn't Mr. Charles Lum indicate that to you in your talks? A As I said before, after the date fixed for closing had passed, Mr. Charles Lum still intimated to me that he would like to try to get it straightened out. 40

Joseph L. Smith, re-direct.

Q He told you where the difficulty had arisen?

A As I understood it, he told me the difficulty was that the Fidelity Union Title Company hadn't completed their title on time, on September 8th.

10 *Re-direct examination by Mr. Lane.*

Q Mr. Smith, you did consider the legal effect of your letter of September 1, 1925, Exhibit D. 2, did you not? A Yes.

Q And in your talks with Mr. Lum, preceding his sending over the agreement, and he requested an extension until September 8th, did you leave him in any uncertainty as to the position of your client, as to how long an extension she would grant? A No, sir, I made it quite
20 definite to Mr. Charles Lum that we would only extend it for one week more, and that was all.

Q And thereupon he sent you this stipulation and asked you to sign it, and you replied by the letter of September 1st, which letter of September 1st made it definite? A Yes.

Q When did you first know that Mr. Beller had anything to do with this thing? A I didn't
30 hear about Mr. Beller, Mr. Lane, for some weeks after the date that the agreement was executed; in fact, I never recognized Mr. Beller in the transaction.

Q Were you ever given any notice of any assignments or anything of that kind until the letter from Lum, Tamblin & Colyer, on September 14 or 15? A Yes, before that Mr. Lum had told me that Dr. Barry had assigned this contract, but I didn't recognize the assignment, because it was agreed that the deed from Mrs.
40 Ruskin should go to Dr. Barry.

Joseph L. Smith, re-cross.

Re-cross examination by Mr. Lum.

Q You recall the conversation with Mr. Charles Lum on Park Place, in which you spoke of the fact that your client didn't want to extend title beyond the eighth? A I recall speaking to Mr. Lum on Park Place, yes, sir.

10

Q Do you recall his definitely saying to you that they would certainly be ready on the eighth, if it was a possibility, but he couldn't assure you that they could be surely ready at that time? A I wouldn't say that Mr. Lum did not say that to me, but I have no recollection of the latter part of your question.

Q What is your recollection of what he did say? Did he say anything about his desire to be ready, the Fidelity holding him up, and that he would be ready if he could? A I don't think that Mr. Lum told me when we met that day on Park Place that the Fidelity was holding them up; I think he made that statement to me one day when I went to see him at his request, in his office; that is my recollection.

20

Q You do recall in Park Place that he said that they would be ready and would close as soon as they could be ready, or words to that effect? A I think the day he met me on Park Place, Mr. Lum asked me if I would get a further extension from Mrs. Ruskin, and that I told him that I would do the very best that I could, and that then we both found out that the longest extension I could get was one week.

30

The Court: These three mortgages that have been mentioned—how were they to be taken care of? They were still on the property on September 8th, were they not?

40

George F. Hewson, direct.

The Witness: Yes; I had planned to take care of those mortgages in one of two ways, either as is very customary, that we take care of them as between the parties on the day of closing, or, if that had not been agreeable, I was willing to advance the money to take care of them.

10

Q Were the mortgages due? Could they have been paid off? A Yes, sir.

The Court: The contract, as I recall it, called for conveyance free and clear, did it not?

Mr. Lum: Yes.

20

GEORGE F. HEWSON, sworn for defendant.

Direct examination by Mr. Lane.

Q Where do you live? A My office is 197 Market street, Newark.

Q What is your business? A Real estate broker.

Q How long have you been in the real estate brokerage business? A Fifteen years.

30

Q Do you know the property on Washington street, involved in this controversy? A I do.

Q Do you know property in that immediate vicinity? A Yes.

Q Do you know whether or not there was considerable speculation in that property during the last year? A Yes, sir.

Q Commencing when? A Commencing on or about March 1st and running up to close to the first of the year.

40

George F. Hewson, direct.

Q Did you have anything to do with this sale? A Yes. I submitted the property to Dr. Barry; he ultimately bought the property through my office.

Q Did you have anything to do with the sale from Barry to Beller? A No, sir, I did not.

Q Did you have any talks with Dr. Barry after he purchased this property with respect to closing title? A Yes, I had several conversations with him; I had understood that the title was to close— 10

Mr. Lum: I object to what you understood.

Q Unless you understood it from Dr. Barry.

Mr. Lum: I want the conversation, not his understanding. 20

A I went to Dr. Barry's office after July 15th, the day fixed for closing, and he kept promising from week to week that the title would be closed; he subsequently told me, on or about August 1, that he had sold the contract; he didn't state to whom, and he said that he expected the title to be closed shortly.

Q Do you know the value of this property? 30

A Yes.

Q What is it worth?

Mr. Lum: I object; I don't think it is material.

The Court: It may be material on this point: The defense is that time was of the essence, because of the activity in real estate, and because it was alleged to have been so made by this agreement of extension. I 40

George F. Hewson, cross.

think it is material; I think the value of the property now is material as indicating what the rise in value may have been since the contract was entered into, and I will receive it.

10 A I consider the property worth today \$1,500 a foot, or approximately \$40,000.

Q During this speculation in real estate on Washington street, were there rapid rises in value? A Very rapid, very widely marked.

Q Do you know how many transfers were made down there within a month or so, in the summer of 1925? A I would say in the limit of three months there were possibly 100 transfers.

20 Q And were contracts being made and sold before closing? A Yes.

Q Trading in contracts? A Yes.

Q Do you know whether this piece of property that is owned by Mrs. Ruskin was her home property or not? A Yes.

Q She occupied it as a home? A Yes.

Q Did you ever have any talk with Mr. Beller as to this property? A No, sir, I never knew Mr. Beller in the transaction at all.

30 *Cross examination by Mr. Lum.*

Q You never knew, then, that there was any other date but the fifteenth of July for closing this title? A I understood subsequently from my client that there was a clause in the contract that—the way I understood it, it was optional with the party of the second part, the buyer, to have the date extended to September 1st.

40 Q You don't know where he got that idea from? A No.

George F. Hewson, re-direct.

Q You were not present when the case was closed, then? A No, sir, I was not.

Q And for how long a time has property in that block, on this side, been worth \$1,500 a foot? A Possibly from July 1st or August 1st.

Q Of last year? A Last year.

Q It is worth as much now as it was last August? A In that very block, yes, sir. 10

Q There has been a drop recently, hasn't there? A There hasn't been any drop, but the edge is a little off mark; I haven't heard of any drops.

Q But there is falling off in activity there now? A Yes.

Q And since last July it has stood still at about \$1,500 a foot? A I wouldn't put it stationary at \$1,500 a foot; I am setting the value with regard to this property. 20

Q And that property has been worth \$1,500 a foot since last July? A Yes.

Re-direct examination by Mr. Lane.

Q Do you know whether property has been sold up there on contract for more than \$1,500 a foot and for less than \$1,500 a foot in this speculative time? A Yes, property has been sold for less and sold for more. For instance, the property at 272 Washington street was sold for over \$3,000 a foot. 30

Q When you put the value of \$1,500 a foot on this property you are giving what you consider actual value? A Actual value.

Q Irrespective of speculative value? A Yes.

The Court: What was its value in June, when this contract was signed? 40

George F. Hewson, re-direct.

The Witness: I considered it at that time worth a thousand dollars a foot.

The Court: You say in July it had risen to \$1,500 a foot?

The Witness: Yes.

10 The Court: Then there has been no rise since then?

The Witness: No real rise. It stood practically at the same price. Perhaps in one or two instances there has been higher prices paid, but I am not acquainted with those; I have heard of them.

Q You heard of higher prices, but for speculative purposes? A Yes.

20 Q You are trying to confine yourself to what you call actual value? A Yes.

Q Do you know whether at about the time fixed for the closing of this contract in September Mrs. Ruskin was contemplating the purchase of any other property? A She had purchased—yes.

30 Q Tell us about it. A She had purchased a property at 62-64 Court street, on which she had paid a deposit; the money to be derived from this No. 350 to be put into that property, and she had finally to sell that contract because she didn't have the money to close it, at a loss, I understand, of \$250 to her.

Q Do you know of any other piece of property that she was considering purchasing at or about this time, and she didn't have the money? A Yes.

40 Q Which property? A Property at No. 370 Washington street, consisting of twenty-seven feet front by eighty-five deep; beyond that, a three-story brick building, which was sold in

George F. Hewson, re-direct.

the month of August for \$19,000, and subsequently an offer was made inside of two weeks for \$29,000.

The Court: Is this residence property?

The Witness: Residence property.

The Court: I mean the property which
you have just referred to? 10

The Witness: Yes, sir.

The Court: How about the Court street
property; was that residence property?

The Witness: That was commercial and
residence. It had garages.

The Court: When was the contract on
the Court street property entered into?

The Witness: I think some time in the
month of July. 20

The Court: When was the closing under
that contract fixed for?

The Witness: The closing was fixed, to
the best of my knowledge, for September 15
or October 1.

The Court: When did she sell the con-
tract?

The Witness: She sold the contract, I
think, in the month of September, if I am
not mistaken; the exact date I am not sure
of; perhaps the latter part of August or
the first or second week in September. 30

The Court: Was it in August or was it
September?

The Witness: I think it was in Sep-
tember.

The Court: Before or after Septem-
ber 8th? 40

George F. Hewson, re-cross.

The Witness: That I am sure of. The contract itself will speak for that.

Q Has Mrs. Ruskin any other moneys except this property? A No, sir.

10 *Re-cross examination by Mr. Lum.*

Q How do you know what money she has?
A She told me on several occasions.

Q You only know from that? A From that.

Q Did you know that she had agreed to sell another piece of property to close title for that on July 1, 1925? A I did.

Q You knew that she refused to carry that out? A I didn't know that; I heard of it in a general way, but I didn't know about it positively.
20

Q You say that she sold out a contract at a loss? A Yes.

Q Who told you that? A She did.

Q That is the only knowledge you have of it?
A I know what she paid for the property, and finally what she had to get or buy it for.

Q You had nothing to do with it personally?

A I sold Mrs. Ruskin this property; sold it
30 to her.

Q After that you are dependent entirely on what she told you? A What Mr. told me, who was the owner.

Q You didn't have any knowledge of it of your own? A Except what he told me.

Q Hearsay evidence, in other words, entirely?
A I wouldn't say so.

Q What someone else tells you is hearsay evidence. A What she told me; she is the
40 only one that has that knowledge.

Oral Conclusions of Vice-Chancellor.

Q You are basing it entirely on what she told you? A Yes.

Q There is a good building on this property?
A Which one?

Q The one in question, the Washington street property, 350. A That has a fairly good building on it. 10

Q How much is that building worth? A I didn't consider the building, in fixing value, worth anything.

Q Pretty good building, not worth anything?
A I mean in fixing value I wouldn't say it was worth anything; I didn't put any value on it.

Q Do you know how much it is taxed for?
A I should judge between \$15,000 and \$16,000.

Q The very piece of property you speak of, which sold for a much higher price, was very differently situated property from this, in a different area entirely, different scale of value? A Possibly 300 feet. 20

Q Right back here? A No.

Q Near what street? A Near Branford place.

RECESS.

The Court: I haven't so definitely concluded this issue that I don't want to hear from you, but I want to indicate just how my mind is running. 30

It rather seems to me that while time was not made of the essence of the contract as originally drafted, that the letter of September first, written by Mr. Lane's office to Mr. Lum's office, does make time of the essence of the contract.

My attention has been called to this case of the Orange Society; I haven't read the case, I read the syllabus. I knew about the case, but I don't 40

Oral Conclusions of Vice-Chancellor.

10 recall the facts very clearly. In that case there was an extension of seven days' time, as I understand it, beyond the time fixed for settlement. There the time fixed for settlement in the contract was not by the contract made of the essence. Vice-Chancellor Backes held that seven days' extension, where unusual circumstances arose in connection with the title was not a sufficient extension; that is, was not a reasonable extension, and that a period of twenty days ought to have been allowed.

20 Now, while there were perhaps some unusual features in connection with this title, particularly the objection which might have been raised except for the divorce, under the testimony of the representative of the Title Company, that question did not cause any delay in the closing of the title, because they had determined prior to the eighth of September that the divorce decree was good, and that that objection was eliminated. There were some other minor objections raised by the Fidelity Company. The most important objection, however, was that concerning the survey. Counsel for complainants attempted to show that during the summer season the Fidelity Title Company was somewhat pressed with work and the vacation period interfered with getting
30 out the settlement sheet promptly, and so forth, and so on, and it seems to me all of those things were matters which ought have been taken into consideration by the purchaser. The contract was made on June 5th; settlement was fixed for September first. There was three months allowed within which title examination might be had. The evidence indicates that an application was not made to the Fidelity for a title policy
40 until about the fourteenth of August.

Oral Conclusions of Vice-Chancellor.

Mr. Lum: Tenth.

The Court: There was some testimony respecting the tenth, but the examiner who was on the stand, I understood him to say it was the fourteenth when he got the application.

Mr. Lum: Twelfth he ordered the survey.

The Court: Then we will say the tenth. That 10
was a lapse of over two months from the time the contract was made. Certainly, if there is a delay in getting out the search of only two or three days beyond the time fixed for settlement and the ordering of the search was delayed two months by the purchaser himself, I don't see how you can charge the seller with any fault on account of the delay of the Title Company, in view of what I have said. If you want to make an argument or submit a memorandum I don't want 20
to foreclose you from doing it.

There is another case which isn't reported, by Vice-Chancellor Backes; I think it is Lindsley vs. Newark; reported in 114 Atlantic, page 794.

30

40

Conclusions of Vice-Chancellor.

CONCLUSIONS.

Filed May 24, 1926.

IN CHANCERY OF NEW JERSEY.

10	<p><i>Between</i></p> <p>WALTER F. BARRY, <i>et al.</i>,</p> <p style="text-align: center;"><i>Complainants,</i></p> <p style="text-align: center;"><i>and</i></p> <p>ANNA RUSKIN,</p> <p style="text-align: right;"><i>Defendant.</i></p>	<p><i>On Bill for Specific Per- formance on Final Hearing. Conclusions.</i></p>
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Ralph Lum for complainants.

Lane, Lynch & Smith for defendant.

20 BERRY, *V.-C.*

The complainant Belier is the assignee of the complainant Barry and seeks the specific performance of a contract for the sale of land in the City of Newark by the defendant, who agreed to convey to Barry. The contract is dated June 5, 1925, and its terms are not in dispute. It provided for settlement on September 1, 1925. Time was not made of the essence of the contract by its terms. The contract was assigned to Belier 30 by Barry on July 22, 1925, but the defendant had no notice of this assignment. The complainant assignee was not ready for settlement on September 1st because of exceptions on the title company's report of the examination of the title which had not been cleared up, and a few days before September 1st applied, through his counsel, to the defendant for an extension of time to September 15th for settlement. This was re- 40 fused, but these negotiations resulted in an agree-

Conclusions of Vice-Chancellor.

ment between the attorneys of the respective parties that the time of settlement would be fixed for September 8, 1925, and to carry out that understanding counsel for complainants prepared a form of written agreement which provided for an adjournment of the time of closing from September 1st to September 8th. This form of agreement, however, the defendant refused to sign, but under date of September 1st wrote the complainant Barry a letter advising him that the time of settlement would be extended to September 8th. The letter closes with the following statement: "I will not grant any further extension to you for the passing of title of the property." No reply to this letter was made by anyone, and I think it may be fairly assumed that complainant acquiesced in the arrangement evidenced by that letter. The title company was not ready for closing the title until September 10th because the exceptions appearing on its report had not been satisfactorily cleared up until that time. On September 8th complainants' attorney addressed a letter to the defendant calling her attention to certain exceptions on the title company's report, and in which letter complainants contended that defendant was not in a position to convey a marketable title at that time, but suggested that the objections might be taken care of by September 15th. Under date of September 9th defendant replied to that letter denying that there was any defect in her title and because of the failure of the vendee to perform on September 8th, repudiated and rescinded the contract. On September 14th complainants' attorney advised defendant's attorney that complainant Barry was prepared to close the title, but defendant stood on her letter of September 9th and refused to perform.

10

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Conclusions of Vice-Chancellor.

It appears that the complainants did not order a search against this property until August 10th, a period of over two months after the date of the contract. If title examination had been ordered by complainants promptly after the execution of the contract there would have been no delay in the performance, as the title company would then have had ample time for the work before the date fixed for settlement. By delaying the placing of an order for the title policy the complainants must be taken to have assumed the consequences. At the time this contract was made and at the time fixed for performance the real estate market in the City of Newark was speculative and prices were subject to considerable variation. While time was not of the essence of the contract as originally executed, it seems to me that it was made such by agreement of the parties when the final date for closing was fixed for September 1st, which was evidenced by the letter of September 1st from the defendant to the complainant Barry, and further evidenced by the form of extension agreement prepared by complainants' solicitor. The preparation and submission of this form of agreement by the complainants' solicitor is strong evidence to my mind that he understood that the final date for closing was September 8th, and his failure to demur to defendant's letter of September 1st is conclusive. I feel that in rescinding the contract after the failure of the vendee to perform on September 8th the defendant was clearly within her rights. Under the circumstances of this case the extension of one week granted by the defendant for the closing of title was, in my judgment, entirely reasonable, especially in view of the complainants' long delay in ordering searches. This I believe to be in ac-

Conclusions of Vice-Chancellor.

cordance with the adjudication of this Court and the Court of Errors and Appeals in the following cases: *King v. Ruckman*, 23 N. J. Eq. 316; *Huffman v. Hummer*, 17 N. J. Eq. 267; *Newark v. Lindsley*, 114 Atl. Rep. 794; *Orange Society v. Kinski*, 94 N. J. Eq. 632, affirmed 95 N. J. Eq. 254.

10

In *Orange Society v. Kinski*, *supra*, Vice-Chancellor Backes said, at page 635:

“The law is that a day fixed in a contract for closing title, without more, is merely formal; but if it is stipulated that time is of the essence, or the circumstances are persuasive that that is the case, prompt performance is essential, and it is also the law that where the time fixed is regarded as a formality only, and the period has gone by, or where time is of the essence and there is a waiver, that time may nevertheless be made of the essence by formal demand that the title be closed by a given day, but the time given must be reasonable.”

20

And in *Newark v. Lindsley* *supra*, at page 796, the same Vice-Chancellor said:

“A bill for specific performance is addressed to the extraordinary jurisdiction of a court of equity to be exercised according to its discretion. The general rule is that he who seeks performance of a contract for the conveyance of land must show himself ready, desirous, prompt and eager to perform the contract on his part. Therefore, unreasonable delay in doing those acts which are to be done by him will justify and require a denial of relief. No rule respecting the length of the delay which will be fatal to relief can be laid down, for each case must depend on its peculiar circumstances.”

30

In that case a delay of two months in beginning the examination of title was one of the

40

Conclusions of Vice-Chancellor.

circumstances moving the Court to refuse relief. The case is, in part at least, analogous to the case *sub judice* and is ample authority for dismissing this bill. The long delay of the complainants in ordering searches in this case was responsible for their not being ready to close the title on
10 September 1st. At that time conditions in the real estate market were such that further delay might be prejudicial to the interests of the vendor, and I am of the opinion that she was within her rights in refusing to extend the time for settlement beyond September 8th, but irrespective of the reasonableness or unreasonableness of this extension, it is clear that such an extension fixing the final date for settlement at September 8th and beyond, which, it was understood, no
20 further extensions would be allowed, was agreed upon between the parties. I will, therefore, advise a decree dismissing the bill of complaint.

Heard April 14, 1926.

Decided May 17, 1926.

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*Final Decree.***FINAL DECREE.**

Filed June 15, 1926.

IN CHANCERY OF NEW JERSEY.

59-163.

*Between*WALTER F. BARRY and LOUIS
BELLER,*Complainants,**and*

ANNA RUSKIN,

Defendant.

10

*On Bill, &c.**Final Decree.*

This cause coming on to be heard before the
Chancellor, in the presence of Ralph Lum, of
counsel with complainants, and Merritt Lane, of
counsel with defendant, upon bill, answer, repli-
cation and proofs taken in open court, and the
Court having considered the pleadings, proofs
and argument of counsel, and being of the opinion
that time became of the essence of the contract
and that the complainants did not perform that
which was to be performed upon their part, and
that the contract became and was at the time of
the filing of the bill and is unenforceable against
the defendant:

20

30

It is, on this 15th day of June, 1926, by his
Honor, Edwin Robert Walker, Chancellor of the
State of New Jersey, ORDERED, ADJUDGED and DE-
CREED, and the said Chancellor doth, by virtue
of the power and authority of this Court, hereby
ORDER, ADJUDGE and DECREE that the complain-
ants' bill be dismissed for the reasons stated in
the recital hereof, with costs, in which shall be

40

Final Decree.

included a counsel fee of \$250.00, to be paid by the complainants to the defendant, and that the record of said contract in the Essex County Register's Office be cancelled, and that the *lis pendens* filed herein be cancelled of record.

10 And it is further ordered that the defendant return to the complainant the deposit made.

E. R. WALKER,
C.

Respectfully advised,

MAJA L. BERRY,
V-C.

20

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Notice of Appeal.

NOTICE OF APPEAL.

Filed June 15, 1926.

IN CHANCERY OF NEW JERSEY.

59-163.

Between

WALTER F. BARRY, *et al.*,
Complainants,

and

ANNA RUSKIN,

Defendant.

10

On Bill, etc.

*Notice of
Appeal.*

The complainants hereby appeal from the final
decree made in the above-entitled cause on the
15th day of June, 1926, and from the whole and
every part thereof, to the Court of Errors and
Appeals in the last resort in all causes.

20

Dated the 15th day of June, 1926.

LUM, TAMBLYN & COLYER,
Solicitors of Complainants.

RALPH E. LUM,
Of Counsel.

30

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

RALPH E. LUM,
Of Counsel with Complainants.

Service of a copy of the within notice of appeal
is hereby acknowledged this 15th day of June,
1926.

MERRITT LANE,
Solicitor of Defendant.

40

Amended Notice of Appeal.

AMENDED NOTICE OF APPEAL.

Filed June 22, 1926.

IN CHANCERY OF NEW JERSEY.

59-163.

10

Between

WALTER F. BARRY, *et al.*,
Complainants,

and

ANNA RUSKIN,
Defendant.

On Bill, etc.
Amended
Notice of
Appeal.

20

The complainants hereby appeal from the final decree made by the Chancellor on the advice of Vice-Chancellor Berry in the above-entitled cause on the 15th day of June, 1926, and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all causes.

Dated the 15th day of June, 1926.

LUM, TAMBLYN & COLYER,
Solicitors of Complainants.

30

RALPH E. LUM,
Of Counsel.

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

RALPH E. LUM,
Of Counsel with Complainants.

40

Service of a copy of the within amended notice of appeal is hereby acknowledged this 24th day of June, 1926.

MERRITT LANE,
Solicitor for Defendant.

Petition of Appeal.

PETITION OF APPEAL.

Filed June 30, 1926, with Secretary of State.

New Jersey Court of Errors and Appeals

Between

WALTER F. BARRY and LOUIS
BELLER,
Complainants-Appellants,

and

ANNA RUSKIN,
Defendant-Respondent.

*On Appeal
from
Chancery.*

*Petition of
Appeal.*

10

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

20

The petition of Walter F. Barry and Louis Beller, the appellants in the above-stated cause, respectfully show that your petitioners find themselves aggrieved by a final decree made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date the 15th day of June, 1926, in a certain cause in the said Court of Chancery, wherein the said Walter F. Barry and Louis Beller were complainants and Anna Ruskin was defendant, in this respect, to wit: that the said decree adjudges that the complainants' bill be dismissed for the reasons stated in the recital thereof with costs, in which shall be included a counsel fee of Two Hundred and Fifty Dollars (\$250.00), to be paid by the complainants to the defendant, and that the record of said contract in the Essex County Register's Office be cancelled and that the *Lis Pendens* filed therein be cancelled of record.

30

40

Petition of Appeal.

10 And your petitioners humbly appeal from the decree of the Chancellor, which decrees as aforesaid, upon the ground that the same is erroneous in that the Court held that time became of the essence of the contract; that complainants did not perform that which was to be performed upon their part, and that the contract became and was at the filing of the bill unenforceable against the defendant.

Your petitioners therefore pray that the said decree of the said Chancellor may be wholly reversed, set aside and for nothing holden and that your petitioners may have such relief in the premises as to this Honorable Court shall seem meet.

20 LUM, TAMBLYN & COLYER,
Solicitors for and of Counsel with Appellants.

RALPH E. LUM,
Of Counsel with Appellants.

Endorsed:

“Filed June 30, 1926.

THOMAS F. MARTIN,
Clerk.”

30 Service of a copy of the within petition of appeal is hereby acknowledged this 29th day of June, 1926.

MERRITT LANE,
Solr. for Deft.-Respondent.

Answer to Petition of Appeal.

ANSWER TO PETITION OF APPEAL.

Filed July 2, 1926.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

Between

WALTER F. BARRY and LOUIS
BELLER,
Complainants-Appellants,

and

ANNA RUSKIN,
Defendant-Respondent.

10

*On Petition
of Appeal,
&c.*

*Answer to
Petition of
Appeal.*

The answer of the above-named respondent to
the petition of appeal of the above-named appel-
lant.

20

This respondent, not acknowledging all or any
of the matters which in the said petition of ap-
peal are contained to be true, for answer thereto,
nevertheless, says and admits that a decree was,
on the 15th day of June, 1926, made and entered
in the Court of Chancery, in the cause and for
that purpose mentioned in the said petition, as
is therein stated; but as to the substance and
form thereof this respondent prays to refer
thereto when the same shall be produced. And
this respondent is advised and believes that the
said decree is agreeable to equity, and she prays
that the same may be affirmed, with costs to be
adjudged to this respondent.

30

LANE, LYNCH & SMITH,
Solicitors of Respondent.

40

*Exhibit C. 1.***EXHIBIT C. 1.**

ANNA RUSKIN, ARTICLES OF AGREEMENT,
 AND made the fifth day of
 DR. WALTER F. BARRY, June, in the year of Our
 Lord One Thousand

10 Nine Hundred and twenty-five, BETWEEN Anna
 Ruskin, (Widow) of the City of Newark in the
 County of Essex and State of New Jersey, party
 of the first part; AND Dr. Walter F. Barry, of
 the City of Newark, in the County of Essex and
 State of New Jersey, party of the second part:
 WITNESSETH, That the said party of the first
 part, for and in consideration of the sum of
 Twenty five thousand three hundred and twelve
 dollars and fifty cents (\$25,312.50) to be paid and
 20 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 she the said party of the first part, will
 well and sufficiently convey to the said party of
 the second part, his heirs and assigns, by Deed
 of Warranty free from all encumbrance on or
 before the 15th day of July, next ensuing the
 date hereof, all that lot, tract or parcel of land
 30 and premises, hereinafter particularly described,
 situate, lying and being in the City of Newark,
 in the County of Essex and State of New Jersey.

BEGINNING in the easterly line of Washington
 Street at a point therein distant one hundred and
 forty-six feet, and forty six hundredths of a
 foot northerly from the northerly line of Hill
 Street from thence running along Washington
 Street north twenty-four degrees thirteen min-
 utes east twenty six feet and sixteen hundredths
 40 of a foot to line of land now or formerly be-

Exhibit C. 1.

longing to Martin Rowan; thence along that line south sixty-two degrees thirty-nine minutes east one hundred and one feet and seventy-eight hundredths of a foot; thence south twenty-seven degrees thirty-six minutes west twenty-four feet and fifty hundredths of a foot; thence north sixty-two degrees twenty six minutes west seventy-one feet and eight hundredths of a foot; and thence north sixty-six degrees twenty one minutes west twenty-nine feet and twenty-five hundredths of a foot to Washington Street and place of BEGINNING. This description is taken from an actual survey of the premises, made by Edward G. Kempf, Surveyor, dated February 3, 1913. Being the same premises conveyed to the said Anna Ruskin by deed of Rudolph Pollak, and recorded in the Essex County Register's office in Book M-68 of Deeds, at pages 36-37.

AND the said Dr. Walter F. Barry, for his heirs, executors and administrators, doth covenant, promise and agree to and with the said party of the first part, her heirs, executors, administrators and assigns, that he 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 \$25,312.50 as and for the purchase money of the foregoing described land and premises, in the following manner, that is to say:

On Execution of this agreement for which this is also a receipt	\$700.00
On delivery of deed, cash	\$24,612.50
Total Consideration	\$25,312.50

Commissions to be paid upon the delivery of the deed pursuant to Real Estate Board Sched-

Exhibit C. 1.

ule by the party of the first part. to George F. Hewson Co. George F. Hewson and H. W. Pitman & Co. jointly, it being understood and agreed that party of first part is to pay to the above named, three agents, commissions in the sum not to exceed \$812.50. This property is sold subject to existing tenancies.

10 This Contract is entered into upon the knowledge of the parties as to the value of the land and whatever buildings are upon the same, and not on any representations made as to character or quality.

AND IT IS FURTHER AGREED, by the parties to these presents, that the said party of the second part, his heirs and assigns, may enter into and upon the said land and premises on the 1st day of September next ensuing the date hereof, and from thence take the rents, issues and profits to his and their use.

20 AND IT IS FURTHER AGREED, by the parties hereto, that the said Deed shall be delivered and received at the office of Lane, Lynch & Smith, Prudential Building, 763 Broad Street, Newark, N. J. between the hours of nine in the forenoon and five o'clock in the—noon on the said 1st day of September next ensuing the date hereof.

30 The rents of said premises, insurance premiums, water rents, taxes, and interest on Mortgage, if any, shall be adjusted, apportioned and allowed as of the day of delivery of said deed.

40 Gas and electric fixtures, gas stoves, hot water heaters and chandeliers, carpets, linoleum, mats and matting in halls, screens, shades, awnings, ash cans, heating apparatus, if any, and all other personal property appurtenant to or used in the operation of said premises is represented to be owned by seller and is included in this sale.

Exhibit C. 1.

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

In case the premises shall suffer injury beyond the ordinary wear and tear, the party of the first part, shall repair the damage before the date set for delivery of said deed or make an appropriate deduction from the purchase price herein stated. 10

It is understood and agreed that the buildings upon said premises are all within the boundary lines of the property as described in the deed therefor, and that there are no encroachments thereon and that the buildings comply with municipal ordinances and regulations and the provisions of the New Jersey State Tenement House Act as enforced by the State Board of Tenement House Supervision, to be shown by the report of the department or board enforcing the same where such ordinances, regulations and said act apply. 20

It is expressly understood and agreed that the title to the land and premises hereby agreed to be conveyed is not derived from any Martin Act proceedings or any Act for the Sale of Land for non-payment of the municipal taxes or assessments, nor depends upon adverse possession. 30

The premises above described are sold subject to restrictions appearing of record, if any.

It is hereby agreed that all assessments are to be paid by party of second part, except such assessments as are a lien on the date hereof, which party of the first part agrees to pay.

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

ANNA RUSKIN (SEAL)

WALTER F. BARRY (SEAL) 40

Exhibit C. 1.

Signed, Sealed and Delivered
in the Presence of

G. NELSON KLING,

STATE OF NEW JERSEY, ss. BE IT REMEMBERED,
10 COUNTY OF ESSEX, That on this 5th day
of June, in the year of our Lord One Thousand
Nine Hundred and twenty-five, before me, the
subscriber, An Attorney at Law of New Jersey,
personally appeared Anna Ruskin, who, I am
satisfied, is the grantor mentioned in the within
Instrument, to whom I first made known the
contents thereof, and thereupon she acknowl-
edged that, she signed, sealed and delivered the
same as her voluntary act and deed, for the uses
and purposes therein expressed.

20 John J. Clancy, Attorney at Law of New Jer-
sey.

In consideration of one dollar (\$1.00) dollars
to me in hand paid by Louis Belles, I hereby
assign to said Louis Belles, this contract and
all my rights thereunder, subject to all condi-
tions herein mentioned.

30 WITNESS my hand and seal this twenty-second
day of July, A. D. 1925.

WALTER F. BARRY (SEAL)

Signed, Sealed and Delivered
in the Presence of

GEORGE B. ASTLEY,

Received in the office September 1st, A. D.
1925 at 3:42 P. M. No. 116.

Exhibit C. 3.

Office of
 REGISTER OF DEEDS AND MORTGAGES
 Essex County, New Jersey
 (Cut)

STATE OF NEW JERSEY, }
 COUNTY OF ESSEX. }^{ss.} 10

I, HOWARD S. DODD, Register of Deeds and Mortgages of the County of Essex, State of New Jersey, do hereby certify that the foregoing is a true and correct copy of the record of a certain Agreement made by Anna Ruskin, and Dr. Walter F. Barry, and also of the certificate of acknowledgment thereto annexed, as the same may be found recorded in my office in book E-73 of Deeds for said County on pages 58-59. 20

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal (SEAL) this 12th day of April, A. D. 1926.

HOWARD S. DODD,
 Register of Deeds and Mortgages.

EXHIBIT C. 3.

30

September 9th, 1925.

Dr. Walter F. Barry,
 516 Broad Street,
 Newark, New Jersey.

Dear Sir:—

I herewith beg to advise that the contents of your letter of September 8th, 1925 do not set forth correctly the status of property owned by me known as premises #350 Washington Street, Newark, New Jersey. 40

Exhibit C. 3.

You were under contract to purchase the property from me by articles of agreement made June 5th, 1925.

I extended your time for taking title to the property in my letter to you of September 1st, 1925 wherein I wrote you as follows:

10 "I beg to herewith advise you that pursuant to a contract made under date of June 5th, 1925, between you and myself relating to the sale of the property situate at 350 Washington Street, Newark, New Jersey, that I have extended the time for you from September 1st, 1925 to Tuesday, September 8th, 1925 for you to perform this contract and take title pursuant to the terms

Dr. Barry

Page 2.

20 and provisions of the said contract of the property therein referred to and further be advised that I will not grant any further extension to you for the passing of title of the property."

This letter of September 1st, 1925 in extending the time of closing of this title made time the essence thereof in that I advised in extending the time for closing as of your request that title must close on yesterday, September 8th, 1925. On Tuesday, September 8th, 1925 I was ready, 30 willing and able to convey said premises to you pursuant to the aforesaid contract and a warranty deed covering said premises was ready for delivery to you upon completion by you of the terms and conditions of the aforesaid contract. Your failure to comply with the terms and conditions of the aforesaid contract has aggregated and nullified the aforesaid contract. Your deposit made thereunto has been forfeited.

Yours very truly

ANNA RUSKIN ABRAHMS,

40

Owner.

Anna Ruskin Abrams.

Exhibit C. 8.

EXHIBIT C. 8.

September 17, 1925.

Messrs. Lane, Lynch & Smith,
763 Broad Street,
Newark, N. J.

Attention: Mr. Smith. Re: Ruskin-Barry Title. 10

My dear Mr. Smith:

We are pleased to advise you that Mr. Barry is willing to divide the profit in connection with the purchase of property No. 350 Washington Street, Newark, N. J. with Mrs. Ruskin. The purchase price of the property was \$24,500.00 and the property was sold by Mr. Barry for \$26,000.00 leaving an apparent profit of \$1,500.00 but Dr. Barry, in addition to the purchase price, was required by the terms of the contract with Mrs. Ruskin to pay commissions of \$812.50 in connection with the sale to him, leaving a net profit of \$687.50. 20

We are, therefore, in a position to say that Mrs. Ruskin will receive, when the matter is closed, \$343.75 in addition to the purchase price. We hope your kind suggestion to us that the plan to divide the profit might be satisfactory to Mrs. Ruskin can be consummated. 30

Kindly advise us as soon as possible, as we have been prepared for some time to close this matter.

Your very truly,

CML:M

Exhibit C. 9.

EXHIBIT C. 9.

LANE, LYNCH & SMITH
Prudential Building
763 Broad Street
Newark, New Jersey
Telephone Market 3100

10

September 18th, 1925.

Lum, Tamblyn & Colyer, Esqrs.,
Firemen's Building,
Newark, N. J.

Attention: Mr. Charles M. Lum
Ruskin-Barry Title.

Gentlemen:

20 We beg to acknowledge your favor of the 17th
inst. in reference to the above matter, and have
submitted same to Mrs. Ruskin and await her
advice relative thereto.

We will advise you as soon as we hear from
her.

With kind personal regards, we are

Very truly yours,

LANE, LYNCH & SMITH.

30

40

Exhibit C. 12.

EXHIBIT C. 12.

LANE, LYNCH & SMITH
Prudential Building
763 Broad Street
Newark, New Jersey
Telephone Market 3100

10

November 19th, 1925

Lum, Tamblyn & Colyer,
Firemen's Building,
Newark, N. J.

Barry vs. Ruskin

Gentlemen:

We beg to advise that pursuant to Mr. Smith's recent telephone conversation with Mr. Charles Lum, we have conferred with our client, Mrs. Ruskin, who advised us that she would accept \$35,000 for the property in question. This offer of course, is made without prejudice.

20

Awaiting your advice,

We are

Very truly yours,
LANE, LYNCH & SMITH,

30

40

Exhibit C. 12. (Title Co.'s Record).

EXHIBIT C. 12.

(Fidelity Union Title Record)

LUM, TAMBLYN & COLYER
Counselors at Law
Firemen's Insurance Building
(Fourteenth Floor)
Newark, New Jersey

10

September 2, 1925.

Fidelity Union Title and Mortgage Guaranty Co.,
755 Broad Street, Newark, N. J.

—:Attention of Mr. Mailsnet:—

Dear Sir:

We enclose herewith a copy of a certified copy
of journal entry of the divorce decree #243553
of the Cuyahoga County, Ohio, Common Pleas
Court between Meyer Abrams and Anna R.
Abrams.

20

Yours very truly,

LUM, TAMBLYN & COLYER.

RL:FR
(Encl.)

THE STATE OF OHIO, }
CUYAHOGA COUNTY. } ss.

30 BE IT REMEMBERED, That on the 6th day of
July, in the year of our Lord One Thousand
Nine Hundred and Twenty-five, the Court of
Common Pleas within and for the County of
Cuyohoga and State of Ohio, convened at the
Court House, in the City of Cleveland, pursuant
to law. Present:

Hon. James B. Ruhl
Hon. Thos. M. Kennedy
Hon. Frank C. Phillips
Hon. Alvin J. Pearson
40 Hon. Walter McMahan

Exhibit C. 12. (Title Co.'s Record).

Hon. Samuel E. Kramer
 Hon. Samuel H. Silbert
 Hon. George P. Baer
 Hon. Frederick P. Walther
 Hon. Homer G. Powell, Chief Justice
 Hon. Dan B. Cull
 Hon. Carl V. Weygandt 10
 Judges; also present George Wallace, Clerk of
 said Court, and Fred Kohler, Sheriff of said
 county: His Honor Judge James B. Ruhl presid-
 ing for the trial of divorce causes, at said term,
 court being open according to law, the divorce
 business is disposed of as follows, to wit:

IN THE COURT OF COMMON PEAS.

No. 243553. 20

THE STATE OF OHIO, }
 CUYAHOGA COUNTY. } ss.

Meyer Abrams, vs. Anna Ruskin Abrams, Defendant.	}	Plaintiff, Divorce.	30
---	---	----------------------------	----

On July A. D. 1925, being a day in said
 July Term of said Court.

This cause came on to be heard upon the plead-
 ings filed and the evidence on the 22nd day of
 July, 1925. The defendant having been properly
 served with process and both the said parties
 being present in open court. Upon due consid-
 eration thereof, the court finds that all the alle-
 gations in plaintiff's petition contained are true 40

Exhibit C. 12. (Title Co.'s Record).

and the defendant herein has been guilty of gross neglect of duty as charged by the plaintiff in his petition. It is, therefore, ORDERED, ADJUDGED and DECREED that this plaintiff be and is hereby granted an absolute divorce from the defendant, Anna Ruskin Abrams, that the marital contract heretofore existing by and between
 10 said parties be and the same is hereby dissolved, that both of said parties be forever released from all obligations and duties arising by virtue of their said marital status and that both of said persons be forever barred and quitclaimed of any right of dower or distribution in the property or effects of the other.

THE STATE OF OHIO, }
 CUYAHOGA COUNTY. } ss.

20 I, GEORGE WALLACE, Clerk of the Court of Common Pleas, within and for said county, and in whose custody the files, journals and records of said court are required by the laws of the State of Ohio to be kept, hereby certify that the foregoing copy is taken and copied from the Journal of the Proceedings of the Court of Common Pleas within and for said Cuyahoga County, and that said foregoing copy has been
 30 compared by me with the original entry on said journal, and that the same is a correct transcript thereof.

IN TESTIMONY WHEREOF, I do hereby subscribe my name officially and affix
 (L. S.) the seal of said Court, at the Court House, in the City of Cleveland, in said county, this 28th day of July,
 A. D. 1925.

GEORGE WALLACE,
 Clerk.
 By A. M. Harrington,
 Deputy Clerk.

Exhibit C. 12. (Title Co.'s Record).

I, HOMER G. POWELL, Chief Justice, Presiding Judge of the Court of Common Pleas, within and for the Eleventh Judicial District of the State of Ohio, in which district in said County of Cuyahoga, do hereby certify that George Wallace was, at the date of the above certificate, and now is, Clerk of said Court of Common Pleas, within and for said Cuyahoga County, and State of Ohio; and that said Clerk is the officer in whose custody said original journal is required to be kept by the laws of the State of Ohio, and authorized by the laws of the State of Ohio to certify as aforesaid, and that said attestation to said copy is in due form of law. 10

Signed by me, and dated at Cleveland, Cuyahoga County, Ohio, this 28th day of July, A. D. 1925.

HOMER G. POWELL, 20
Judge as aforesaid.

30

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Exhibit C. 12. (Title Co.'s Record).

September 10, 1925.

Title No. 63314.

Messrs. Lum, Tamblyn & Colyer,
Firemen's Building,
Newark, N. J.

Dear Sirs:—

10 Supplementing our report of recent date, Items Nos. 10, 11 and 12 have been canceled. We have not received the affidavit of Anna Ruskin that the recognizance stated, and No. 8 was not given by her. A copy of the affidavit, however is enclosed, which you may have her execute at the closing.

Survey made by Lehlbach Bros. has just been received, a blue print of which is enclosed herewith. Description in the proposed deed should be as follows:

20 All that certain tract or parcel of land situate, lying and being in the City of Newark, County of Essex and State of New Jersey.

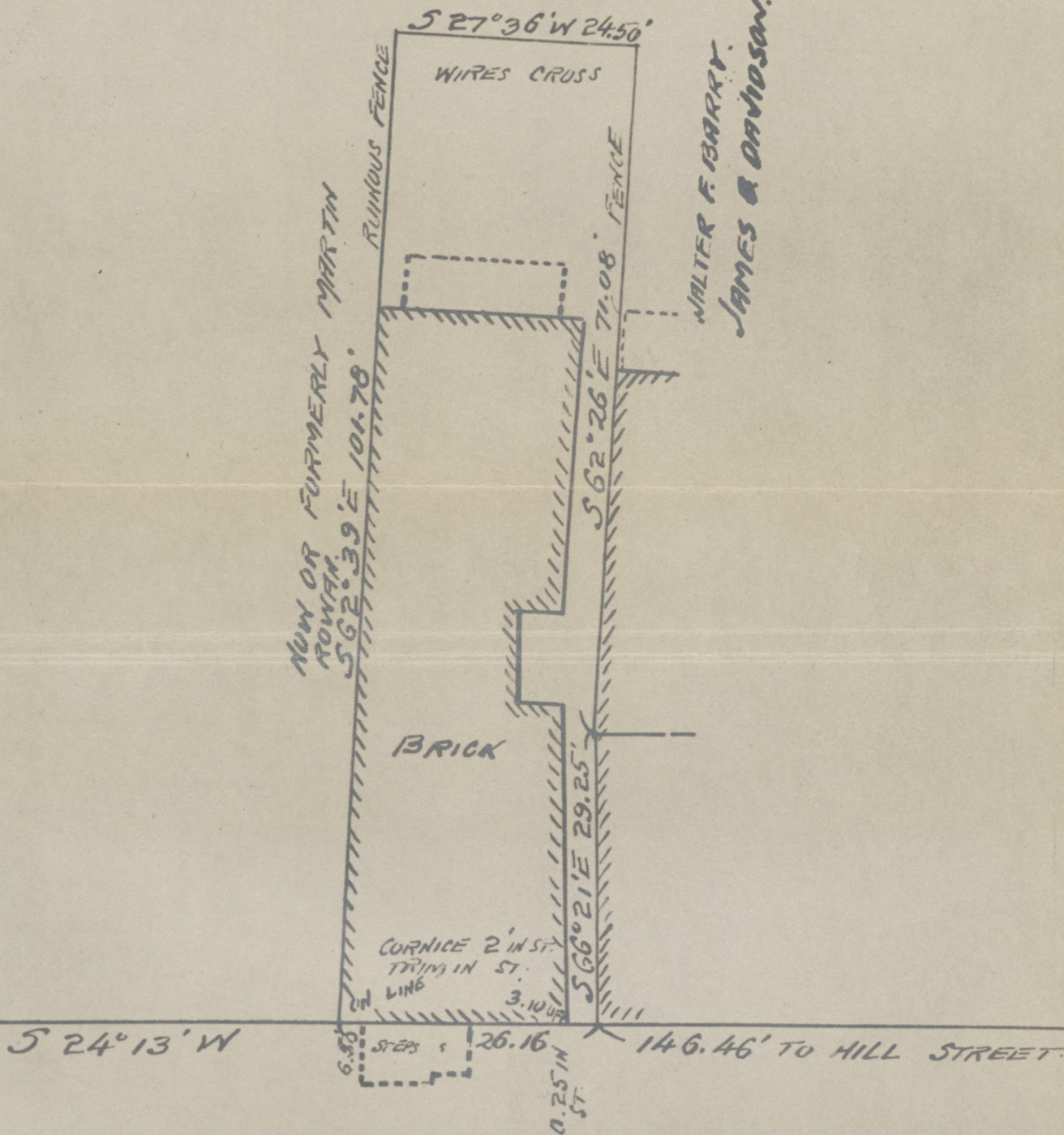
BEGINNING in the Easterly line of Washington Street at a point distant 146.46 feet Northerly from the Northerly line of Hill Street, from thence running along Washington Street North 24 degrees 13 minutes East 26.16 feet to line of land now or formerly belonging to Martin
30 Rowan; thence along that line South 62 degrees 39 minutes East 101.78 feet; thence South 27 degrees 36 minutes West 24.50 feet; thence North 62 degrees 26 minutes West 71.08 feet and thence North 66 degrees 21 minutes West 29.25 feet to Washington Street and BEGINNING.

Yours very truly,

FIDELITY UNION TITLE AND MORT-
GAGE GUARANTY COMPANY.

By

40 CNM/MNC
Inc.



WALTER F. BARRY
JAMES A. DAVIDSON.

WASHINGTON STREET

LEHLBACH BROTHERS
CIVIL ENGINEERS AND SURVEYORS
BONNELL BUILDING, 196 MARKET STREET
NEWARK, N. J.

SURVEY SUBJECT TO LATENT CONDITIONS
This survey is made upon a requisition of Fidelity Union Trust Company
No. **63314** and follows the instructions therein contained.

DATED AUGUST 14-1925.

Lehbach Brothers.

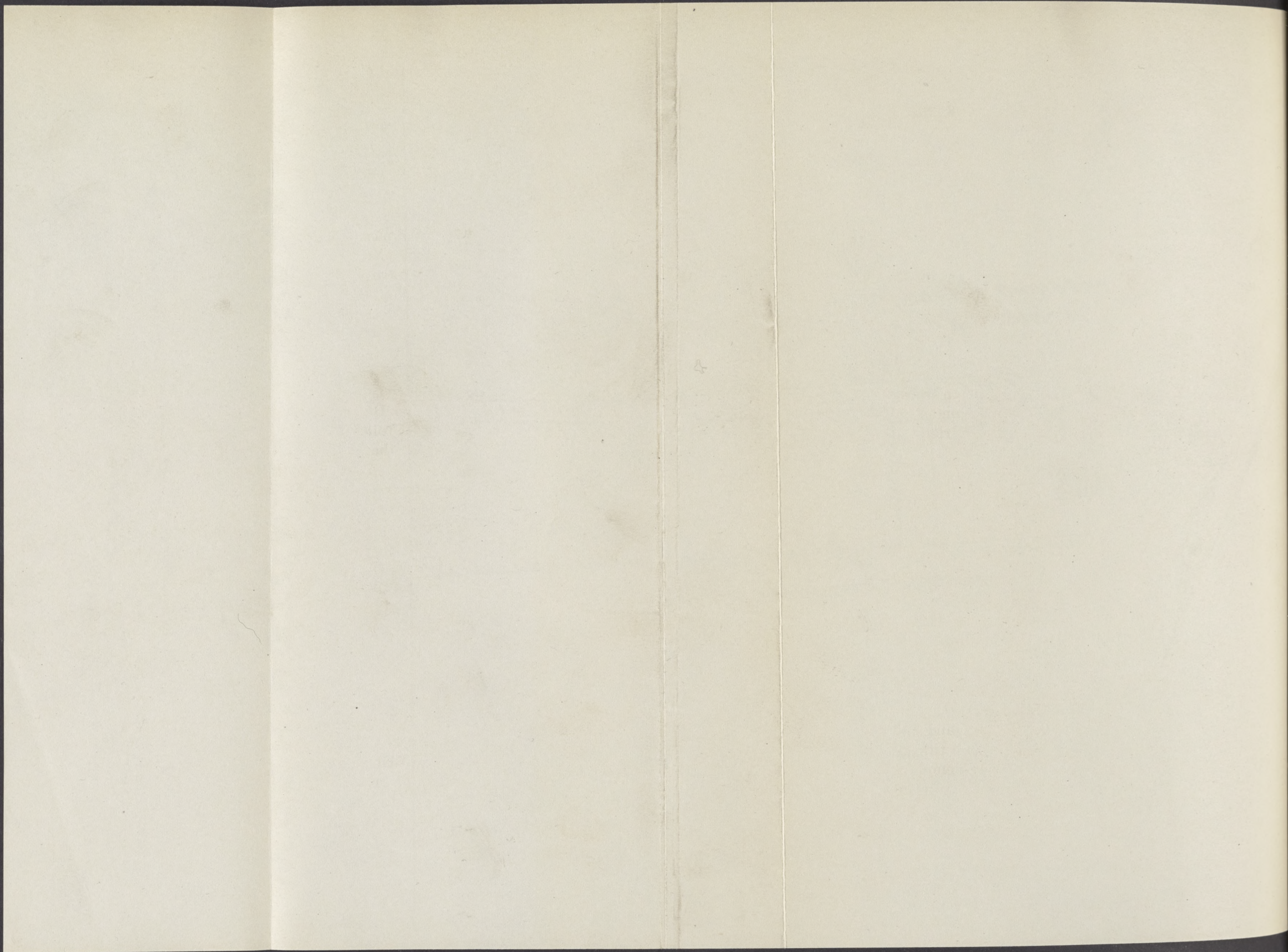


Exhibit C. 12. (Title Co.'s Record).

August 28, 1925.

In re title No. 63314.

(L. Bellen)

Messrs. Lum, Tamblyn & Colyer,
Firemen's Building,
Newark, N. J.

10

Dear Sirs:

We have completed our examination of the record in connection with the search of title to premises known as 350 Washington Street, Newark, and search is now in the hands of one of our readers. We will send out the report on title as soon as we have received the survey, and tax search, disposed of a Trenton recognizance and cleared a question arising under the last Will and Testament of Theodora Prieth.

20

Very truly yours,

FIDELITY UNION TITLE AND MORTGAGE
GUARANTY COMPANY.

AM/MC

No. 63314.

Newark, N. J., 8/10, 1925.

30

The undersigned hereby applies to FIDELITY UNION TITLE AND MORTGAGE GUARANTY COMPANY for a Guaranty of the title of the land hereinafter described in this application for the sum of \$20,000 (being the value of the said land and buildings or the amount of the mortgage title to which is to be guaranteed), and hereby employs said Company to make an examination of said title; for which examination and guaranty the undersigned agrees to pay the charges specified

40

Exhibit C. 12. (Title Co.'s Record).

in this application, or if estimated or not specified, such charges as the Company may fix.

- 1 Name and address of party to be guaranteed—John W. Vliet, 87 Academy St., Newark, N. J.
- 2 Value of Property—\$46,000.
- 10 3 Estate to be Guaranteed. (State whether a Fee, Mortgage or Assignment of Mortgage.)—Mortgage.
- 4 4 Location and description of Premises. (Give some definite description. Refer, if possible, to a recorded instrument. Leave agreement of sale, if any, or copy thereof.)—Municipality Newark, County of Essex, N. J., Block, Lot, Street Washington, No. 350. Property supposed to be in name of Anna Ruskin as indicated by a Deed recorded in
- 20 Bk. M68—page 36 of Deeds for Essex County.
- 5 5 Is purchase price to be paid or loan to be made at passing of title?—Loan to be made.
- 6 6 State any known party wall, way, drain, water course or other use by any other than the owner to which premises are subject
- 7 7 State any objection to the title which has come to your attention—None.
- 30 8 State whether land is vacant or built upon, and general characteristics, *i. e.*, whether city property, farm, swamp, woodland, etc.—Occupied by building.
- 9 9 Who is in occupation and by what right? —.
- 10 10 Is there a building equipped for or used by three separate families on the land? If so, is report by Telement House Commission as to compliance with regulations desired?

Exhibit C. 12. (Title Co.'s Record).

- 11 Are there mortgages or other encumbrances?
If so, by whom given, the amount, and addresses of holders. How are the mortgages to be disposed of?
Have mortgagees been notified?
- 12 Give name, address (including telephone address) and occupation of grantor or mortgagor and *husband and wife*, if any. State as fully as possible the source from which title was derived. . . . 10
- 13 Is there any incomplete building on said land?—No.
Has any labor been performed or materials furnished for the construction or repair of any building thereon within four months?—No.
- 14 Is the title derived through a sale for taxes or assessments? 20
- 15 Shall Company procure survey? (If not, it may state in Guaranty that survey and inspection are waived by applicant.)—Yes, Lehlbach Bro.
- 16 Is a report, preliminary to closing report, desired by applicant?
- 17 If this land consists of non-contiguous tracts, guaranty must be written in a separate amount for each tract. Separate the amount of insurance as follows: 30

CHARGES.

Fees\$185
SurveyAt cost
Drawing Deed
Drawing Mortg.
Settlement Fee

Exhibit C. 12. (Title Co.'s Record).

- If outside Fidelity Union Title and Mortgage Guaranty Company's office, plus disbursements..
- Appraisalment Fee
- Writing additional Guaranty
- Recording Deed
- 10 Recording Mtge.
- I. R. Stamps

To be reported to Lum, Tamblyn & Colyer
 Aug: 28th, 1925.

To close at Lum, Tamblyn & Colyer Aug. 31st,
 1925.

(If passing of title is not to take place at this Company's office and our representatives is desired, a settlement fee will be charged.)

- 20 Papers to be drawn by Company as per requisition on the back hereof

Papers left with Company by.... to be return to.... may be retained by Company.

LOUIS BELLEN,
 Applicant.

Address Lum, Tamblyn & Colyer, Attys.
 Telephone

Received by O. H. Rathjen.

30

40

Exhibit C. 12. (Title Co.'s Record).

Received by Plant, 8/11/25
 Received by Reader 8/26/25
 Received by Settlement Officer, 9/11/25
 Closed,

	Report Due	
	From Searcher 8/24/25	
No. 63314	From Reader 8/28/25	10
	Application for Guaranty of Title	
	Of Land at Essex Co., Newark	
	350 Washington St.	
	For L. Bellen	
	(Lum, Tamblyn & Colyer)	
	Interrogatories send owner, 8-12-25. M.D.	
	Block Plant (96) 31	
	Judgment Searches 8-13-25.	
	Continuations	
	Chancery Exam's	
	Docket Compared by T. M. 8-13-25	
	Tax Seach 8/12/25 R. B. S.	
	Survey Lehlbach Bros.	
	Report Wanted 8/28/25	
	Reported by 192..	
	To close at 8/31/25	
	Guaranty No.	
	Fidelity Union	
	Title and Mortgage Guaranty Co.	
	Broad and Bank Streets	
	Newark, N. J.	
		30

*Exhibit C. 13.***EXHIBIT C. 13.**

LUM, TAMBLYN & COLYER
 Counselors at Law
 Cable Address "Guiddlum"
 Firemen's Insurance Building
 (Fourteenth Floor)
 Newark, New Jersey

10

November 21, 1925

Messrs. Lane, Lynch & Smith,
 763 Broad Street,
 Newark, N. J.

Barry vs. Ruskin

Gentlemen:

We are just in receipt of your favor of yesterday in which you state that pursuant to Mr. Smith's recent telephone conversation with Mr. Charles Lum, you have conferred with your client Mrs. Ruskin who advised you that she would accept \$35,000 for the property in question.

Mr. Charles Lum does not understand this matter at all. He has never, directly or indirectly, made inquiry as to what Mrs. Ruskin would accept for property which she has agreed to sell and convey to our client.

If any one has made inquiry of Mrs. Ruskin or you as to what Mrs. Ruskin would accept, it is without our knowledge and we certainly would not have suggested such action.

Yours very truly,

LUM, TAMBLYN & COLYER.

CML/E

40

*Exhibit D. 1.***EXHIBIT D. 1.**

LUM, TAMBLYN & COLYER
 Counselors at Law
 Cable Address "Guiddlum"
 Firemen's Insurance Building
 (Fourteenth Floor)
 Newark, New Jersey

10

September 8, 1925.

Mrs. Anna Ruskin,
 350 Washington Street,
 Newark, N. J.

Dear Madam:

I wish to advise you that I am ready to take title to premises known as No. 350 Washington Street, Newark, N. J. but there appears on record in the Register's Office of Essex County the following mortgages:

20

1. David Rosenbaum, widower, and Rudolph Pollak, widower, to the Court House Building & Loan Association of the City of Newark dated August 16, 1920 and recorded in the Register's Office of Essex County in Book W-42 of mortgages, pages 245-247, to secure \$4000.00;

30

2. David Rosenbaum, widower, and Rudolph Pollak, widower, to the Court House Building & Loan Association of the City of Newark dated August 16, 1920 and recorded in the Register's Office of Essex County in Book W-42 of mortgages, pages 247-249, to secure \$4000.00;

3. Anna Ruskin, widow, to Rudolph Pollak and David Rosenbaum dated April 23, 1923 and recorded in the Register's

40

Exhibit D. 1.

Office of Essex County in Book W-47 of mortgages, pages 531-533, to secure \$5000.00;

I also find of record a recognizance in the United States District Court in the amount of \$2000.00, entered November 24, 1924, which you entered into as surety.

- 10 There is also a question against the title arising from the fact that I have been unable to obtain proof that the proceeds of the sale of this property were ever paid over to the proper trustees named in the will of Theodora Prieth, deceased. The conveyance in question was by deed from Anna Faber and husband, Theodora Thielan and husband and Bertha Feick to Joseph Okin, dated February 4, 1913 and recorded in Book H-52 of deeds for Essex County.
- 20 The Fidelity Union Title & Mortgage Guaranty Company has requested more detailed information from you in this matter, which I would appreciate your furnishing.

2.

Mrs. Anna Ruskin,

September 8, 1925.

- I, therefore, feel that you are not in a position to convey a marketable title at this time, but
 30 trust that these objections may be taken care of so that title may pass on September 15, 1925.

Yours very truly,

WALTER F. BARRY.

JSF:M

Exhibit D. 2.

EXHIBIT D. 2.

September 1st, 1925.

Dr. Walter F. Barry,
516 Broad Street,
Newark, New Jersey.

Dear Sir:—

10

I beg to herewith advise you that pursuant to a contract made under date of June 5th, 1925 between you and myself relating to the sale of the property situate at 350 Washington Street, Newark, New Jersey, that I have extended the time for you from September 1st, 1925 to Tuesday, September 8th, 1925 for you to perform this contract and take title pursuant to the terms and provisions of the said contract of the property therein referred to and further be advised that I will not grant any further extension to you for the passing of title of the property.

20

I am,

Yours very truly,
ANNA RUSKIN ABRAMS,
Owner.

30

40

Exhibit D. 3.

EXHIBIT D. 3.

FIDELITY UNION TITLE AND MORTGAGE
GUARANTY COMPANY

Report to Applicant

10 Application No. 63314

Dated at Newark, N. J., August 13, 1925, 8 A. M.

Fidelity Union Title and Mortgage Guaranty Company hereby certifies to the applicant for guaranty under above application and under the provisions thereof that it has examined the title to land in City of Newark, Essex County, New Jersey, described hereinafter for a P. M. Mortgage about to be made by Louis Biller and Anna Biller, his wife to John W. Vliet for \$46,000, and finds title in Anna Ruskin by Deed from Rudolph Pollak, single, dated Apr. 23, 1923 and recorded Apr. 24, 1923 in Deed Book M 68 pages 36-37, subject only to the following estates, liens, defects and questions which, together with any others which may be found in continuing the search, are to be excepted in the guaranty which it will issue in the above amount when the title is properly closed and satisfactorily reported, unless documentary evidence of their removal be submitted which shall be satisfactory to this Company:

- 30 1. Statutory and Municipal requirements relating to land and buildings.
2. Terms of Contract of Sale, if any, between If a stranger to the contract is to take title, proper assignment of the contract by the vendee and his wife, if any, should be made.
3. Liability, if any, to Mechanics' Liens:

40

Exhibit D. 3.

We will require satisfactory proof that at date of delivery of instrument passing title to be guaranteed there is no uncompleted building upon lands covered thereby; and that no labor has been performed or materials furnished for erection, addition, alteration or repair of any building on said premises within past four months. 10

4. Rights of tenants and occupants, if any, at date of delivery of deed to be guaranteed.

6. Taxes and other Municipal liens as follows:

Note.—Taxes for current year are payable $\frac{1}{2}$ April 1 and remainder December 1, with penalty from 7 to 9 per cent. for non-payment of first $\frac{1}{2}$ on June 1, and second $\frac{1}{2}$ on December 1, and become a lien on real estate December 1. 20

In absence of agreement in contract or deed, seller is liable for payment of such proportion of the taxes for the current year as the time between January 1st previous and date of delivery of deed, bears to a full calendar year. If the amount of taxes for the current year has not been determined, the amount of taxes last previously assessed is to be used as a basis for computing this apportionment. 30

a. Such Municipal liens as may attach subsequent to Aug. 13, 1925 the date of tax search.

b. Returns shown on search for tax and other

Municipal liens, as follows:

1924 taxes 2nd half \$236.25.

Water Rent from June 16, 1925.

Exhibit D. 3.

7. MORTGAGES.

10 (a) Mortgage made by David Rosenbaum, widower, and Rudolph Pollak, widower, to The Court House Building and Loan Association of the City of Newark, dated Aug. 16, 1920 and recorded in the Register's Office of Essex County on Sept. 4, 1920 in Mortgage Book W 42 pages 245-247, to secure payment of \$4000 in monthly payments.

20 (b) Mortgage made by David Rosenbaum, widower, and Rudolph Pollak, widower, to The Court House Building and Loan Association of the City of Newark, dated Aug. 16, 1920 and recorded in the Register's Office of Essex County on Sept. 4, 1920 in Mortgage Book W 42 pages 247-249, to secure payment of \$4000 by Aug. 16, 1921 in monthly payments, with interest at 6% per annum.

(c) Mortgage made by Anna Ruskin, widow, to Rudolph Pollak and David Rosenbaum, dated Apr. 23, 1923 and recorded in the Register's Office of Essex County on Apr. 24, 1923 in Mortgage Book W 47 pages 531-533, to secure payment of \$5,000 in two years with interest at 6% per annum.

30 8. Trenton Judgment:— Being investigated Herman Silverstein, Principal and Anna Ruskin, Surety, to United States of America; United States District Court; Recognizance; Ent. Nov. 24, 1924; Amount \$2000.00.

Exhibit D. 3.

9. Interrogatories of Anna Ruskin not yet received.

This report is made subject to such facts and conditions as same may show when received.

10. We note that one of the Deeds in the chain of title comes from Anna Faber and husband, Theodora Thielen and husband, Bertha E. Feick to Joseph Okin, dated February 4th, 1913 and recorded in Book H 52 page 512, consideration \$11,000.00. 10

We are endeavoring to obtain proof that Theodore Thielen's share of the proceeds of this Deed or sale was paid over to her Trustees named in the Will of Theodora Preith, deceased.

11. The present owner has been divorced and we have a copy of the final decree. The divorce will be examined by our title officer and we shall advise you the result as soon as possible. 20

12. Survey has not yet been received.

30

40

Exhibit D. 5.

EXHIBIT D. 5.

THIS AGREEMENT, made this first day of September, Nineteen Hundred and Twenty-five, by and between ANNA RUSKIN, of the City of Newark, County of Essex and State of New Jersey, party of the first part, and LOUIS BELLER, of the City of Newark, County of Essex and State of New Jersey, party of the second part,

10 WHEREAS, the party of the first part did enter into an agreement under date of June 5, 1925 with Walter F. Barry, of the Town of West Orange, County of Essex and State of New Jersey, wherein and whereby the party of the first part agreed to convey the premises at No. 350 Washington Street, in the City of Newark, County of Essex and State of New Jersey, to the said
20 Walter F. Barry on the first day of September, 1925, and

WHEREAS, the said Walter F. Barry did, by an agreement dated July 22, 1925, assign the said agreement of sale to the aforesaid Louis Beller, and

WHEREAS, the parties hereto are desirous of adjourning the time of closing,

Now, THEREFORE, it is mutually agreed by and
30 between the parties hereto that the time for closing title be adjourned to the eighth day of September, 1925, at eleven o'clock in the forenoon at the offices of Lane, Lynch & Smith, Prudential Building, No. 763 Broad Street, Newark, N. J.

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

WITNESS:

(SEAL)

(SEAL)

Exhibit D. 6.

EXHIBIT D. 6.

THIS INDENTURE, Made the twenty-second day of July, in the year of our Lord One Thousand Nine Hundred and twenty-five

BETWEEN Anna Ruskin Abrams and Meyer Abrams, her husband of the City of Newark in the County of Essex and State of New Jersey party of the first part;

10

AND Walter F. Barry of the City of in the County of and State of party 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 consideration lawful money of the United States of America, to us in hand well and truly paid by the said party of the second part, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said party of the first part being therewith fully satisfied, contented and paid, have given, granted, bargained, sold, aliened, released, etnfeoffed, conveyed and confirmed, and by these presents do give, grant, bargain, sell, alien, release, enfeoff, convey and confirm unto the said party of the second part, and to heirs and assigns, forever, ALL that tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the City of Newark in the County of Essex and State of New Jersey.

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BEGINNING in the easterly line of Washington Street at a point therein distant one hundred and forty-six feet, and forty-six hundredths of a foot northerly from the northerly line of Hill Street, from thence running along Washington Street north twenty-four degrees thirteen minutes east twenty-six feet and sixteen hundredths

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Exhibit D. 6.

of a foot to line of land now or formerly belonging to Martin Rowan; thence along that line south sixty-two degrees thirty-nine minutes east one hundred and one feet and seventy-eight hundredths of a foot; thence south twenty-seven degrees thirty-six minutes west twenty-four feet and fifty hundredths of a foot; thence north
 10 sixty-two degrees twenty-six minutes west seventy-one feet and eight hundredths of a foot; and thence north sixty-six degrees, twenty-one minutes west twenty-nine feet and twenty-five hundredths of a foot to Washington Street and the place of BEGINNING.

This description is taken from an actual survey of the premises made by Edward G. Kempf, Surveyor, dated February 3, 1913.

Being the same premises conveyed to the
 20 grantor herein by Rudolph Pollak, by deed recorded in the Essex County Register's office in Book M-68 of deeds, for said county, at pages 36-37.

TOGETHER with all and singular, the houses, buildings, trees, ways, waters, profits, privileges, and advantages, with the appurtenances to the same belonging or in anywise appertaining:

30 ALSO, all the estate, right, title, interest, property, claim and demand whatsoever, of the said party of the first part, of, in and to the same, and of, in and to every part and parcel thereof,

To HAVE AND TO HOLD, all and singular the above described land and premises, with the appurtenances, unto the said party of the second part, his heirs and assigns, to the only proper use, benefit and behoof of the said party of the second part, his heirs and assigns forever:

40 AND the said Anna Ruskin Abrams and Meyer Abrams, her husband do for themselves, their heirs, executors and administrators covenant

Exhibit D. 6.

and agree to and with the said party of the second part, his heirs and assigns, that they the said Anna Ruskin Abrams and Meyer Abrams, her husband are the true, lawful and right owners of all and singular the above described land and premises, and of every part and parcel thereof, with the appurtenances thereunto belonging; and that the said land and premises, or any part thereof, at the time of the sealing and delivery of these presents, are not encumbered by any mortgage, judgment, or limitation, or by any encumbrance whatsoever, by which the title of the said party of the second part, hereby made or intended to be made, for the above described land and premises, can or may be changed, charged, altered or defeated in any way whatsoever:

10

AND ALSO that the said party of the first part now have good right, full power and lawful authority, to grant, bargain, sell and convey the said land and premises in manner aforesaid;

20

AND ALSO, that the said Anna Ruskin Abrams and Meyer Abrams, her husband will WARRANT, secure, and forever defend the said land and premises unto the said Walter F. Barry, his heirs and assigns, forever, against the lawful claims and demands of all and every person or persons, freely and clearly freed and discharged of and from all manner of encumbrance whatsoever.

30

IN WITNESS WHEREOF, the said party of the first part have hereunto set their hands and seals the day and year first above written.

ANNA RUSKIN ABRAMS (L. S.)
M. ABRAMS (L. S.)

Signed, sealed and Delivered
in the Presence of
E. M. KLEIN.

40

Exhibit D. 6.

STATE OF OHIO, }
 COUNTY OF CUYAHOGA. } ss.

BE IT REMEMBERED, That on this 22nd day of July, in the year of our Lord One Thousand Nine Hundred and Twenty-five, before me, the subscriber, a notary public, personally appeared
 10 Anna Ruskin Abrams and Meyer Abrams, wife and husband respectively, who, I am satisfied, are the grantors mentioned in the within Instrument, to whom I first made known the contents thereof, and thereupon they acknowledged that, they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed.

And the said Meyer Abrams being by me privately examined, separate and apart from his
 20 wife, did further acknowledge that he signed, sealed and delivered the same as his voluntary act and deed, FREELY, without any fear, threats or compulsion of his said wife.

(SEAL) PETER L. HORWITZ,
 Notary Public.

THE STATE OF OHIO, }
 30 CUYAHOGA COUNTY. } ss.

I, GEORGE WALLACE, Clerk of the Court of Common Pleas, a Court of Record of Cuyahoga County, aforesaid,

DO HEREBY CERTIFY THAT Peter L. Horwitz, before whom the annexed acknowledgment, oath, affidavit, was taken, was at the date thereof a
 NOTARY PUBLIC in and for the said County, duly authorized by the laws of Ohio to take
 40 the same, also to take acknowledgments, affidavits and proofs of deeds or conveyances for

Exhibit D. 6.

land, tenements or hereditaments situated and lying in said State of Ohio, and further that I am well acquainted with his handwriting and believe his signature thereto is genuine, and that the annexed instrument is executed according to the laws of the State of Ohio.

Commission expired Dec. 14, 1927. 10

IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal
(SEAL) of said Court, at Cleveland, this 28th day of July, A. D. 1925.

GEORGE WALLACE,
Clerk.

No. D 3870 20

DEED.

Anna Ruskin Abrams
and
Meyer Abrams, her husband
to
Walter F. Barry

Dated, July 22nd, 1925 30

*Exhibit D. 7.***EXHIBIT D. 7.**

THIS INDENTURE, Made the Eighth day of September, in the year of our Lord One Thousand Nine Hundred and twenty-five

10 BETWEEN Anna Ruskin Abrams, divorced, of the City of Newark in the County of Essex and State of New Jersey, party of the first part;

AND Walter F. Barry of the City of Newark in the County of Essex and State of New Jersey, party of the second part:

20 WITNESSETH, That the said party of the first part, for and in consideration of One Dollar (\$1.00) and other good and valuable consideration lawful money of the United States of America, to her in hand well and truly paid by the said party of the second part, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said party of the first part being therewith fully satisfied, contented and paid, has given, granted, bargained, sold, aliened, released, enfeoffed, conveyed and confirmed, and by these presents does give, grant, bargain, sell, alien, release, enfeoff, convey and confirm unto the said party of the second part, and to his heirs and assigns, forever, ALL that tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the City of Newark in the County of Essex and State of New Jersey.

30

BEGINNING in the easterly line of Washington Street at a point therein distant one hundred and forty-six feet, and forty-six hundredths of a foot northerly from the northerly line of Hill Street, from thence running along Washington Street north twenty-four degrees thirteen minutes east twenty-six feet and sixteen-hundredths of a foot to the line of land now or formerly

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Exhibit D. 7.

belonging to Martin Rowan; thence along that line south sixty-two degrees thirty-nine minutes east one hundred and one feet and seventy-eight hundredths of a foot; thence south twenty-seven degrees thirty-six minutes west twenty-four feet and fifty hundredths of a foot; thence north sixty-two degrees twenty-six minutes west seventy-one feet and eight hundredths of a foot; and thence north sixty-six degrees, twenty-one minutes west twenty-nine feet and twenty-five hundredths of a foot to Washington Street and the place of BEGINNING.

10

This description is taken from an actual survey of the premises made by Edward G. Kempf, Surveyor, dated February 3, 1923.

Being the same premises conveyed to the grantor herein by Rudolph Pollak, by deed recorded in the Essex County Register's office in Book M-68 of deeds, for said county, at pages 36-37.

20

TOGETHER with all and singular, the houses, buildings, trees, ways, waters, profits, privileges, and advantages, with the appurtenances to the same belonging or in anywise appertaining:

ALSO, all the estate, right, title, interest, property, claim and demand whatsoever, of the said party of the first part, of in and to the same, and of, in and to every part and parcel thereof.

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

AND the said Anna Ruskin Abrams does for herself, her heirs, executors and administrators covenant and agree to and with the said party of the second part, his heirs and assigns, that

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Exhibit D. 7.

10 she is the said the true, lawful and right owner of all and singular the above described land and premises, and of every part and parcel thereof, with the appurtenances thereunto belonging; and that the said land and premises, or any part thereof, at the time of the sealing and delivery of these presents, are not encumbered by any mortgage, judgment, or limitation, or by any encumbrance whatsoever, by which the title of the said party of the second part, hereby made or intended to be made, for the above described land and premises, can or may be changed, charged, altered or defeated in any way whatsoever:

20 AND ALSO that the said party of the first part now has good right, full power and lawful authority, to grant, bargain, sell and convey the said land and premises in manner aforesaid;

AND ALSO, that Anna Ruskin Abrams will WARRANT, secure, and forever defend the said land and premises unto the said Walter F. Barry, his heirs and assigns, forever, against the lawful claims and demands of all and every person or persons, freely and clearly freed and discharged of and from all manner of encumbrance whatsoever.

30 IN WITNESS WHEREOF, the said party of the first part has hereunto set her hand and seal the day and year first above written.

ANNA RUSKIN ABRAMS (L. S.)

Signed, Sealed and Delivered
in the Presence of

JOSEPH L. SMITH.

Exhibit D. 7.

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

BE IT REMEMBERED, That on this Eighth day of September in the year of our Lord One Thousand Nine Hundred and twenty-five, before me, the subscriber, a Master in Chancery of New Jersey, personally appeared Anna Ruskin Abrams (Divorced) who, I am satisfied, is the grantor mentioned in the within Instrument, to whom I first made known the contents thereof, and thereupon she acknowledged that, she signed sealed and delivered the same as her voluntary act and deed, for the uses and purposes therein expressed. 10

JOSEPH L. SMITH,
 Master in Chancery of New Jersey. 20

DEED.

Anna Ruskin Abrams (Divorced)
 to
 Walter F. Barry

Dated, September 8th, 1925 30

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New Jersey Court of Errors and Appeals

Between

WALTER F. BARRY and LOUIS
BELLER,

Complainants-Appellants,

and

ANNA RUSKIN,

Defendant-Respondent.

On Bill, etc.

*On Appeal
from
Chancery.*

BRIEF FOR APPELLANTS.

Statement of Case.

The complainants, Walter F. Barry and Louis Beller, filed their bill of complaint praying for the specific performance of a certain contract made between the complainant, Walter F. Barry, and the defendant.

In the bill it is alleged that on June 5, 1925, the defendant entered into a contract in writing with the complainant, Walter F. Barry, whereby she agreed to convey to the said complainant, certain premises in the City of Newark, New Jersey, on or before September 1st, next ensuing the date thereof, for the consideration of \$25,312.-50 (Case, pp. 1 and 2). A copy of the contract is annexed to the bill of complaint and is set forth on pages 5 to 9 inclusive of the State of Case. It is alleged in the bill that the deposit money required under the contract was paid and that the contract was recorded in the register's office of the County of Essex (Case, p. 2, l. 20). On July 22, 1925, the complainant, Walter F. Barry, assigned the contract and all his rights thereunder to the complainant, Louis Beller

(Case, p. 2, ll. 30-32). It is then alleged that complainants caused a search to be made of the title of the defendant and prior to the first day of September, 1925, informed the defendant that a search revealed certain discrepancies or defects therein and requested the defendant to extend the time for closing the title for a period of about fifteen days, in order that the defects so appearing might be removed and the title made to appear satisfactory to the complainants. In pursuance of said request defendant informed the complainant Barry, that she had extended the time to take title to September 8, 1925, and would not grant any further extension for passing of title. It is further alleged that the complainants were not able to clear up the defects appearing before the 8th day of September, 1925 (Case, p. 2, l. 39 to p. 3, l. 29).

It is further alleged that on September 14, 1925, complainants advised the solicitor of defendant that they were ready to take title and requested that a time be fixed for closing the same; that complainants were informed by the solicitor for the defendant, that the defendant considered that complainant Barry had broken his contract and that his deposit had been forfeited; that again on September 17, 1925, complainants advised the solicitors of defendant that they had been prepared to take title and that on September 22, 1925, defendant informed complainants' solicitors that she had considered since the date set by her for closing title that the contract had been abrogated and that all rights of the complainant Barry had been forfeited (Case, p. 3, l. 30 to p. 4, l. 10).

The bill further alleges that the complainants have at all times since the clearing of title been ready and willing to close title and to pay over

the balance of the consideration money upon receipt of the deed as required by the contract (Case, p. 4, l. 12).

The answer of the defendant is set forth on pages 10, 11 and 12 of the printed case. In her answer defendant alleges that on September 1, 1925, complainant requested an adjournment of the closing of title and that complainant and defendant did agree to adjourn the time for closing of title until the 8th day of September, 1925. It is then alleged "that it was agreed between the parties that time was of the essence and defendant did then and there notify complainants that no further extension of time would be given." It is further alleged that on the 8th day of September, 1925, defendant was ready at the time and place to close title and that the complainants did not appear, and that thereupon, on the 9th of September, defendant informed complainants that by reason of failure to take title on the 8th day of September, the contract had become forfeited (Case, p. 11). The substantial defense made by the defendant is set forth in the last paragraph in the answer, wherein it is alleged that by the express act of the parties time was made of the essence of the closing of title and the day fixed was the 8th of September, 1925; that on said date, although defendant attended and was able, ready and willing to convey complainants did not attend and did not tender performance (Case, p. 12, l. 25).

To the answer of the defendant a general replication was filed (Case, p. 16).

The conclusions of the Vice-Chancellor upon the hearing are set forth on page 76 of the printed case.

By the final decree entered in pursuance of the opinion of the Court, the bill of complaint was dismissed with costs (Case, pp. 81 and 82).

Notice of appeal was duly filed and an amended notice of appeal was also filed in conformity to the Chancery rules (Case, pp. 83 and 84).

The petition on appeal was duly filed in this court on June 30, 1926, and is set forth in the printed case (Case, pp. 85 and 86).

Formal answer to the petition on appeal was filed by the respondent (Case, p. 87).

GROUND OF APPEAL.

The appellants herein assign and allege as grounds of appeal that the Court below erred in holding that time became of the essence of the contract and that the complainants did not perform that which was to be performed on their part, and that the contract became and was at the time of the filing of the bill and is unenforceable against the defendant (Case, p. 86).

BRIEF OF THE ARGUMENT.

Time did not become of the essence of the contract.

In the conclusions filed by the Vice-Chancellor he holds that while time was not of the essence of the contract between the parties as originally executed, it was made such by the agreement of the parties which was evidenced by the letter of September 1st, from the defendant to the complainant Barry (Case, p. 78, l. 18). Again this conclusion is stated at the conclusion of the

opinion, which is found on page 80, of the printed case. We quote therefrom as follows:

“But irrespective of the reasonableness or unreasonableness of this extension, it is clear that such an extension fixing the final date for settlement at September 8th and beyond which, it was understood, no further extensions would be allowed, was agreed upon between the parties.”

We respectfully contend that there was no agreement so far as the complainants were concerned that the time granted reluctantly by the defendant was to be considered of the essence of the contract and we further contend that the extension granted was unreasonable in view of all the circumstances of the case.

By reference to the testimony of G. Nelson Kling, it appears originally that the contract which is dated the 5th day of June, was to be closed on the 15th of July. Before it was executed, however, the closing date was changed to September 1st, at the request of the defendant herself. This witness states that the defendant wanted the time to look around to get another piece of property and she didn't want to pay rent there if she gave title before or around the time signed. The complainant, Dr. Barry, consented to the suggestion when the contract was executed (Case, pp. 49 and 50).

Apparently, then, at the time of the execution of the contract the defendant was anxious to retain possession of the premises for her own peculiar benefit and apparently at that time was not intent upon having the title closed with any very great expedition.

After the contract was executed Dr. Barry assigned the same to Louis Beller by written assignment, which bears date the 22nd day of

July, 1925 (Exhibit C. 1; Case, p. 92). After Mr. Beller acquired an interest in the contract he retained Mr. Precker, a member of the New Jersey Bar, to represent him with reference to the title and particularly to secure a mortgage loan upon the premises (Case, p. 45). Mr. Precker endeavored to secure a loan from one of the building and loan associations which he represented, but was unable to accomplish this because his associations were not in sufficient funds at the time to make the loan. Finally, however, Mr. Beller secured a mortgage loan from a client of Lum, Tamblyn & Colyer, who were directed to secure a search of the premises (Case, p. 46, ll. 20-30). Mr. Precker states that he was familiar with the application made to the Fidelity Union Title & Mortgage Guaranty Company, and that the same must have been made, as nearly as he could fix it, on August 8th.

By reference to the file of the Fidelity Union Company, which is Exhibit C. 12 (Case, p. 103), the application to that company for the search is dated August 10, 1925.

Mr. Joseph L. Smith, an attorney and counselor, represented the defendant in this title matter and had for a great many years and was present at the time the original contract was signed (Case, p. 53). Evidently Mr. Smith knew that Lum, Tamblyn & Colyer were representing the party who was to make a loan to Mr. Beller in order to consummate this purchase. At the top of page 54, Mr. Smith admits that he saw someone from the office of Lum, Tamblyn & Colyer, with respect to the title and Mrs. Ruskin's marriage. Mr. Smith also conversed with someone with respect to recognizances which had been turned up on the searches by the Fidelity Union Title Company (Case, p. 54).

At the top of page 55, Mr. Smith states that about September 1st, there was a request made for an adjournment of this title closing from Mr. Charles Lum and he produces a form of extension of time which was submitted but which was not signed by any of the parties to the transaction (Case, pp. 55 and 56).

Mr. Smith declined to execute the agreement and sent the letter of September 1st to Dr. Barry personally (Case, p. 56, l. 20). This letter is Exhibit D. 2, and is set forth on page 111 of the printed case.

The witness also testifies that he was prepared to close the title on the 8th of September, and had his deeds executed and offered the same in evidence. These deeds are marked Exhibits D. 6 and D. 7 (Case, pp. 117 and 122).

Furthermore, it appears on cross examination that Mr. Smith had received communications from the office of Lum, Tamblyn & Colyer, with respect to his client's title. Information was sought of him with respect to the divorce of his client, as he says, about the end of August (Case, p. 59).

By reference to the contract between the parties (Exhibit C. 1; p. 88), it appears that the defendant therein describes herself as "Anna Ruskin, widow" and signs the contract "Anna Ruskin." By reference to Exhibit D. 6 (Case, p. 117) which is dated the 22nd day of July, 1925, it appears that the deed is made by "Anna Ruskin Abrams" and husband and the deed is signed by the same name.

By reference to Exhibit D. 7 (Case, p. 122), which is dated the 8th day of September, 1925, the defendant describes herself therein as "Anna Ruskin Abrams, divorced."

It is very apparent, therefore, that there was need for a careful investigation on the part of counsel making a thorough search of this title for a purchaser or mortgagee.

Furthermore, Mr. Smith had communications with either Mr. Foster or Mr. Charles Lum about the recognizances (Case, p. 59, l. 29).

Furthermore, Mr. Smith admits that on the 8th day of September, the taxes of 1924 were unpaid and that there were mortgages then outstanding uncanceled of record (Case, p. 60).

Again at the bottom of page 60, Mr. Smith was asked this question:

“Q You were informed by our office that our client was at all times desirous of taking the title and that it was merely a matter of the physical work being done by the Fidelity, were you not?”

To this question the following answer was made:

“A After the last date set for closing, at least after what I considered would be the last date set for closing, I so inferred from Mr. Charles Lum that your client would still like to take title, but we didn't feel that he was entitled to it.”

At this point we might observe that it was very apparent from the fact that a title company had been employed to search the title and that the work was going forward as fast as conditions would permit that the complainants were making every reasonable effort to comply with the terms of the contract and to secure such title as they were reasonably entitled to.

With respect to the extension of time for one week, Mr. Smith says that this was granted by him on the oral request of Mr. Charles Lum “and I believe I so advised Mr. Lum that I

would only adjourn it for a week and then followed it up with this letter of September 1st" (Case, p. 62, ll. 10-20).

Evidently Mr. Smith understood from his communications with counsel for the purchasers that there were grave doubts as to the ability of the title company to have everything in readiness to close title within the short time which he was willing to grant. At the bottom of page 62, Mr. Smith is asked this question:

"Q You recall that the request you had from our office was for time until the 15th of September, and that you said that Mrs. Ruskin would not grant until the 15th; do you recall that?"

To this question the following response was made:

"A Yes, I think your office did request an extension for a longer period of time than we finally both agreed should be extended. Mr. Lum and I both agreed on one week instead of two weeks and Mr. Lum sent me a stipulation to that effect, carrying out our understanding, and instead of using his stipulation I used my letter."

By reference to the formal extension that was submitted and the letter of Mr. Smith it is very apparent that Mr. Smith did not consider the informal extension as having the same effect as his letter. When he is asked whether he considered there was a different legal effect between the agreement and his letter he says: "I don't think I considered the legal effect of this agreement particularly" (Case, p. 63, l. 20).

Again Mr. Smith is asked if he recalled that he was informed of the difficulties that were being met and that a request was made until the 15th of September to close title. To this he responds that he does not recall that he was

advised of the difficulties on the way other than what had been submitted to him in the communication.

When Mr. Smith is further pressed on this subject he apparently evades a direct answer to the question.

His testimony runs as follows (see bottom of page 63, printed case):

“Q You did know that the purchaser was at all times anxious to have the title as soon as it could be certified, didn't you?”

“A I didn't have any definite knowledge of that.

“Q Didn't Mr. Charles Lum indicate that to you in your talks?”

“A As I said before, after the date fixed for closing had passed, Mr. Charles Lum still intimated to me that he would like to try to get it straightened out.”

And again at the top of page 64:

“Q He told you where the difficulty had arisen?”

“A As I understood it, he told me the difficulty was that the Fidelity Union Title Company hadn't completed their title on time, on September 8th.”

Again on cross examination Mr. Smith admitted that he recalled a conversation with Mr. Charles Lum on Park Place in Newark, in which Mr. Smith had indicated that his client did not want to extend the time for taking title beyond the 8th of September. Thereafter his testimony is as follows (beginning on p. 65, l. 10):

“Q Do you recall his definitely saying to you that they would certainly be ready on the 8th, if it was a possibility, but he could not assure you that they could be surely ready at that time?”

“A I would not say that Mr. Lum did not say that to me, but I have no recollection of the latter part of your question.

“Q What is your recollection of what he did say? Did he say anything more about his desire to be ready, the Fidelity holding him up, and that he would be ready if he could?”

“A I don't think that Mr. Lum told me when we met that day on Park Place that the Fidelity was holding them up; I think he made that statement to me one day when I went to see him at his request in his office; that is my recollection.

“Q You do recall in Park Place that he said that they would be ready and would close as soon as they could be ready, or words to that effect?”

“A I think the day he met me on Park Place Mr. Lum asked me if I would get a further extension from Mrs. Ruskin and that I told him that I would do the very best that I could, and that then we both found out that the longest extension I could get was one week.”

Charles N. Macknet was a witness offered on behalf of the complainant, who testified that he was employed as a title reader by the Fidelity Union Title and Mortgage Guaranty Company. On behalf of the company he had charge of the title for the Ruskin property on Washington street in the City of Newark (Case, p. 27, ll. 10-20). Mr. Macknet recounts a certain question which arose in the title and stated that there were certain questions regarding survey, boundaries, etc., which were unanswerable without a survey (Case, p. 27, l. 30). He states that the survey was ordered on August 12th and was not received by his company until September 9th. The office work was hampered by the vacation season and by the fact that the title company was unusually busy during the month of August (Case, p. 27, ll. 30-40). He states that there was no unnecessary delay on the part of his company in moving the work forward

and recounts again certain questions arising in the title, especially regarding the marital status of the defendant (Case, p. 28, ll. 1-20). Mr. Macknet states that it was practically an impossibility for his company to have the title ready for closing on the 1st of September, and that the title was not ready for closing until September 10th (Case, p. 28). Mr. Macknet states that generally the surveyor reports on his work within three weeks from the time it is begun, but that in this instance it did take longer. A survey was necessary to dispose of certain questions which arose in the search of the title. Furthermore, Mr. Macknet says the surveyors were just as much rushed in August as his company was, which accounted for their failure to receive the survey within the usual time. He further states that it was an unusually busy time in the real estate market in Newark during the month of August (Case, pp. 36-37).

From the proofs presented, to which reference has been made, it appears that so far as the complainants were concerned there was no agreement that the time granted by the defendant was to be considered of the essence of the contract. Furthermore, it also appears that the extension granted, in view of all the circumstances of the case, was unreasonable.

At this point we would refer to the cases of our own courts dealing with this subject.

The circumstances under which time may be of the essence of the contract were considered by Vice-Chancellor Backes, in the case of *Orange Society v. Konski*, 94 N. J. Eq. 633. The complainant entered into a contract with defendant to sell to defendant a certain piece of property in the City of Orange. The bill was filed to

enforce a specific performance of the contract. The closing of title was set for October 10th. The type of the building to be erected on the premises was to be approved by the Society, the Chief Engineer of a railroad and the Mayor of the City and if either of the latter two refused or was unwilling to approve the plans and if the defendant would then not modify them so as to meet their approval the money paid down was to be returned. The contract provided, "If the necessary plans for the erection of the said building are neither approved nor rejected by the 10th day of October, then the purchaser may, at his option, (1) cancel this contract, and in such event the seller agrees to return to him all moneys paid on account of the contract, or (2) take the title to the property subject to all the other terms and conditions of this contract, and in the event that he exercises the last option, the contract shall be performed within five (5) days thereafter."

In the course of the opinion, at the top of page 634, the Court says:

"Neither side was ready on the appointed day. Konski had furnished a sketch of his proposed building, but the plans were not submitted until about the 25th of the month. They were approved by the engineer of the railroad and were satisfactory to the mayor, but he declined to give his approval unless a pending zoning ordinance be modified relieving the site of a ban against industrial structures. All hands, including Konski, worked industriously to have this done. Konski at length became impatient and under date of November 18th, wrote to the society as follows:

"I would suggest that we agree on some definite date, say, not later than November 25th, for Mayor Lord or other interested Orange City officials to come to a

final decision in reference to allowing the erection of factory on plot in question.

“‘In the event that no decision is arrived at on date mentioned, our negotiations will be discontinued on terms and conditions outlined in our agreement of August, 1921.’”

With respect to the further proceedings the Court, in the course of the opinion, says, at the foot of page 634:

“The zoning commission made the desired amendment December 2d; on the following day the mayor approved the plans, and Konski was notified, by letter, on December 6th. Konski refused to take title, claiming that as the mayor had not approved the plans by November 25th, he had the right to terminate the agreement, and that he had done so. Thereafter a formal tender of the deed was made and this action was promptly brought.”

Considering the legal rights of the parties, the Court, in the course of the opinion at the top of page 635, says:

“I said during the course of the argument that time was of the essence of the contract. That statement was too broad. I should have said that the assent of the engineer and the mayor was, at all events, a condition precedent to performance and that it was Konski's privilege to withdraw from the contract if his building plans were not accepted by the 10th of October. It was his right to do so arbitrarily, but he did not, and it is quite evident from what transpired that neither party regarded performance on that date imperative. Konski had not in mind that if his plans were not approved by October 10th, and the society was not minded that if the purchase price was not paid by that time, that the contract was to be at an end, if either so elected. I need not dwell longer on that phase because even if punctual

performance was considered essential at the time the contract was made it was waived, and it seems to me we need look no further than the letter of November 18th. Indeed Konski relies solely upon the letter, and the failure to meet its terms, as justifying his stand. The law is that a day fixed in a contract for closing title, without more, is merely formal; but, if it is stipulated that time is of the essence, or the circumstances are persuasive that that is the case, prompt performance is essential, and it is also the law that where the time fixed is regarded as a formality only, and the period has gone by, or where time is of the essence and there is a waiver, that time may nevertheless be made of the essence by formal demand that the title be closed by a given day; but the time given must be reasonable. Now, as I read Konski's letter, he did not fix November 25th as final. He suggested that the matter be closed by that day; that is, he asked the society to agree with him that it come to an end one way or another by then. The society did not agree, and I think Konski so understood it, for after writing the letter he appeared with the society's attorney before the mayor to get him to give his consent. But if I am mistaken in my interpretation of the letter, and if it is to be regarded as peremptorily fixing November 25th, to make good or quit, I think Konski cannot avail himself of it as a means of terminating the bargain. As I have indicated, to make time of the essence of the contract under such circumstances the extension, that is, the time given for performance, must be reasonable. Here but seven days were allowed. In the circumstances it was, in my judgment, too short. Konski knew what the difficulties were. He knew they could, and in all likelihood would be overcome. * * * The contract for sale had been made in August to be executed in October, and I think that that period is to be considered in measuring reasonableness of time for performance. In other words,

the time to elapse must bear some reasonable comparison to the time which has already elapsed. * * * I repeat that I think the time fixed for the conclusion of the contract was entirely too short under the circumstances. Considering that three months had gone by, demand then for performance within seven days was unjustified. I think at least twenty days should have been given."

In conclusion, the Court says, at the top of page 637:

"Mr. Konski will have to perform and a decree to that effect will be advised."

The decree of the Court of Chancery was affirmed in this court; as reported in 94 N. J. Eq. 632.

This subject was again considered by Vice-Chancellor Backes in *Watchung Realty & Development Co. v. Llewellyn Holding Corporation*, 96 N. J. Eq. 498. This was a bill for specific performance. In the contract the time for closing was fixed by defendant for September 6th, which was not agreeable to complainant because it was not in funds. The defendant then fixed the time for September 28th. It then appears that the complainant was not ready, but promised to be on October 10th "seeking no further adjournment from that date." The defendant extended the time until October 10th and placed its deed to the complainant in escrow with a trust company, to be delivered upon payment of the balance of the consideration, it being stipulated in writing that in case the complainant defaulted the deed was to be returned the next day and the defendant was to be relieved of all responsibility. On October 10th, the complainant could only pay a part of the purchase money and defendant agreed to take a note for the balance. The note was dishonored and repeated demands

were made of the complainant to pay. On January 7, 1924, defendant wrote the complainant that it was taking steps to demand the return of the escrow deed. On the 9th, the complainant pleaded for more time and the defendant offered to hold the matter open until Friday, the 11th, at noon. If the balance was not paid by that time the transaction would be considered closed. The deed thereafter was demanded of the trust company and returned on January 14th. The defendant refused all further negotiations and thereupon a bill for specific performance was filed by the complainant. In the course of the opinion in this case, at the top of page 500, the Court says:

“The principal contention of the complainant is that time was not of the essence of the contract and that the final call to perform was too abrupt. Time was not expressly made the essence of the contract, but that it was of the essence is inferable from the circumstances. The defendant had made a contract to purchase the land, which, in effect, it turned over to the complainant at a slight profit. The conveyances to and from it were to concur. Its purchase price was to be supplied by the complainant, and that it was to be timely furnished was essential to the defendant's due performance of its contract with its vendor. Prompt performance was waived, but time was again made of the essence by the extension to October 10th, and again by the extension to December 10th, and again by the extension to January 11th (cases cited). It was the privilege of the defendant to put an end to the contract on any of these occasions. This it chose to do on January 11th. Tender of performance thereafter was properly rejected (cases cited). The forbearance of the defendant does not imply that time was not essential. Graciously extending the time of performance over and over again was

not a license to presume on good nature. The defendant waited long and patiently after December 10th and very properly refused to go further than the last call, January 11th. The halt was not abrupt or unreasonable. The principle of *Orange Society of New Jerusalem v. Konski*, 95 N. J. Eq. 254, cannot be applied."

This subject was also considered in *Ulikowski v. Casper*, 130 Atl. Rep. 454. In the course of the opinion Vice-Chancellor Griffin says, at the bottom of page 454:

"On November 6, 1922, the complainant entered into a contract with the defendants Casper for the sale of certain lands at Secaucus. Passing over a great many mistakes made in this contract as to the time of passing title counsel agree that title was to be passed on December 6, 1922. The title was not passed on that date because the complainant did not have the \$1,000.00 required to be paid on the passing of title. On February 14, 1923, counsel for defendants wrote a letter to the complainant fixing February 19, 1923, as the date of passing title or the contract to be at an end. This period may have been too short. *Orange Society v. Konski*, 94 N. J. Eq. 632, 121 A. 448."

Reference is also made to the *Orange Society* case in the course of the opinion in *Strauss v. Rabe*, 127 Atl. Rep. 188. From the statement of facts in this case it appears that on June 12, 1924, the parties entered into a written contract for the sale of real estate by defendant to complainant under the terms of which title was to pass on August 2nd of that year. The complainant did not appear at the time, and, subsequently, on August 18th, notice was given to complainant in writing by defendants, through their attorney, fixing September 8th as the time and the office of said attorney as the place for closing title

and making time of the essence of the contract. The letter specifically stated that the defendants made time of the essence, which carefully showed that the attorney only obeyed their instructions. On the day fixed the complainant, with his attorney, appeared at the place designated but was not prepared to accept defendants' deed and sought a postponement until two days later. The defendants considered the contract as terminated by failure to close title on September 8th, whereupon the bill was filed seeking a specific performance of the contract. In the course of the opinion in the cause Vice-Chancellor Bentley says, at the foot of page 189:

“There can be no doubt of the authority of the vendor to make time of the essence of a contract by giving notice to the vendee, as was done in this case, notwithstanding the doubt expressed by Vice-Chancellor Garrison in *Cranwell v. Clinton Realty Co.*, 67 N. J. Eq. 540, 58 A. 1030. The matter has been set at rest by the opinion of Vice-Chancellor Backes in *Orange Society of New Jerusalem v. Konski*, 94 N. J. Eq. 632, 121 A. 448, affirmed on the opinion of the Vice-Chancellor in 122 A. 753. Therefore, time was of the essence and that is an extremely important circumstance. Therefore, any default in this respect on the part of either party gave to the other the right to treat the contract as breached and at an end.”

We call attention to this case because it appears from the facts that 16 days after the time fixed for the passing of title the defendants gave notice to the complainant fixing the eighth day of September as the final date upon which title could be closed. In other words, the defendant in this case gave the complainant 21 days' notice of the time fixed by him for closing the title after the lapse of some 16 days since the time fixed by the contract. It is very evident, there-

fore, that the defendant gave at least 20 days' notice, as was suggested by Vice-Chancellor Backes as a reasonable time in the Orange Society case.

The Court below, in the course of the opinion (Case, p. 79) refers to the case of *Newark v. Lindsley*, 114 Atl. Rep. 794. In this case the City of Newark was purchasing certain Martin Act titles from the defendant. A period of some eight months was allowed for the closing in order that the city might determine by its own law department which of the titles it would accept. The Court, in the course of the opinion, says that the acceptance of the deeds was virtually optional with the city and "it was clear to both parties, and their understanding, that the defendant's freedom of disposing of his lands elsewhere—and there were other bidders—was not to be tied up longer than the day fixed" (p. 795).

The facts of the instant case present a very different situation.

In conclusion we would refer briefly to the circumstances established by the evidence and proofs offered herein.

When the contract was executed the date for closing title was, at the request of the defendant, extended from July 15th to September 1st, in order that she might have the benefit of the occupation of the property without rent. There was nothing in her attitude at that time to indicate that she was particularly anxious to close title promptly. Thereafter every reasonable effort was made on the part of the complainants to be ready at the time stated. Whatever delay occurred was due in a large measure to the activity in the office of the Title Company, and particularly to the inability of the surveyor to

complete his work. The difficulties encountered were well known to the defendant and her counsel at all times.

In the course of the search it appears that questions of title arose which called for serious consideration. When the contract was executed the defendant described herself therein as a widow. Thereafter it was learned that the defendant here was a party to a divorce proceeding brought by her husband in a foreign state. After the date fixed in the contract for closing title the title company received a copy of a record of an Ohio court indicating that a decree of divorce had been granted against the defendant. In view of all the circumstances of the case this subject required serious consideration.

In fact, every reasonable effort was made by the complainant and their counsel and the title company to expedite the closing of title. Furthermore, it should be observed that the extension of one week from the first of September gave the complainants very limited opportunity to clear up outstanding questions, when it is remembered that a Sunday, Labor Day and a Saturday half-holiday intervened. In view of all the attendant circumstances we respectfully contend that the time granted was unreasonable.

We respectfully submit that the decree of the Court of Chancery should be reversed and that the prayer of complainants' bill should be granted.

Respectfully submitted,

LUM, TAMBLYN & COLYER,
Of Counsel with Appellants.

RALPH E. LUM,
Of Counsel.

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New Jersey Court of Errors and Appeals

Between

WALTER F. BARRY and LOUIS
BELLER,
Complainants-Appellants,

and

ANNA RUSKIN,
Defendant-Respondent.

On Bill.

*On Appeal
from
Chancery.*

BERRY, V.-C.

*Specific Per-
formance.*

*Decree for
Defendant.*

*Complain-
ants' Appeal.*

BRIEF FOR RESPONDENTS.

*Italics, etc., except where otherwise stated,
mine.*

The Case.

The contract, to compel the specific performance of which this suit was brought, was dated June 5th, 1925, and was to close September 1st, 1925 (p. 88).

The consideration was \$25,312.50. Barry, the purchaser, assigned the contract to complainant Beller July 22, 1925 (p. 18). The property was located on Washington street, Newark. For sometime before the purchase, at the time of the purchase, at the time fixed for closing title and for sometime thereafter real estate on Washington street was the subject of speculation (p. 19). Hewson, a real estate agent, testified that there was speculation on Washington street, and very marked rises in value in the immediate vicinity

of the property involved in this suit. There were, within a three months' period, possibly a hundred transfers. There was trading in contracts (pp. 68, 69, 70). Barry purchased for speculative purposes (p. 20). He had contracted to purchase other property for speculation and had disposed of his contracts to Beller about the same time (p. 20).

After the making of the contract the next that defendant heard of the matter was in the latter part of August, 1925, when Mr. Smith, her counsel, was asked for a copy of her final decree of divorce. Counsel immediately sent a copy to Lum, Tamblyn & Colyer, counsel for Beller (pp. 54, 59). About the same time defendant's counsel was asked by Lum, Tamblyn & Colyer about certain recognizances and he advised complainants' counsel that defendant had signed no recognizance and furnished an affidavit to that effect.

The next thing that occurred was a request on the part of Mr. Lum to Mr. Smith for an adjournment of the time for passing title. Mr. Smith testified that: Mr. Lum requested an extension of two weeks (p. 55); that he (Smith) stated that he would not give an extension of two weeks but would give one week (p. 62); and (p. 62)—“Mr. Lum and I both agreed on one week instead of two weeks, and Mr. Lum sent me a stipulation to that effect, carrying out our understanding, and instead of using his stipulation I used my letter” (pp. 62, 63). After the talk, Mr. Lum sent to Mr. Smith the form of agreement, Ex. D. 5 (p. 55). This is a formal agreement extending the time of passing title to the 8th of September, 1925 (p. 56).

Instead of executing that agreement Mr. Smith sent a letter, D. 2 (p. 56), reading as follows:

“September 1st, 1925.

Dr. Walter F. Barry,
516 Broad Street,
Newark, New Jersey.

Dear Sir: I beg to herewith advise you that pursuant to a contract made under date of June 5th, 1925 between you and myself relating to the sale of the property situate at 350 Washington Street, Newark, New Jersey, that I have extended the time for you from September 1st, 1925 to Tuesday, September 8th, 1925 for you to perform this contract and take title pursuant to the terms and provisions of the said contract of the property therein referred to and further be advised that I will not grant any further extension to you for the passing of title of the property. I am,

Yours very truly,
ANNA RUSKIN ABRAMS,
Owner.”

No reply was made to this letter, and there was no dissent from its terms.

Throughout his brief counsel for appellants argues that Mr. Lum never agreed to the extension for one week, or, at least, never agreed that that extension should be final. Mr. Lum did not take the stand. Mr. Smith swore positively that he had told Mr. Lum that one week's extension was all that he would give, and that, thereupon, Mr. Lum and he agreed upon that one week's extension. Mr. Lum then drew the agreement, which formally extended the time for closing the contract for one week, and sent it to Mr. Smith. In order to make clear that they had agreed upon a final extension Mr. Smith had defendant sign the letter Ex. D. 2, in which she distinctly said that she would not grant any

further extension. This letter was retained by complainants without dissent.

On September 8th, defendant was prepared to close the title. In the afternoon of September 8th, Mr. Lum sent to Mr. Smith a letter, dated September 8th, Ex. D. 1 (p. 21). That letter purports to set up certain objections to the title. It refers to mortgages, which were to be paid. It refers to recognizances, which Mr. Smith had already taken up with Mr. Lum, and, with respect to which, he had informed Mr. Lum that defendant was not the person who had signed them. It refers to the inability of Barry to obtain proof that the proceeds of the sale of the property were ever turned over to the proper trustees named in a deed made in 1913. It then says that the defendant is not in a position to convey a marketable title but that he trusts "that these objections may be taken care of so that title may pass on September 15, 1925." Mr. Smith immediately replied by the letter of September 9th, 1925 (Ex. C. 3, p. 25). It directs attention to the facts: that the time for closing title had been definitely fixed for September 8th; that defendant was ready to close title on that date; that Barry did not appear to close title. It ended with a statement that defendant would no longer be bound by the terms of the agreement.

On September 14, 1925, Lum, Tamblyn & Colyer wrote Mr. Smith giving him a description of the property and stating that the deed should be made to Beller (p. 32). Mr. Smith replied by letter, dated September 15, 1925, advising Mr. Lum that on account of Barry's failure to take title at the time fixed, the contract was no longer binding upon defendant (p. 32).

Lum, Tamblin & Colyer, on September 17, 1925, wrote Mr. Smith advising him that Barry was willing to divide the profit on a resale of the property by him between himself and defendant (p. 34).

On September 22, 1925, Mr. Smith wrote Mr. Lum that defendant would not settle; that "she feels that Dr. Barry kept putting off the closing of her title awaiting the turn of events in connection with Washington street property, and that he waited to see how the other properties on that street would go."

Mr. Smith again advised Mr. Lum that from September 8, 1925, defendant had considered the contract abrogated.

The bill was filed September 30, 1925.

At the time fixed for the closing of title defendant contemplated the purchase of a piece of property, 63-64 Court street (p. 70). She had no other property or moneys (p. 72). She was obliged to let the contract for the purchase of this property go at a loss (p. 70). She was also contemplating the purchase of certain other properties which rose in value (pp. 70, 71). Because of the failure of Barry to perform his contract at the time stated she was unable to use the moneys for the purposes for which she intended. Hewson, a real estate broker, had been continuously at Barry to get the title closed (p. 67).

The first application to the Fidelity Union Title and Mortgage Guaranty Company to search this property was made on *August 10th*. The contract was dated *June 5th* to close *September 1st*, yet no application was made to the Title Company to make the search until more than two months after the date of the contract, and but twenty days before the contract was to close.

The excuse given for not closing the contract on September 1st or September 8th is the failure of the Title Company to be ready with the search, the Title Company representative testifying that their office was hampered by the summer vacation, etc. (pp. 27, 28).

An effort was made to show that some of the delay was due to the refusal of defendant to co-operate but when it finally appeared, as it did, that everything requested of defendant was done by the 2nd of September, the only excuse left for the failure to close title on September 8th was that the survey had not yet been obtained (p. 43).

It is now apparent that the letter of September 8th, purporting to set out that defendant could not give a marketable title, was a mere subterfuge. Complainants do not insist that any of the alleged defects in title set out in this letter of September 8, 1925, were, in reality, defects.

The Vice-Chancellor held, upon the facts that complainants were responsible for the delay; the delay of complainants in ordering search was responsible for complainants not being able to close title on September 1st; the condition of the real estate market was speculative, and "such that further delay might be prejudicial to the interests of the vendor"; the defendant was warranted in refusing to extend the time for settlement beyond September 8th; the extension to September 8th was agreed upon by the parties; it was understood that time was of the essence.

A decree then went dismissing the bill (p. 81).

From that decree this appeal is taken by complainants.

ARGUMENT.

While time is not usually of the essence in equity it may be considered such, even though not so stated in the contract, because of the nature of the subject matter of the contract, or it may be made such by agreement of the parties, or by notice from one party to the other.

In the case at bar, time was of the essence under all three of the rules hereinbefore referred to.

1. Time was the essence because of the nature of the subject matter of the contract.

In Pomeroy Specific Performance of Contracts, 3rd Edition, 1926, sec. 384, page 814, the rule is stated—

“When the nature of the subject-matter is such that its value necessarily changes—that is, either increases or decreases with the mere lapse of time—time is then of the essence of the contract, and performance must be completed at the specified period.

* * * * *

Closely analogous in form, and really governed by the same principle, is the case of contracts the subject-matter of which is from its nature liable to frequent, sudden, or considerable changes or fluctuations in value; but in England it would seem hardly possible that an agreement for the sale of land could fall under this particular rule, and its operation is there confined to other kinds of subject-matter. In the United States—at least in some of the states—the value of land in a given locality is not so stable as in England; it is subject to more rapid rises and falls; it is often exceedingly fluctuating and even speculative. As a consequence of this fact, the American courts have been more liberal than the English in extending the above rule concerning the

effect or fluctuation of value to contracts for the sale of land; not, of course, to the extent of impairing the general doctrine that time is non-essential in agreements for the sale of land, but special circumstances of the case are more regarded, and their effect is allowed to be more controlling. In like manner, and for the same reason, if the consideration of the contract is in its nature changeable, fluctuating, or perishable, time would be *prima facie* essential, or at least *very material.*”

In the case at bar the proof is, without contradiction, that at the time, the value of land in the locality was fluctuating and the market was speculative. This was due to the proposed widening of Washington street. Within a very short period, there had been more than one hundred transfers to the knowledge of one real estate man, Hewson, in the immediate vicinity (p. 68). There was trading in contracts (p. 68). Values were changing daily (p. 68). Complainant Barry made this contract and others for speculative purposes (p. 20). He was urged by Hewson to complete the contract (p. 67). During the time that he held the contract he made no attempt to have the title searched and made no attempt to put himself in a position to take title. He waited until he could dispose of the contract, which he did, to complainant Beller, on the 22nd day of July, 1925. Beller waited until August 10th before he made any attempt to have the title searched, although title was to close September 1st.

2. Time was made of the essence by agreement of the parties.

Prior to September 1st, the date originally fixed for the closing of the title, the representative of complainants asked for an adjournment.

Request was made for two weeks. The representative of defendant stated that two weeks would not be allowed but that one week would be allowed "but no more." This express limitation of time was agreed to by the representative of complainants (p. 62). It is argued, at least by inference, in appellants' brief that this was not so. But that argument can hardly be made in the face of the express statement of Mr. Smith, in view of the fact that Mr. Lum, with whom he says he had the agreement, did not take the stand. And it is apparent that Mr. Lum considered that there was an agreement for this one week's adjournment and limitation to one week for he sent to Mr. Smith a *formal* agreement to be executed under seal adjourning the closing of title for one week (Ex. D. 5, p. 116).

The preparation of this formal agreement extending the time for one week is evidence that complainants considered that time was of the essence.

In view of the speculative nature of the property it was reasonable that they should consider time of the essence. Defendant was privileged to speculate as well as complainants. By reason of the failure of complainants to perform at the time stated, she lost that opportunity and was obliged to give up a contract at a loss (pp. 70, 71).

It is the intention of the parties, to be gathered from what they did in the light of the surroundings, which is to control.

In *King v. Buckman*, 20 N. J. E. 316, the Chancellor said that a new agreement extending the time is evidence that the parties considered the time material.

It is true that this case was reversed by this Court in 21 N. J. E. 599, but the statement of law by the Chancellor was not criticised. The reason for the opinion of this Court is stated in the 8th statement of the Court, 21 N. J. E. 605, to the effect that the notice given that the time would not be extended, etc., would not aid defendant because the complainant was ready with the money on the day fixed, and the dispute was whether he produced and offered it at the proper place.

Vice-Chancellor Emery said in *Agens v. Koch*, 74 N. J. E. 528, at p. 532:

“The defendant’s solicitor says that the reason given for refusing a longer delay given by one of the vendors was that a higher price had been offered for the property, and they would not keep the matter open longer. This evidence was not contradicted, and if true, would tend to indicate that in fixing the time in the extension of the contract time was considered essential, not only by the purchaser but by the vendors. The mere fixing of a date by written extension has of itself been sometimes considered as having a bearing on the question whether time was considered of the essence of the contract.”

In the case at bar we have the facts: that the property was of a highly speculative nature; that an extension for more than one week was refused; that an extension of one week was given and accepted, and a formal document drawn to evidence it.

Vice-Chancellor Backes recognized the rule in *Wachung, &c., Co. v. Llewellyn, &c., Corp.*, 96 N. J. E. 498, when he said at page 500:

“Prompt performance was waived, but time was again made of the essence by the extension to October 10th, and again by the

extension to December 10th, and again by the extension to January 11th."

Citing

King v. Ruckman, 20 N. J. E. 316;
Bullock v. Adams, 20 N. J. E. 367;
Newark v. Lindsley, 114 Atl. Rep. 794.

And again Vice-Chancellor Backes in *Merchants and Manufacturers National Bank v. Newark Rubber Company*, 4 N. J. Advance Reports, 79, at p. 80 (not officially reported) said:

"Time was of the essence of the contract. The stipulation extending the time is evidence of that."

3. Time was made of the essence by the act of defendant.

Pomeroy *Specific Performance of Contracts*, 3d Ed., 1926, sec. 395, p. 840.

As early as *Bullock v. Adams' Executors*, 20 N. J. E. 367, at p. 371, the Chancellor said:

"Courts of equity do not, in general, consider the time of performance as of the essence of a contract for the sale of lands; but hold it may become of the essence, by being expressly made so by the contract itself." * * * "Or, by notice from the other party insisting upon performance at a time fixed." * * * Or, by the subject matter of the contract and its surrounding circumstances."

In the case at bar, Mr. Smith, counsel for defendant, sent to complainant Barry a letter, Ex. D. 2, p. 56, 111, signed by defendant, in which letter the statement is made that the time had been extended to September 8th and "I will not grant any further extension of time to you for the passing of the title to the property." This letter was turned over to counsel for complainants. There was no dissent from its terms.

While it is true that where time is made of the essence by the act of one party, the notice must be reasonable, whether it is reasonable, in any particular case, depends upon the circumstances. In this case complainants had from June 5th to September 1st to prepare for taking title. They had taken no steps to have the title searched until August 10th. They had requested an adjournment of two weeks and had been granted one week to which they had agreed through counsel. When the letter was sent by Mr. Smith stating, in unequivocal terms, that no extension of time would be given there was no dissent from its terms. The property was of a highly speculative nature. How can it now be said that the limitation to one week was not, under the circumstances, reasonable?

The Vice-Chancellor in his conclusions (p. 79) has quoted copiously from the cases of the *Orange Society v. Konski*, 94 N. J. E. 632, affirmed 95 N. J. E. 254, and *Newark v. Lindsley*, 114 Atl. 794 (not officially reported).

In addition to the cases cited by the Vice-Chancellor there is *Wachung v. Llewellyn, &c., Park Corp.*, 96 N. J. E. 498, heretofore referred to.

Also *Strauss v. Rabe*, 97 N. J. E. 208.

This Court, affirming Vice-Chancellor Leaming on his opinion in *Doctorman v. Schroeder*, 92 N. J. E. 676, held that, where time was made of the essence of a contract for sale of land by supplemental agreement, time not being of the essence of the original agreement, an offer to perform made a few hours after the extension of time fixed was unavailing.

An attempt was made in the case at bar to show that complainants were not ready because their searches had not been completed. The same attempt was made in *Newark v. Lindsley*, 114 Atl. 794. There, as here, complainant raised questions as to the title requiring proof, etc., which proof defendant was under no obligation to furnish. Here, as there, notwithstanding what was said in the letter of September 8th, 1925, with respect to the title, complainants are now content. The language of Vice-Chancellor Backes in *City of Newark v. Lindsley*

“They were all matters extra the record that did not affect the titles. The titles were absolute. That is now admitted, and Newark is content. It should have been long ago,”

can be applied with equal force to the situation at bar.

If complainants were not able to assure themselves that the title was good prior to the date fixed for the passing, it was their own fault, for they waited from June 5th, the date of the contract, to August 10th before attempting to have it searched. Of course, they waited hoping to dispose of the contract by resale, believing that they would not be obliged to have a search made. But that is not the fault of defendant. The letter of September 8th, pointing out alleged defects in the title, was an apparent subterfuge to get further time.

Counsel says in his brief (p. 21) that the Title Company did not receive a copy of the record of the Ohio Court indicating that a decree of divorce had been granted between defendant and her husband until after the time fixed in the contract for closing title. I do not know what testimony supports this assertion. Mr. Smith says (p. 59) that he gave them the cer-

tified copy of the record the latter part of August. In any event, it was received in sufficient time to permit the title to close on September 8th. So with respect to the recognizances. On September 2nd counsel for complainants was in possession of an affidavit of defendant that she had not entered into the recognizances and no contention is now made that she had (pp. 40, 41).

How can it be said that complainants have complied with the rule referred to by Vice-Chancellor Backes in *Newark v. Lindsley*, 114 Atl. 794, as follows:

“The general rule is that he who seeks performance of a contract for the conveyance of land must show himself ready, desirous, prompt and eager to perform the contract on his part. Therefore unreasonable delay in doing those acts which are to be done by him will justify and require a denial of relief.”

in view of the fact that there was a delay from June 5th, 1925 to August 10th, 1925, before any attempt was made to search the title.

To the case of *Newark v. Lindsley* cited by the Vice-Chancellor as holding that a bill for specific performance is addressed to the extraordinary jurisdiction of the Court and that relief is not of right but of judicial discretion depending upon the circumstances of each particular case, may be added

Brown v. Brown, 33 N. J. E. 650 (Court of Errors and Appeals).

Blake v. Fatley, 44 N. J. E. 228, at p. 231 (Court of Errors and Appeals).

Ten Eyck v. Manning, 52 N. J. E. 47, at p. 49 (V.-C. Van Fleet).

Pyatt v. Lyon, 51 N. J. E. 308, at p. 314 (Court of Errors and Appeals).

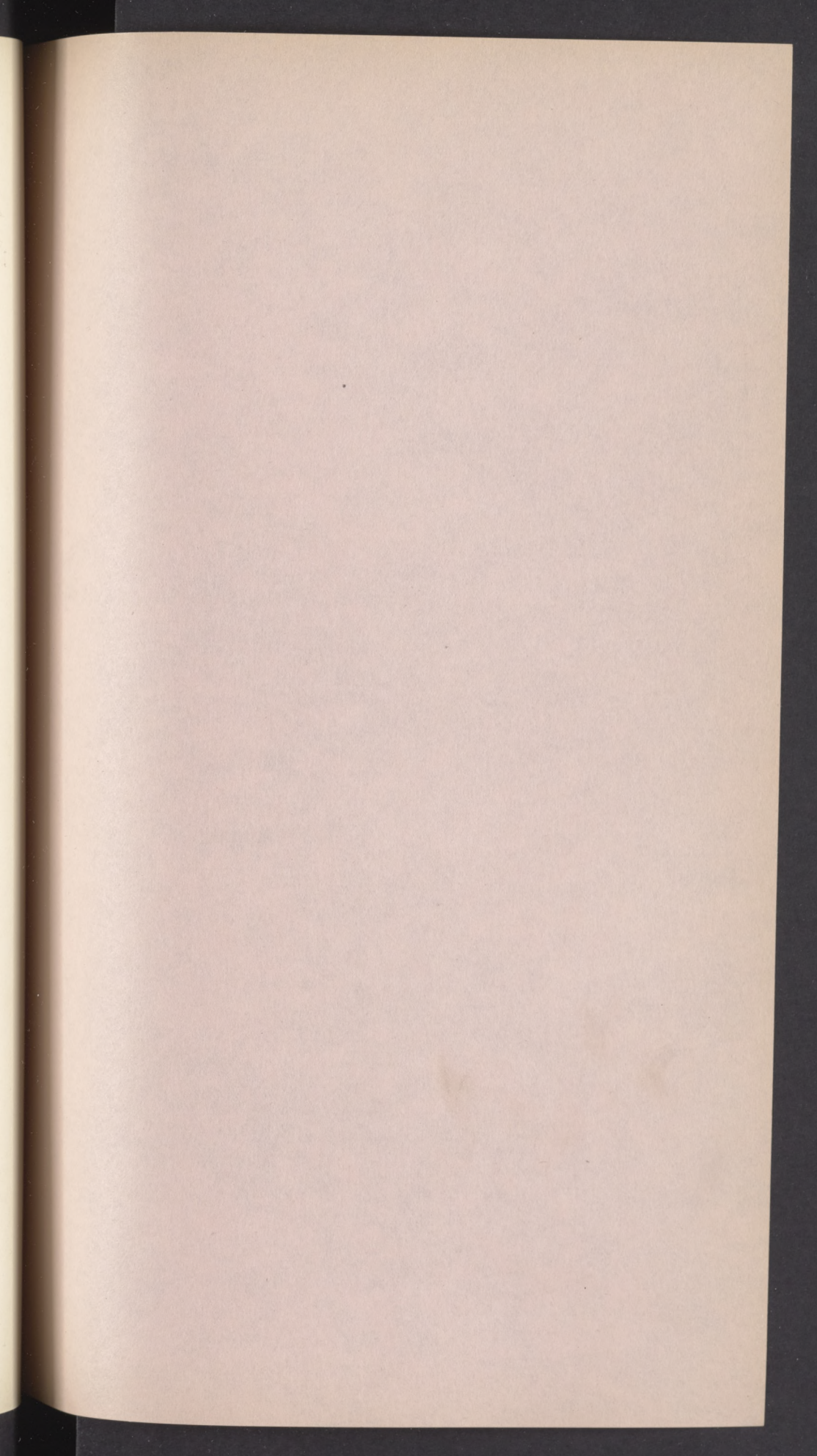
It is respectfully submitted that the decree below should be affirmed.

Respectfully submitted,

MERRITT LANE,
Of Counsel for Respondent.

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