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COMPLAINANT'S EXHIBITS:

New Jersey Court of Errors and Appeals.

MARY M. SCHULTZ and FRANK SCHULTZ, her husband,
Complainants-Appellees,

vs.

LOUIS POLLOCK and MOLLIE POLLOCK, his wife,
Defendants-Appellants.

Petition of Appeal.

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

The petition of Louis Pollock and Mollie Pollock, the appellants in the above entitled cause, respectfully shows that:

1. 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 January 30, 1928, advised by the Honorable Alonzo Church, Vice Chancellor in a certain cause in said Court of Chancery, wherein Mary M. Schultz and Frank Schultz, were complainants and the said Louis Pollock and Mollie Pollock, his wife, were the defendants, in this respect, to wit; that the decree adjudges that the defendants specifically perform a contract dated March 17, 1926, accept the conveyance in its present condition of the said prem-

ises, and pay the purchase price therein set forth, and in which decree it is further ordered that the defendants pay to the solicitor of the complainants, the sum of $150.00 as counsel fee, together with taxed costs.

And petitioners appeal from the decree of the Chancellor which decrees as aforesaid, upon the ground that the same is erroneous, in that, the contract providing against encroachments, and there being encroachments, and the building upon the premises encroaching, and time having been made of the essence by the conduct of the parties, and the complainants having tendered performance with the encroachments, denying the encroachments and refusing to remedy the encroachments, and the defendants having tendered performance on their part, and having rescinded upon the refusal of the said tender, and the complainants being in laches in not removing the encumbrances, there should have been a decree for the defendants as against the complainants upon the counterclaim, and the said decree as entered should have imposed no counsel fee and/or costs as against the defendants.

Petitioners therefore pray that the said decree of the said Chancellor may be in the particulars aforesaid, reversed, set aside and for nothing holden; that a decree may be entered for the defendants upon their counterclaim, and that petitioners may have such other relief in the premises as to this Court shall seem proper.

HARRY LEVIN,
Solicitor for and of Counsel with
Appellants.

Answer to Petition of Appeal.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

MARY M. SCHULTZ and FRANK SCHULTZ, her husband,
Complainants-Respondents,

and

LOUIS POLLOCK and MOLLIE POLLOCK, his wife,
Defendants-Appellants.

The answer of the above-named respondents to the petition of appeal of the above-named appellants.

The respondents, not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereto, nevertheless, say and admit, that a decree was, on the 30th day of January, 1928, made and entered in the Court of Chancery, in the cause for that purpose mentioned in the said petition as is therein stated; but as to the substance and form thereof, these respondents pray to refer thereto when the same shall be produced. And these respondents are advised and believe, that the said decree is agreeable to equity and they pray that the same may be affirmed, with costs to be adjudged to these respondents.

MICHAEL J. TANSEY,
Solicitor for and of Counsel with
Respondents.

Notice of Appeal.

IN CHANCERY OF NEW JERSEY.

Between

MARY M. SCHULTZ and FRANK SCHULTZ, her husband,

Complainants,

and

LOUIS POLLOCK and MOLLIE POLLOCK, his wife,

Defendants.

To:

MICHAEL J. TANSEY, ESQ.,
Solicitor for Complainants:

The defendants, Louis Pollock and Mollie Pollock, his wife, hereby appeal from the final decree made in the above entitled cause on January 30, 1928, and from the whole and every part thereof, made by the Chancellor on the advice of Vice-Chancellor Alonzo Church, to the Court of Errors and Appeals in the Last Resort in all Causes.

Dated, March 1, 1928.

JACOB KAPLAN,
Solicitor for Defendants.

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

HARRY LEVIN,
Of Counsel with Defendants.

Complaint.

IN CHANCERY OF NEW JERSEY.

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

The complainants, Mary M. Schultz and Frank Schultz, her husband, of the City of Newark, in the County of Essex and State of New Jersey, respectfully show that:

1. On March 17th, 1926, the complainant, Mary M. Schultz, was seized in fee simple of all that certain lot, tract or parcel of lands and premises situate, lying and being in the City of Newark, aforesaid:

BEGINNING at a point in the Westerly line of Leslie Street therein distant 312.83 feet Southerly from the Southerly line of Nye Avenue; thence running Southerly along said Westerly line of Leslie Street 25 feet; thence Westerly 100 feet; thence Northerly 25 feet; thence Easterly 100 to the Westerly line of Leslie Street and point and place of BEGINNING.

BEGINNING at a point in the Westerly line of Leslie Street therein distant 337.83 feet Southerly from the Southerly line of Nye Avenue; thence running Southerly along said Westerly line of Leslie Street 25 feet; thence Westerly 100 feet; thence Northerly 25 feet; thence Easterly 100 feet to the Westerly line of Leslie Street and the point and place of Beginning.

Being known and designated as Nos. 153-155 Leslie Street, Newark, New Jersey.

2. On the date last mentioned complainants entered into a certain agreement in writing with Louis Pollock and Mollie Pollock, wherein and whereby complainants agreed to convey the said lands and premises, by deed of warranty, on or before May 1st, 1926, to the said Louis Pollock and Mollie Pollock, in consideration of the payment by said Louis Pollock and Mollie Pollock, of the sum of $31,200.00, and the said Louis Pollock and Mollie Pollock, agreed to pay to complainants, said purchase price of $31,200.00, by the payment of $500.00 at or before the execution of said agreement, and the payment of the remainder of said purchase price upon the delivery by complainants of said deed to said Louis Pollock and Mollie Pollock, by the payment of $4,700.00, in cash or certified check and the execution by said Louis Pollock and Mollie Pollock, to complainant, Mary M. Schultz, of a purchase money mortgage on said lands and premises in the sum of $7,000.00, including the withdrawal value of the back shares in the Building and Loan Association, payable in five years after date, with interest at the rate of six per cent. per annum, payable semi-annually; the said deed to be delivered at the office of Isaac Fleischman, Esq., Counsellor at Law, 9 Clinton Street, Newark, New Jersey, on the First day of May, 1926, between the hours of 10:00 o'clock in the forenoon and 4:00 o'clock in the afternoon. A true copy of said written agreement is hereunto annexed and made a part hereof.

3. The said Louis Pollock and Mollie Pollock, paid to complainants the said sum of Five Hundred Dollars at the time of the execution and delivery of the said agreement in writing.

4. On said May 1st, 1926, complainants duly attended at the office of said Isaac Fleischman, Esq., at 9 Clinton Street, Newark, N. J., with a warranty deed conveying the lands and premises hereinabove referred to, to the said Louis Pollock and Mollie Pollock, his wife, duly executed by complainants, for the purpose of delivering the said deed to the said Louis Pollock and Mollie Pollock, his wife, upon the payment by the said Louis Pollock and Mollie Pollock, of the balance of the purchase money pursuant to the terms of the aforesaid agreement and actually made tender of the same but the said Louis Pollock and Mollie Pollock refused to take title to the premises by reason of some supposed encumbrance affecting the property, although the complainants were ready and willing to convey the premises, since there was no encumbrance on the premises that would prevent the complainants from conveying the premises according to the aforesaid agreement.

5. Complainants have always been ready and willing and now tender themselves ready and willing to perform their part of the agreement, and, on being paid the remainder of said purchase money, with interest, to convey the said lands and premises to the said Louis Pollock and Mollie Pollock, by a warranty deed, duly executed by complainants.

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

1. That Louis Pollock and Mollie Pollock, who are the defendants to this suit, may answer this bill of complaint and each statement therein made:

2. That the said Louis Pollock and Mollie Pol-

lock, may be compelled by the decree of this Court specifically to perform the said agreement with complainants, and to pay to complainants the remainder of the said purchase money, as in and by said agreement provided, with interest from the time said purchase money ought to have been paid, on the delivery by complainants to said Louis Pollock and Mollie Pollock, his wife, of a deed executed by complainants, as in said agreement provided.

3. That in case the said defendants Louis Pollock and Mollie Pollock, should, within the time limited by this Court for such performance of said contract, fail and neglect, upon the tender of said deed, to pay the said remainder of said purchase money as aforesaid, that then and in that event the said sum, together with interest and costs, may be and become a lien upon the said lands and premises in favor of the complainants, and that the said lands and premises may be sold under the direction of this Court for the satisfaction of such lien so impressed on said lands and premises; and in case a deficiency should arise upon said sale, that the said defendants may be ordered by this Court to pay said deficiency, together with interest and costs to these complainants.

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

MICHAEL J. TANSEY,
Solicitor for and of Counsel with Complainants.

Answer and Counterclaim.

IN CHANCERY OF NEW JERSEY.

Between

MARY M. SCHULTZ and FRANK SCHULTZ, her husband,
Complainants,

and

LOUIS POLLOCK and MOLLIE POLLOCK, his wife,
Defendants.

The answer of the defendants, Louis Pollock and Mollie Pollock, his wife, and their counterclaim against the complainants, Mary M. Schultz and Frank Schultz, her husband.

These defendants, Louis Pollock and Mollie Pollock, his wife, answering the Bill of Complaint, say that:

1. Paragraphs 1, 2 and 3 of the Bill of Complaint are admitted excepting that the agreement in question provides that a conveyance was to be made by Deed of Warranty, free of all encumbrances and that the balance of the purchase price, on delivery of deed, was to be paid by cash or by certified check.

2. Paragraphs 4 and 5 of the Bill of Complaint are denied.

FIRST SEPARATE DEFENSE.

The complainants did not and could not tender

these defendants a Warranty Deed free of all encumbrances, as was agreed upon.

SECOND SEPARATE DEFENSE.

The complainants failed to make proper tender in accordance with their agreement.

THIRD SEPARATE DEFENSE.

The complainants are in default in that they could not comply with the express provision of the contract, made and entered into by them, which expressly provides that the buildings on the premises in question shall be within the boundary lines thereof, the said buildings extending or encroaching out into the street or sidewalk.

FOURTH SEPARATE DEFENSE.

The complainants are in laches in the prosecution of this suit.

WHEREFORE, your defendants pray that this suit may be hence dismissed with their proper costs and counsel fee taxed against the complainants.

And by way of counterclaim against the complainants, Mary M. Schultz and Frank Schultz, her husband, the defendants, Louis Pollock and Mollie Pollock, his wife, say that:

1. On March 17, 1926, the defendants entered into a written agreement with the plaintiffs, whereby the said Mary M. Schultz and Frank

Schultz, her husband, agreed to sell and convey to Louis Pollock and Mollie Pollock, his wife, on or before the first day of May, 1926, certain premises known and designated as #153-155 Leslie Street, Newark, New Jersey, agreeing that the said premises consist of a plot of land measuring fifty (50) feet front and rear by one hundred (100) feet in depth, together with a three (3) story frame dwelling house arranged for the occupancy of six (6) families, comprising one apartment of four (4) rooms and bath and five (5) apartments of five (5) rooms and bath each, and one garage for the occupancy of five (5) cars in the rear thereof, all as evidenced by an agreement in writing, a copy of which is attached to the Bill of Complaint in this action and alleged therein to have been made a part thereof.

2. At the closing of title, the said Mary M. Schultz and Frank Schultz, her husband, were to convey the said premises to Louis Pollock and Mollie Pollock, his wife, their heirs and assigns, by Deed of Warranty, free and clear of all encumbrances excepting monthly tenancies; a certain agreement as to the common driveway, which agreement is recorded in the Register's Office of Essex County in Book I-70 of Deeds, page 43; a certain Building & Loan mortgage in the sum of $19,000; and subject to reservation by the said Mary M. Schultz and Frank Schultz, her husband, of the right to remain a monthly tenant in the apartment then occupied by them, in accordance with the said agreement.

3. Among the other provisions in the said contract, it was also provided as follows:

> "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."

4. The said Louis Pollock and Mollie Pollock, his wife, have caused a sixty (60) year search to be made of the title of Mary M. Schultz and Frank Schultz, her husband, to the premises in question, and have also caused a survey to be made thereof, and the said survey discloses that the front stoop of the building on said premises extends over and encroaches upon the City property to the extent of 14 inches.

5. On May 21, 1926, at 2 P. M., by agreement between Jacob I. Kaplan, as attorney for Louis Pollock and Mollie Pollock, his wife, and Isaac Fleischman, Esq., as attorney for Mary M. Schultz and Frank Schultz, her husband, all the parties met at the office of Isaac Fleischman, Esq., as aforesaid and the said Louis Pollock and Mollie Pollock, his wife, then and there tendered themselves ready, able and willing to accept a conveyance of the said premises from the said Mary M. Schultz and Frank Schultz, her husband, in accordance with the agreement as aforesaid, but the said Mary M. Schultz and Frank Schultz, her husband, have at no time been able to make a conveyance to the said Louis Pollock and Mollie Pollock, his wife, in accordance with the said

agreement on account of the defect by way of encroachment as aforesaid.

6. The said Louis Pollock and Mollie Pollock, his wife, expended for necessary searches and surveys of the premises, the sum of Five hundred ($500) Dollars.

7. The said Louis Pollock and Mollie Pollock, his wife, also paid on account of the purchase price of $31,200 the sum of Five hundred ($500) Dollars, an acknowledgment of which was made in the said contract.

The defendants, Louis Pollock and Mollie Pollock, his wife, therefore, pray:

1. That the said complainants, Mary M. Schultz and Frank Schultz, her husband, may answer this counterclaim and each statement herein made.

2. That it be adjudged and decreed that the complainants, Mary M. Schultz and Frank Schultz, her husband, repay to the defendants, Louis Pollock and Mollie Pollock, his wife, the sum of Five hundred ($500) Dollars paid by them on account of the purchase price in the said agreement together with interest thereon, and the sum of Three hundred ($300) Dollars expended by the said Louis Pollock and Mollie Pollock, his wife, in making examination of the title of the complainants to the premises in question and a survey thereof, and that the said Eight hundred ($800) Dollars, with interest, be impressed as a lien on the lands and premises described in the Bill of Complaint as aforesaid, and in the event that the said Mary M. Schultz and Frank Schultz, her husband, do not pay the same to Louis Pollock and Mollie Pollock, his wife, the said property be sold to raise and satisfy the sum due to Louis Pollock and Mollie Pollock, his wife.

4. That in the meantime, the said Mary M. Schultz and Frank Schultz, her husband, be enjoined and restrained from disposing of or encumbering in any way the said lands and premises.

5. That the said Louis Pollock and Mollie Pollock, his wife, may have such other and further relief in the premises as the nature of the case may require and as may be agreeable to equity and good conscience.

JACOB I. KAPLAN,
Solicitor for Defendants,
Louis Pollock and Mollie Pollock, his wife.

CARL OLSON,
Of Counsel with Defendants,
Louis Pollock and Mollie Pollock, his wife.

Replication and Answer to Counterclaim.

IN CHANCERY OF NEW JERSEY.

Between

MARY M. SCHULTZ and FRANK SCHULTZ, her husband,
Complainants,
and
LOUIS POLLOCK and MOLLIE POLLOCK, his wife,
Defendants.

By way of reply, complainants deny all the allegations in paragraphs one and two of the answer except such matter therein, as admits the allegations of the complaint and joins issue on same.

ANSWER TO SEPARATE DEFENSES.

Complainants deny the first, second and third and fourth separate defenses.

ANSWER TO COUNTERCLAIM.

Complainants admit paragraphs one and two of the counterclaim.

Complainants deny paragraphs three, four, five, six and seven of the counterclaim.

Further answering, complainants say that they have always been ready, able and willing to convey the property described to the defendants in accordance with the terms of the contract applying

thereto and actually tendered conveyance thereof in acordance with such terms, which tender said defendants refused to accept.

Complainants say that they are still ready, willing and able to convey in accordance with said terms.

They pray to be dismissed from said counterclaim with their reasonable costs and charges.

MICHAEL J. TANSEY,
Solicitor for and of Counsel
with Complainants.

Replication.

IN CHANCERY OF NEW JERSEY.

Between

MARY M. SCHULTZ and FRANK SCHULTZ, her husband,

Complainants,

and

LOUIS POLLOCK and MOLLIE POLLOCK, his wife,

Defendants.

The defendants deny the allegations made by the complainants in their answer to counterclaim and join issue on same, excepting such matter therein as admits the allegations of the said counterclaim.

JACOB I. KAPLAN,
Solicitor for Defendants.

Interrogatories.

IN CHANCERY OF NEW JERSEY.

Between

MARY M. SCHULTZ and FRANK SCHULTZ,
her husband,

Complainants,

and

LOUIS POLLOCK and MOLLIE POLLOCK, his wife,

Defendants.

To the complainants Mary M. Schultz and Frank Schultz, or to Michael J. Tansey, Esq., solicitor for said complainants:

The complainants, Mary M. Schultz and Frank Schultz, her husband, are hereby required to answer, under oath, the following interrogatories, and to serve the answers hereto upon me within ten days after service of the interrogatories upon you.

JACOB S. KAPLAN,
Solicitor for Defendants.

First Interrogatory. Where do you reside?

Second Interrogatory. Does the building on the premises #153-155 Leslie Street, or any part thereof extend over the boundary lines of the property as described in the deed therefor, or is said building within the boundary lines?

Third Interrogatory. Did said building, or any part thereof, extend over the boundary lines of the property as described in the deed therefor on May 1, 1926?

Fourth Interrogatory. Did said building, or any part thereof, extend over the boundary lines of the property as described in the deed therefor on May 21, 1926?

The complainants Mary M. Schultz and Frank Schultz, her husband, and each of them are required to answer each and every one of the interrogatories above set forth.

Answers to Interrogatories.

IN CHANCERY OF NEW JERSEY.

Between

MARY M. SCHULTZ and FRANK SCHULTZ, her husband,

Complainants,

and

LOUIS POLLOCK and MOLLIE POLLOCK, his wife,

Defendants.

To Jacob I. Kaplan, Esq., Solicitor of Defendants:

TAKE NOTICE that the following are answers to interrogatories as propounded by you in the above matter:

1. 153 Leslie Street, Newark, New Jersey.
2. No. I believe not; I believe so.
3. I think not.
4. I believe not.

MICHAEL J. TANSEY,
Solicitor of Complainants.

State of New Jersey,
County of Essex—ss.:

Mary M. Schultz and Frank Schultz, of full age, being duly sworn according to law, on their oath depose and say that they are the complainants in the above entitled cause and that the answers to the interrogatories herein are true to the best of their knowledge and belief.

FRANK SCHULTZ.
MAE SCHULTZ.

Sworn to and subscribed before me at Newark, this 2nd day of November, 1927.

PHILIP A. DONNELLY,
Notary Public of New Jersey.

Opinion.

IN CHANCERY OF NEW JERSEY.

Between

MARY M. SCHULTZ and FRANK SCHULTZ, her husband,

Complainants,

and

LOUIS POLLOCK and MOLLIE POLLOCK, his wife,

Defendants.

MICHAEL TANSEY, for Complainant.
JACOB I. KAPLAN, for Defendant.

CHURCH, V. C.:

This is a suit for specific performance and a counterclaim for the return of the deposit with reasonable allowances.

The contract provides:

"It is expressly understood and agreed that the buildings upon the said premises are all within the boundary lines of the property as described in the deed therefor, and that there are no encroachments thereon." The contract was to have been closed May 1, 1926. It was agreed by counsel at the hearing that the original contract did not make time of the essence of the contract: that the premises of the complainants encroached upon the street line some 16 inches but the encroachment was removed Nov. 13, 1927, before the hearing in this case.

Opinion.

Defendants contend that by reason of two letters written by their representative, time was made the essence of the contract as of May 21st, and therefore complainant was in laches because he did not remove the encroachment until Nov. 13, 1927. On May 14, 1926, the solicitor for defendants wrote to solicitor for complainants, "I therefore beg to notify you that my clients are fully ready, willing and able to accept a conveyance of said premises from your clients and will on Friday the 21st proximo, at two P. M., be at your office to tender the balance of the cash purchase price to your clients and demand from your clients a warranty deed fully in accord with the aforesaid agreement. Hoping that the discrepancy between our clients will be amicably adjusted and that it will throw no reflection upon the relationship between us personally, I am, etc." This is not a definite notice that time is considered of the essence of the contract. On the contrary there is a hope expressed that the differences may be adjusted. Counsel have discussed at some length the meaning of the words "21st proximo" in a letter dated May 14th. They undoubtedly mean June 21st.

"Proximo in or of the next or coming month" Funk & Wagnalls Dictionary.

"Proximo. In the next month after the present as on the 3rd proximo" Webster's Dictionary.

Indeed it is not necessary to go to the learned lexicographers for a solution. Proximo is a latin word in the ablative case and literally translated means "in the next". Therefore "21st proximo" would mean the 21st (day) in the next (month).

However, the parties did meet on May 21st and failed to agree. Exactly what transpired at this

meeting is not disclosed in the testimony except that a deed was tendered and refused. Thereafter on May 24, the solicitor for the defendants wrote again to the solicitor for the complainant as follows:

"My clients stand pat in their position which they have taken at our conference last Friday with reference to the above matter. Kindly advise me what your intentions are as to further action. As for us, you surly realize that we expect a return of deposit and a reasonable amount in addition thereto to cover all the expenses to date. What do you say?" Neither does this letter in my opinion make time of the essence of the contract nor the two letters taken together. There is no fixed and definite time in either after which the defendant will consider the contract at an end. In Wyatt v. Bergen, 98 New Jersey Equity 502, a letter of defendants' called in the opinion Exhibit 7 and set out in full on page 505 coached in much stronger terms than the ones before us in this case was held by Vice Chancellor Griffin at page 506 not to make time of the essence of the contract. The learned Vice Chancellor speaking of other notices referred to in the same case says again at page 505 that he thinks "in the language of Mr. Justice Holmes in Stewart v. Griffith, 30 Sup. Ct. Rep. 528" that they were "politely to apply a spur to the defendant to speed her in the performance of the contract". This is an apt characterization it seems to me of the letters we are discussing. Again in Orange Society v. Konski, 94 New Jersey Equity, 632 Vice Chancellor Backes held that a letter much stronger than those in this case quoted at length at page 634 was not final, page 635. The learned

Vice Chancellor further says, page 635-636: "But if I am mistaken in my interpretation of the letter, and if it is to be regarded as peremptorially 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." It will be observed that if we adopt as to the letter of May 14, the construction put upon it by the defendants and assume 21st proximo means May 21st, which it does not mean, at which day the parties actually met, and not June 21st which it does mean, and on which day they did not meet, exactly seven days intervened.

Having come to the conclusion that time was not made of the essence of the contract, we come to the questions of the removal of the encroachment and the laches. We have seen that time is not of the essence of this contract. In the case of Nars v. Munzing, 136 Atlantic 344, Vice Chancellor Backes says at page 345, "Time was not of the essence of the contract. It is timely performance if conveyance in conformity with the contract can be made at the time of the decree. Gerba v. Mitruske, 84 New Jersey Equity 141." The encroachment in this case was removed before the case was heard in this court.

As to the laches: Suit was started by defendants in the Supreme Court to recover the deposit on June 26, 1926. Complainants in this suit filed an answer and counterclaim on July 13th, 1926. And on July 31st, 1926, filed a bill for specific per-

formance in this Court. It is admitted that the delay in the first instance was caused by defendants' counsel who asked for an adjournment in order to move his law office. Then as he himself says in his supplemental brief "it just happened that because of the then illness of the counsel for the plaintiffs in the Supreme Court action, that the case was not tried then. Furthermore even the hearing in the Chancery suit had been set for an earlier date than it actually took place. It also happened that because the Jewish New Year fell on the date first set for the hearing in Chancery, same was deferred to Nov. 23, 1927". This last adjournment was granted by me at request of defendants' counsel out of respect for his religious beliefs. I do not see therefore how these delays can be charged against the complainant.

There is testimony which is uncontradicted that this encroachment was known to defendants from the beginning. A survey was shown to their counsel on which the encroachment appeared. He borrowed this and had it in his possession for at least six weeks; also defendants stored their automobile in the garage for two months; took people to see the apartments and made suggestions as to their rental.

However, having found that time was not of the essence and never was made so, that the encroachment was removed before the hearing and that there was no laches I shall advise for those reasons a decree for specific performance.

Decree.

IN CHANCERY OF NEW JERSEY.

#61—418.

Between

MARY M. SCHULTZ and FRANK SCHULTZ, her husband,

Complainants,

and

LOUIS POLLOCK and MOLLIE POLLOCK, his wife,

Defendants.

This matter coming on to be heard before the Chancellor and in the presence of Michael J. Tansey, Solicitor of Complainants, and Jacob I. Kaplan, Solicitor of Defendants, and upon hearing testimony in open Court and considering the arguments of Counsel for the parties, it appearing that complainants filed a Bill in this Court seeking to compel the defendants to specifically perform, in all things, their part of a Contract dated March 17, 1926, whereby complainants agreed to convey by Deed of Warranty free from encumbrances, except as noted in said Contract, on or before May 1, 1926, and the defendants agreed to purchase, at a price stated, the premises described in said Contract, situate, lying and being in the City of Newark, County of Essex and State of New Jersey, commonly known and designated as #153-155 Leslie Street, same consisting of a plot of land measuring Fifty (50) feet front and rear by One Hundred (100) Feet in depth, to-

gether with a Three (3) story frame dwelling house arranged for the occupancy of Six (6) families, comprising one apartment of four rooms and bath and five apartments of five rooms and bath, and one garage arranged for the occupancy of Five (5) cars in the rear thereof; the said property is more particularly described as follows:

BEGINNING at a point in the Westerly line of Leslie Street therein distant three hundred twelve feet and eighty-three hundredths of a foot Southerly from the Southerly line of Nye Avenue; thence running Southerly along said Westerly side of Leslie Street Fifty feet; thence Westerly One-Hundred feet; thence Northerly and parallel with the first course Fifty feet; thence Easterly and parallel with the second course One Hundred feet to the Westerly line of Leslie Street and place of BEGINNING.

Being the same premises conveyed to Mary M. Schultz, wife of Frank Schultz, by Warranty Deed, dated December 1, 1924, and recorded in the Office of the Register of Essex County in Book Q-71 of Deeds at pages 39-40.

The defendants were to pay therefor:

$500.00 in cash on execution of said Contract; $4700.00 on delivery of Deed; By assuming the mortgage at present a lien on the premises, and paying the same according to the terms thereof $19,000.00; Balance of the purchase price including the withdrawal value of the back shares in the Building & Loan Association, subject to apportionments, on Bond and Mortgage, same containing usual interest, tax, assessment, insurance and installment default clauses, and an agreement not to claim credit on the interest payable on bond and mortgage, by reason of any tax assessed against the premises, with interest at 6% payable semi-annually for five years, this was to be a Second Mortgage, containing a privilege in favor of the parties of the Second Part to make installment payments on the principal thereof in amounts no less than $1,000.00 at a time. Also, the privilege of pre-payment of the said principal amount at any time before the maturity thereof, interest to accrue as of the date of said installment or pre-payment of principal. Defendants were to take possession May 1, 1926.

And it appearing that the defendants refused to carry out or perform their part of said Contract alleging the existence of an encroachment of the building on the premises within the street lines bounding same; and it further appearing that time was not of the essence of the Contract, and was never made of the essence; and it further appearing that the encroachment complained of was removed before the case was heard in this Court, and that complainants were not guilty of laches in removing the alleged encroachment, and that defendants should specifically perform said Contract;

It is thereupon, on this 30th day of January, 1928, on motion of Michael J. Tansey, of Counsel

Decree.

with Complainants, Ordered, Adjudged and Decreed, by His Honor, Edwin Robert Walker, Chancellor, and the said Chancellor by the power and authority of this Court doth hereby Order, Adjudge and Decree that the defendants, Louis Pollock and Mollie Pollock, his wife, do within 30 days from the date hereof, in all things, perform their part of the said Contract to purchase the premises therein described, and that complainants deliver to said defendants a Deed of Warranty free from encumbrances, except as noted in said Contract;

It is further Ordered, Adjudged and Decreed that a Writ of Injunction issue against the defendants commanding that they do absolutely desist and refrain from prosecuting a suit now pending in the New Jersey Supreme Court against the complainants seeking to recover the deposit money paid on the signing of the Contract abovementioned;

It is further Ordered, Adjudged and Decreed that the defendants pay to the Solicitor of Complainants the sum of $150.00 Dollars, as Counsel fee, to be included in the taxed costs of this suit and recoverable therewith according to law and the practice of this Court.

Respectfully advised,

ALONZO CHURCH,
V. C.

This Decree approved as to form.

.....,
Of Counsel with Defendants.

Testimony.

IN CHANCERY OF NEW JERSEY.

November 23, 1927.

Between

MARY M. SCHULTZ and FRANK SCHULTZ, her husband,
Complainants,

and

LOUIS POLLOCK and MOLLIE POLLOCK,
Defendants.

Transcript of shorthand notes of testimony taken in the above entitled matter before his Honor, Alonzo Church, Vice Chancellor, at the Chancery Chambers, Newark, New Jersey, in the presence of Michael J. Tansey for complainant; Jacob I. Kaplan for defendant.

(Both counsel open.)

The Court: It is admitted time is not of the essence of the contract. Let that appear on the record.

And it is also admitted that this stoop was over the line 14 inches.

Mr. Kaplan: Sixteen inches.

The Court: Well, whatever it is. And, on the twenty-first of May, 1926, it was over the line and that it has since—a year afterwards——

Mr. Kaplan: More than a year, a year and a half.

The Court: Well, a year and a half afterwards it was moved back so that there is now no encroachment.

Well, it seems to me that the only question for the Court to decide is whether there was laches in that removal, because, as I understand it, there are cases that hold that if the defect in title can be removed within a reasonable time, the vendee is bound to take. Am I right about that?

Mr. Tansey: That is right. That is a late case and also when a suit is pending for the recovery of the deposit, as it was in this case, and the refusal to turn the deposit back is evidence that the parties still insisted on their contract, there has been no rescission of the contract.

Mr. Kaplan: Starting a suit in the Supreme Court for the return of a deposit, wouldn't that be an election?

Mr. Tansey: It is not a proper rescission of the contract. They would have to give us a reasonable time by notice to change our situation.

(Disscussion.)

The Court: Aren't the facts so clearly established that they can be stipulated and let the Court apply the law?

Mr. Tansey: Yes, I think so.

The Court: Why don't you prepare a stipulation, if you can do so?

Mr. Tansey: That will be perfectly satisfactory.

The Court: Is there any hitch about the stipulation? Because, if there is, we had better take this time and have the testimony put in.

Mr. Tansey: The only question—the only additional question is as to the question of overage, which I wish to offer testimony on.

(Discussion.)

The Court: I think, if Mr. Tansey wants to put in testimony we better take it, then we can argue about it later.

Mr. Tansey: I think so. Mr. Fleischman.

ISAAC FLEISCHMAN, sworn for the complainant.

Direct examination by Mr. Tansey:

Q. Are you a counsellor at law? A. I am.

Q. And were you such in 1926? A. I was.

Q. In March did you represent Mr. and Mrs. Schultz?

Mr. Kaplan: I admit that.

A. I did.

Q. You represented them in the matter of selling this property to Louis Pollock and Mollie Pollock? A. I did.

Q. And you drew this contract, did you? A. Yes.

Mr. Tansey: I offer the contract in evidence.

Mr. Kaplan: That is admitted.

(Contract marked Exhibit C-1.)

Q. Were Mr. and Mrs. Pollock present at the time of the drawing of this contract? A. They were.

Q. And was Mr. Kaplan their representative at the time? A. Yes, sir.

Q. Was he present? A. Yes, sir.

Q. Were they all together in your office? A. Partly in my office and partly in his.

Q. And Mr. and Mrs. Schultz were there? A.

Q. And will you tell us the situation in regard to whether you produced a survey of the premises? A. I did.

Q. And is this the survey you produced at the time (showing witness paper)? A. Yes.

Q. Was this the survey that you had at the time? A. That was the survey I had on my desk at the time the contract was drawn.

Q. The contract was drawn. A. (No answer.)

Mr. Tansey: I offer the survey in evidence.

(Survey marked Exhibit C-2.)

Q. What did you do with this survey at that time, Mr. Fleischman? A. At the beginning of the discussion, which lasted about four hours—we started in quarter after one and it did not end up until after five o'clock—in drawing the contract I produced that survey and I said that—(interrupted)

Mr. Kaplan: I object. It is an attempt to vary a contract.

The Court: I will allow the——

A. (Continuing.) —and I said that we would convey subject to whatever the survey showed. Mr. Kaplan came from in front of my desk, back over my shoulder, looked at it over my shoulder and we looked at it and then I called his attention to the easement of a common driveway on the west side of the property as well.

Q. And after you called his attention what, if

anything, was said about the survey? A. It was passed over.

Q. And you proceeded then with the rest of the contract? A. We did.

Q. And finally finished it? A. In his office.

Q. Did you put the provision in the contract as to being subject to the—what the survey would show?

Mr. Kaplan: The contract speaks for itself.

A. That was drawn in his office and was not put in there.

Q. And why was it not put in there? A. Overlooked. We were tired after all the wrangling for four hours.

Q. Very well. After you got the contract executed, do you recall what date that was? A. Seventeenth of March.

Q. 1926? A. Yes, sir.

Q. What was done thereafter about the passing of the title up to the first of May? A. About the twenty-third or twenty-fourth of April, Mr. Kaplan came to me and borrowed the search, which had on it also a copy of the contract. That was the original building and loan search which he borrowed from me.

Q. You mean, a copy of the survey? A. Of the survey.

Q. He borrowed the search from you that had a copy of the survey? A. Yes.

Q. Then what happened? A. Nothing. First, Mr. Kaplan himself before the first of May asked me for an adjournment because he was moving his office from the Clinton Building—or rather,

the Union Building on Clinton Street to the Federal Trust Company building, and, without consultation with my client, I granted it.

Q. And then when did you hear about him after that? A. I didn't hear definitely from him until the fourteenth of May. I think it was the fourteenth.

Q. Did you hear from him by letter or by telephone before that? A. Mr. Schultz was dissatisfied with the postponement and I had telephoned to Mr. Kaplan's office to try to make an appointment to close, but had not succeeded in getting one.

Q. And in response to that you had written a letter to Mr.—or, in pursuance to that you had written a letter to Mr. Kaplan? A. I did.

Q. Under date of May 11, 1926.

Mr. Tansey: I gave you notice, Mr. Kaplan, to produce that letter.

Mr. Kaplan: I am sorry I haven't it, because of the moving.

Mr. Tansey: Then we can use this copy, I suppose.

Mr. Kaplan: I have no objection to this letter, except the tone in which it was written stating, because my girl did not answer the telephone properly I was unethical.

Mr. Tansey: You have no objection to the fact it was a letter——

Mr. Kaplan: That we wanted to make time of the essence.

The Witness: Oh, no.

Mr. Kaplan: Asking a definite date and I made time of the essence.

Q. This letter of May eleventh is the one you wrote to Mr. —(interrupted) A. That is a carbon copy, with the exception of the signature. The original was signed, of course, by me.

Mr. Tansey: May I read the letter, your Honor please?

The Court: Yes.

Mr. Tansey: It is on May 11, 1926. "Mr. Jacob Kaplan, Newark, New Jersey. Dear Sir: Either your secretary is not well trained or your business methods are unethical. In either event, a lie was told to me today by your office—told us—told to us by your office. I phoned to inquire when you would be ready to close the Leslie street title and was told that you were in. When I gave my name I was told you were out. That is not the kind of treatment which one gentleman should accord another. The time fixed to close this title is passed and I want you to fix a day now convenient to both parties or I shall be put to the necessity of fixing a time and in making time the essence of the——

The Court: Contract?

Mr. Tansey: "—making time the essence——"

Mr. Kaplan: "Making time the essence of the time."

Mr. Tansey: "Which I fixed. I shall also request you to immediately return to me the building and loan search which you borrowed from me. Yours truly,"

The Court: What reply did Mr. Kaplan make to that?

Mr. Tansey: Your Honor, I have here a letter of May fourteenth from Mr. Kaplan to Mr. Fleischman.

Q. Did you receive this letter from Mr. Kaplan? A. I did. Shall I read it?

Q. Did you receive that letter? A. I did.

The Court: Let it be marked. Then you can read it.

(Letter marked Exhibit C-3.)

The Witness: On the letterhead of Jacob I. Kaplan, addressed to me. "My dear Mr. Fleischman: A survey of the premises 153-155 Leslie Street discloses that the buildings thereon are not within the boundary lines thereof in that the building extends over the city property to the extent of fourteen inches. I have taken the matter up with my client and explained the situation to him and he instructed me to advise you that the only condition upon which he will accept title is if conveyance be made fully in accordance with the contract between him and your client. I therefore beg to notify you that my clients are fully ready, willing and able to accept a conveyance of said premises from your clients and will on Friday, the twenty-first, proximo, at two P. M. be at your office to tender the balance of the cash purchase price to your client and demand from your client a warranty deed fully in accordance with

the aforesaid agreement. Hoping that the discrepancy between our clients will be amicably adjusted and that it will throw no reflection upon the relationship between us personally, I am, Yours very truly, Jacob I. Kaplan."

Mr. Tansey: That has been marked.

Q. Now, did you meet on the twenty-first of May? A. We did.

Q. And did you, at that time, tender a deed to Mr. Kaplan's clients? A. We did.

The Court: I don't think it is necessary Mr. Tansey——

Mr. Kaplan: There is no objection to the tender, tender to one another.

Q. And was there further discussion at that time about the overage? A. There was.

Q. And what was the final determination? A. We broke up.

Q. Did you receive a letter after that from Mr. Kaplan? A. I did.

Q. I show you a letter dated May the twenty-fourth, 1926. Did you receive that letter from Mr. Kaplan? A. I did.

Mr. Tansey: And will you please mark the letter?

(Letter marked Exhibit C-4.)

The Witness: This is dated May twenty-fourth on the letterhead of Mr. Kaplan, addressed to me. "My clients stand pat

in their position which they have taken at our conference last Friday with reference to the above matter. Kindly advise me what your intentions are as to further actions. As for us, you surely realize that we expect a return of the deposit and a reasonable amount in addition thereto to cover all the expenses incurred to date. What do you say? Yours very truly." Signed "Mr. Kaplan".

Q. Did you have any other letters from Mr. Kaplan about this matter that you recall? A. I don't recall any.

Q. And then the negotiations ended, so far as you were concerned with the Pollocks? A. Yes.

The Court: Is that all?
Mr. Tansey: That is all.

Cross examination by Mr. Kaplan:

Q. You don't remember definitely whether you called my attention to the encroachment of the stoop? A. I do not. I do recall saying that we will have to make it subject to whatever the survey shows. That I recall definitely.

Q. Specifically the stoop you did not mention? A. I do not recall specifically mentioning the stoop to you.

Q. And the first you heard from me about it is a letter of May fourteenth? A. That is the first information we had that you were objecting to that encroachment.

Q. That was subsequently to the date of the contract, of course. A. Two months afterwards.

Q. When I borrowed the search, together with the survey on it from you, it was after the making of the contract, about a month or two after? A. Yes; about the twenty-third or twenty-fourth of April, I think it was.

The Court: That is all.

FRANK SCHULTZ, sworn for the complainant.

Direct examination by Mr. Tansey:

Q. Mr. Schultz, after this contract was signed in Mr. Kaplan's office——

Mr. Tansey: I withdraw that question.

Q. Were you present at the time of the making of the contract? A. Yes.

Q. Between you and Mr. Pollock in Mr. Fleischman's office? A. I was.

Q. And do you remember seeing this survey in the office at the time? A. Let me see the survey.

The Court: Referring to Exhibit C-2.
The Witness: Yes, sir.

Q. Did you see that brought before the parties while the contract was being discussed? A. This was the main issue during the afternoon conference between Mr. Kaplan and Mr. Fleischman.

Q. Did you see them discussing that—did you see them examining the survey and hear them discussing it? A. Mr. Fleischman had this on his desk. He was sitting at his desk and when he

specified about this porch being over, this was the first I heard about it, Mr. Kaplan walked over and stood over Mr. Fleischman's shoulder like this (illustrating) kept looking at it, then he spoke about it and said that didn't matter, they were all the same in the street.

Q. Yes. Now, after the making of the contract, did Mr. Pollock do anything to take possession of the premises? A. Why, after the making of the contract, he come in and he put his automobile there.

Mr. Kaplan: I object. I do not see the materiality.

The Court: It might be material, Mr. Kaplan. It might show he accepted the contract. That is Mr. Tansey's purpose apparently. (To witness:) How long did the automobile remain there?

The Witness: For about two weeks.

Q. And did it remain there after the first of May? A. It remained until about a week after May—the first of May.

Q. About a week after the first of May? A. About a week after the first of May. That was Monday.

Q. Did Mr. Pollock or Mrs. Pollock come to the premises at any time after the making of the contract? A. He always come daily, or every other day, with different people, showing them the house that he purchased.

Q. And how long did that continue, up to what time? A. From the time he purchased—well, a week before he purchased—it must be two weeks before he used to come over and then the contract

was signed and he continued that until after—a week after the first of May.

Q. Bringing folks to the house? A. Well, different people. He showed them in the house until I objected to it. I told Mrs. Schultz I wanted this stopped, because they used to come in the different tenants' houses and they would examine the property and I didn't know whether they were contractors, measuring and going in the cellar, disturbing the whole house.

Q. Do you remember an occasion when Mr. Pollock's brother came there? A. That was about a week after the first of May.

Q. Do you remember that occasion? A. Yes. That was on Sunday morning, about ten o'clock in the morning.

Q. Was Mr. and Mrs. Pollock with them? A. Yes; they were.

Q. And did you hear a conversation between—or did you hear a conversation with Mr. Pollock's brother in Mr. Pollock's presence? A. Well, Mr. Pollock's brother spoke to me himself.

Q. Was Mr. Pollock present there? A. Well, they was sitting in the parlor, Mr. and Mrs. Pollock and Mrs.——

Q. Were they near? A. Well, just adjoining room, next room.

Q. And was the door open? A. Yes—there is no door.

Q. What was said by Mr. Pollock and his brother there?

Mr. Kaplan: I object. He is not here. Mr. Pollock's brother is not here. Whatever was said—(interrupted)

Mr. Tansey: Said in the presence of Mr. Pollock.

The Court: Well, if it was in the presence of Mr. Pollock it is all right.

Mr. Kaplan: He said he was in the other room.

The Witness: Well, the next room, you could hear all over the house; we wasn't talking in a whisper.

Q. You were not talking in a whisper so you you could be heard. What did he say?

Mr. Kaplan: I object.

The Court: I will receive it.

Q. What did he say? A. Mr. Pollock's brother said to me—he was looking over the panel wall, and he said, "Yes, it is built very nice." I was showing him through the house, because it is changed all the time and he was looking over the wall. He was a painter or paper hanger or mechanic of some kind, and he was going all over the room and looking at the stippled walls——

The Court: Well——

Q. What did he say? Never mind that. Tell me what he said. A. Well, he said, "It is a very nice house and all that, but," he says, "he is my brother-in-law and all that and I don't want to discourage him, but I know we can buy houses like this for twenty-eight thousand dollars."

Q. And the price of this was thirty-one thousand five hundred? A. Thirty-one thousand five hundred.

The Court: I don't see that is material. (Discussion.)

Q. Did Mr. Pollock make any arrangements with you about renting a flat or not renting a flat? A. He wanted to reserve—there was one flat vacant which he wanted to reserve to himself, and there was another flat was vacant at that time, and we wanted to rent to somebody else because it was the first of May and we figured, if we don't rent it the first of May, possibly we won't rent it all summer, so Mrs. Pollock objected to renting to a certain man, who was in the poultry business; they didn't want him in because they said he was going to bring his truck in the garage and they didn't want to smell the chickens. He has a big poultry business.

Q. Was he trying to rent the property to this chicken man? A. Yes; and because Mrs. Pollock objected to it the flat was vacant for three months.

Q. You did not rent it to this man? A. No.

Q. What about the flat Mr. Pollock said he was going to occupy himself? A. I rented it from the fifteenth, the following month.

Q. You did not rent it from the first of May? A. No; they wanted to reserve it for themselves.

Cross examination by Mr. Kaplan:

Q. Mr. Schultz, do you say that you saw this survey before the contract was signed? A. I did.

Q. And you heard Mr. Fleischman and myself discuss the question of the encroachment of the stoop? A. I did.

Q. Then you did know there was an encroachment on the street, didn't you? A. I did not.

Q. You heard it discussed? A. I heard it, but I understand it didn't matter, inasmuch as in my street there is about two dozen houses—(interrupted)

Q. Never mind what you knew—you knew the stoop of your house encroached upon the street, did you not?

The Court: He has already said that. (To witness): That is so, that you knew about it, didn't you?

The Witness: I— First I heard about it we didn't purchase the house.

The Court: You heard about it, you say, at this discussion.

The Witness: Yes, I did.

Q. Well, now— Is this your signature, Mr. Schultz, at the bottom, right there (indicating)? A. No; it is not.

Q. Is it not your signature? A. No.

Q. Frank Schultz, right here (indicating)? A. It is not.

Q. Did you ever sign answers to interrogatories? Did Mr. Tansey explain to you that I had requested for interrogatories and did you ever sign the answers?

Mr. Tansey: That is not the original. That is the reason that is not his signature.

The Witness: I can recognize my signature.

Q. Is this your signature? A. It is.

Q. Do you know what this paper is? A. Yes; I recall what it is.

Q. The questions in the interrogatories were as follows:

The Court: One?

Mr. Kaplan: Secondly. Interrogatories. "Does the building on the premises at number 153-155 Leslie Street, or any part thereof, extend over the boundary lines of the property as described in the deed therefor, or is said building within the boundary lines? Answer: No; I believe not—I believe so." Third interrogatory, or fourth —yes, third: "Did said building or any part thereof extend over the boundary lines of the property as described in the deed therefor on May 1st, 1926? Answer: I think not." Fourth interrogatory: "Did said building or any part thereof extend over the boundary lines of the property as described in the deed therefor on May 21st, 1926? Answer: I believe not." And you gave all these answers under oath.

The Witness: I did.

Q. And at the same time you state now under oath that you definitely knew that there was an encroachment of this stoop over the street lines? A. I did.

Mr. Tansey: I object to that, your Honor please. He didn't say he definitely knew it.

The Court: He just this minute said so.

Mr. Tansey: He saw the survey.

Q. Now, you say Mr. Shultz, that Mrs. Pollock came to you and objected to your renting your vacant flat to a certain tenant? A. Yes.

Q. You signed the contract, did you? You signed the contract for the sale of the premises to Mrs. Pollack? A. Yes, sir.

Q. Does the contract specify anywhere that you have to take Mrs. Pollock's instructions as to renting rooms?

The Court: Well, the contract speaks for itself, Mr. Kaplan.

Mr. Tansey: It speaks for itself.

A. I asked Mr. Fleischman whether——

Mr. Kaplan: He testified to an item of damages and I want to show that he was not obliged to listen to Mrs. Pollock, even if she did say anything.

The Court: That is a matter of argument to the contrary.

Q. Mr. Pollock you say, had his car in your garage for how long? A. About two or three weeks; say, about two weeks.

Q. Can you recollect approximately when he moved his car into your garage? A. I believe it was the later part of April.

Q. The later part of April. Can you recollect what he told you when moving his car to your garage? A. Well, he didn't have room, he was paying rent for that garage and he said inasmuch as he didn't take the title yet, why, he could save himself storage by putting it in that garage, because that garage—as I had a garage vacant.

Q. Did you say he could save himself storage? A. Yes.

Q. Wouldn't you charge him any rental for it?

A. I didn't, inasmuch as I figured the man purchased the house.

Q. When did he move out? A. I don't know. When I noticed the automobile was gone, it was about the week after the first.

Q. About a week after the first? A. Yes.

Q. That was altogether about two weeks? A. About two weeks. It was on Monday.

Q. About two weeks? A. About two weeks.

Q. And did you see him since? A. In your office I did.

Q. You didn't see him between the time of his removal and the time you saw him in my office or at Mr. Fleischman's office? A. No.

Q. Did you ever ask him for any rental for that period? A. I didn't see him. How could I ask him?

Q. You did not. And you say that you left the apartment vacant for him at his request? A. Mrs. Schultz did.

Q. Did you ask your lawyer whether you had to do it? A. I spoke to Mr. Fleischman on one occasion; I called him up and told him I had two flats vacant and Mrs. Pollock spoke to Mrs. Schultz and she didn't want to rent to certain people, objecting to renting to only certain people they want, and therefore I was going to be under losses of rent there, and after the first of May, it was hard to rent the places.

Q. And did Mr. Fleischman advise you that you were obligated under the contract to keep the place vacant? A. I don't know. He told me he was going to get in touch with you and find out when to close the title, I shall not rent the place.

MARY M. SCHULTZ, sworn for the complainant.

Direct examination by Mr. Tansey:

Q. Mrs. Schultz, do you remember after this contract was signed that Mr. and Mrs. Pollock came to the Leslie Street house? A. I do.

Q. And did they bring any persons there with them? A. They brought innumerable people.

Q. And did they come quite often? A. Yes, sir; they did.

Q. Do you know what they were doing there? A. Well, they said to look over the house and they wanted to look in the different flats. Well, they brought so many people and so many different times the tenants objected, and I didn't care to have so many people morning, noon and night going through my home.

Q. Well, finally did you tell anything about it to Mr. and Mrs. Pollock? A. Why, no; I didn't tell them anything.

Q. Do you recall about when it was that they had their car in your garage? A. I believe it was some time in April, just about the time——

Q. Some time in April. And how long did they remain there? A. About two weeks. Mr. Pollock came in and out with his car, in company with other men, usually with other men when he came in his car.

Q. Did they say anything when they put the car in your place as to why they were putting it there? A. Mr. Pollock asked me if he could get the car in the garage as he left the car on the street, and he expected the title to be passed soon and he would like to have it in the garage, if he could.

Q. And then you let him put it in the garage? A. Yes.

Mary M. Schultz—for Complainant—Direct.

Q. Was it there after the first of May? A. It was there about the week after the first of May.

Q. And were you there on the occasion when Mr. and Mrs. Pollock and his brother or brother-in-law came there? A. I was.

Q. And about what time in May was that? A. It was about the eighth—first of May, around the first of May, the week following the first of May.

Q. And did you hear a conversation in Mr. Pollock's presence about the house, and so forth? A. I did.

Q. And was there any intimation at that time that they were not going to carry out the title? A. Well, none other than this, that his brother said it was a very nice house, but he could have bought a much nicer house on Belmont or Ridgewood avenue, I don't know which and he didn't want to discourage his brother.

Q. Around that time did he take the car out of the garage? A. He did.

Q. It was after this conversation he took the car out of the garage? A. After.

Q. After that they did not bring any more people to the house? A. No.

Q. What were they doing, bringing so many people to the house? A. I don't know. I suppose they wanted to—

The Court: This witness said that they went through the house. The inference is they were showing them through.

Q. Were you present in the office of Mr. Fleischman when they were discussing signing the contract? A. I was.

Q. Did you see this survey there? A. Yes.

Q. And what, if anything, was said about the

overage there? A. Well, I heard them discussing the stone driveway on the other side of the house.

Q. Was anything further said about the overage, the porch? A. No; I didn't hear—I heard Mr. Pollock talking to—Mr. Fleischman speaking to Mr. Kaplan.

Q. What did you hear him say about it? A. Well, I understood him to say, "Well, that doesn't matter; it doesn't make any difference."

Q. Did you hear Mr. Fleischmann say what didn't matter? What was he talking about. A. No.

Q. Who said it didn't matter? A. Mr. Kaplan.

Q. Mr. Kaplan. Do you know what Mr. Fleischman called his attention to? A. No. I do not.

Mr. Tansey: That is all.

Mr. Kaplan: No questions.

The Court: That is all, madam.

Mr. Tansey: That is our case, your Honor please, with this exception. The suit was started the twenty-sixth of June and summons delivered to the lawyer, that is the defendant's, for the defense.

The Court: What suit?

Mr. Tansey: Supreme Court suit.

The Court: Put that on record. The Supreme Court suit was started to recover back the deposit money.

Mr. Tansey: On about June twenty-sixth.

The Court: On June twenty-sixth.

Mr. Tansey: 1926. And the summons herein reached the lawyer's office on July the sixth, I think it was. The bill of complaint in the suit for specific performance was filed, I think, on the eighth or tenth of July.

The Court: Wait a minute; let me see.

Mr. Tansey: I have it in a memorandum here.

The Court: It was filed July thirty-first.

Mr. Tansey: That is the bill of complaint.

The Court: Bill for specific performance filed July thirty-first.

Mr. Tansey: Yes. And the suit for the recovery of the deposit.

The Court: Yes.

Mr. Tansey: I have the summons here.

The Court: Well——

Mr. Tansey: The answer of that suit was filed July thirteenth, 1926, in the Supreme Court and this bill for specific performance was filed, as you have said, on December thirty-first, but I think it was dated some time before that. The answer to that was filed July thirteenth, 1926.

The Court: Bill of specific performance was filed July thirty-first, 1926.

Mr. Tansey: To keep your Honor right on the Supreme Court suit, it was served on June twenty-eighth, 1926.

The Court: All right.

Mr. Tansey: Received on July second, 1926.

The Court: All right.

Mr. Tansey: So that it was answered on July thirteenth, that is, the answer in the—to the Supreme Court was filed June fifteenth.

(Discussion.)

The Court: As I understand it, Mr. Kaplan, you went into the Supreme Court and asked for a return of your deposit; is that right? You did?

Mr. Kaplan: Yes, sir.

The Court: And then Mr. Tansey comes in here——

Mr. Kaplan: And a counterclaim in order to dispose of it in one suit.

The Court: We will have the testimony written out and you will file memorandums.

Mr. Tansey: As I understand it, the stipulation is unnecessary except in the presence of the Court here, that we have moved the porch back seventeen and a half inches.

The Court: Well, is that admitted?

Mr. Kaplan: If you state the time; I want to have the time definitely stated.

The Court: Yes.

Mr. Tansey: During the last week.

The Court: Let it appear on record, then, that the porch has been moved back during the past week.

Mr. Kaplan: During the week of November——

Mr. Tansey: November twenty-first, isn't it?

The Court: Yes; during the week of November twenty-first.

Mr. Kaplan: November fourteenth, 1927.

The Court: November fourteenth, 1927. So that the——

Mr. Kaplan: Over a year and a half——

The Court: Wait a minute. Don't put that in. —so that it does not now encroach; that is true. It is moved back so it does not encroach?

Mr. Tansey: I saw in their statement—in their bill of complaint they say it is over sixteen inches. We have moved it back seventeen and a half inches.

The Court: All right. Then during the week of November fourteenth, 1927, the porch was moved back to such a position that it does not now encroach.

Mr. Tansey: That is my understanding.

The Court: Yes.

(Discussion.)

Exhibit C-1.

ARTICLES OF AGREEMENT made the 17th day of March, in the year of our Lord One Thousand Nine Hundred and Twenty-six BETWEEN MARY M. SCHULTZ and FRANK SCHULTZ, her husband of the City of Newark, in the County of Essex and State of New Jersey, party of the first part; AND LOUIS POLLOCK and MOLLIE POLLOCK, his wife 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 Thirty-one Thousand Two Hundred ($31,200.00) Dollars, to be paid and satisfied as hereinafter mentioned, and also in consideration of the covenants and agreements hereinafter mentioned, made and entered into by the said party of the second part, doth agree to and with the said party of the second part, that they the said party of the first part, will well and sufficiently convey to the said party of the second part, their heirs and assigns, by Deed of Warranty free of all encumbrances on or before the 1st day of May next ensuing the date hereof, ALL that certain lot, tract, or parcel, of land and premises, hereinafter particularly described situate, lying and being in the City of Newark in the County of Essex, State of New Jersey being commonly known and designated as #153-155 Leslie Street, same consisting of a plot of land measuring fifty (50) feet front and rear by one hundred (100) feet in depth, together with a three (3) story frame dwelling house arranged for the occupancy of six (6) families, comprising one apartment of four rooms and bath and five apartments of five rooms and

no less than One Thousand ($1,000.00) Dollars at a time. Also, the privilege of pre-payment of the said principal amount at any time before the maturity thereof. In the event of installment payments or pre-payment as aforesaid, the interest shall accrue and be payable to the date of such payment.

Simultaneously with the delivery of the deed, the said parties of the first part shall also deliver a properly executed assignment of the shares of stock in the Building and Loan Association as aforesaid to the parties of the second part.

The purchase money bond and mortgage as aforesaid to be drawn on the form submitted by the vendor, a copy of which in blank was delivered to the attorney for the vendee on the date of the agreement.

The said mortgage shall also contain a prior mortgage default clause for two (2) months and also a sixty (60) day tax, interest and insurance default clause, it being understood, however, that as to the tax, the default shall not commence until sixty (60) days after December 1st of the year for which such taxes are due.

The parties of the first part represent that they know of no structural defects in the premises aforesaid, nor have they received any notices to make any repairs or alterations therein.

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 the said party of the first part hereby agrees to pay to the licensed and authorized agent, Fannie Rosenbaum, a commission of $200 on the

purchase price aforesaid, said commission to become due and payable only if and when title passes hereunder.

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

AND IT IS FURTHER AGREED by the parties hereto, that the said deed of Warranty shall be delivered and received at office of Isaac Fleischman, Esq., 602 Union Building, Newark, N. J., between the hours of 10:00 in the forenoon and 4:00 o'clock in the afternoon on the said day of settlement next ensuing the date hereof.

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.

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

Exhibit C-1.

for delivery of said deed or make an appropriate deduction from the purchase price herein stated.

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.

It is expressly understood and agreed that the title to the land and premises hereby agreed to be conveyed is not derived from any proceedings or any Act for the Sale of Land for non-payment of the municipal taxes or assessments, or by adverse possession.

If at any time before the delivery of the deed the premises or any part thereof shall be or shall have been affected by any assessment or assessments which are or may become payable in annual installments of which the first installment is then due or has been paid, then for the purposes of this contract all the unpaid installments of any such assessment, including those which are to become due and payable after the delivery of the deed, shall be deemed to be due and payable and to be liens upon the premises affected thereby and shall be paid and discharged by the seller thereof, upon the delivery of the deed.

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

Exhibit C-1.

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

MARY M. SCHULTZ, L. S.
FRANK SCHULTZ, L. S.
LOUIS POLLOCK, L. S.
MOLLIE POLLOCK, L. S.

Signed, sealed and delivered
in the presence of

Name illegible.

In consideration of mutual promises and agreements herein stated, we hereby agree to extend the date for the delivery of deed and execution of this contract to
at same hour and place

WITNESS our hands and seals this
day of A. D. 19

Exhibit C-1.

State of New Jersey,
County of Essex—ss.:

BE IT REMEMBERED, that on this 17th day of March in the year of our Lord One Thousand Nine Hundred and Twenty-six, before me, the subscriber, a Master in Chancery of New Jersey, personally appeared Mary M. Schultz and Frank Schultz, her husband, 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 Mary M. Schultz, wife as aforesaid, being by me privately examined, separate and apart from her said husband, further acknowledged that she signed, sealed and delivered the same as her voluntary act and deed, FREELY, without any fear, threats or compulsion of her said husband.

Name illegible.
Master in Chancery of N. J.

Received in the Register's Office of the County of Essex, N. J., on the 3rd day of June, A. D., 1926, at 3:45 o'clock in the afternoon, and Recorded in Book Z-73 of Deeds for said County, on pages 486-488.

HOWARD S. DODD,
Register.

JACOB I. KAPLAN,
Newark, N. J.,
926 Federal Trust Bldg.

Exhibit C. 2

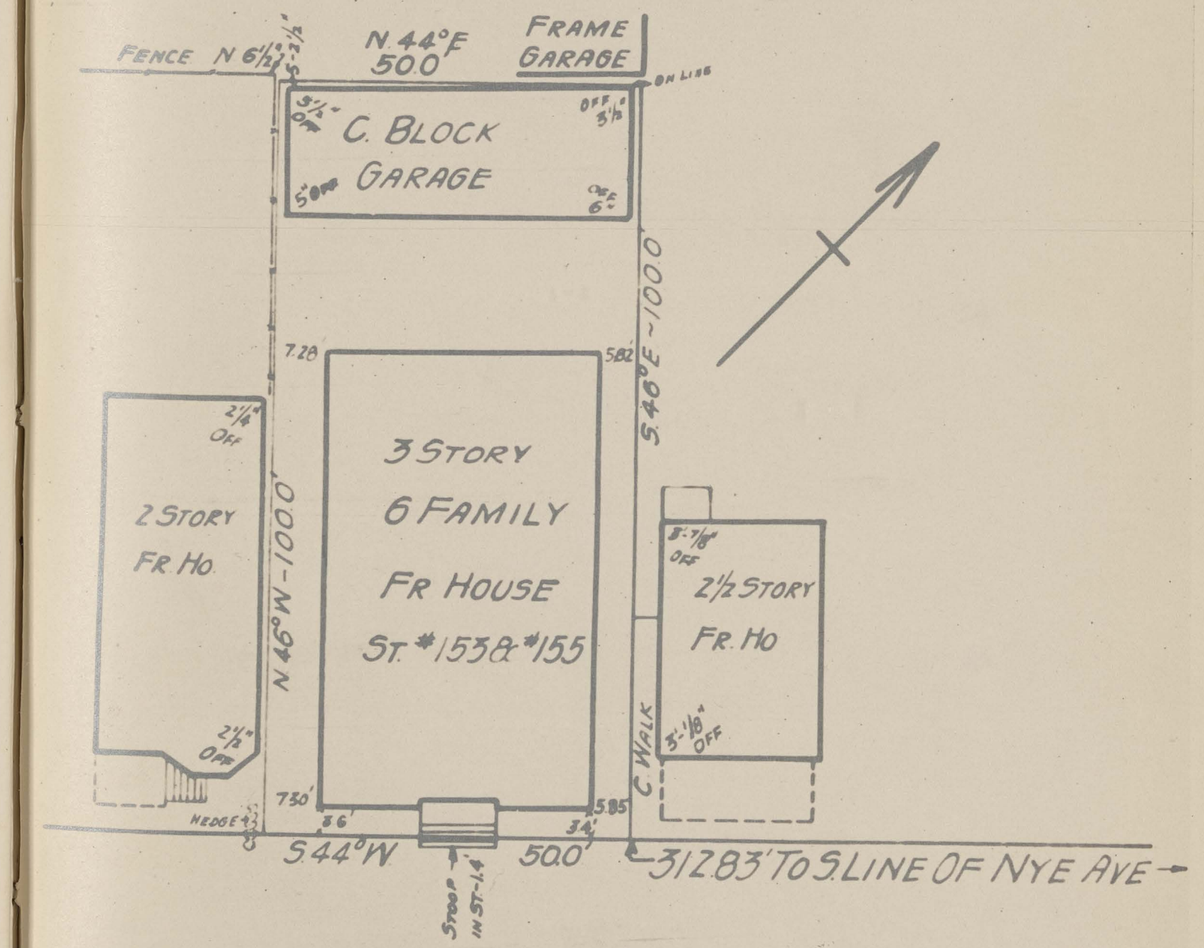
OFFICE PHONE MKT 5908

114 MARKET ST
ROOM No 55 PROCTOR BLDG

SURVEY
OF PROPERTY BELONGING TO

SITUATED IN NEWARK, N.J.

EDWARD CLAWANS. C. E.
CIVIL ENGR & LAND SURVEYOR



LESLIE ST.

LOT NUMBER
BLOCK NUMBER
MAP NUMBER
FIELD BOOK 1-22

NEWARK N. J. JAN. 17 1924

Edward Clawans
CIVIL ENGINEER & SURVEYOR

SCALE 1"=20'

LICENSE NO. 780

Exhibit C-2.

(SURVEY)

Exhibit C-3.

Res. Phone
Phone Mulberry 2560 Terrace 3607

LAW OFFICES
JACOB I. KAPLAN
UNION BUILDING
9-15 Clinton Street
Newark, N. J.

(Stamped)

Removed to
Federal Trust Bldg.
24 Commerce St. Newark, N. J.

May 14, 1926.

Isaac Fleischman, Esq.,
602 Union Bldg.,
Newark, N. J.

Re Schultz and Pollock.

My dear Mr. Fleischman:

A survey of the premises #153-155 Leslie Street, discloses that the buildings thereon, are not within the boundary lines thereof, in that the stoop extends over the City property to the extent of 14 inches.

I have taken the matter up with my client and explained the situation to him; and he instructed me to advise you that the only condition upon which he will accept title if conveyance be made fully in accordance with the contract between him and your client.

I, therefore, beg to notify you that my clients are fully ready, able and willing to accept a conveyance of the said premises from your clients, and will, on Friday, the 21st proximo, at 2 P.

Exhibit C-4.

M., be at your office to tender the balance of the cash purchase price to your clients and demand from your clients a Warranty Deed fully in accordance with the aforesaid agreement.

Hoping that the discrepancy between our clients will be amicably adjusted and that it will throw no reflection upon the relationship between us personally, I am

Yours very truly,

JACOB I. KAPLAN.

JIK:PF

Exhibit C-4.

Res. Phone
Phone Mulberry 2560 Terrace 3607

LAW OFFICES
JACOB I. KAPLAN
UNION BUILDING
9-15 Clinton Street
Newark, N. J.

(Stamped)

Removed to
Federal Trust Bldg.
24 Commerce St. Newark, N. J.

May 24, 1926.

Isaac Fleischman, Esq.,
Union Bldg.,
Newark, N. J.

Re Pollock vs. Schultz.

My dear Mr. Fleischman:

My clients stand pat in their position which

Exhibit C-4.

they have taken at our conference last Friday, with reference to the above matter.

Kindly advise me what your intentions are as to further action.

As for us, you surely realize that we expect a return of deposit and a reasonable amount in addition thereto to cover all the expenses incurred to date.

What do you say?

Yours very truly,

JACOB I. KAPLAN.

JIK:PF

Exhibit, Summons, Complaint and Answer in Supreme Court Suit, Pollock et al. v. Schultz et al.

SUPREME COURT OF NEW JERSEY,
ESSEX COUNTY.

State of New Jersey

to

Mary M. Schultz and Frank Schultz, her husband, #153-155 Leslie Street,
(L. S.) Newark, New Jersey.

You are summoned to answer the annexed Complaint of Louis Pollock and Mollie Pollock, his wife, in an Action at Law in the Supreme Court. And take notice that unless you file your answer to said Complaint with the clerk of the Supreme Court, in Trenton, New Jersey, within 20 days after service upon you of this Writ and the annexed Complaint, the plaintiffs may proceed in the suit and judgment may be entered against you.

Witness, William S. Gummere, Chief Justice of the Supreme Court, Trenton, this 14th day of June, One Thousand Nine Hundred and Twenty Six.

Signed EDWARD J. KELLEHER,
Clerk.

JACOB I. KAPLAN,
Attorney.

To the within named defendants.

Please take notice that if the within Summons and Complaint be served upon you personally, and if you intend to make a defense, then you must file an Affidavit of Merits within 10 days after such service and must file an answer within 20 days after such service, and that in default thereof judgment will be entered against you.

JACOB I. KAPLAN,
Attorney for Plaintiffs.

Exhibit.

SUPREME COURT OF NEW JERSEY,

ESSEX COUNTY.

Action at Law,

LOUIS POLLOCK and MOLLIE POLLOCK, his wife,
Plaintiffs,

—against—

MARY M. SCHULTZ and FRANK SCHULTZ, her husband, jointly, severally and in the alternative,
Defendants.

COMPLAINT.

The plaintiffs, residing in the City of Newark, in the County of Essex and State of New Jersey, say that:

1. On March 17, 1926, the defendants entered into a written agreement with the plaintiffs whereby the said defendants agreed to sell and convey to the plaintiffs, on or before the 1st day of May, 1926, certain premises known and designated as #153-155 Leslie Street, Newark, New Jersey, agreeing that the said premises consist of a plot of land measuring fifty (50) feet front and rear by one hundred (100) feet in depth, together with a three-story frame dwelling house arranged for the occupancy of six (6) families, comprising one apartment of four rooms and bath each and five apartments of five rooms and bath each, and one garage for the occupancy of five cars in the rear thereof, all as evidenced by an agreement in writing, a copy of which is attached hereto and made part hereof.

Exhibit.

2. At the closing of title the defendants were to convey the said premises to the plaintiffs, their heirs and assigns, by deed of warranty, free and clear of all encumbrances, excepting monthly tenancies; a certain agreement as to a common driveway, which agreement is recorded in the Register's Office of Essex County in Book I-70 of Deeds, page 43; a certain building and loan mortgage in the sum of $19,000; and subject to reservation by the defendants of the right to remain a monthly tenant in the apartment now occupied by them, in accordance with the said agreement.

3. Among the other provisions in the said contract, it was also provided as follows:

> "It is understood and agreed that the buildings upon said premises are all within the boundary line of the property as described in the deed therefor, and that there are no encroachments thereon."

4. The plaintiffs have caused a sixty-year (60) search to be made of the defendants' title to the premises in question, and also caused a survey to be made thereof, and the said survey discloses that the front stoop of the building on said premises extends over and encroaches upon the City property to the extent of 14 inches.

5. On May 21, 1926, at 2 P. M., by agreement between the attorney for the plaintiffs and the attorney for the vendors, the plaintiffs met the

Exhibit.

defendants at the office of Isaac Fleischman, Esq., 602 Union Building, Newark, New Jersey, and tendered themselves ready, able and willing to accept a conveyance of the said premises from the defendants in accordance with the agreement as aforesaid, but the defendants have at no time been able to make a conveyance to the plaintiffs in accordance with the said agreement on account of the survey defect as aforesaid.

6. Plaintiffs expended for necessary searches and survey of said premises the sum of $300.

7. Plaintiffs also paid on account of the purchase price of $31,200 the sum of $500, an acknowledgment of which was made in the said contract.

Judgment will be claimed in the sum of $800 together with legal interest thereon and cost of suit.

JACOB I. KAPLAN,
Attorney for Plaintiffs.

Exhibit.

SUPREME COURT OF NEW JERSEY,

ESSEX COUNTY.

Action at Law.

LOUIS POLLOCK and MOLLIE POLLOCK, his wife,
Plaintiffs,

vs.

MARY M. SCHULTZ and FRANK SCHULTZ, her husband, jointly, severally and in the alternative,
Defendants.

ANSWER.

1. Defendants admit paragraphs 1, 2 and 3.

2. Defendants admit paragraph 4 except in so far as relates to the encroachments stated therein and say there is no encroachment whatever as therein specified.

3. Defendants admit paragraph 5 as to the meeting, but deny that plaintiffs tendered themselves ready, willing and able to take a conveyance as therein set forth and further deny that the defendants have not been able to make the conveyance to the plaintiffs in accordance with the

Exhibit.

said agreement but on the contrary thereof aver, that the said defendants were then and are now ready, willing and able to make said conveyance in accordance with the terms of the agreement which conveyance said plaintiffs refused to accept.

4. Defendants deny paragraph 6.

5. Defendants admit paragraph 7.

6. Defendants deny that any action has accrued to the plaintiffs as in said complaint stated and pray to be hence dismissed with their reasonable costs and charges.

MICHAEL J. TANSEY,
Attorney for Defendants.

New Jersey Court of Errors and Appeals.

Between

MARY M. SHULTZ, FRANK SHULTZ,
Complainants,

and

LOUIS POLLOCK and MOLLIE POLLOCK,
Defendants.

BRIEF OF DEFENDANTS-APPELLANTS.

Facts.

Complainants are the vendors, and the defendants the vendees in a contract for the sale of real estate in the City of Newark. The contract was entered into in March, 1926, and was to be consummated on May 1, 1926. At the request of the defendants, a short adjournment was agreed to (S. of C.—32) and then on May 11, 1926, when title was still not closed, complainants' attorney wrote to the defendants' attorney "the time fixed to close this title is passed, and I want you to fix a date now convenient to both parties, or I shall be put to the necessity of fixing the time, and in making time the essence of the time which I fix" (S. of C.—33). In reply, the defendants' attorney immediately wrote, Exhibit C-3 (S. of C.—60) in which he calls attention to the fact that a survey discloses that the stoop encroaches fourteen inches, and that his client

will not accept the title unless this is cleared, and then, "I therefore beg to notify you that my clients are fully ready, able and willing to accept a conveyance of the said premises from your clients, and will, on Friday, the 21st proximo, at 2 P. M. be at your office to tender the balance of the cash purchase price to your clients and demand from your clients, a warranty deed fully in accordance with the aforesaid agreement". Regardless of what the exact technical meaning of the word proximo might be, the testimony is, that all of the parties met in accordance with this letter on the 21st day of May at the office of the complainants' attorney, and tenders were made each to the other, the defendants refusing to take title in accordance with their letter because there were encroachments, and the complainants insisting that there were no encroachments, and making a tender of their deed, which was of course refused.

After a further letter to the complainants' attorney to which no response whatever was ever made, on June 14, 1926, three weeks after tender and rejection, and notification by this last letter that they expected a return of the deposit, the defendants instituted a suit in the Supreme Court rescinding the contract, and suing for the return of the deposit and search fees (S. of C.—64). The action, of course, was an action rescinding the contract, alleging encroachments "and the complainants had *failed and refused* to perform their contract." To this, the complainants herein, set up in their answer, a *denial of any encroachments.* This answer was filed July 13, 1926, two months after the original refusal to convey.

This bill for specific performance was then filed on July 31, 1926, and an examination of the complaint shows an assertion by the complainants

that they were always ready to convey, but (S. of C.—7) "the said Louis Pollock and Mollie Pollock refused to take title to the premises by reason of *some supposed encumbrance* affecting the property, although the complainants were ready and willing to convey the premises *since there was no encumbrance* on the premises that would prevent the complainants from conveying the premises according to the aforesaid agreement." To this, of course, the defendants herein answered and counterclaimed that there were encroachments contrary to the agreement that they had tendered themselves willing to perform, and complainants had refused to perform, and, therefore, they rescinded the contract and demanded the return of their deposit.

The issue clearly joined on was, therefore, whether or not there were encroachments; the complainants' position clearly being there were no encroachments, and "you will take the property as it is," and the defendants' position clearly being, there are encroachments and "we therefore will not take the property, and demand the return of our deposit."

The defendants propounded interrogatories to the complainants (S. of C.—15) specifically inquiring as to whether the property encroached, or was within the boundary lines, and the answer under oath was just as specific (S. of C.—16) that the premises did *not* encroach, but was entirely within the line.

The matter finally came to hearing on November 23, 1927 (more than one year and seven months after the original closing, render, refusal, etc., and one year and six months after the commencement of the suit for the return of the deposit) and then for the first time during the entire course of the litigation, the complainants

suddenly admitted that the premises did encroach fourteen inches, but asserted that one week before the hearing on *November 14, 1927,* the encroachments were removed.

It was upon these facts, that the Court decreed specific performance to the complainants, even allowing the complainants costs of suit, and it is from this, that the defendants herein respectfully appeal.

Outline of Argument.

1. Regardless of whether time was or was not of the essence, the conduct of the complainants has barred them from the right to specific performance, which right, is addressed to the extraordinary jurisdiction of the Court of Equity.

(a) They must be, and they have shown themselves not to be ready, desirous, prompt and eager to perform the contract on their part.

(b) They indefensibly persisted in refusing to give a clear title when it was their duty and in their power to do so, and after rescission by the defendant, persisted in this conduct, even in their answer at law and bill in equity for nineteen months until the final hearing.

(c) They elected to stand upon the correctness of their title, and refused further performance to the defendants, and cannot now change their position after the defendants have rescinded and changed their position.

(d) The defendants had a right to rescind when they did because of the complainants' conduct, and if they had the right to so rescind at the

said time, a change of mind by the complainants can avail the complainants nothing.

2. Time was made of the essence of the contract by the expressions and conduct of the parties, and complainants not having performed within the time set, are not entitled to relief.

3. Complainants are barred from relief by their obvious laches.

4. Under the circumstances, costs could not be allowed the complainants.

Argument.

POINT ONE.

Regardless of whether time was or was not of the essence, the conduct of the complainants has barred them from the right to specific performance, which right is addressed to the extraordinary jurisdiction of the court of equity.

(a) *They must be, and they have shown themselves not to be ready, desirous, prompt and eager to perform the contract on their part.*

(b) *They indefensibly persisted in refusing to give a clear title when it was their duty and in their power to do so, and after rescission by the defendant, persisted in this conduct, even in their answer at law and bill in equity for nineteen months until the final hearing.*

The fundamental principle that a bill for specific performance is addressed to the extraordinary

jurisdiction of the court of equity is repeated time and again throughout all of the cases touching upon the subject. *Medley* v. *Trefz,* 48 Eq. 638, 23 Atl. Rep. 824; *Pyatt* v. *Lyons,* 51 Eq. 308, 27 Atl. Rep. 934; *City of Newark* v. *Lindsley,* 114 Atl. 794, are only a few of the cases which reiterate this principle. In the last case, Vice-Chancellor Backes said:

> "A bill for specific performance is addressed to the extraordinary jurisdiction of the 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.
>
> The complainant has forfeited its right to the aid of this Court by its dilatory tactics and inexcusable delays."

In the case *sub judice,* not only is the complainant asking for the ordinary relief of specific performance, but is asking for a further extension of the Court's extraordinary jurisdiction so as to allow the complainants to enforce the defendants to take the title which the complainants had refused to give, and contract for which the defendants had therefore rescinded more than one year and seven months before the final decree.

And when the complainant goes further and asks for this relief with time to correct its title, or when it has only corrected its title during the pendency of a suit, it is of course obvious that the

Court is extending further its extraordinary jurisdiction in this case only for the purpose of establishing actual equity, fairness and justice.

It will be admitted at the start that the Court of Chancery by its precedents has taken to itself this jurisdiction, and has granted such relief, and that the usual question involved is only the one as to whether time is or is not of the essence of the contract to be enforced. It is with these decisions in mind that Vice-Chancellor Church viewed this case and decided it, but it is our contention that whether time was or was not of the essence of the contract (and it will be argued at length in my next point that in this case time was of the essence), that still the complainants, because of the facts in this case, are not entitled to specific performance.

Let us at this point take up the cases which decide that where time is not of the essence, the complainant is entitled to a decree if clear title can be given by him at the time of the making of the decree.

An examination of the cases shows that the rule sprung up when the hostility of the defendant was not to those encumbrances, but to some other part of the title. Obviously, the defendant in those cases had no substantial reason for objecting to those encumbrances which were to be removed when title closed, but was simply throwing up in bad faith the technicality so as to prevent the closing, and it was this that equity would not allow.

There can be no question that, as said in *Agens* v. *Koch,* 74 Eq. 528, 70 Atl. 348:

> "Ordinarily, if time is not of the essence of a contract to convey, it is suffi-

> cient if the vendor can give clear title at the date of a decree to compel the purchaser to specifically perform, though the vendor has no clear title when the bill is brought."

And, therefore, in the ordinary case, the material question is, whether or not time was of the essence of the contract. The defendant insists that time was of the essence in this contract, and will argue this point further at length in the second point of this brief, but it is our contention that whether or not time is of the essence, the facts and circumstances of this case, and the indefensible conduct of the complainants persistingly refusing to give a clear title, when it was their duty and in their power to give it, brings the case within the familiar principle reiterated in *Pyatt* v. *Lyons,* 51 Eq. 308:

> "The relief invoked is not a matter *Ex ~~De Bito~~ Justitiae;* the bill of specific performance is addressed to the extraordinary jurisdiction of the Court of Equity, to be exercised according to its discretion, and 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."

This principle and decision is reiterated and set forth at length by Vice-Chancellor Backes in the case of *Kobrin* v. *Drazin,* 97 Eq. E. 400. This case bears a striking resemblance to the case sub-judicy. The complainants there agreed to sell to the defendants two apartment houses. The defendants offered to accept the deed and pay the purchase price on a day fixed, but the complainants refused to discharge certain judgments of record, or to make allowances for them in the settlement, claiming that the judgments were not

liens of record. They then filed this bill for specific performance, and upon the defendants setting up the defense stated, the complainants by their replication, offered to remove the judgments if the Court should find them liens. It should be noted also in that case, that the complainants offered at the time of closing of title to indemnify the defendants against the alleged encumbrances, and to place money in escrow to discharge the encumbrances if they were declared liens. So that you see, the complainants in that case were in a far more favorable position to invoke the discretion of the Court, than the complainants in the case at bar. In the case at bar, the complainants emphatically and persistently denied the existence of any encroachments, made no pro-offer of indemnification or method of determination, and persisted in this attitude until practically the final hearing.

Under these facts as outlined, Vice-Chancellor Backes refused to allow specific performance, and said:

> *"Where there are no complications, a specific performance will be directed if the complainants can make good title at the time of the decree, although he could not before. Gerba* v. *Mitruske, 84 Eq. 79, and it will not be defeated by an encumbrance which may be discharged out of the purchase money. 25 R. C. L. 277; Moore* v. *Galupo, 65 Eq. 194. But this grace is extended only to those who are willing and unable, not to those able and unwilling to perform as agreed. The indefensible conduct of the complainants in persistently refusing to give a clear title when it was their duty and in their power to give, and on such frivolous grounds, brings the case within the familiar principle reiterated*

in Pyatt v. *Lyons, 51 Eq. 308. The defendants were willing, the complainants were not, to perform the contract according to its terms. Their refusal to do equity bars them from seeking equity."*

And it should be noted, that in the case above cited, Vice-Chancellor Backes held that time was not of the essence because it had been waived by the parties (paragraph on p. 403).

So also in the case of *The City of Newark* v. *Lindsley,* 114 Atl. 795. In this case, the vendees raised frivolous objections to the title, and when finally the vendors because of this, rescinded the contract, about six months after they filed this bill for specific performance, admitted that their objections had been erroneous, and the title good. The Court refused to grant the specific performance, and said:

> "A bill for specific performance is addressed to the extraordinary jurisdiction of the 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 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.
>
> The complainant has forfeited its right to the aid of this Court by its dilatory tactics and inexcusable delays. * * *"

And so also in *Moore* v. *Galupo,* 65 Eq. 194, 55 Atl. 628. In this case, the objection was a mortgage lien upon the premises, and the Court (V.-C. Grey) held that, as this could be paid off with the purchase money at the time of the closing of title, and the objection was bad, the performance would be allowed. He said:

> "It is therefore of no significance that when a deed was tendered the defendant, this mortgage was a lien on the title. He was invited to perform the contract. *If he had told the complainant that he was willing to accept the deed upon the cancellation of the mortgage, and the complainant had refused to obtain it to be cancelled, the circumstances would have presented a different aspect.* It clearly appears that the defendant was, at all events, determined not to perform the contract, and that he made known this determination to the complainants." *Maxwell, adm'r, & Pittenger* v. *Pittenger,* 3 Eq. 156; *Oakey* v. *Cook,* 41 Eq. 363, 7 Atl. 495.

The case *sub judice* falls directly within the exception outlined above. The defendants stated both at the closing of title and subsequently, that they were willing to accept the title if the encroachments were removed, and the complainants refused to so remove the encroachments, and cannot now be held to say after the positions of the parties have been taken, decision made and nineteen months elapsed, that they will now remove.

In the case just cited, Vice-Chancellor Grey goes into the history of the rule, and its "raison d'etre". It seems to have been established by the old English practice of the decree for specific performance directing a master to determine as to whether the vendor could take title under the decree, and if he could, the purchase money was to be paid by the defendants. *Langford* v. *Pitt,*

2 Peere Williams 630, and *Braybrooke* v. *Inskip,* 8 Ves. 417, and *Coffin* v. *Cooper,* 14 Ves. 205. It therefore seems that the question as to whether the complainant had a right to a decree under *the issue* would first be determined and then if the complainant proved a good title before the master, performance would be made. The Court was therefore only concerned with not making an abortive decree if complainant could not render good title, but if up to the time of the decree, complainant's title was made good, there would be, of course, specific performance.

From this rule sprung up our present practice that mortgages and other encumbrances could be paid off at the closing with the simultaneous payment of the purchase money, and that such encumbrances would therefore be no bar to a decree for specific performance, and also, that such encumbrances as the complainant had a right to remove (if time were not of the essence) within a reasonable time, would be no bar if they were removed before the final decree.

But this rule, of course, did not apply when *the issue* was directly upon the existence or denial or refusal to remove the encumbrances in question. In the English court, the existence of the encumbrance would be the only *"issue"* and there, of course, would be no master to determine the question of title, and in our court following directly the reasoning of the cases above cited where the complainant denies the defect in title or refuses to remove it, as stated in *Moore* v. *Galupo, supra,* "the circumstances will have presented a different aspect". And in *Kobrin* v. *Drazin, supra,* 97, etc., *"the indefensible conduct of the complainants in persistently refusing to give a clear title when it was their duty and in*

their power to give", and specific performance may be ordered if the complainants can give good title at the time of the decree; but this grace is not granted to one who is able but unwilling to perform at the time fixed by the contract".

And with this point in mind, the numerous cases in this State on the question of "time of the essence" are of course ordinarily seen to be inapplicable.

In *Nass* v. *Munzing,* 136 Atl. Rep. 345, the opinion is also written by V.-C. Backes. Bearing in mind the distinction here drawn, this case (*Nass* v. *Munzing*) is easily distinguishable, and we can see why V.-C. Backes differentiated this case from the case of *Kobrin* v. *Drazin* (*supra*). In the case of *Nass* v. *Munzing, supra,* the defendant apparently refused to give the complainant *any time at all* to remove the encumbrance and the Court says:

> "And the defendant is not to be deprived of this privilege afforded by equity in this class of relief, unless he had breached the contract and the complainants had the right for that reason to treat it as at an end when they brought their suit to recover for the purchase money."

In the case *sub judice,* there can be no question about the defendants having the right to bring and having brought their action to recover the purchase price, and of electing their rescission, and it was therefore too late for the complainants subsequently, after an unreasonable time, to offer to perform.

The question of right to rescission will be more fully taken up in subdivision "C" in this point hereafter.

So, also, *Jackson* v. *Leyton,* 3 Leigh, 161:

> *"but where a plaintiff asserts and defendant denies good title and both parties refer the question to the Court, it should determine the question at once, and not give the vendor time to perfect her title."*

(Subdivision "C") They elected to stand upon the correctness of their title, and refused further performance to the defendants, and cannot now change their position after the defendants have rescinded and changed their position.

In *Bloom Building Co.* v. *Ingersoll,* 134 Atl. 176, the complainants' vendee sought to enforce their vendors to convey. The complainants were to purchase, if "building permit was obtained from the Village of South Orange, and litigation was pending in the Supreme Court on mandamus in regard to this", but after a long delay, the complainants refused to wait any longer and filed its bill, asking for the return of its deposit. The defendant set up that the matter was being diligently prosecuted in the Supreme Court, and that time was not of the essence, and that the complainant must wait until the final decision. The final hearing was adjourned a number of times, and before the hearing, the Supreme Court handed down a decision in favor of the permit, and the complainant now desired to amend to pray for specific performance, while defendant now contested this. The Court refused specific performance, and V.-C. Backes stated:

> "A word as to the practice; setting up a maintainable, new and inconsistent cause of action is not allowable after issue. The course is to take a dismissal without prejudice and start a new one."

Coddington v. *Mott,* 14 Eq. 430, 82 Am. Dec. 258.

> "* * * The complainants, having by its original bill, elected to be no longer bound by the contract is not privileged to again choose to be bound. Having committed itself to a recovery of the deposit, its rights to have the property is forever gone. The election is irrevocable. *Claron* v. *Thommesen,* 96 Eq. 650, 126 At. 308; *Heller* v. *Elliott,* 44 Law, 467. The commencement of an action where all the facts are known, is conclusive evidence of an election. *Conrow* v. *Little,* 115 N. Y. 387, 22 N. E. 346, 5 L. R. A. 693. 'A party', says Bigelow, 'cannot, either in the course of litigation or in dealing *in pais,* occupy inconsistent positions. Upon that rule election is founded. A man shall not be allowed to approbate and reprobate. And where a man has an election between several inconsistent causes of action, he will be confined to that which he first adopts. The election, if made with knowledge of the facts, is in itself binding. It cannot be withdrawn without due consent. It cannot be withdrawn though it has not been acted upon by another by any change of position'."

Bigelow on Estoppel (16th Ed.) 732.

A comprehensive statement of the effect of an election is given in 20 C. J., page 38, thus:

> "An election once made between coexisting remedial rights which are inconsistent is not only irrevocable and cannot be withdrawn without due consent even though it has not been acted upon by another to his detriment, but it is also conclusive and constitutes an absolute bar to any action, suit or proceedings based upon a remedial right inconsistent with that asserted by the election or to the maintenance of a defense founded on such inconsistent rights.

Chancellor Kent, in *Sanger* v. *Wood,* 3 Johns. Ch. (N. Y.) 416, put it in this way:

> 'Any decisive act of the party, with knowledge of his rights and of the fact, determines his election in the case of conflicting and inconsistent remedies'.

In *Connihan* v. *Thompson,* 111 Mass. 270, it is said that:

> 'The defense of waiver by election arises where the remedies are inconsistent; as where one action is founded on an affirmance, and the other upon the disaffirmance of a voidable contract, or sale of property. In such cases any decisive act of affirmance or disaffirmance, if done with knowledge of the facts, determines the legal rights of the parties, once for all. The institution of a suit is such a decisive act; and if its maintenance necessarily involves an election to affirm or disaffirm a voidable contract or sale, or to rescind one, it is generally held to be a conclusive waiver of inconsistent rights, and thus to defeat any action subsequently brought thereon'.

In *Thompson* v. *Howard,* 31 Mich. 312, this language is used:

> 'A man may not take (two) contradictory positions, and where he has a right to choose one of two modes of redress, and the two are so inconsistent that the assertion of one involves the negation or repudiation of the other, his deliberate and settled choice of one, with knowledge, or the means of knowledge, of such facts as would authorize a resort to each, will preclude him thereafter from going back and electing again'.

In *Rodermund* v. *Clark,* 46 N. Y. 354, the principal is stated in this manner:

> 'Where there exists an election between inconsistent remedies, the party is confined to the remedy which the first prefers and adopts. The remedies are not concurrent, and the choice between them being once made, the right to follow the other is forever gone'.

It is not helpful to multiply these citations but for outstanding cases expressing the doctrine, see *Livingston* v. *Thorp,* 51 N. Y. 174; *Acer* v. *Hotchkiss,* 97 N. Y. 395; *Terry* v. *Munger,* 121 N. Y. 161, 24 N. E. 272, 8 L. R. A. 216, 18 Am. St. Rep. 803; *Mills* v. *Parkhurst,* 126 N. Y. 89, 26 N. E. 1041, 13 L. R. A. 472; *Washburn* v. *Insurance Co.,* 114 Mass. 175; *Metclaf* v. *Williams,* 144 Mass. 452, 11 N. E. 700; *Kearney Elevator Co.* v. *Howard, supra; Farewell* v. *Myers,* 59 Mich. 179, 26 N. W. 328. A collection of many of the cases is to be found in the note to *Crossman* v. *Universal Rubber Co.,* 13 L. R. A. 91 (127 N. Y. 34, 27 N. E. 400). The principle is so fundamental and universal of the application that our Court of Appeals in the *Claron* case simply applied it without discussion.

It is the contention of the complainant that the subsequent conduct of the defendants, and the dealings of the parties, released it of its election or, if not released, that the defendants are estopped from setting up the election. An election once made, being irrevocable nothing short of a contract reviving the lost remedy will restore it."

In *Naugle* v. *Bauman,* 127 Atl. Rep. 267, 97 E. 118, the Court held:

> "Where a vendee of real estate sues a vendor to recover back his own down pay-

ment, vendor not having title to premises, and continues the prosecution of suit after knowledge that his vendee obtained title, he thereby waives his right to specific performance.

And in *Cohen* v. *Miller,* 128 Atl. 790, 97 Eq. 440, where the vendee, after rejecting title because of encroachments, and the value of the property had increased, insisted upon specific performance, the Court said:

> 'Where vendee, under contract of sale, knowing of certain encroachments, and having had time to consider them, refused to accept a warranty deed, held, that on such property's increasing in value and after considerable delay, vendee will not be granted specific performance on expressing his willingness to take title, defects and all'.

So, also, in *Goldthwart* v. *Lynch,* 9 Utah, 186, 33 Pac. 699, it was held, that where a vendee refuses a title which the vendor tendered, he cannot maintain an action for specific performance, but the only title the vendor can give was the same title which he had refused to accept."

Under these cases, it is apparent that the complainant at the time the closing was to take place, had its option of asking for time to ascertain the encroachments, and removing them, or had the option of denying the encroachments, and refusing conveyance in the property's then condition, and in this way put the defendants in default, if they refused to accept.

The complainants herein with full knowledge of the facts (there is no denial of this or any attempted explanation which might excuse this) elected to stand upon good title at the closing, made a definite tender of their deed, so as to put

the defendants herein in default, in their answer in the suit of law, plead good title so as to call a default of the earnest money, and then later, instituted this suit for specific performance, still maintaining that they had good title. Having made clear their election to stand upon their title, they cannot now, nineteen months after, change their position, remove the encroachments, and say, "although we were unwilling to perform, we are willing now, and you must take it".

Subdivision D. The defendants had a right to rescind when they did, because of the complainant's conduct, and if they had the right to so rescind at the said time a change of mind by the complainants can avail the complainants nothing.

In *Nass* v. *Munzing,* cited *supra,* 136 Atl. 345, it was pointed out in my argument above, that the reason for the allowance of specific performance, was that the complainants herein did not allow the defendants any time at all, and did not put the defendant in default before instituting the suit for the return of the deposit. V. C. Backes said:

> "And the defendant is not to be deprived of this privilege afforded by equity in this class of relief, unless he had breached the contract, and the complainants had a right for that reason to treat it at an end when they brought their suit to recover the purchase money."

And it was with this distinction in mind that V. C. Backes decided as he did, in the case of *Kobrin* v. *Drazin,* herein above set forth.

The same distinction is made in the case of *Goldstein* v. *Erhlich,* 96 Eq. 52, 124 Atl. 761. In

this case, which is also a case of encroachments, where the contract provided against it, as here, the Court said:

> "The complainant is entitled to rescind and a return of his deposit; he is not obliged to take title with the encroachments. They are slight, but nevertheless substantial, and specific performance would not be decreed against him.
>
> A valid reason for refusing specific performance, such as a defect in the title, warrants a rescision of the contract."

In *Larkin* v. *Koether,* 137 Atl. 849, the Court, Vice Chancellor Berry, also said:

> "In short * * * there was no lawful rescision; no reasonable time was given for the removal of the objections; and prior to this, an arbitrary notice of termination may be entirely disregarded."

In other words, specific performance will be allowed where there was "no lawful rescision, and no reasonable time", but would be allowed where there was "a valid reason for refusing specific performance, and where there was 'proper rescision and reasonable time'." And when a rescision is made, if properly made as above, rescinds the contract not only from the vendee's standpoint, but also from the vendor's standpoint. And it follows obviously with the vendors in this case, a proper rescision having been made, no longer had the right to vacillate in their position and finally, after one year and seven months, to decide that they were going to do what they should have done in the first instance.

The tender, demand and rejection of title by the defendants, on May 1st, was a sufficient rescision. The suit following in the Supreme Court

was a conclusive determination to rescind and call the contract at an end. *Kavedar* v. *Shapiro,* 119 A. R. 104; 98 Law 225.

POINT TWO.

Time was made of the essence of the contract by the expressions and conduct of the parties, and complainants not having performed within the time set, are not entitled to relief.

Title was to close in accordance with the contract on May 1st, 1926. At that time, defendants were not ready, and on May 11th, we have the attorney for the complainants writing, "the time fixed to close this title is passed, and I want you to fix a date now convenient to both parties, or I shall be put to the necessity of fixing the time, and in making *time the essence* of the time which I fix" (S. of C. 33). In reply, defendant's attorney immediately writes, Exhibit C-3 (S. of C. 60) calling attention to the fact that a survey discloses that the stoop encroaches 14 inches, stating "that his client will not accept the title unless this is cleared", and then "I therefore beg to notify you that my clients are fully ready, able and willing to accept a conveyance of said premises from your clients, and will on Friday, the 21st *proximo,* at 2 P. M., be at your office to tender the balance of the cash purchase price to your clients and *demand* from your clients a warranty deed fully in accordance with the aforesaid agreement". Regardless of what the exact meaning of the word *"proximo"* might be, all of the parties met in accordance with

this letter, on the 21st day of May, at the office of the defendant's attorney, and tenders were made, each to the other, defendants refusing to take title in accordance with their letter, because there were encroachments, and the complainants, it should be noted, not asking for any further time to investigate, or further time to remove the encroachments, but insisting that there were no encroachments and tendering their own deed. After a further letter to the complainants' attorney, to which no response was ever received, on June 14, 1926, three weeks after the tender and rejection, the defendants instituted a suit in the Supreme Court rescinding the contract, and suing for the return of the deposit.

The Court held upon these facts that time was not of the essence, saying that there was no fixed and definite time in either, and citing *Wyatt* v. *Bergen,* 98 Eq. 502, and *Orange Society* v. *Konski,* 94 Eq. 632.

In 36 Cyc. 714, it is stated that

> "Although time was not originally an essential part of the contract, still a party may by proper notice bind the other party who is in default, to perform his part of the contract, within a reasonable time, to be specified in such notice, and if the party receiving such notice does not perform within the time so specified, his right to specific performance is lost."

So also Pomeroy on Specific Performance, 3rd Ed., Section 395. Here it is stated that the vendee or vendor "by notice fixed upon assign a reasonable time for completing the contract, and may call upon the defaulting party to do the acts to be done by him within this period. The time

allowed becomes essential and if the party in default fails to perform before it has elapsed, the Court will not aid him in enforcing the contract."

Let it now be first pointed out, that it is not necessary to use the words "time of essence". Such conclusion which follows upon the necessary implications may be inferred by the circumstances or avowed objects of the vendor or vendee. *Newark* v. *Lindsley,* 114 Atl. 794; *Watchung Realty Co.* v. *Liewellyn,* 96 Eq. 498; *Kobrin* v. *Drazin,* 97 Eq. 400; *Berry* v. *Reskin,* 99 Eq. 730; *Agens* v. *Koch,* 74 Eq. 528. In all of these cases, it is further time and the Court held "the defendant by Exhibit 7, did not attempt to make time of the essence of the contract". This was attempted to be done by the complainants and as the complainants could not give good title by reason of this encroachment on April 10, the defendants accepted the complainants' notice *in the light in which it was intended* and gave notice to the complainants of its rejection because of the encroachment, and this *she had a right to do*".

So also in *Orange Society* v. *Konski,* 94 Eq. 632, 120 Atl. Rep. 448. In this case the Court held that the letter did not give sufficient time. After the matter had dragged for more than three months, because of building plans, etc., seven days time was not sufficient, and the action by Konski was "snap action". But in this case, there can be no question of the time nor the question of the wording, because as stated before, the parties acquiesced in the time fixed and wanted no further time.

In *Franklin* v. *Welt,* 98 Eq. 602, 131 Atl. 185, the Court said:

> "Purchaser's failure to reply to vendor's

letter suggesting their agent's office as place of settlement, held an acquiescence in such suggestion, fixing place named as place of settlement."

In the case *sub judice,* there has never been any question as to whether the parties agreed upon the time and place for the settlement; as above. There is no question that the time was definitely fixed for the closing and agreed upon by both parties as May 21st, and on this date the parties definitely met and decided their status, and neither party asked for further extensions. What further could possibly be necessary to fix the status of the parties, or what was further necessary to establish time of the essence, is hard to understand.

POINT THREE.

Complainants are barred from relief by their obvious laches.

The contract was to close May 1st, 1926, but because of reasons stated before, the parties did not get together for the closing until May 21st. A week before, on May 14th, the defendants notified the complainants of the existing encroachments, and of their insistence that these be removed. At the closing, complainants refused to remove the encroachments, denying the existence of the encroachments, and tendered its deed in defiance. On June 14, 1926, suit was instituted; on July 13, answer was filed still denying the existence of the encroachments, and on July 31, 1926, this bill for specific performance was filed, still denying the existence of the encroachments, and alleging "the said Louis Pollock and Mollie Pollock refuse to

take title to the premises by reason of some *supposed encumbrance* affecting the property, although the complainants were ready and willing to convey the premises, *since there was no encroachment* on the premises that would prevent the complainants from conveying premises according to the aforesaid agreement".

The defendants filed their counterclaim setting up the encroachments, and issue was joined upon this. Interrogatories were then propounded in which the same positions were maintained; complainants still denying under oath the existence of the encroachment. Upon the hearing, however, it was first disclosed about a week before, or November 14, 1927, a year and seven months after the original closing, and after a year and six months after the commencement of this suit, that the complainants had removed the encroachments and they (S. of C. 43) admitted they always had known of the encroachment. The question that was raised by the defendants is that the complainants were obviously guilty of laches, and therefore should not prevail upon a bill such as this for specific performance.

As stated before, in *Pyatt* v. *Lyons,* 51 Eq. 308, "the relief invoked is not a matter *ex debito justitiae.*" The bill for specific performance is addressed to the extraordinary jurisdiction of the Court of Equity to be exercised according to its discretion, and 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.

I do not propose to waste the Court's time in citing authorities on the proposition that laches of any material kind would bar the complainants' right to succeed.

It is conceded in the opinion of the Vice Chancellor, but the Vice Chancellor misconceives the facts that constitute laches, and in his opinion, merely discusses the various adjournments of the Supreme Court action and the Chancery suit. It is here that he errs; the laches consisted, first, in not instituting this suit for specific performance for more than two months after the actual rejection of title, and secondly and more importantly and emphatically, in not removing the encroachments for a period of seventeen months after suit had been instituted by the other side rejecting the title because of the encroachments.

Admitting for the sake of argument that time was not of the essence in either the original contract or the subsequent negotiations, and that the complainant had a reasonable time to remove the encroachments, it is absurd to say that seventeen months is such a reasonable time under these circumstances.

And if we consider in connection with this the admitted refusal to remove the encroachments, the attempted stand in the Supreme Court answer and in the complaint in this case, that there was no encroachment, and if we then further consider the startling proposition that no explanation is attempted of the reason for the complainants' delay, the conclusion becomes unavoidable, that laches is chargeable to the complainant.

In *Agens* v. *Koch,* 74 Eq. 528, "the lapse of time in this respect is set up as a defense to the suit because of laches in seeking the equitable remedy, an altogether different question from the question of time in the contract itself".

As to this defense of laches, the general rule is that where one party arbitrarily or otherwise

notifies the other that he will not perform the contract, the bill must be filed speedily unless the party receiving the notice be in a position—whether such delay is an acquiescence or an abandonment depends upon the circumstances of each case, and the explanation of the delay.

In the case *sub judice* there was never even an attempted explanation.

In *Heller* v. *Sweeney, et al.,* 100 Eq. 150, 135 Atl. 264, the complainant was guilty of laches for failure to promptly institute a suit for specific performance.

But, as before stated, the principal element of laches remains unjustified, and that is the non-removal of the encroachments for the period of one year and seven months.

POINT FOUR.

Under the circumstances, costs could not be allowed the complainants.

It of course goes without argument that up to the final decree, the complainants were actually in default and that the defendants were correct in resisting the attempt of the complainants for specific performance. Title was properly rejected by the defendants at the time of the closing because of the encroachments which the complainants denied and refused to remove. Complainants then instituted suit, again insisting upon there being no encroachments, and again defendants were entirely within their rights in resisting an attempted performance of the contract with the encroachments still remaining. In other words, at the

time of the institution of the suit, and throughout the suit, complainants were not entitled to specific performance and if they were entitled to it at all, only became entitled to it when they removed the encroachments just before the final decree.

As defendants were of course right in defending the suit as it was brought, and complainants were wrong in bringing the suit as it was brought, costs should of course not go against the defendants for doing something which they were right in doing.

If through the Court's discretion, specific performance is allowed to the complainants, insult should not be added to injury by charging the defendants for cost of the proceedings. These should properly be charged to the complainants.

As stated in Kocher & Trier on Chancery Practice, page 849:

> "As a general rule, any order for costs in a vendor's suit for specific performance must be made with regard to the status of the vendee, not at the end of the suit, but at its commencement, at the time when he refused to take the offered title. Where the suit has exercised a curative effect upon the title, and the vendee was justified, under the contract, in demanding that such cure should be made, the expense of the suit may be a necessary incident to the performance of the contract by the vendor; not only should the vendee not be mulcted with the costs of the vendor, but, in some cases, the payment by the vendor of the entire costs and expenses of the vendee will be made a condition upon which the decree in favor of the vendor will be made.
>
> Although performance of a contract was

> decreed, costs were denied upon the ground of complainant's laches."
>
> *Barger* v. *Gery,* 64 Eq. 276, and the *New Barbadoes Toll Bridge Co.* v. *Vreeland,* 4 Eq. 157.

It is agreed between counsel that the above point be considered and restricted to the costs only and not the counsel fee as counsel have stipulated between themselves as to the counsel fee.

Before closing my brief, let me refer to the closing remarks of the Vice-Chancellor in his opinion, as to the knowledge of the survey and the occupancy of the garage, etc. It should be noted that the case was tried mainly upon stipulation, and that there was no evidence put in at all on behalf of the defendant because of the stipulated facts. On a question of survey, however, the testimony of the complainants (S. of C.—36) is expressly, that they do not recall whether the encroachments of the stoop was pointed out. Testimony also is that it was before the contract was drawn, so it can hardly have any bearing upon the carrying out of the contract. The case of *Naumberg* v. *Young* would prevent its being added to a written contract, and there was no attempt made by the complainants to reform the contract, or intimation that they desired it to be reformed. But FINALLY, the best answer to the survey question is that the complainants answered it themselves and removed the encroachments, so we are no longer concerned with the survey.

As to the occupancy of the garage: the testimony discloses that it was an occupancy of a small garage for about two weeks, and that the defend-

ants had removed their car long before the actual closing of title.

And as to the reference by the Vice-Chancellor of taking people through the house, this also was done before the rejection of title and was merely showing the house to people while negotiations were going on for its closing, an act which no one can say was unjustifiable. It should further be recalled that the Vice-Chancellor in his opinion merely states these facts in closing, but decides the case upon the question only of *time of the essence.*

It is respectfully urged that the decree of specific performance should not have been allowed to the complainants herein because firstly it had forfeited its right to the extraordinary jurisdiction of this Court by its "dilatory tactics and inexcusable delays", and because of "indefensible conduct persistently refusing to give a clear title when it was their duty and in their power to give it."

Secondly: Because the time agreed upon between the parties was of the essence of the contract as neither of the parties desired or required any further time and by their acts, the time was made of the essence.

Thirdly: Because it has been plainly shown that the complainants were guilty of laches.

Fourthly: It is argued that no costs should have been allowed to the complainants under the circumstances.

CONCLUSION.

It is therefore respectfully urged that the decree entered was erroneous, and that this Court should either enter a decree for the defendants upon their counterclaim, or send this cause back for a new trial.

Respectfully submitted,

HARRY LEVIN,
Of Counsel with Defendant-Appellant.

JACOB KAPLAN,
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New Jersey Court of Errors and Ap

MARY M. SCHULTZ and FRANK SCHULTZ, her husband,
Respondents,

and

LOUIS POLLOCK and MOLLIE POLLOCK,
Appellants.

RESPONDENTS' BRIEF.

Facts.

The main question which the Court took to decide in this case was whether was laches in the removal of the steps, having been done before the hearing but one and one-half years after May 21, Suit to recover the deposit was started defendants in the Supreme Court on Ju 1926. The complainants in this suit fil answer and counter-claim on July 13, 192 thereafter on July 31, 1926, filed their b specific performance. Defendants gave tice of a rescission of their contract bef ginning suit in the Supreme Court f recovery of the deposit.

From the testimony of Isaac Fleischm counsellor at law, who represented Mr. an

14 OCT.T.1928

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RESPONDENTS' BRIEF.

Facts.

The main question which the Court undertook to decide in this case was whether there was laches in the removal of the steps, same having been done before the hearing but about one and one-half years after May 21, 1926. Suit to recover the deposit was started by the defendants in the Supreme Court on June 26, 1926. The complainants in this suit filed an answer and counter-claim on July 13, 1926, and thereafter on July 31, 1926, filed their bill for specific performance. Defendants gave no notice of a rescission of their contract before beginning suit in the Supreme Court for the recovery of the deposit.

From the testimony of Isaac Fleischman, a counsellor at law, who represented Mr. and Mrs. Schultz upon the negotiations for the sale of the property to Pollock, it appears that the survey showing the steps of the property to be over the street line about 14 inches was shown to the Pollocks and their counsel, Mr. Kaplan, at the time the agreement was in preparation for signing, that he called Mr. Kaplan's atten-

Service of three copies of the within Brief hereby acknowledged this 20th day of October, 1928.

of Counsel with Def'ts Appellants.

tion to it specially and said that they would convey subject to whatever the survey showed. It was discussed by them with relation to the easement of a common driveway on the west side of the property and he passed the survey over to Mr. Kaplan. They overlooked putting in the contract the provision about the survey because they were quite tired after wrangling for four hours.

Mr. Schultz's recollection is that during the discussion Mr. Fleischman called Mr. Kaplan's attention particularly to the overage shown on the survey and he said that it does not matter, it was like the rest of the houses on the street.

Thereafter Mr. Kaplan borrowed from Mr. Fleischman his original search which had on it a copy of the survey Exhibit C. 2. This was sometime in March and nothing further was said about it until sometime before the first of May, when Mr. Kaplan asked Mr. Fleischman for an adjournment of the day of taking title because he was obliged to move from his office to the Federal Trust Company Building, and Mr. Fleischman granted him the adjournment.

In the meantime Pollocks had gone into possession of the premises to the extent of placing their automobile in one of the garages where it remained from the latter part of March until early in May, 1926.

After the signing of the contract Mr. Pollock requested Mr. Schultz to leave one flat vacant for his own occupancy until title would pass; he also requested him not to rent a flat to a certain man who was objectionable to Mr. Pollock and Mr. Schultz kept the flat vacant and refused to rent the flat to the objectionable party and both remained idle until May 15, 1926.

The Pollocks came to the flats many times after the signing of the contract and before and after May 1st, they brought various persons with them to see the place, evidently trying to sell again. On one of these occasions the brother-in-law of Mr. Pollock talked to Mr. and Mrs. Schultz in Pollock's presence and said he knew where Pollock could get as good a place for less money, mentioning $28,000. This was shortly before May 15th, and about that time Pollock removed his car from the garage and Mr. Kaplan wrote his letter, mentioned hereafter.

Not hearing definitely from Mr. Kaplan, after May 1st, Mr. Fleischman tried to get him on the phone but could not, and then on May 11, 1926, wrote him a letter complaining that he had not heard from him and threatening to make time the essence of the contract, if he did not respond. Thereafter under date of May 14th, Mr. Kaplan wrote a letter to Mr. Fleischman setting up for the first time a complaint about the overage and saying that on Friday, the 21st *"Proximo"* at 2 P. M., his clients would be at Mr. Fleischman's office to tender the balance and to take a warranty deed in accordance with the agreement. He said in conclusion that he hoped the discrepancy between their clients would be amicably adjusted and that it would throw no reflection upon the personal relationship between the lawyers. There was nothing in the letter to indicate an ultimatum.

The Court will notice that this letter says, "the 21st, *proximo*" which, if it means anything at all, means June 21st, and which, if it is thought, makes time the essence of the agreement as of May 21st it does not so express.

The parties met on May 21st at Mr. Fleischman's office at which meeting deed was tendered which the Pollocks refused and the meeting broke up, and thereafter under date of May 24th, Mr. Kaplan wrote a letter to Mr. Fleischman saying that his clients stood pat in their position, asking him to advise his intentions as to further action and saying "As for us, you surely realize that we expect a return of the deposit and a reasonable amount in addition thereto to cover all the expenses incurred to date. What do you say?"

The defendants-appellants took no further steps either to put complainants-respondents in default or to rescind the contract, but began suit in the Supreme Court for the return of their deposit, to which complainants made answer, and afterwards filed their bill for specific performance as before noted, which was tried on November 23, 1927, and led to a decree in their favor under date of January 30, 1928.

The answer of defendants (Case, p. 12) avers that on May 21, 1926 * * * all the parties met * * * and the said (defendants) tendered themselves ready, able and willing to accept a conveyance of the said premises in accordance with the agreement but the said (complainants) *have at no time been able to make a conveyance to* (defendants) *in accordance with the said agreement on account of the defect by way of encroachment as aforesaid.* There is no allegation that complainants were unwilling to convey or refused to convey, and there is no other date named for a conveyance besides May 21st, showing that defendants attached no particular importance to the letter of May 24th.

All adjournments of the time mentioned in the contract for passing title had been at the sug-

gestion of the defendants and for their convenience. And as to the extensions of time for hearing of the cases in the Supreme Court and in the Court of Chancery, it is perhaps proper for me to say, in view of reference to it in defendants' brief, that all the extensions were made at the request of and for the accommodation of Mr. Kaplan; one time on account of his illness the Supreme Court case went off, and again owing to the proximity of the Jewish New Year the Court of Chancery hearing went over. All extensions of every kind granted in the matter of the contract and of the prosecution of the suits were at the request and for the benefit of defendants, Pollocks. It is hardly to be supposed, therefore, that if the complainants needed or desired further time to put themselves in a position to convey according to the contract they were not entitled to some consideration.

ARGUMENT.

There was no legal rescission before beginning suit.

Up to the time of beginning suit by the defendants there was no evidence whatever that complainants had breached their contract, and the defendants therefore could not lawfully rescind and repudiate their contract.

Larkin v. *Koether,* 137 Atl. 849;
Orange Society v. *Konski,* 94 Eq. 632; affd. 95 Eq. 254;
Nass v. *Munsing,* 136 Atl. 344.

They could not rescind legally until they had by proper notice and demand, which gave the complainants a reasonable time to perform, placed said complainants in such a position as

to absolve defendants from their contract on the ground of the complainants' unwillingness or inability to perform.

Ruckman v. *King,* 20 Eq. 316.

There being no lawful rescission on defendants' part, the complainants were justified in treating the contract as still in existence.

Complainants were not in laches after the commencement of suit in the Supreme Court by defendants for the return of the deposit money.

During the pendency of defendants' suit to recover their deposit, it was a definite declaration by them that they were unwilling to carry out the terms of the contract even though the complainants were able within a reasonable time to convey free of the defect and they cannot be heard to complain that the complainants' ability to perform at the time of the decree comes too late.

Nass v. *Munsing*, 136 Atl. at page 345, also *Larkin* v. *Koether,* 137 Atl. 849.

The defendants waived strict performance of the contract.

Expressly, on examination of the survey when the contract was being prepared, and saying that the overage did not matter; impliedly, by having the survey in their possession from the latter part of March until after the time set in the contract for closing, May 1st, without any complaint as to the overage.

By asking and obtaining an adjournment of passing title just before May 1st to enable the defendants' attorney to move his offices, and saying nothing then about such overage.

By saying nothing at the time of making and signing the contract, although they had the survey in hand for inspection and actually discussed some features shown thereon. The law imputes knowledge to them of all that the survey showed.

National Bank v. *Dressler,* 136 Atl. 417-418.

In that case it was said:

> "The testimony satisfied me that the vendees did not rely upon the provision of the contract respecting the location of the building entirely within the lot lives; but that on the contrary they examined and inspected the premises and must reasonably have discovered that the extensions complained of existed. Nevertheless they permitted the transaction to proceed up to the point of requesting an adjournment of the passing of title merely because of the absence of their counsel who was actually engaged in the trial of a case in another city and could not be present, and who raised no objection to the title or the extension of the buildings over the lot lines onto the adjoining properties until the deed was tendered by the vendees on the final date fixed for the closing of the transaction. Under these circumstances I am of the opinion that the vendees defaulted in their obligation under the contract and cannot now ask this court to enforce their alleged vendees' lien with regard to the original payment of $500 on account of the purchase price."

To the same effect is *Mahaffey* v. *Sarshik*, 137 Atl. 887 at 889, where the Court says:

> "Under the circumstances it is not in the power of defendant by reason of the well known rule of equitable estoppel to come here and make as a defense for non-performance the claim that his vendees failed to do the very thing he led them to believe they need not do."

Whatever puts a party upon inquiry amounts in judgment of law to notice, provided the inquiry became a duty, as in the case of purchasers and creditors, and would lead to the knowledge of the requisite fact by the exercise of ordinary diligence and understanding.

Vredenburg v. *Burnet*, 31 Eq. 229 at 233.

Where purchasers claimed they had knowledge of a lease on the property, but not of an option in the lease to purchase, the Court held them chargeable with notice of all the lease contained.

McClung Drug Co. v. *City Realty & Investment Co.*, 108 Atl. Rep. 767.

There is not a scrap of evidence on the part of defendants denying that they knew of the alleged encroachment at the time the agreement was made. There is no denial on their part that it was brought to their attention by Mr. Fleischman, and was intended to be mentioned in the agreement, there is no denial by them that they said it did not matter. What right have they now, therefore, to urge it as a reason for refusal to take title which equity will uphold.

The defendants, moreover, were in actual possession of a part of the premises from the latter part of March when the agreement was signed until just before May 15th; visited the premises frequently with possible purchasers, gave directions as to renting and keeping vacant certain flats, setting apart a flat for their own use, and suggested that the purchase price was too high as compared with other properties, but never once made complaint as to the alleged encroachment. It is quite plain that this was an excuse seized upon at the last moment to get them out of what seemed (when they could not readily sell) a bad bargain.

The complainants never made time the essence of the contract.

In the letter of Mr. Fleischman intended as a spur upon the defendants there was a threat to make time the essence by some future action. It was not as strong as either of the letters in

Wyatt v. *Bergen*, 98 Eq. 502; affd. 98 Eq. 738; or

Stewart v. *Griffith*, 217 U. S. 323; 30 Sup. Ct. Rep. 528,

classified therein as polite spurs to speed the performance of the contract.

The defendants did not make time the essence by their letter mentioning the meeting of the "21st *proximo*." They merely set up the encroachment and stated they would be ready to take title in strict accordance with the contract; nothing therein stated about annulling the contract or getting their deposit back.

A notice something similar to this but stronger was held in *Wyatt* v. *Bergen*, 98 Eq. 502, Ex. 7, as not attempting to make time the essence of the contract. Nothing further was done after the meeting of May 21st broke up, to bring about a further meeting, and under date of May 24th, defendants' attorney wrote complainants' attorney a letter to the effect that his clients stood pat on their position at the meeting, asking complainants' intentions as to further actions and continuing.

> "As for us you surely realize that we expect a return of the deposit and a reasonable amount in addition thereto to cover all the expenses incurred up to date. What do you say?"

This cannot be considered as a final notice of defendants' intention to repudiate the contract,

as it is in the form of a suggestion merely relating to the return of the deposit and costs and asks the complainants' opinion thereon. There is no allegation in it that complainants have breached their contract or are unable or unwilling to perform within a reasonable time.

All adjournments of the time mentioned in the contract for passing title had been at the suggestion of the defendants and for their convenience. They were no more than postponements and measurably show that on the day of settlement, there should have been a further postponement of settlement given by the defendants and giving to the sellers an appropriate time to perform.

Mahaffey v. *Sarshik,* 137 Atl. 887 at 889.

Obviously arbitrary action cannot be justified because time was not the essence of the contract and where time is not the essence an arbitrary and sudden determination of the transaction cannot be permitted to end pending disputes or negotiations as to the title. The other party must be allowed a reasonable length of time in which to perform; an arbitrary notice of termination may be entirely disregarded.

Ib. 137 Atl. 887.

Intent to make time essential must be clearly, unequivocably and unmistakably shown.

Larkin v. *Koether,* 137 Atl. 849;

Orange Society v. *Konski,* 94 Eq. 632; affd. 95 Eq. 254.

Defendants cite *Pyatt* v. *Lyons,* 51 Eq. 308, and *Kobrins* v. *Drazin,* 97 Eq. 400, as authority to show that equity will not aid an unwilling performer. The unwillingness in those cases clearly appeared, and continued up to the time of hearing and decree. In the first case complainant was unwilling to take a deed which did not include a plot 3 feet and 11 inches wide within the lines of a street and not mentioned in the agreement; and in the second case complainants had refused either to give possession of the premises, although needed for immediate occupancy, or to discharge judgments of record out of the purchase money, and of course specific performance could not be granted.

The case at bar, however, shows no such conduct on the part of complainants. They permitted defendants to go into possession before the time of performance and remain in possession for some time after the time set in the contract for performance; they gave them possession of the survey showing the overage, which they held until after the time named in the contract without making complaint; they gave defendant repeated adjournments of performance for their convenience, and were suddenly met with notice that defendants, long after the specified date, objected to the intrusion of the step 14 inches into the public street, although conforming approximately with the lines of the other houses on the block. These facts bring the case rather within the ruling of *Nass* v. *Munsing,* 100 Eq. 421; Affd. 138 Atl. 922 (for the reasons stated in the court below).

In that case the agreement was to convey an apartment house with a strip of land in the rear. The strip of land was subject to a right of way of an adjoining owner. It was known to be so encumbered by the complainants. The failure to especially note it in the contract was mutually accidental. The contract was to be executed on May 1, but complainants' counsel was still investigating the title on the closing day and on May 5 wrote defendant's attorney in

reply to his letter concerning the transaction that he would be glad to take the matter up with him in a few days, and thereafter without intimation, on May 10 brought suit for the deposit, alleging the encumbrance of easement, and that they were ready and willing to perform but defendant upon demand was unwilling to perform and was unable to do so.

Defendant answered denying allegations of complaint and set up that she was and had always been ready and tendered herself ready to perform and by counterclaim set up the omission in the contract was by mutual mistake and prayed its reformation and specific performance as reformed. On the day of trial defendant was ready to convey free of the easement, she having on that day procured a release of the easement. The Court refused reformation but held that as defendant was now able to convey free of the easement, it was timely performance under the contract, since time was not of the essence; that the defendant could not be deprived of this privilege unless she had breached the contract at the time of beginning suit for the return of the deposit, and the complainants had the right for that reason to treat the contract as at an end, which they had not. Had they become aware of the easement after the engagement they could have repudiated the contract provided they acted promptly after discovery, else the right would be waived. The right to repudiate arises out of want of mutuality and is coupled with the notion that the facts were concealed and the vendee deceived. *But here the complainants knew all along of the easement and they must be treated as if they had discovered the easement after making the contract and had waived the right to repudiate,* and

the cause must be regarded simply as failure of the vendor to perform on the day stipulated in the contract. The defendant stood ready to go forward, and the presence of the easement did not warrant the charge in the bill that she could not and refused to perform the contract any more than *the existence of a mortgage or other removable lien would justify the assumption.* Fixing a day for closing was a mere formality. Either party was entitled to fair leeway; neither could arbitrarily put an end to the contract; and before one could put the other in default reasonable notice of time to perform was required.

(The time between May 14 and May 21 was but seven days.)

In this the complainants failed and to this day. Their suit was brought before they matured their cause of action by the requisite notice and demand for performance, and it is not maintainable. The suit cannot be regarded as a substitute for the notice and demand; it amounts only to a gesture that the complainants regarded themselves as no longer bound. It is not founded on a right to rescind and has not the legal effect of relieving them from a liability to perform.

The defendant cannot be charged with laches. The pendency of complainants' suit was a definite declaration by them that they were unwilling to carry out the terms of the contract even though the defendant were able within a reasonable time to convey free of the easement, and they cannot be heard to complain that the defendant's ability to perform at the time of the decree came too late.

The only difference between this case and the case at bar is the fact of the alleged notice by letter of May 14 referring to the "21st *proximo*" before the commencement of suit. And it is submitted that this was not such a notice as warranted the rescinding of the contract by defendants. The contract was never in fact rescinded.

The defendants make much of the fact that in the answer to the Supreme Court complaint the complainants denied the existance of an encroachment "as therein specified." A similar answer interposed to the suit to recover down money in the case of *Nass* v. *Munsing* (*supra*) was held proper by the Court, although the easement existed to the knowledge of the pleader at the time, and that evidence of waiver of the encroachment could be interposed under that answer.

In addition, the defendants cite certain answers to interrogatories propounded to complainants (defendants in the Supreme Court suit) as to the extension of the building over the boundary lines of the property into Leslie street, and whether the building or any part thereof extended over the boundary lines on May 1, 1926, and May 21, 1926.

The interrogatories were answered on November 2, 1927 (the chancery hearing taking place on November 23, 1927), to the effect that complainants did not believe the building extended over and believed it was within the boundary lines and that they believed it did not extend over on May 1 or May 21, 1926, and defendants allege that the answers show unwillingness of complainants to convey according to the contract, from which laches can be inferred. The answers were in their belief and opinion, not necessarily final, as they were not surveyors and were not obliged to pay for a survey to make certain. The defendants were in possession of the same survey that they had access to and could inform themselves fully on the point. The knowledge of complainants was immaterial to the issue, since the encroachment, if any, was removed before the hearing and admitted so to be by the defendants. The encroachment was the material question, not the knowledge of complainants thereof.

Interrogatories propounded to an adversary under authority of Pr. Act 1903, Sec. 140, should be directed to some matter material to the issue.

Watson v. *Cope,* 86 Atl. 545.

They should relate to the case of the party propounding them and should not be asked for the mere purpose of prying into that of his adversary.

Ib.

The defendants say that the Court below erred in discussing merely the delays in adjourning the Supreme Court action and the chancery suit; that the real laches consisted not in this but in that complainants did not institute their suit for specific performance for more than two months after the actual rejection of title; and more *importantly* and emphatically in not removing the encroachments for a period of seventeen months *after suit had been instituted rejecting the title because of encroachments.*

Defendants apparently have two dates in mind for rejection of title; one, May 21, 1926, the last meeting, and two, the beginning of the Supreme Court action.

Process in the Supreme Court suit was served on complainants on June 28, 1926, and reached

their lawyer for action on July 2, 1926; answer was filed on July 13, 1926; and bill for specific performance was filed on July 31, 1926 (see Case, pp. 50-51). There was no unnecessary delay after complainants learned of the decision of defendants to reclaim their deposit, in filing suit for specific performance and the fact that defendants indicate two dates for having rejected the title shows that such definite notice as is required was never given complainants before suit; the suit was prematurely brought and was not notice to complainants, as determined in *Nass* v. *Munsing*.

This being the case the complainants were not in laches in removing the encroachment during the pendency of the suit but before final hearing. *Gerba* v. *Meteroska*, 84 Eq. 141.

Complainants were entitled to costs as allowed.

When defendants instituted their Supreme Court suit without proper notice they had not put complainants in default, but were in default themselves; the suit "amounted only to a gesture that the complainants regarded themselves as no longer bound; it was a definite declaration that defendants were unwilling to carry out the terms of the contract even though the (complainants) were able to convey within a reasonable time free of the (encroachment). Their precipitate and ill conceived suit and reprobation of the contract precluded the argument that the loss, if any, should fall on the (complainants) for their failure to do that which defendants) rejected in advance." *Nass* v. *Munsing*.

As the suit for specific performance was proper and necessary, complainants were entitled to

costs as the prevailing party in the discretion of the Court.

McCloskey v. *Bowden*, 82 Eq. 410;
Cohn v. *Plass et al.*, Err. & App. 100 Atl. 327.

The allowance of costs being in the discretion of the Court, is not appealable.

Pariser v. *Pasteelwick*, Err. & App. 112 Atl. 187.

Appellants do not press their appeal as to allowance of counsel fee.

Finally the contract contained a provision reading

> "It is the intention of the parties hereto that the said parties of the first part will convey all that they have at the above address."

Complainants in equity were not required to convey more than they had.

In *Pyatt* v. *Lyons*, 51 Eq. 308, the agreement was to convey land on the corner of Nassau and Witherspoon streets, Princeton. There was an encroachment of 3 feet, 6 inches in the street. The Court of Errors and Appeals decided that all the vendors could be required to convey under the contract was the lot of land up to the boundary of the street, omitting the encroachment, and the vendee was in fault in refusing the conveyance. It appears therefore that the Court was correct in decreeing specific performance with costs and the decree should be sustained.

Respectfully submitted,

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