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BILL OF COMPLAINT.

In Chancery of New Jersey

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

The complainants, John Saracino and Mary Saracino, his wife, of the City of Newark in the County of Essex and State of New Jersey, respectfully show that:

1. On November 9, 1926, complainant John Saracino was seized in fee simple of all that certain lot, tract, or parcel of lands and premises situate, lying and being in the Township of Hanover in the County of Morris in the State of New Jersey:

BEGINNING at the bridge crossing the Rockaway River near to where Isaac Kingsland formerly lived, at corner of formerly Judith and Mary Peer's land, and from thence running (1) south 21 degrees 10 minutes west 46.30 feet to a point; thence (2) south 1 degree 50 minutes east 218 feet to a point; thence (3) south 65 degrees west 177.83 feet to the road leading from Kingsland's bridge to the Jersey City Water Supply Co. dam; thence (4) along the same south 70 degrees 8 minutes west 262.69 feet to a point; thence; (5) still along said road south 31 degrees 45 minutes west 525.79 feet to a point; thence (5) still along said road south 53 degrees 8 minutes west 689.40 feet to a point; thence south (7) 19 degrees 39 minutes east 132 feet to a point; thence (8) north 88 degrees 51 minutes east 629.94 feet to a point; thence (9) south 1 degree 30 minutes

west 596.64 feet to a point; thence (10) north 82 degrees 30 minutes east 190 feet to a point; thence (11) south 11 degrees 30 minutes east crossing the Jersey City Water Co.'s line 610.50 feet to a point; thence (12) south 87 degrees 18 minutes west 368 feet to a point; thence (13) south 5 degrees 30 minutes east 462 feet to a point in line of lands of one Edelman; thence (14) along his line north 87 degrees 18 minutes east 1056 feet to a point; thence (15) along property of formerly one Starkey and now owned by one Rabe, north 5 degrees 30 minutes west 462 feet to a point; thence (16) along said Rabe property north 89 degrees east 300 feet to a point; thence (17) still along the same north 85 degrees 10 minutes east 330 feet more or less to a corner of property of Elizabeth Meldrum; thence (18) northerly, along the said Meldrum property 985.07 feet to a point; thence (19) south 85 degrees 20 minutes east 425 feet to a point; thence (20) north 4 degrees east still along said Meldrum property 358.73 feet to a point; thence (21) south 85 degrees 20 minutes east 1012 feet along said Meldrum property to a point; thence (22) south 24 degrees west 112 feet to a point; thence (23) south 72 degrees east 995 feet more or less to the Rockaway River; thence (24) up the said river in a northerly direction the several courses and distances thereof to a stake at the southeasterly corner of property of Elsa K. Gay; thence (25) along the same north 74 degrees 8 minutes west 920 feet; thence (26) still along the same north 12 degrees 48 minutes east 44.60 feet to a point; thence (27) still along said

Gay property north 89 degrees 48 minutes west 52.20 feet to a point; thence (28) still along said Gay property north 35 degrees east 26.20 feet to a point in other property of said Gay; thence (29) still along said Gay property north 84 degrees 45 minutes west 877.80 feet to a point; thence (30) along said Gay's property north 5 degrees east 420.70 feet; to the said Rockaway River; thence (31) up the said Rockaway River the several courses and distances thereof to the point and place of BEGINNING.

Containing 135 acres of land more or less.

There is to be excepted however out of and from the said premises above described a lot of land containing one acre more or less, conveyed by Augustus L. Peer to Horace W. Scandlin; said premises are also conveyed subject to the lands owned by the Jersey City Water Supply Co., or Mayor and Alderman of Jersey City, also excepting rights of others in roadways.

2. On the date last mentioned complainants entered into a certain agreement in writing with Kosower Construction Company, a corporation, organized and existing under the laws of the State of New Jersey having its principal office in the City of Jersey City, wherein and whereby complainants agreed to convey the said lands and premises by deed of warranty on or before February 1, 1927, to the said Kosower Construction Company in consideration of the payment by said Kosower Construction Company of the sum of $27,500 and the said Kosower Construction Company agreed to pay to complainants said purchase price of $27,500 by the payment of $1,000 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 Kosower Construction Company by the payment of $6,500 in cash and the execution by said Kosower Construction Company to complainant John Saracino of a purchase money mortgage in the sum of $4,000 payable in three years after date with interest at the rate of six (6) per cent. per annum; the said deed to be delivered at the office of Welanko & Strauss, Counsellors at Law, 24 Commerce street, Newark, New Jersey, on or before the first day of February, 1927, between the hours of 10 in the forenoon and 2 o'clock in the afternoon. The original agreement will be produced at the hearing herein.

3. The said Kosower Construction Company paid to complainants the said sum of $1,000 at the time of the execution and delivery of the said agreement in writing.

4. It was thereafter agreed that the date for closing said Kosower Construction Company be extended to February 16, 1927, at the said office aforesaid. On said 16th day of February, 1927, at the hour of four o'clock in the afternoon complainants duly attended at the office of said Welanko & Strauss aforesaid with a warranty deed conveying the lands and premises herein above referred to to the said Kosower Construction Company duly executed and acknowledged by the complainants for the purpose of delivering the said deed to the said Kosower Construction Company upon the payment by the said Kosower Construction Company of the balance of the purchase money pursuant to the terms of the aforesaid agreement; but the said

Kosower Construction Company refused to accept said deed and refused to pay the purchase price in accordance with the terms of said agreement herein referred to.

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

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

1. That Kosower Construction Company, a corporation, who is the defendant to this suit, may answer this bill of complaint and each statement therein made.

2. That the said Kosower Construction Company 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 Kosower Construction Company of a deed executed by complainants, as in said agreement provided.

3. That in case the said Kosower Construction Company 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 defendant 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 defendant to answer this bill of complaint and to abide by such decree as this Court may make in the premises.

WELANKO & STRAUSS,
Solicitors for and of Counsel with Complainants.

ANSWER AND COUNTER-CLAIM.

IN CHANCERY OF NEW JERSEY.

Between

JOHN SARACINO and MARY SARACINO,
Complainants,
and
KOSOWER CONSTRUCTION COMPANY,
Defendant.

On Bill, Etc.

Answer and Counter-claim.

The answer and counter-claim, of the defendant, Kosower Construction Company, a corporation of New Jersey, against the complainants, John Saracino and Mary Saracino, his wife.

The defendant, Kosower Construction Company, a corporation of New Jersey, answering the bill of complaint says that:

1. It denies that the complainant, John Saracino was seized in fee simple of all that certain lot, tract or parcel of lands and premises, situate, lying and being in the Township of Hanover and the County of Morris, in the State of New Jersey, and more particularly described in the complainant's bill of complaint.

2. It admits the second paragraph of the complainant's bill of complaint.

3. It admits the third paragraph of the complainant's bill of complaint.

4. It admits so much of the fourth paragraph as alleges that it was agreed that the date for

closing be extended to February 16, 1927. It denies that on the 16th day of February, 1927, at the hour of four o'clock in the afternoon, or at any time thereafter that the complainants attended at the office of Welanko & Strauss, with a warranty deed conveying the lands and premises herein referred to, to the said Kosower Construction Company, duly executed and acknowledged by the complainants, for the purpose of delivering the said deed to the Kosower Construction Company, upon the payment by the said Kosower Construction Company, of the balance of the purchase money pursuant to the terms of the aforesaid agreement. The defendant further says it attended at the office of Welanko & Strauss on the 16th day of February, 1927, at the hour of four o'clock in the afternoon, and was ready, willing and able to accept a warranty deed from the complainant, but that the complainants did not and were not in a position to tender a warranty deed to the defendant because of certain outstanding rights of one Jacob Peer, son of Theodore A. Peer, his heirs and assigns, other than Laura Peer, in the premises in question; the complainants were unable to produce any proof of death of Jacob Peer, or the names of other possible heirs, other than Laura Peer; the defendant is also informed that there is an outstanding interest by the wife of Jacob Peer, who has not departed this life, and who has a dower right in the interest of Jacob Peer, to which right the complainants have not possessed themselves, and because of the outstanding rights, the complainants have not a marketable or merchantable title, and that the complainants refuse to deliver to the defendant a warranty deed free from all encumbrances and

objections, and in accordance with the terms of the contract. Defendant further denies that it refused to pay the purchase price or perform their part of the agreement but avers and says that they have been ready, willing and able to perform the terms and conditions of the agreement, and on the 16th day of February, 1927, tendered to the complainants the sum of sixty-five hundred dollars in cash, and agreed to execute the purchase money mortgage to the complainants in accordance with the contract, upon the delivery to them of a deed for the premises, free and clear from any encumbrances and objections.

The defendant, holds itself ready and willing to perform its part of the agreement and upon being tendered a deed for the premises free and clear from any objections, holds itself ready to abide by the terms of this contract.

By way of counter-claim against complainants, John Saracino and Mary Saracino, his wife, the defendant, Kosower Construction Company, says that:

1. On or about November 9, 1927, the complainants, John Saracino and Mary Saracino, his wife, entered into an agreement in writing with the defendant, wherein and whereby, complainants agreed to convey the lands and premises more particularly described in the complainant's bill of complaint, by deed of warranty on or before February 1, 1927, to the defendant, in consideration of the payment by the defendant of the sum of twenty-seven thousand five hundred dollars, and the defendant, agreed to pay the complainants, the said purchase price of twenty-seven thousand five hundred dollars, by the pay-

ment of one thousand dollars on or before the execution of the said agreement, and the payment of the remainder of the said purchase price upon the delivery to the complainants of deed of warranty by the defendant, by the payment of six thousand five hundred dollars in cash and the execution by said defendant to complainant, John Saracino, of a purchase money mortgage in the sum of four thousand dollars payable in three years after date with interest at the rate of six per cent. per annum, the said deed to be delivered at the office of Welanko & Strauss, counsellors-at-law, 24 Commerce street, Newark, New Jersey, on or before the 1st day of February, 1927, between the hours of ten o'clock in the forenoon and two o'clock in the afternoon.

2. The defendant, Kosower Construction Company, paid to complainants, the sum of one thousand dollars at the time of the execution of the said agreement hereinbefore mentioned.

3. Thereafter it was agreed that the date for closing be extended to February 16, 1927, at the said office aforesaid, on that day at the hour of four o'clock in the afternoon, defendant duly attended at the office of Welanko & Strauss aforesaid, and offered to accept a warranty deed conveying the lands and premises herein referred to, to be tendered the sum of six thousand five hundred dollars in cash to the complainants and offered to execute the purchase money mortgage in the sum of four thousand dollars pursuant to the terms of the agreement between the parties; but the said complainants refused the said tender made by the defendant, and failed to execute, deliver or offer to deliver to the defendant, warranty deed in accordance with the terms of the agreement herein referred to, free and clear

of the outsanding rights of one Jacob Peer, son of Theodore A. Peer, his heirs and assigns, other than Laura Peer, in the premises in question; the complainants were unable to produce any proof of death of Jacob Peer, or the names of other possible heirs other than Laura Peer; the defendant is also informed that there is an outstanding interest by the wife of Jacob Peer, who has not departed this life, and who has a dower right in the interest of Jacob Peer, to which right the complainants have not possessed themselves.

4. The defendant, has always been ready, willing and able, and hereby tenders itself ready and willing to perform the agreement according to its terms, and offers to pay to the complainants, the sum of six thousand five hundred dollars in cash, and offers to execute to the complainant, John Saracino, a purchase money mortgage in the sum of four thousand dollars, pursuant to the terms of the agreement, upon delivery by the complainants, of a warranty deed duly executed by the complainants.

The defendant therefore prays:

1. That the complainants, John Saracino, and Mary Saracino, his wife, may answer this counter-claim, and each statement therein contained.

2. That the complainants, John Saracino and Mary Saracino, his wife, may be compelled by the decree of this Court to specifically perform this said agreement with the defendant, Kosower Construction Company, and to deliver to the defendant, a deed of warranty, executed by the complainants; free and clear of any and all encumbrances heretofore mentioned and any and

all outstanding interests heretofore set forth except those interests and encumbrances in the agreement set forth, upon the payment by the defendant of the remainder of the said purchase money, as in the said agreement provided.

MEANEY & LIFLAND,
Solicitors for and of Counsel with Defendant.

REPLICATION.

IN CHANCERY OF NEW JERSEY.

Between JOHN SARACINO and MARY SARACINO, *Complainants,* *and* KOSOWER CONSTRUCTION COMPANY, *Defendant.*	*On Bill, Etc.* *Replication to Answer of Defendant, and Answer to Counter-claim of Defendant.*

1. The complainants join issue in the answer of the defendant.

2. Complainants deny that there was any outstanding rights in one Jacob Peer, son of Theodore A. Peer, or his heirs or assigns.

3. Complainants deny that they were unable to produce any proof of the death of Jacob Peer, or the names of other possible heirs, other than Laura Peer.

4. Complainants deny that there is an outstanding interest in the wife of Jacob Peer, and further denies that there is any dower right in the wife of said Jacob Peer.

As to the counter-claim contained in said answer, complainants say:

1. They repeat all the allegations set forth in the bill of complaint herein.

2. Complainants deny that the said defendant offered to execute the purchase money mort-

Replication.

gage and bond in the principal sum of four thousand dollars pursuant to the terms of the agreement between the parties.

3. Complainants deny that said defendant tendered the sum of sixty-five hundred dollars in cash to the complainants and that complainants refused said tender.

4. Complainants deny that they failed to execute, deliver, or offer to deliver to the defendant a warranty deed in accordance with the terms of the agreement herein referred to, but on the contary state that they did tender to the defendant a warranty deed free from all encumbrances, except as set forth in the agreement, and that said defendant refused to accept said deed.

5. Complainants deny that there are any outstanding rights of one Jacob Peer, son of Theodore A. Peer, or his heirs or assigns, other than Laura Peer.

6. Complainants deny that they were unable to produce any proof of the death of Jacob Peer or the names of any other possible heirs, other than Laura Peer.

7. Complainants deny that there is an outstanding interest in the wife of said Jacob Peer, and deny that the said wife Laura Peer has any dower right in the said premises.

8. Complainants deny the allegations set forth in paragraph four of the counter-claim of said defendant.

WELANKO & STRAUSS,
Solicitors for and of Counsel with Complainants.

Note Joining Issue on Counter-claim.

NOTE JOINING ISSUE ON COUNTER-CLAIM.

IN CHANCERY OF NEW JERSEY.

Between	
JOHN SARACINO and MARY SARACINO, *Complainants,*	*On Bill, Etc.*
and	*Note Joining Issue on Counter-claim of Defendant.*
KOSOWER CONSTRUCTION COMPANY, *Defendant.*	

This defendant, Kosower Construction Company, joins issue on the answer of the complainants, John Saracino and Mary Saracino, to the counter-claim of this defendant.

MEANEY & LIFLAND,
Solicitors of Defendant,
Kosower Construction Company.

ORDER OF REFERENCE.

Filed April 12, 1927.

IN CHANCERY OF NEW JERSEY.

Between JOHN SARACINO and MARY SARACINO, *Complainants,* *and* KOSOWER CONSTRUCTION COMPANY, *Defendant.*	*On Bill, Etc.* *Order of Reference.*

IT IS, on this 12th day of April, 1927, on motion of Welanko & Strauss, solicitors of complainants, ORDERED, that the above-stated cause be referred to Honorable Alonzo Church, one of the Vice-Chancellors, to hear the same for the Chancellor and to report thereon to him, and advise what order or decree should be taken therein.

E. R. WALKER,
C.

We hereby consent to the entry of the foregoing order.

MEANEY & LIFLAND,
Solicitors of Defendant,
Kosower Construction Company.

A true copy.

THOMAS BARBER,
Clerk.

DESIGNATION.

IN CHANCERY OF NEW JERSEY.

Between JOHN SARACINO and MARY SARACINO, his wife, *Complainants,* *and* KOSOWER CONSTRUCTION COMPANY, a corporation, *Defendant.*	*On Bill, Etc.* *Designation.*

This matter being opened to the Court by Welanko & Strauss, solicitors of the complainants, and Meaney & Lifland, solicitors of the defendant, Kosover Construction Company, a corporation, consenting hereto:

It is on this 27th day of April, 1927, ordered that the 18th day of May, 1927, at the hour of ten o'clock in the forenoon at the Chancery Chambers in the City of Newark, be designated as the time and place for the hearing of the above-entitled cause.

Respectfully advised,

ALONZO CHURCH,
V.-C.

We hereby consent to the entry of the foregoing order.

MEANEY & LIFLAND,
Solicitors of Defendant,
Kosover Construction Company, a corporation.

TESTIMONY.

IN CHANCERY OF NEW JERSEY.

May 23, 1927.

Between

JOHN SARACINO,
Complainant,

and

KOSAWER CONSTRUCTION CO.,
Defendant.

Transcript of shorthand notes of testimony taken in the above-entitled cause before his Honor, Alonzo Church, Vice-Chancellor, at the Chancery Chambers, Newark, New Jersey, in the presence of Welanko & Strauss for complainant; Meaney & Lifland, for defendant.

JOHN SARACINO, sworn for complainant.

Direct examination by Mr. Welanko.

Q Mr. Saracino, you are the owner of certain property in the Township of Hanover? A Yes.

Mr. Welanko: Mark this in evidence.
(Paper marked Exhibit C. 1.)

Q And you agreed to convey this property to the Kosawer Construction Company? A Yes.

(Another paper marked Exhibit C. 2.)

Q February 16, 1927, were you at my office to close this deal? A Yes.

Q And did you offer—or did I offer for you to the Kosawer Construction Company a deed conveying this property to them? A Yes.

Q Is that your signature? A Yes.

Q Is that the date that was offered? A Yes.

Q And did they accept the deed? A February 16th.

Q Did the Kosawer Construction Company want to take your deed? A They refused to take it.

(Another paper marked Exhibit C. 3.)

Q Did we ask them to sign a bond and mortgage that they agreed to do in the contract? A Yes.

Q And did they want to sign a bond and mortgage?

Mr. Welanko: That is our case.

Cross examination by Mr. Meaney.

Q Mr. Saracino, at this time when you offered this deed, there was a question, wasn't there, of the mortgagability of that title? A When I left everything to the lawyer.

Q Wasn't there some discussion as to whether the title was good or not? A I left everything to the lawyer.

Q You were present, weren't you? A What do you mean? I don't know the question.

Q Were you there when the deed was offered? A Yes.

Q Did you hear any discussion between the lawyer and Mr. Kosawer of the Kosawer Construction Company with reference to why he

wouldn't take the deed? A I don't know what the question means. I don't understand it clear.

Q You know that your lawyer, Mr. Welanko offered a deed? A Yes.

Q And you know that Mr. Kosawer, acting for the construction company, wouldn't take it? A I can't answer this question.

The Court: If there is not anything the matter with the title, that is for you to bring out. He doesn't know, apperently.

Mr. Meaney: I simply wanted to show there was a discussion about the title in his presence.

The Court: That doesn't make any difference.

Mr. Meaney: That is all.

(Discussion.)

The Court: I am not inclined to force this bill so put on your witnesses.

Mr. Welanko: Will you mark that in evidence also?

(Paper marked Exhibit C. 4.)

CAROLINE D. MAIZE, sworn for the complainant.

Direct examination by Mr. Welanko.

Q Mrs. Maize, you were formerly the wife of Jacob Peer? A Yes.

Q And what was your maiden name? A Edwards.

Q When did you marry Jacob Peer? A '73.

Q 1873? A (Witness nods yes.)

Q Where did you live in 1875? A Why, I lived in Vailsburg until after he went away. He went away in 1874. We were married in 1873 and he went away in 1874.

Q Whom do you mean by "he"? A Why, my husband, Mr. Jacob Peer.

Q Jacob Peer? A He walked out and I haven't seen or heard a word of him from that hour until this.

Q And you obtained, in the year 1884 an absolute divorce from Jacob Peer? A I believe I did, yes.

Mr. Welanko: You have no objection to that; it is a certified copy. Will you mark that?

(Paper marked Exhibit C. 5.)

Q You say you never heard of your husband, Jacob Peer— A Never—

Q Since 1874? A Never a word.

Cross examination by Mr. Meaney.

Q How old was your husband when he left, Mrs. Maize? A Well, I really can't just state. I think he was a year older than me or else I was a year older than he was, when we were married.

Q You were about the same age, practically, when you were married? A Yes.

The Court: Well, how old were you when you were married?

The Witness: I think I was twenty-three, as near as I can remember.

Q So that when Jacob Peer disappeared he was about twenty-four or twenty-five? A Yes; I suppose so.

Q You haven't heard from him since then? A Never a word.

Q How many children did you have by Jacob Peer? A One daughter.

Q Laura? A There she is (indicating).

Q Since then you don't know where your husband went? A Never.

Q And haven't heard from him? A Never.

Q You have remarried? A Yes; I remarried.

Q And in 1884 you got a divorce on the ground of desertion? A (Witness nods yes.)

Q From Jacob Peer? A Yes.

THEODORA WOODRUFF, sworn for the complainant.

Direct examination by Mr. Welanko.

Q Mrs. Woodruff, your name was formerly Peer? A Yes.

Q And you were the sister of Jacob Peer? A Yes.

Q When did you last hear from or see Jacob Peer? A I am forty-seven. He disappeared before I was born.

Q He disappeared before you were born. How old are you? A Forty-seven.

Q Forty-seven and have you ever heard or seen of him— A No.

Q Do you know— A I lived home. I never heard.

Q Have you ever spoken to any of the members of your immediate family, the sisters and brothers of Jacob Peer? A Very seldom.

Q Have you ever spoken about Jacob Peer to any of them? A Yes.

Q Did they ever hear or see of him? A No.

Mr. Meaney: I object to that; that is hearsay.

The Court: That is hearsay.

Q You yourself have never heard of him since you were born? A No, sir.

Mr. Meaney: No questions.

Mr. Welanko: Thomas Peer.

THOMAS H. PEER, sworn for the complainant.

Direct examination by Mr. Welanko.

Q Mr. Peer, you are the cousin of Jacob Peer? A Yes.

Q And how old are you? A I will be seventy next Thursday.

Q And did you know Jacob Peer when—before he disappeared? A Very well, yes, sir.

Q When was the last time you ever saw or heard of Jacob Peer? A I couldn't tell you the last time I saw him.

Q About— A But I could tell the last time I heard from him.

Q Have you any idea about how many years ago it was that you saw him?

Mr. Meaney: Wait a minute. He tells you he can tell you how many years ago he heard from him.

Q Have you any idea about how long ago it was? You don't have to fix it accurately, but about how long ago it was that you saw Jacob Peer. A Well, it must have been '72 or '73, around there somewheres.

Q Now, when was the last time that you ever heard of Jacob Peer?

Mr. Meaney: How, if the Court please, I object to that on the same ground, that hearing of him certainly is hearsay.

The Court: I won't allow it.

Mr. Welanko: We are allowed to prove it.

The Court: I will allow it.

Q When was the last time you ever heard of Jacob Peer? A I think it was 1889.

Q And from whom did you hear of Jacob Peer? A Why, there was a friend of mine from Boonton went out to the coast.

Q What was his name? A Frank Crockett.

Q And what were you going to say? A And he went out to the gold fields and was out there and he came back and I met him here in Newark.

Q When did you meet him in Newark? A I can't tell whether it was June or July.

Q I didn't mean the month; I mean the year. A About '89.

Q And what did he say to you? A He told me he had met my cousin Jake out there. Of course, he knew him; he lived there in the Town of Boonton the same as we did, or just on the outskirts and we worked together and he said he met Jake out on the gold fields.

Q Did he say where? A No; he didn't say where. He says him and another man were working a gold claim there and living in a cabin and

he couldn't go further and came back in a couple of weeks and Jake's partner said Jake was dead.

Mr. Meaney: I object to that. I object to what Jacob's partner said to him.

The Court: That is getting a little too far. However, I will allow it.

Q What did Crockett tell you about Jake then? A He said that he was dead, that his partner said he was dead and buried.

Q And when did this conversation occur? A Well, I don't know. It was, I think, about '89. I can't tell exactly what month.

Q Is this man Crockett dead or alive? A I don't know. He went West and I haven't heard from him then until now.

Mr. Meaney: I ask all that testimony be stricken out.

The Court: I will allow it.

Mr. Welanko: That is all.

Cross examination by Mr. Meaney.

Q Is Crockett a friend of yours, too? A We worked in the iron works together there as young men.

Q That is June and July, 1889? A When I met him here in Newark we had left the iron works and come to Newark. I had come to Newark before that.

Q It was June or July, 1889, you had this conversation? A Yes.

Q Did he tell you, at that time, that he had met your brother? A No, not my brother, my cousin.

Thomas H. Peer, cross.

Q Your cousin, Jacob Peer? A Yes, sir.

Q Did he subsequently go out to the gold fields? A Mr. Crockett?

Q Yes, Mr. Crockett. A Yes, he went afterwards. I never heard from him after that.

Q Did he tell you in 1889 that your cousin's partner told him in the intervening seven years he was dead and buried? A Yes, sir.

Mr. Meaney: That is all.

(Discussion.)

The Court: I will advise a decree dismissing the bill.

MEMORANDUM.

IN CHANCERY OF NEW JERSEY

Between	
JOHN SARACINO and MARY SARACINO, *Complainants,*	*Memorandum.*
and	
KOSOWER CONSTRUCTION COMPANY, *Defendant.*	

THIS MEMORANDUM IS NOT TO BE PUBLISHED IN THE OFFICIAL OR UNOFFICIAL REPORTS.

Welanko & Strauss for complainants.

Meaney & Lifland for defendant.

CHURCH, *V.-C.*

This is a bill for specific performance. The defendants claim that the title is defective because there is an outstanding interest in one Jacob Peer.

It is stipulated that if Jacob Peer is alive he has an undivided one-fifteenth interest in the premises.

It appears that Jacob Peer disappeared in 1874; in 1884 his wife secured a divorce from him.

The defendant objected to taking the title because there was no proof of the death of Jacob Peer.

Thomas Peer, a cousin, testified at the hearing that he had heard of Jacob Peer in 1889. The way he heard of him seems to be as follows: A friend of his, one Frank Crockett, who knew

Jacob Peer very well, went to the gold fields and saw Jacob Peer there. He went further west and came back in a few weeks and Jacob Peer's partner told Crockett who told the witness that Jacob Peer had died.

I do not think that this testimony is direct enough to justify me in assuming that Jacob Peer is dead. The witness says that somebody told him that somebody else told him that the man was dead. As specific performance will not be decreed as a matter of right but is in the discretion of the court, it seems to me that starting with the stipulation that Jacob Peer, if alive, is entitled to a one-fifteenth interest, there is not enough testimony to conclusively show his death. Therefore this question would so cloud the title as to make it unmarketable.

I therefore feel that the bill should be dismissed.

Court of Chancery of New Jersey

Alonzo Church

Vice Chancellor

Newark, N. J.

October 18, 1927.

Thomas F. Meaney, Jr., Esq.
Messrs. Welanko & Strauss. Re: Saracino v. Kosower Const. Co.

Gentlemen:

Please add to the memorandum that I sent you on Saturday the following:

"See Porter v. Ogden, 68 Equity, page 409."

Yours very truly,

ALONZO CHURCH

V.C.

Stipulation.

STIPULATION.

IN CHANCERY OF NEW JERSEY.

JOHN SARACINO and MARY SARACINO, *Complainants,* *and* KOSOWER CONSTRUCTION COMPANY, *Defendant.*	*On Bill, &c.* *Stipulation.*

It is hereby stipulated by and between Welanko & Strauss, solicitors for the complainants, and Meaney & Lifland, solicitors for the defendant, that Jacob Peer and his heirs mentioned in the evidence adduced at the trial of the above-entitled cause and who was the Jacob Peer mentioned in the recital T-20 of Deeds for Morris County, p. 353, &c., acquired an undivided one-fifteenth interest in part of the premises described in Exhibit C. 1 and Exhibit C. 2.

WELANKO & STRAUSS,
Solicitors for Complainant.

MEANEY & LIFLAND,
Solicitors for Defendant.

Final Decree.

FINAL DECREE.

IN CHANCERY OF NEW JERSEY.

Between JOHN SARACINO and MARY SARACINO, *Complainants,* *and* KOSOWER CONSTRUCTION COMPANY, *Defendant.*	*On Bill, Etc.* *Final Decree.*

This cause coming on to be heard in the presence of Welanko and Strauss, solicitors of the complainants, John Saracino and Mary Saracino, and Meaney & Lifland, solicitors of the defendant, Kosower Construction Company, and the Court having examined the pleadings, and having taken proofs orally and in open court, and having heard and considered the arguments of counsel thereon;

And it appearing to the satisfaction of the court that the complainants are not entitled to the relief sought and prayed for by them in their bill of complaint;

And it further appearing that the defendant is entitled to a return of the sum of one thousand dollars, deposit money paid to the complainants, together with a reasonable search fee in the sum of one hundred twenty-five dollars, together with counsel fees and costs;

It is thereupon, on this 14th day of September, 1927,

Final Decree.

ORDERED, ADJUDGED and DECREED that the complainants' bill be and the same is hereby dismissed with costs, and the Chancellor, by virtue of the powers and authority of this court doth hereby further,

ORDER, ADJUDGE and DECREE that the complainants pay to the defendant the sum of one thousand dollars, being the deposit money paid to the complainants, together with the sum of one hundred twenty-five dollars, being a reasonable search fee expended by the defendant; together with the sum of two hundred fifty dollars as and for a reasonable counsel fee, together with costs to be taxed.

Respectfully advised,

ALONZO CHURCH,
Vice-Chancellor.

We consent to the making of the within decree.

WELANKO & STRAUSS,
Solicitors of Complainants.

MEANEY & LIFLAND,
Solicitors of Defendant.

NOTICE OF APPEAL.

IN CHANCERY OF NEW JERSEY.

Between JOHN SARACINO and MARY SARACINO, *Complainants,* *and* KOSOWER CONSTRUCTION COMPANY, *Defendant.*	*On Bill, Etc.* *Notice of Appeal.*

The complainants John Saracino and Mary Saracino hereby appeal from the final decree made in the above-entitled cause on September 14, 1927, by Edwin Robert Walker, Chancellor, on the advice of Alonzo Church, Vice-Chancellor, dismissing complainant's bill with costs, directing the payment by complainants to the defendant of the sum of one thousand dollars ($1,000) together with the sum of one hundred twenty-five ($125) reasonable search fee, two hundred fifty dollars ($250) counsel fee and taxed costs, and from the whole and every part thereof to the Court of Errors and Appeals in the last resort in all causes.

Dated September 14, 1927.

WELANKO & STRAUSS,
Solicitors for and of Counsel
with Complainants.

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

ABRAHAM WELANKO,
Of Counsel with Complainants.

Service acknowledged Sept. 16, 1927.

PETITION OF APPEAL.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between JOHN SARACINO and MARY SARACINO, *Complainants-Appellants,* *and* KOSOWER CONSTRUCTION COMPANY, *Defendant-Respondent.*	*On Bill, Etc.* *Petition.*

To the New Jersey Court of Errors and Appeals:

The petition of John Saracino and Mary Saracino, appellants in the above-stated cause, respectfully shows:

That your petitioners find themselves aggrieved by a final decree made in the Court of Chancery bearing date September 14, 1927, wherein the said John Saracino and Mary Saracino were complainants and the said Kosower Construction Company was defendant, in this respect, to wit: That the said decree directed that the complainants' bill be dismissed with costs and that the complainants pay to the defendant the sum of one thousand dollars ($1,000) together with the sum of one hundred twenty-five dollars ($125) search fee, and two hundred fifty dollars ($250) counsel fee together with costs to be taxed.

And, your petitioners humbly appeal from the whole of said decree upon the ground that the same is erroneous, for that the Chancellor should have decreed specific performance in accordance

with the prayer of said complainants' bill because the testimony adduced at the final hearing in said cause proved conclusively complainants' right to the relief prayed for in their said bill of complaint and for the same reason the said Chancellor should not have decreed the dismissal of said bill of complaint, the payment of said sum of one thousand dollars ($1,000), said sum of one hundred twenty-five dollars ($125), allowance to counsel of said sum of two hundred fifty ($250) and taxed costs.

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

WELANKO & STRAUSS,
Solicitors and of Counsel with
Complainants-Appellants.

ACKNOWLEDGMENT OF SERVICE.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between JOHN SARACINO and MARY SARACINO, *Complainants-Appellants,* *and* KOSOWER CONSTRUCTION COMPANY, *Defendant-Respondent.*	*On Bill, Etc.* *Acknowledgment of Service.*

Service of petition of appeal in the above matter is hereby acknowledged this 28th day of September, 1927.

MEANEY & LIFLAND,
Solicitors and of Counsel with
Defendant-Respondent.

ANSWER TO PETITION OF APPEAL.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between	
JOHN SARACINO and MARY SARACINO, *Complainants-Appellants,*	*On Appeal from the Court of Chancery.*
and	
KOSOWER CONSTRUCTION COMPANY, *Defendant-Respondent.*	*Answer to Petition of Appeal.*

The answer of Kosower Construction Company, the above-named defendant-respondent, to the petition of appeal of John Saracino and Mary Saracino, the above-named complainants-appellants.

This defendant-respondent not admitting the truth of any or all of the matters in the petition of appeal contained for answer thereto, nevertheless, admit that a decree was, on September 14, 1927, made and entered in the Court of Chancery of New Jersey, in the above-entitled cause for the purposes in said petition mentioned and as therein set forth; but as to the substance and form of said decree, this defendant-respondent begs leave to refer thereto when the same shall be produced.

This defendant-respondent is advised and believes that the said decree is agreeable to equity; and it prays that the same may be confirmed with

costs to be taxed in favor of said defendant-respondent.

MEANEY & LIFLAND,
Solicitors for Defendant-Respondent.

THOMAS F. MEANEY,
Of Counsel.

Exhibit C. 1.

EXHIBIT C. 1.

Augustus L. Peer & Al. To John Saracino

THIS INDENTURE, Made the Tenth day of April, in the year of our Lord One Thousand Nine Hundred and Twenty-six, Between Augustus L. Peer, (unmarried) L. Newton Peer, (unmarried) and Thomas H. Peer, (widower) of the Township of Hanover, in the County of Morris and State of New Jersey, party of the First Part; And John Saracino, 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 One Dollar and other good and valuable consideration, lawful money of the United States of America, to them in hand well and truly paid by the said party of the Second Part, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said party of the First Part being therewith fully satisfied, contented and paid, have given, granted, bargained, sold, aliened, released, enfeoffed, conveyed and confirmed, and by these presents do give, grant, bargain, sell, alien, release, enfeoff, convey and confirm unto the said party of the Second Part, and to his heirs and assigns, forever, ALL that certain tract or parcel of land and premises, hereinafter Particularly described, situate, lying and being in the Township of Hanover, in the County of Morris and State of New Jersey. BEGINNING at the bridge crossing the Rockaway River, near to where Isaac Kingsland formerly lived, at a corner of formerly Judith and Mary Peer's land, and from thence running (1) South 21° 10′ West,

Exhibit C. 1.

forty-six and thirty-hundredths feet to a point; thence (2) South 1° 50′ East, two hundred and eighteen feet to a point; thence (3) south 65° west, one hundred and seventy-seven and eighty-three hundredths feet to the road leading from Kingsland's bridge to *to* the Jersey City Water Supply Company's dam; thence (4) along the same, South 70° 08′ West, two hundred and sixty-two and sixty-nine hundredths feet to a point; thence (5) still along said road, South 31° 45′ West, five hundred and twenty-five and seventy-nine hundredths feet to a point; thence (6) still along said road, South 53° 08′ west, six hundred and eighty-nine and forty hundredths feet to a point; thence (7) South 19° 39′ East, one hundred and thirty-two feet to a point; thence (8) North 88° 51′ East, six hundred and twenty-nine and ninety-four hundredths feet to a point; thence (9) South 1° 30′ West, five hundred and ninety-six and sixty-four hundredths feet to a point; thence (10) North 82° 30′ East, one hundred and ninety feet to a point; thence (11) South 11° 30′ East, crossing the Jersey City Water Company's line, six hundred and ten and fifty hundredths feet to a point; thence (12) South 87° 18′ West. three hundred and sixty-eight feet to a point; thence (13) South 5° 30′ East, four hundred and sixty-two feet to a point in line of lands of one Edelmann; thence (4) along his line, North 87° 18′ East, ten hundred and fifty-six feet to a point; thence (15) along property of formerly one Starkey, and now owned by one Rabe, North 5° 30′ West, four hundred and sixty-two feet to a point; thence (16) along said Rabe property, North 89° East, three hundred feet to a point; thence (17) still along the same, North 85° 10′ East, three hundred and thirty feet, more

Exhibit C. 1.

or less, to a corner of property of Elizabeth Meldrum; thence (18) Northerly along the said Meldrum property, nine hundred and eighty-five and seven hundredths feet to a point; thence (19) South 85° 20′ East, four hundred and twenty-five feet to a point; thence (20) North 4° East, still along said Meldrum property, three hundred and fifty-eight and seventy-three hundredths feet to a point; thence (21) South 85° 20′ East, ten hundred and twelve feet, along said Meldrum property, to a point; thence (22) South 24° West, one hundred and twelve feet to a point; thence (23) South 71° East, nine hundred and ninety-five feet, more or less, to the Rockaway River; thence (24) up the said river, in a northerly direction, the several courses and distances thereof, to a stake at the southeasterly corner of property of Elisa K. Gay; thence (25) along the same, North 74° 08′ West, nine hundred and twenty feet; thence (26) still along the same, North 12° 48′ East forty-four and sixty hundredths feet to a point; thence (27) still along said Gay property North 89° 48′ West, fifty-two and twenty hundredths feet to a point: thence (28) still along said Gay property, North 35° East. twenty-six and twenty hundredths feet to a point in other property of said Gay; thence (29) still along said Gay property, North 84° 45′ West, eight hundred and seventy-seven and eighty hundredths feet to a point; thence (30) along said Gay property, North 5° East, four hundred and twenty and seventy hundredths feet to the said Rockaway River; thence (31) up the said Rockaway River; the several courses and distances thereof, to the point and place of Beginning. Containing one hundred and thirty-five acres of land, more or less. There is to be excepted, however, out

Exhibit C. 1.

of and from said premises above described, a lot of land containing one acre, more or less, conveyed by Augustus L. Peer to Horace W. Scandlin; said premises are also conveyed subject to the lands owned by the Jersey City Water Supply Company or Mayor and Alderman of Jersey City, also excepting rights of others in roadways. It is understood that the parties of the first part hereby convey all *righs* in Deeds now held by them for the above premises. It is understood and agreed that possession of lands occupied by dwellings, outbuildings and garden is to be given October 1st, 1926. TOGETHER with all and singular the houses, buildings, trees, ways, waters, profits, privileges, and advantages, with the appurtenances to the same belonging or in anywise appertaining: Also, all the estate, right, title, interest, property, claim and demand whatsoever, of the said party of the First Part, of, in and to the same, and of, in and to every part and parcel thereof. TO HAVE AND TO HOLD, all and singular the above described land and premises, with the appurtenances, unto the said party of the Second Part, his heirs and assigns, to the only proper use, benefit and behoof of the said party of the Second Part, his heirs and assigns forever: And the said parties of the first part do for themselves, their heirs, executors and administrators covenant and agree to and with the said party of the Second Part, his heirs and assigns, that the said parties of the first part are the true, lawful and right owners of all and singular the above described land and premises, and of every part and parcel thereof, with the appurtenances thereunto belonging; and that the said land and premises, or any part thereof, at the time of the sealing and delivery of these presents, are not encumbered by any

Exhibit C. 1.

mortgage, judgment or limitation, or by any encumbrance whatsoever, by whch the title of the said party of the Second Part, hereby made or intended to be made, for the above described land and premises, can or may be changed, charged, altered or defeated in any way whatsoever:

And also that the said party of the First Part now have good right, full power and lawful authority to grant, bargain, sell and convey the said land and premises in manner aforesaid. And also, that they, the said Augustus L. Peer, L. Newton Peer, and Thomas H. Peer, their heirs, executors and administrators will WARRANT, secure, and forever defend the said land and premises unto the said John Saracino, his heirs and assigns, forever, against the lawful claims and demands of all and every person or persons, freely and clearly freed and discharged of and from all manner of encumbrance whatsoever. IN WITNESS WHEREOF, the said party of the First Part have hereunto set their hands and seals the day and year first above written.

AUGUST L. PEER (L. S.)
L. NEWTON PEER (L. S.)
THOMAS H. PEER (L. S.)

Signed, Sealed and Delivered in the presence of

NELSON C. DOLAND

STATE OF NEW JERSEY }
COUNTY OF MORRIS } *ss.*

BE IT REMEMBERED, That on this Tenth day of April, in the year of our Lord, One Thousand Nine Hundred and Twenty-six, before me the subscriber, an Attorney at Law of New Jersey,

Exhibit C. 1.

personally appeared Augustus L. Peer, (unmarried) L. Newton Peer, (unmarried) and Thomas H. Peer, (widower) who I am satisfied are the grantors mentioned in the within Indenture, and 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.

NELSON C. DOLAND
Attorney at Law of New Jersey

Received & Recorded April 12th., 1926 at 2:13 o'clk. P. M.

E. BERTRAM MOTT, Clerk. No. 11313

STATE OF NEW JERSEY, }
COUNTY OF MORRIS. } *ss.*

I, E. BERTRAM MOTT, Clerk of the County of Morris, do hereby Certify that the foregoing is a true copy of the record of a Deed given by Augustus L. Peer & Al. to John Saracino, as fully and entirely as the same remains of record in my office in Book U-29 of Deeds for said County, on pages 577, etc.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said County, at Morristown, this twelfth day of May, A. D. nineteen hundred and twenty-seven.

(SEAL) E. BERTRAM MOTT,
Clerk.

Exhibit C. 2.

MORRIS COUNTY CLERK'S OFFICE

MORRISTOWN, NEW JERSEY

DEED

Augustus L. Peer & Al.
To
John Saracino

Certified Copy

Deed Dated April 10th, 1926
Rec. & Rec. April 12, 1926
Book U-29 of Deeds on
Pages 577 &c.

Elias Bertram Mott, Clerk.

EXHIBIT C. 2.

ARTICLES OF AGREEMENT, made the 9th day of November in the year of Our Lord One Thousand Nine Hundred and twenty six

BETWEEN John Saracino and Mary, his wife of the City of Newark in the County of Essex and State of New Jersey party of the first part;

AND Kosower Construction Co. a corporation of New Jersey having its principal office in the City of Jersey City, 591 Summit Ave., party of second part;

WITNESSETH, That the said party of the first part, for and in consideration of the sum of Twenty seven thousand five hundred 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,

Exhibit C. 2.

doth agree to and with the said party of the second part, that the said party of the first part, will well and sufficiently convey to the said party of the second part, its successors assigns, by Deed of Warranty free from all encumbrance except as hereinafter set forth on or before the first day of February next ensuing the date hereof, all that lot , tract , or parcel , of land and premises, hereinafter particularly described situate, lying and being in the Township of Hanover in the County of Morris and State of New Jersey.

BEGINNING at the bridge crossing the Rockaway River near to where Isaac Kingsland formerly lived, at corner of formerly Judith and Mary Peer's land, and from thence running (1) South 21 degrees 10 minutes west 46.30 feet to a point; thence (2) south 1 degree 50 minutes east 218 feet to a point; thence (3) south 65 degrees west 177.83 feet to the road leading from Kingsland's bridge to the Jersey City Water Supply Co. dam; thence (4) along the same south 70 degrees 8 minutes west 262.69 feet to a point; thence (5) still along said road south 31 degrees 45 minutes west 525.79 feet to a point; thence (6) still along said road south 53 degrees 8 minutes west 689.40 feet to a point; thence south 19 degrees 39 minutes east 132 feet to a point; thence (8) north 88 degrees 51 minutes east 629.94 feet to a point; thence (9) south 1 degree 30 minutes west 596.64 feet to a point; thence (10) north 82 degrees 30 minutes east 190 feet to a point; thence (11) south 11 degrees 30 minutes east crossing the Jersey City Water Co's line 610.50 feet to a point; thence (12) south 87 degrees 18 *minyes* west 368 feet to a point; thence (13) south 5 degrees 30 minutes east 462 feet to a point in line

Exhibit C. 2.

of lands of one Edelmann; thence (14) along his line north 87 degrees 18 minutes east 1056 feet to a point; thence (15) along property of formerly one Starkey and now owned by one Rabe, north 5 degrees 30 minutes west 462 feet to a point; thence (16) along said Rabe property north 89 degrees east 300 feet to a point; thence (17) still along the same north 85 degrees 10 minutes east 330 feet more or less to a corner of property of Elizabeth Meldrum; thence (18) northerly, along the said Meldrum property 985.07 feet to a point; thence (19) south 85 degrees 20 minutes east 425 feet to a point; thence (20) north 4 degrees east still along said Meldrum property 358.73 feet to a point; thence (21) south 85 degrees 20 minutes east 1012 feet along said Meldrum property to a point; thence (222) south 24 degrees west 112 feet to a point; thence (23) south 72 degrees east 995 feet more or less to the Rockaway River; thence (24) up the said river in a northerly direction the several courses and distances thereof to a stake at the southeasterly corner of property of Elsa K. Gay; thence (25) along the same north 74 degrees 8 minutes west 920 feet; thence (26) still along the same north 12 degrees 48 minutes east 44.60 feet to a point; thence (27) still along said Gay property north 89 degrees 48 minutes west 52.20 feet to a point; thence (28) still along said Gay property north 35 degrees east 26.20 feet to a point in other property of said Gay; thence (29) still along said Gay property north 84 degrees 45 minutes west 877.80 feet to a point thence (30) along said Gay's property north 5 degrees east 420.70 feet to the said Rockaway River; thence (31) up the said Rockaway River the several courses and distances thereof to the point and place of Beginning.

Exhibit C. 2.

Containing 135 acres of land more or less.

And the said Kosower Construction Co. for itself its successors and assigns, doth covenant, promise and agree to and with the said party of the first part, their heirs, executors, administrators and assigns, that the said party of the second part, will pay and satisfy, or cause to be paid and satisfied, unto the said party of the first part, the said sum of Twenty Seven Thousand Five Hundred Dollars as and for the purchase money of the foregoing described land and premises, in the following manner, that is to say:

On Execution of this agreement for which this is also a receipt...$	1000.00
On delivery of deed, cash.....$	6500.00
By assuming the mortgage at present a lien on the premises, and paying the same according to the terms thereof due in 1931 containing no provision requiring payment of installments, except in accordance with release provision .....$	10000.00
By assuming the mortgage at present a lien on the premises and paying the same according to the terms thereof, due April 1927....	6000.00
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, or to be assessed against the prem-	

M. L. L.

ises, with interest at six % payable semi-annually for three years to be a third mortgage, with 30 days Interest and 60 days tax default clauses. .....$ 4000.00

27500.00

There is to be excepted however out of and from the said premises above described a lot of land containing one acre more or less, conveyed by Augustus L. Peer to Horace W. Scandlin; said premises are also conveyed subject to the lands owned by the Jersey City Water Supply Co. or Mayor and Alderman of Jersey City, also excepting rights of others in roadways.

Said $4,000. mortgage to be drawn by the attorneys of the vendors, and vendee to pay the cost thereof and also the cost of recording the same.

When the $6,000. mortgage falls due the vendee shall have the right to take assignment thereof or extend the term thereof for a period not to exceed the unexpired term of the aforesaid $4,000. mortgage; or the vendee shall make payment in full of the aforesaid $4,000. mortgage when the said $6,000. mortgage shall become due and thereupon the vendors shall arrange to take assignment of said $6,000. mortgage, or at their option required the vendee to execute and deliver a new bond and mortgage in the principal sum of $6,000. in the place and stead of the original $6,000. mortgage for a term not to exceed the unexpired term of the aforesaid $4,000. mortgage; said $4,000. mortgage to contain a clause containing the aforesaid provision.

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,

Vendee shall also have the further privilege to replace present $6,000. mortgage with another $6,000. non-installment mortgage for a term not to exceed the unexpired term of said $4,000. mortgage; said mortgage to be similar in all respects to said present $6,000. mortgage, provided always the first mortgage shall be in good standing and not have become due or in default, and thereupon the vendors shall subordinate said $4,000. mortgage to said new $6,000. mortgage; said subordination agreements to be at the expense of the vendee; and in such event the vendors shall be entirely relieved of any obligation to advance any money for or take over any such $6,000. mortgage as provided for in the paragraph heretofore.

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

And It Is Further Agreed, by the parties hereto, that the said Deed shall be delivered and received at the office of Welanko & Strauss, 24 Commerce Street, Newark, N. J. between the hours of ten in the forenoon and two o'clock in the afternoon on the said first day of February 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.

Exhibit C. 2.

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

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

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 Martin Act proceedings or any Act for the Sale of Land for non-payment of the municipal taxes or assessments, or adverse or color of title possession.

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

If at the time for the delivery of the deeds, the premises or any part thereof shall be or shall have been affected by an 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. Unconfirmed improvements or assessments, if

Exhibit C. 2.

any, shall be paid and allowed by the seller on account of the purchase price, if the improvement or work has been completed on or before

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

KOSOWER CONSTRUCTION CO (L. S.)

By Abraham Kosower,
President.

Signed, Sealed and Delivered in the Presence of

M. Lester Lynch.

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

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

Be It Remembered, That on this first day of November 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 John Saracino and Mary his wife who, I am satisfied, are the grantor 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 Saracino being by me privately examined, separate and apart from her husband, did further acknowledge 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.

Master in Chancery of New Jersey.

EXHIBIT C. 3.

THIS INDENTURE, Made the first day of February, in the year of our Lord One Thousand Nine Hundred and Twenty-seven

BETWEEN John Saracino, and Mary, his wife of the City of Newark in the County of Essex and State of New Jersey, of the first part,

AND Kosower Construction Company a body corporate of the State of New Jersey party of the second part,

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

confirm unto the said party of the second part, its successors and assigns, forever

ALL that tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the Township of Hanover in the County of Morris and State of New Jersey

BEGINNING at the bridge crossing the Rockaway River near to where Isaac Kingsland formerly lived, at corner of formerly Judith and Mary Peer's land, and from thence running (1) South 21 degrees 10 minutes west 46.30 feet to a point; thence (2) south 1 degree 50 minutes east 218 feet to a point thence (3) south 65 degrees west 177.83 feet to the road leading from Kingsland's bridge to the Jersey City Water Supply Co. dam; thence (4) along the same south 70 degrees 8 minutes west 262.69 feet to a point; thence (5) still along said road south 31 degrees 45 minutes west 525.79 feet to a point; thence (6) still along said road south 53 degrees 8 minutes west 689.40 feet to a point; thence south 19 degrees 39 minutes east 132 feet to a point; thence (8) north 88 degrees 51 minutes east 629.94 feet to a point; thence (9) south 1 degree 30 minutes west 596.64 feet to a point; thence (10) north 82 degrees 30 minutes east 190 feet to a point; thence (11) south 11 degrees 30 minutes east crossing the Jersey City Water Co's line 610.50 feet to a point; thence (12) south 87 degrees 18 minutes west 368 feet to a point; thence (13) south 5 degrees 30 minutes east 462 feet to a point in line of lands of one Edelmann; thence (14) along his line north 87 degrees 18 minutes east 1056 feet to a point; thence (15) along property of formerly one Starkey and now owned by one Rabe, north 5 degrees 30 minutes west 462 feet to a point; thence (16) along said Rabe prop-

erty north 89 degrees east 10 minutes east 330 feet to a point; thence (17) still along the same north 85 degrees 10 minutes east 330 feet more or less to a corner of property of Elizabeth Meldrum; thence (18) northerly, along the said Meldrum property 985.07 feet to a point; thence (19) south 85 degrees 20 minutes east 425 feet to a point; thence (20) north 4 degrees east still along said Meldrum property 358.73 feet to a point; thence (21) south 85 degrees 20 minutes east 1012 feet along said Meldrum property to a point; thence (22) south 24 degrees west 112 feet to a point; thence (23) south 72 degrees east 995 feet more or less to the Rockaway River; thence (24) up the said river in a northerly direction the several courses and distances thereof to a stake at the southeasterly corner of property of Elsa K. Gay; thence (25) along the same north 74 degrees 8 minutes west 920 feet; thence (26) still along the same north 12 degrees 48 minutes east 44.60 feet to a point; thence (27) still along said Gay property north 89 degrees 48 minutes west 52.20 feet to a point; thence (28) still along said Gay property north 35 degrees east 26.20 feet to a point in other property of said Gay; thence (29) still along said Gay property north 84 degrees 45 minutes west 877.80 feet to a point thence (30) along said Gay's property north 5 degrees east 420.70 feet; to the said Rockaway River; thence (31) up the said Rockaway River the several courses and distances thereof to the point and place of Beginning.

Containing 135 acres of land more or less.

Excepting, however out of and from the above described premises a lot of land containing one acre more or less conveyed by Augustus L. Peer to Horace W. Scandlin and lands owned by the

Jersey City Water Supply Company or Mayor or Alderman of Jersey City; also excepting rights of others in roadways.

Being the same premises conveyed to John Saracino by Augustus L. Peer and others by deed dated April 10, 1926, and recorded April 12, 1926 in the office of the Clerk of Morris County in Book U 29 of Deeds for said County on Page 577, etc.

This conveyance is made subject to two mortgages in the respective sums of $10,000 and $6,000 which the party of the second part hereby assumes and agrees to pay, said sums having been allowed on account of the purchase price herein.

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

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

To Have and to Hold, all and singular the above described land and premises, with the appurtenances, unto the said party of the second part, its successors and assigns, to the proper use, benefit and behoof of the said party of the second part, its successors and assigns forever: and the said John Saracino does for himself, his heirs, executors and administrators, covenant and agree to and with the said party of the second part, its successors and assigns, that he the said John Saracino is the true, lawful and right owner of all and singular the above described land and premises, and of every part and parcel thereof, with the appurtenances thereunto belonging; and that the said land and premises,

Exhibit C. 3.

or any part thereof, at the time of the sealing and delivery of these presents, are not encumbered by any mortgage, judgment, or limitation, or by any encumbrance whatsoever, by which the title of the said party of the second part, hereby made or intended to be made, for the above described land and premises, can or may be changed, charged, altered or defeated in any way whatsoever: except as aforesaid

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

And Also that the said John Saracino will Warrant, secure, and forever defend the said land and premises unto the said party of the second part, its successors and assigns, forever, against the lawful claims and demands of all and every person or persons, freely and clearly freed and discharged of and from all manner of encumbrance whatsoever. except as aforesaid

In Witness Whereof, the said party of the first part have hereunto set their hands and seals the day and year first above written.

JOHN SARACINO (L. S.)
MARY SARACINO (L. S.)

Signed, Sealed and Delivered
in the Presence of

Abraham Welanko

Exhibit C. 3.

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

Be It Remembered, That on this 1st day of February in the year of our Lord One Thousand Nine Hundred and Twenty Seven, before me, the subscriber, a Master in Chancery of New Jersey personally appeared John Saracino and Mary Saracino, his wife who, I am satisfied are the grantor mentioned in the within Instrument, to whom I first made known the contents thereof, and thereupon he acknowledged that, he signed, sealed and delivered the same as his voluntary act and deed, for the uses and purposes therein expressed; and the said Mary Saracino 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.

ABRAHAM WELANKO
A Master in Chancery of New Jersey

DEED.

John Saracino, and Mary Saracino, his wife

To

Kosower Construction Company

Exhibit C. 4.

EXHIBIT C. 4.

Francenia E. Vreeland & al) Whereas Jacob
To) D. Peer late of
Newton Peer) the Township of
) Hanover in the
County of Morris and State of New Jersey died leaving a last Will and Testament, dated March 23″ 1877, and which was duly admitted to probate by the Surrogate of the County of Morris wherein and whereby he did among other things, make provision as follows:

Item. I give to my daughter Catherine all my homestead farm that descended to me as one of the six children and heirs of my father Daniel Peer and also including such share as descended to my brother Daniel and which I purchased from him which said two portions of my fathers estate is that part of my homestead farm whereon the house in which I reside stands, and begins about at the wagon house in front of my said dwelling house, and being one lot wide extends back westerly to a line formerly of land of my sisters Mary and Judah Peer and which descended to them as heirs of my fathers estate, but which now belongs to my daughter Catherine and also I give to my daughter Catherine a lot of one acre of land which I bought of Moses Peer and wife and which lies immediately in front of my dwelling and adjoining my said old homestead farm and also I give to my daughter Catherine one other lot of ground situated Easterly of my wagon house and lying between said wagon house and the Rockaway River and bounded by a fence running Easterly from said wagon house to said river and by another fence running Northeasterly from said wagon house to said Rockaway River

Exhibit C. 4.

or Zabriskie's Mill Pond, and also I give to my daughter Catherine all my undivided one fifth interest which I own in the lands late of Moses Peer, deceased, and which lie adjoining on the Southerly side of my said old homestead farm hereinbefore given to my said daughter Catherine and also I give to my daughter Catherine one half of the land containing what is known on my farm as the green woods, and lies adjoining the Rockaway River, the part of said green woods lot which I desire my daughter Catherine to have is the westerly end near to the bridge over said River and is to be ascertained and set-off to her in the following manner, viz:—by running a straight line beginning in the Westerly line of my farm and running Easterly at a point five rods Southerly of where the private road now runs from said river bridge to my dwelling, to such point from which a direct line running northerly to said Rockaway River will include the whole of said green woods, and then by running a straight line from said Southerly line to the said river so as to divide equally as near as may be the green wood timber and trees on said green woods lot; the westerly portion thereof on which stands my house in which Humphrey Peer now resides I desire my daughter Catherine to have, the said lands hereinbefore given by me to my daughter Catherine are given for and during her national life, and after her decease I do given and devise the said lands to such person or persons as shall be her heir or heirs of land held by her in fee simple, whereas said Catherine J. Davenport (late Peer) has since died and left surviving her the following named persons as her heirs of land held by her in fee simple, Francenia E. Vreeland only child, descendant and heir at law of her deceased

Exhibit C. 4.

brother Silas Peer deceased, Cornelia B. Peer, only child, descendant and heir at law of Levi Peer another deceased brother, and the following named children, descendants and heirs at law of one Theodore A. Peer deceased, viz:—Fannie Peer, Abbie H. Bryant, Theodora Woodruff, and one Laura Peer the only child descendant and heir at law of one Jacob Peer deceased, a son of said Theodore A. Peer deceased and also Jacob N. Peer (since deceased) a brother of said Catherine J. Davenport deceased.

And whereas said Francenia E. Vreeland, Cornelia B. Peer, Fannie Peer, Dora Woodruff and Daniel Woodruff her husband, Abbie H. Bryant and Elias A. Bryant her husband, and said Laura Peer desire to sell and convey all of their estate, right, title, and interest in and to said lands mentioned in the will of said Jacob D. Peer deceased as hereinbefore set forth.

Now this Indenture, made this Fifth day of April A. D. Ninteen Hundred and Ten Between Francenia E. Vreeland (widow) of Hanover Township, Fannie Peer, (single) of the Town of Morristown, of the County of Morris, Cornelia B. Peer (single) of Boonton, Morris County and Dora Woodruff and Daniel Woodruff her husband, and Laura Peer, of Caldwell, County of Essex, and all the foregoing named in the State of New Jersey, Abbie H. Bryant and Elias A. Bryant her husband of Florida, Volusia County, parties of the first part, and Newton Peer of the said Township of Hanover in the County of Morris and State of New Jersey, party of the second part, Witnesseth: that said parties of the first part, for and in consideration of Five Hundred and Twenty-five Dollars, lawful money of the United States of America, to them in hand well and truly paid by the said party of the

Exhibit C. 4.

second part, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said parties of the first part being therewith fully satisfied, contended and paid, have given, granted, bargained, sold, aliened, released, enfeoffed, conveyed and confirmed, and by these presents do give, grant, bargain, sell, alien, release enfeoff, convey and confirm unto the said party of the second part, and to his heirs and assigns, forever, All their estate, right, title and interest in and to all those certain lands and premises, situate, lying and being in the Township of Hanover in the County of Morris and State of New Jersey, described in and by the last will and testament of Jacob D. Peer as hereinbefore set forth as devised to his daughter Catherine.

Together with all and singular the houses, buildings, trees, ways, waters, profits, privileges and advantages with the appurtenances to the same belonging or in anywise appertaining. Also, all the estate, right, title, interest, property, claim and demand whatsoever, of the said parties of the first part, of, in and to the same, and of, in and to every part and parcel thereof. To Have and to Hold, all and singular the above described land and premises, with the appurtenances, unto the said party of the second part, his heirs and assigns, to the only proper use, benefit and behoof of the said party of the second part, his heirs and assigns, forever.

And the said parties of the first part, each for himself and herself, their heirs, executors and administrators, do covenant, promise and agree to and with the said party of the second part, his heirs and assigns, that they have not made, done, committed, executed or suffered any act

Exhibit C. 4.

or acts, thing or things whatsoever, whereby or by means whereof the above mentioned and described premises, or any part or parcel thereof, now are, or at any time hereafter shall or may be impeached, charged or encumbered, in any manner or way whatsoever.

In Witness Whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

FRANCENIA E. VREELAND (L. S.)
CORNELIA B. PEER (L. S.)
FANNIE PEER (L. S.)
THEODORA WOODRUFF (L. S.)
DANIEL WOODRUFF (L. S.)
LAURA PEER (L. S.)
ABBIE H. BRYANT (L. S.)
ELIAS A. BRYANT (L. S.)

Signed, Sealed and Delivered in the presence of

The interlined were written before acknowledgment taken

NICHOLAS S. VAN DUYNE.

STATE OF NEW JERSEY
COUNTY OF MORRIS } *ss.*

BE IT REMEMBERED, That on this Fifth day of April in the year of Our Lord One Thousand Nine Hundred and Ten, before me, Nicholas S. Van Duyne, A Commissioner of deeds for said County and state, personally appeared, Francenia E. Vreeland, Cornelia B. Peer and Fannie Peer, three of the parties named herein, who, I am satisfied are the grantors mentioned in the within

Exhibit C. 4.

Indenture, and 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.

NICHOLAS S. VAN DUYNE,
Commissioner of Deeds.

STATE OF NEW JERSEY
COUNTY OF MORRIS } *ss.*

BE IT REMEMBERED, That on this Seventeenth day of May in the year of Our Lord One Thousand Nine Hundred and Ten, before me, Nicholas S. Van Duyne A Commissioner of Deeds for said County and State, personally appeared Abbie H. Bryant and Elias H. Bryant her husband, who, I am satisfied are the grantors mentioned in the within Indenture, and 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 Abbie H. Bryant being by me privately examined, separate and apart from her husband, 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.

NICHOLAS S. VAN DUYNE,
Commissioner of Deeds.

Exhibit C. 4.

STATE OF NEW JERSEY, }
COUNTY OF MORRIS } *ss.*

BE IT REMEMBERED, That on this Twelfth day of April in the year of our Lord One Thousand Nine Hundred and Ten, before me, Nicholas S. Van Duyne A Commissioner of Deeds for said County and state, personally appeared Theodora Woodruff and Daniel Woodruff her husband, and Laura Peer, three of the parties named herein, who, I am satisfied are the grantors mentioned in the within Indenture, and 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 Theodora Woodruff being by me privately examined, separate and apart from her husband, acknowledged that she signed, sealed and delivered the same as her voluntary act and deed, freely, without any fear, threats or compulsion of——said husband.

NICHOLAS S. VAN DUYNE,
Commissioner of Deeds.

Received & Recorded Mar. 8, 1911
at 11:24 o'clock A. M.

ELIAS BERTRAM MOTT,
Clerk.

Exhibit C. 4.

STATE OF NEW JERSEY, }
COUNTY OF MORRIS } *ss.*

I, E. BERTRAM MOTT, Clerk of the County of Morris, do hereby Certify that the foregoing is a true copy of the record of a Deed given by Francenia E. Vreeland & al. To Newton Peer, as fully and entirely as the same remains of record in my office in Book T-20 of Deeds for said County, on pages 353, etc.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said County, at Morristown, this Eleventh day of May, A. D. nineteen hundred and twenty-seven.

(SEAL) E. BERTRAM MOTT,
Clerk.

By EDWIN W. ORR,
Deputy Clerk.

MORRIS COUNTY CLERK'S OFFICE

MORRISTOWN, NEW JERSEY

DEED

Francenia E. Vreeland & al.
To
Newton Peer

CERTIFIED COPY

Deed dated Apr. 5, 1910
Rec. Mar. 8th., 1911
Book T-20 of Deeds on
Pages 353 &c.
Elias Bertram Mott, Clerk

Exhibit C. 5.

EXHIBIT C. 5.

IN CHANCERY OF NEW JERSEY.

Between

CAROLINE D. PEER,
Petitioner,

and

JACOB PEER,
Defendant.

On Petition for Divorce.

This cause having been regularly set down for hearing at the February term, eighteen hundred and eighty-four, of this court, and now coming on to be heard in the presence of Herbert Boggs of counsel with the petitioner, no one appearing, for the defendant;

Whereupon, and upon reading the pleadings and proofs in the cause, and the report of Thomas Anderson, Esquire, one of the special masters of this court, to whom by a previous order herein, it was referred to take the depositions and show proofs offered by the said petitioner in support of the allegations of the petition, and to report the same together with his opinion thereon; from all which it now satisfactorily appears to the Chancellor that the marriage between the petitioner, Caroline D. Peer, and the defendant, Jacob Peer, was solemnized and took place in the State of New Jersey; and that the said petitioner was an actual resident of, and inhabitant in, this State at the time of the injury complained of, and at the time of exhibiting the said petition; and that the said defendant has been guilty of wilful, continued, and obstinate desertion of the petitioner during the term of three years next before the exhibiting of the said petition:

Exhibit C. 5.

It is, thereupon, on this twenty-fifth day of April, eighteen hundred and eighty-four, by his Honor Theodore Runyon, Chancellor of the State of New Jersey, by virtue of the power and authority of this court, and of the acts of the legislature in such case made and provided, ordered, adjudged and decreed that the said petitioner Caroline D. Peer, and the said defendant, Jacob Peer, be divorced from the bond of matrimony for the cause aforesaid, and the marriage between them is hereby dissolved accordingly, and the said parties, and each of them are and is hereby freed and discharged from the obligations thereof.

THEODORE RUNYON,
C.

Respectfully advised

WASHINGTON B. WILLIAMS,
Advisary Master.

Exhibit C. 5.

10/702

IN CHANCERY OF NEW JERSEY

Between

Caroline D. Peer

Petitioner

and

Jacob Peer

Defendant.

On Petition &c.

DECREE OF DIVORCE

Samuel J. Macdonald
Solicitor.

Filed: April 25, 1884.

I, THOMAS BARBER, Clerk of the Court of Chancery of the State of (SEAL) New Jersey, the same being a Court of Record, do hereby certify that the foregoing is a true copy of the Final Decree in the cause wherein Caroline D. Peer is petitioner, and Jacob Peer is defendant, now on the files of my office.

IN TESTIMONY WHEREOF, I have hereto set my hand and affixed the seal of said Court, at Trenton, this 7th day of April A. D. nineteen hundred and Twenty-seven.

THOMAS BARBER,
Clerk.

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

New Jersey Court of Errors and Appeals

Between

JOHN SARACINO and MARY SARACINO,
Complainants-Appellants,
and
KOSOWER CONSTRUCTION COMPANY,
Defendant-Respondent.

On Bill, &c.
On Appeal.

BRIEF FOR APPELLANTS.

This is a suit for specific performance of a contract for the sale of real property located in Hanover Township, Morris County, New Jersey, from the complainants as vendors to the defendant as purchaser. Complainants' title to the property in question is derived through one Jacob Peer, who acquired title both by will and descent to an interest in part of the lands in question. In 1910, a deed (Exhibit C. 4) was recorded in the office of the Clerk of Morris County, which deed was made by several grantors including one Laura Peer, and said deed recites that the said Laura Peer was the ONLY CHILD, DESCENDANT, AND HEIR-AT-LAW OF ONE JACOB PEER, DECEASED (the same Jacob Peer hereinabove mentioned). The other grantors in the deed, as can be inferred from their names and from the recitals in the deed, were also related to the said Jacob Peer.

The sole defense raised is that the title to said lands is unmarketable; the defendant alleging that there is no adequate proof of the death

of said Jacob Peer and conveyance of his interest in the premises by all of his heirs.

Defendant failed to offer one iota of evidence that would tend to indicate in the slightest degree that Jacob Peer was alive at the time said deed was executed and delivered or that there were any heirs who did not join in said deed, notwithstanding the fact that the deed recites that Laura Peer was the ONLY CHILD, DESCENDANT AND HEIR-AT-LAW OF JACOB PEER, DECEASED.

The learned Vice-Chancellor advised a decree dismissing the complainants' bill of complaint.

The opinion states (State of Case, p. 27A) it was stipulated that if Jacob Peer is alive he has an undivided one-fifteenth interest in the premises. This is not so. The stipulation states that Jacob Peer acquired an undivided one-fifteenth interest in the premises, but leaves to the parties in the case, proof of the disposition of his interest.

POINT I.

The title offered by the complainants to the said defendant is a marketable one for the following reasons:

A. A good record title has been established by the complainants.

The only question in the case concerns itself with the death of said Jacob Peer and his heirs-at-law. The said Jacob Peer, complainants alleged, died survived by his daughter, Laura, the date of death not mentioned (Exhibit C. 4). Jacob Peer's wife, obtained an absolute decree of divorce from him in the year 1884 (Exhibit

C. 5). The interest of the wife is accounted for and no deed is necessary conveying any possible right of dower of the wife of said Jacob Peer. Exhibit C. 4 was duly executed by Laura Peer and duly acknowledged by her. It was an act of solemnity as high in degree as though the said Laura Peer applied for letters of administration. It is a fact well known to all lawyers and to all title examiners that the records of surrogate's offices have not until comparatively recent years disclosed in either applications for administration or applications for probate, proof of the death of testators or intestates except by the bald statement that such testators or intestates died. Notwithstanding that fact, titles are considered marketable because of the practicable impossibility of proving the actual death of almost all owners of real property who died intestate forty or fifty years ago. In this case we have a similar situation except for one fact, that the positive statement of the death of the said Jacob Peer was made not in an application for administration, but was made by way of recital in a deed (Exhibit C. 4). The said Laura Peer who executed Exhibit C. 4 and who was recited in said deed as the ONLY CHILD, DESCENDANT AND HEIR-AT-LAW OF JACOB PEER, DECEASED, was in court during the trial of this case (State of Case, p. 22) and could have been examined by defendant if defendant had so elected. Defendant did not choose to do so and furthermore offered no evidence which would in any way question the truth of the recital in Exhibit C. 4.

It is an established rule of law in this State, that where the record title is good, the burden is upon the vendee to show the facts making the title doubtful, and that the possibility of the ex-

istence of heirs or of the continued life of the individual originally seized of the property, based on any claim, and not on proof of any facts to support it, did not raise a reasonable doubt as to the validity of the title good upon the record (*Day* v. *Kingsland,* 57 N. J. E. 134).

> "The mere possibility of the existence of these heirs, or persons claiming under them, based on suspicion or conjecture, and without the production of any evidence to support the conjecture, is not sufficient to relieve the vendee." *Day* v. *Kingsland, supra,* citing also *Greenblatt* v. *Herrmann,* 144 N. Y. 13.

The record title in this case contains no notice on its face of something outside which may lead to some fact that may disturb the title and the marketability of this title falls squarely within the rule of law laid down by Vice-Chancellor Pitney, in his opinion in the case of *Rutherford Land and Improvement Co.* v. *Sanntrock,* 44 Atl. 938, affirmed in 60 N. J. E. 471, wherein he stated:

> "I will define a title that is not marketable as, in the first place, one where the written title contains on its face some notice of something outside which may lead to some fact that may disturb the title. * * * Before you can make a title unmarketable, you must show the reasonable probability of proving such a thing."

In view of the fact that the record title in this case was good on its face, the burden was on the defendant to introduce some evidence casting doubt on the title. Defendant failed to do so and HENCE should not be relieved of its contract of purchase.

B. The actual death of the said Jacob Peer has been proved; and his death survived by one daughter only, Laura, has been proved.

The recital in deed (Exhibit C. 4) states that said Laura Peer is the ONLY CHILD, DESCENDANT AND HEIR-AT-LAW OF JACOB PEER, DECEASED. The testimony of Thomas Peer (State of Case, p. 24) states that he was informed by a man whose whereabouts are today unknown, that the said Jacob Peer was, prior to 1889, in the gold fields out West and that Jacob Peer's partner informed him that the said Jacob Peer had died. The testimony of Jacob Peer's former wife, and half-sister stated that he disappeared about the year 1873 and had not been heard from since that time.

The recital in said deed is adequate proof of the death of said Jacob Peer and the fact that his only surviving issue was his daughter, Laura.

> "A recital in a deed that the record owner of the fee is dead and that one of the subscribing grantors is her daughter and heir-at-law is admissible to prove the death of such person, the deed being signed not only by the daughter, but by the brothers and sisters of the person alleged to be dead, since the oral declarations of the persons so related would be competent proof of the death." 17 *C. J.,* 1176, Sec. 26.

The testimony offered by Thomas Peer was not impeached, and complainants maintain his testimony is competent proof of the death of said Jacob Peer.

> "The general rule is that death may be proved by hearsay evidence. Thus evidence that witness was informed by a person since dead of the death of another person is admissible to prove the death of the latter. * * * Hearsay evidence as proof of death is admissible only after a considerable lapse of time." 17 *C. J.,* 1176, Sec. 22.

The testimony indicated that Jacob Peer died prior to 1889, so that a considerable time lapsed since the statement relative to Jacob Peer's death was made to Thomas Peer, his cousin.

The testimony of Jacob Peer's former wife, and half-sister, create a presumption of death; and

> "In the absence of rebutting proof, the presumption of death from seven years' absence, when once created is conclusive." 17 *C. J.* 1176, Sec. 13.

In considering the testimony adduced by the complainants relative to the death of said Jacob Peer, we must bear in mind that notwithstanding that Peer's former wife, and half-sister did not testify as to his actual death, their testimony was not in conflict with the recital in the deed and the testimony of Thomas Peer, but was supplemental thereto. In connection with this particular question, the defendant offered no testimony whatever to indicate in any way that the said Jacob Peer was alive at any time after the year 1873, and particularly nothing that he was alive in the year 1910, when the deed (Exhibit C. 4) was executed by said Laura Peer and the other grantors. Complainants maintain that the evidence in this case proves beyond a reasonable doubt the actual death of said Jacob Peer.

Day v. *Kingsland, supra,* 57 N. J. E. 134;

Finnie v. *Kelsey,* 95 N. J. L. 163;

Doyon v. *Massoline Motor Car Co.,* 98 N. J. L. 540;

Union Garage v. *Wilner,* 101 N. J. L. 362;

Vendola v. *Public Service Railway & Transportation Co.,* 136 Atl. 415.

C. There is no presumption of issue of said Jacob Peer other than the said daughter, Laura.

The defendant raises the question that notwithstanding the recital in the deed (Exhibit C. 4) and the other testimony, there is a possibility that the said Jacob Peer may have died leaving other lawful issue than the said Laura Peer, but it offered no evidence to indicate that such a thing occurred, and produced no evidence on any question in this case. *In re Meyer* v. *Madreperla,* 68 N. J. L. 258, the facts were similar to those in the case at issue although the former was not a suit for specific performance, but one for breach of contract. In that case one Patrick became heir to an interest in real estate. He was a sailor who left his home and was unheard from for a considerable time. The Court stated (p. 263):

> "As Patrick, when he went away, was unmarried, his status as a single person is presumed to have continued, *no contrary proof being adduced, and his presumptive death is accompanied by the presumption that he left no lawful issue.*" (Italics mine.)

In the present case, Jacob Peer was married when he left home. He could have no lawful issue other than that resulting from the marriage with the wife he left in 1873. Defendant is as suspicious of this fact as it is of the other questions in this case, but offers no evidence at all which would indicate that its suspicions are based on anything except conjecture.

D. Notwithstanding the fact that actual death of Jacob Peer has been proved, the presumption of his death survived only by his daughter, Laura, is so strong in this case that it is sufficient to render the title marketable.

Assuming for the purpose of argument that the actual death of Jacob Peer has not been proved, complainants allege that the title is marketable because the presumption of the death of Jacob Peer survived by one daughter, Laura, is so strong in this case as to be considered conclusive.

There are many decisions in this State relative to marketable titles, but in very few of them are the facts similar to those in this case. One case which is analogous to the present case is that of *Day* v. *Kingsland, supra.* In view of the similarity we wish to indulge the Court's patience in reciting the salient features of that case. That suit was also for specific performance. Complainants' title was derived through a sale in a partition suit. In the partition suit there were three alleged heirs not made parties defendant for the reason that they had disappeared a considerable time prior to the institution of said partition suit and only one of them had been heard from. The testimony in the partition suit indicated the death of that one of the three heirs, but as to the other two there was no testimony except that they had disappeared and were not heard from from the time of such disappearance to the date of the trial in said partition suit. The defendant in the specific performance suit alleged that these three children should have been made parties defendant in the partition suit, and because they were not made parties defendant their possible interests in said premises were still outstanding. The Court in that case held

> "No proof whatever has been offered in this cause showing the existence of either of these three children of Hannah, or of any heirs of either of them at the time of the partition proceedings, and, in the absence of any evidence in this suit, rendering it probable that they or their heirs were then in existence, and should have been made parties, the vendee cannot set up the failure to make them parties in order to avoid the contract. The mere possibility of the existence of these heirs, or persons claiming under them, based on suspicion or conjecture, and without the production of any evidence to support the conjecture, is not sufficient to relieve the vendee. Cites *Greenblatt* v. *Herrmann,* 144 N. Y. 13, the burden was upon the vendee to show the facts making the title doubtful, and also that the possibility of the existence of heirs, based on any claim, and not on proof of any facts to support it, did not raise a reasonable doubt as to the validity of a title good upon the record."

In the very lengthy opinion in the case of *Rutherford Land and Improvement Co.* v. *Sanntrock, supra,* we find

> "Before you can make a title unmarketable, you must show the reasonable probability of proving such a thing."

In the case at issue the proof of death by the recital in the deed (Exhibit C. 4) will always be available to all persons who wish to prove the death of said Jacob Peer. The testimony in this case as to the disappearance of said Jacob Peer unheard from for a period of fifty-four years and the testimony of said Thomas Peer will also always be available, so that no matter who takes title to the premises in question and no matter who may dispute such title, the evidence offered in the present case is always avail-

able to any subsequent purchaser. The fact that the said Jacob Peer is now missing fifty-four years and that he was about twenty-three or twenty-four years of age at the time of his disappearance, would make him today seventy-eight years of age. The facts that he was in the gold fields engaged in a very hazardous occupation and has been unheard from except as testified herein, create a presumption which we think is conclusive of his death; and inasmuch as no testimony has been offered to indicate that he is still alive we believe that that presumption is so strong as to render the title in this case marketable.

The doubt as to the marketability of the title must be a reasonable one and must not only be a suspicion. It must be one which might subject a purchaser of said premises to the "hazards of litigation," and by the term "hazards of litigation" is not meant merely a possibility of a suit being instituted, because there is no way that we can prevent any individual from instituting a suit. That phrase means subject to the hazards of SUCCESSFUL litigation. The following cases all define the rules which govern the present case:

Potter v. *Lumsden,* 93 N. J. E. 476, in which the Court of Errors and Appeals accepted the opinion of Vice-Chancellor Fielder, stating:

> "I should consider the principle laid down by this Court that, when the validity or marketability of title depends upon facts outside the public records, a vendee should not be forced to take the title unless the necessary proofs are available to him when he may have future need of them. A doubt as to the validity of title which can avail to defeat the vendor's claim to specific performance, must be reasonable and, so far as it depends on contingent events and uncertain fact, their occurrence or existence must be fairly probable."

Vice-Chancellor Berry in the case of *Standard Realty Co.* v. *Gates,* 132 Atl. 487, states:

> "Any impending litigation which might excuse the vendee from performance, it seems to me, must be litigation which has some possibility of success." Citing Pomeroy on Specific Performance of Contract, p. 524, Sec. 204.

In *Salter* v. *Beatty,* 137 Atl. 844, we find the rule further enunciated in an opinion written by Vice-Chancellor Backes, stating:

> "The remote possibility of an idle and vain suit is not within the category of being 'exposed to the hazard of litigation' a defense sometimes accorded to vendees in suits for specific performance."

The general rule of law is found in 39 Cyc. p. 1475:

> "Conveyance by the heirs of a deceased owner does not render the title unmarketable even if the death of the ancestor can be established only by presumption. And the presumption, under the statute, of the death of one heir after seven years' absence will render the title of the other heirs good."

39 Cyc., p. 1489:

> "But it is no objection that the wife of a prior vendor did not join in the deed, where it is shown that she was dead at the time, when there is no evidence of her existence for such a length of time that it will be presumed that she is dead and that no right of dower exists."

In a very able opinion written by Vice-Chancellor Stevenson in the case of *Barger* v. *Gery,* 64 N. J. E. 263, we find:

> "That titles must be held marketable, although dependent on the proof of facts, can-

not be disputed. If this were not so, a vendor holding title as heir or devisee, in a large number of cases, could not have the remedy of specific performance. * * * We have the general rule that the purchaser has a right to a title which is reasonably safe—reasonably safe against loss and reasonably safe against attack. When the authorities speak of the hazard of litigation to which the purchaser must be subjected, it seems to me that they must refer to a hazard which is to be determined by the chance of successful attack as viewed by the Court in the suit for specific performance. When, also, they speak of a doubt or a supposed flaw as affecting the salability of a title, they must refer to the character of the doubt or flaw as the Court views it, and not as it may be viewed by the indeterminate judgment of the real estate market. Some purchasers, guided by cautious counsel, will not accept a title against which the slightest possibility of a doubt is suggested; and yet there is no title concerning which a possible doubt or the possibility of a future flaw cannot be raised.

The authorities, I think, establish the rule as a safe one that a title dependent on a fact must be regarded as marketable when (1) the fact is so conclusively proved in the suit for specific performance that a verdict against the existence of the fact would not be allowed to stand in a court of law and (2) where there is no reasonable ground for apprehending that the same fact cannot be, in like manner, proved, if necessary, at any time thereafter for the protection of the purchaser." * * *

Citing *Ferry* v. *Sampson,* 112 N. Y. 415:

"If the existence of the alleged fact which is supposed to cloud the title is a possiblity merely, or the alleged outstanding right is a very improbable and remote contingency, which, according to the ordinary experience, has no probable basis the Court may compel the purchaser in such a case to complete his title."

Barger v. *Gery* has been followed by numerous subsequent cases in this State, particularly *Potter* v. *Lumsden,* 93 N. J. E. 476; *Breitman* v. *Jachnel,* 132 Atl. 293; *Standard Realty Co.* v. *Gates,* 132 Atl. 490; *Security Bond and Mortgage Co.* v. *Weiss,* 135 Atl. 329.

The case of *Meyer* v. *Madreperla,* 68 N. J. L. 258, was decided by this Honorable Court but that case, although the facts were analogous to the one in issue, was not for specific performance but for breach of contract; and the Court declined to state what it would have decided if that particular suit were one for specific performance. Nevertheless, the Court laid down the law which complainants contend is applicable to the present case. The opinion written by Chancellor Magie stated:

"The presumption of the continuance of the life of a person shown to have been once living, in the absence of contradictory proof, seems not to have been limited, at common law, by any definite rule. But such a presumption was always assailable by evidence that the person had absented himself from his usual place of residence, and had not been heard from by those to whom his continued existence would naturally have been known. If evidence of absence unheard from for a period of seven successive years was adduced, it seems that the presumption of continued existence ceased, and that a presumption of death arose, which, in the absence of counter-proof, would prevail.

By the construction given by our courts to the Death Act, above cited, I apprehend that it has been properly determined that proof of the absence of a person, whose existence is in question from the state or from his last known residence for the period of seven successive years defeats the presumption of continuance in life, and raised a counter presumption of death. This counter

presumption of death is not a presumption of fact, but a presumption of law, which, in the absence of proof, rebutting such presumption, stands as proof of death.

The alleged flaw in the title consists in the possibility it can hardly be called a probability that Patrick, may appear, or be shown to have been alive * * *. Lord Hardwicke observed, 'the Court must govern itself by a moral certainty, for it is impossible, in the nature of things, that there should be a mathematical certainty of a good title.' Lyddall *v.* Weston, 2 Atk. 20. And Mr. Sugden declared that a purchaser would not be permitted to object to a title on account of a mere probability, 'because a court of equity, in carrying agreements into execution, governs itself by a moral certainty, it being impossible, in the nature of things, that there should be a mathematical certainty of a good title.' '' Sugden Vend (1st Ed.) 214.

Followed *in re Sternkopf,* 72 N. J. L. 356, and *Sulk* v. *Tumulty,* 77 N. J. E. 97.

The defendant relies on the decision in *Potter* v. *Ogden,* 68 N. J. E. 409, decided by our Court of Chancery in the year 1905 in which Vice-Chancellor Stevenson also wrote the opinion. The facts in that case relative to the disappearance of a person holding an interest in the title involved, were similar to the facts in the case at bar, but there is one marked difference between *Potter* v. *Ogden* and the present case which is sufficient to sustain the ruling made in that case but nevertheless to decide that in the present case a decree should be granted as prayed for by the complainants. In *Potter* v. *Ogden* the contract involved required the delivery of a PERFECT title, whereas, in the present case the complainants are only required to give a title that is MARKETABLE. The Court in *Potter* v.

Ogden properly distinguished between a PERFECT title and a MARKETABLE title, for the Vice-Chancellor stated:

> ''A perfect title, if such a thing exists, should probably be defined, if a definition were necessary, in such a manner as to make it appear less open to criticism and attack than many titles which courts of equity deem merely marketable.''

And it should be further observed that in *Potter* v. *Ogden,* there was no deed on record reciting the death of the owner of the alleged outstanding interest as in the case *sub judice.*

The case of *Day* v. *Kingsland, supra,* is practically on all fours with the present case. In view of the decision in that case and the numerous other decisions cited herein above, and in view of the testimony: (1) that Jacob Peer has been missing and unheard from for a period of practically fifty-four years, (2) that there is a deed on record dated 1910, executed by his daughter and by other relatives of the said Jacob Peer, which recites that the daughter is the ONLY CHILD, DESCENDANT AND HEIR-AT-LAW OF JACOB PEER, DECEASED, and (3) of Thomas Peer that he was informed that the said Jacob Peer died some time prior to the year 1889 in the gold-fields, (4) decree of divorce (Exhibit C. 5); we find the actual death proved, we find that Laura is the only child and only lawful issue of said Jacob Peer; we find that there is no presumption of issue other than Laura Peer; we find that there is no interest in the wife of said Jacob Peer; and therefore the title offered by the complainants to the defendant derived through the deed (Exhibit C. 4) is a good and marketable title.

II.

No question of fact arose in this case, because the complainants' testimony was uncontroverted and no conflicting inferences from said testimony are possible.

The only testimony adduced in this case was offered by the complainants and witnesses on behalf of the complainants together with complainants' exhibits. Complainants acquired title in fee simple by a warranty deed (Exhibit C. 1). Their title is derived through deed (Exhibit C. 4). No question is raised as to any other features of the title. A decree of divorce was obtained by the wife of said Jacob Peer (Exhibit C. 5). The testimony of the former wife of said Jacob Peer and a half-sister shows that the said Jacob Peer was unheard from for a period of fifty-four years, and that he was unheard from in the year 1910 when the deed (Exhibit C. 4) was executed and delivered. The testimony of Thomas Peer proves that Jacob Peer died prior to 1889 in the gold-fields.

The case is conspicuous for the absence of any testimony by defendant.

The burden is on the defendant of introducing some evidence which would cast some doubt on the title. But defendant apparently contends that the title is unmarketable because the "*corpus deliciti*" has not been produced.

In an able opinion, Justice Minturn laid down the rule applicable to cases such as is herein presented in *Finnie* v. *Kelsey,* 95 N. J. L. 163, stating:

> "This factual status presented no question for the jury to consider, since the material facts were all conceded. Whatever claim

> the plaintiff might be able to maintain in equity upon the contention made here, she presented no debatable issue on the record for a jury to consider."

The rule was further enunciated by this Court in the case of *Doyon* v. *Massoline Motor Car Co.,* 98 N. J. L. 540:

> "No question for a jury arises where the facts are uncontroverted unless from the facts conflicting inferences may be drawn."

Followed in *Vendola* v. *Public Service Railway Transportation Co., supra.* In a recent case decided by this Court, *Union Garage* v. *Wilner,* 101 N. J. L. 362, Justice Black stated:

> "But where the question at issue arises upon uncontroverted proofs as in this case, the question is one for the court and not for the jury."

We, therefore, respectfully urge and submit that the decree entered by our Honorable Court of Chancery dismissing the bill of complaint with costs, directing the payment of the sum of $1,000 by the complainants to the defendant together with the sum of $125 search fee and directing the payment of $250 counsel fee should be reversed and for nothing holden and that a decree should be entered compelling the defendant to accept the title offered by the complainants, to carry out the terms of the contract (Exhibit C. 2) and to pay the costs of said suit in our Court of Chancery with costs of this appeal and a reasonable counsel fee.

Respectfully submitted,

WELANKO & STRAUSS,
Of Counsel with Complainants-
Appellants.

ABRAHAM WELANKO,
On the Brief.

New Jersey Court of Errors and Appeals.

Between

JOHN SARACINO
and
MARY SARACINO,
Complainants-Appellants,

and

KOSOWER CONSTRUCTION COMPANY,
Defendant-Respondent.

ON APPEAL FROM CHANCERY

RESPONDENT'S BRIEF

FACTS

This is an appeal from a decree in the Court of Chancery denying specific performance to the complainants-appellants and awarding the return of the sum of $1,000.00 to the defendant by complainant, being the down money paid to complainant by defendant, together with counsel fees and costs.

Complainants brought their action for specific performance against the defendant to compel the defendant to accept title to certain premises in Hanover Township, Morris County, New Jersey, pursuant to a contract of sale entered into between the parties. Complainants' title to the property is derived through one Jacob Peer, who acquired title, both by will and descent, to an undivided interest in the lands in question. The defendants resisted the action on the ground that the title was unmarketable and advanced the following

reasons:

(a) That there is an outstanding interest in the premises in one Jacob Peer; through whom the complainants derive title; which interest the said Jacob Peer has not conveyed to complainant;

(b) That the death of the said Jacob Peer has not been proved.

The defendant counter claimed for specific performance against the complainant in the event that complainant could make out a marketable title to the premises in question. Vice Chancellor Church, after a hearing, found the title to be unmarketable and advised a decree, dismissing the complainants bill, awarding the return of the down money to defendants, together with costs and counsel fees, from which decree complainants now appeal.

ARGUMENT

THE TITLE BY THE COMPLAINANT TO THE DEFENDANT IS NOT MARKETABLE FOR THE FOLLOWING REASONS:

POINT I

THERE IS AN OUTSTANDING INTEREST IN THE PREMISES IN ONE JACOB PEER, WHOSE DEATH HAS NOT BEEN PROVED.

Complainants, in support of their title and of the death of Jacob Peer, offered the former wife of Jacob Peer as a witness, who testified at page 21, line 2, state of case:

"He went away in 1874. We were married in 1873 and he went away in 1874.

"Q. Whom do you mean by he? A. Why, my husband, Mr. Jacob Peer.

"Q. Jacob Peer. A. He walked out and I have not seen or heard a word of him from that hour until this."

Complainants then offered another witness, the sister of Jacob Peer, who testified, page 22, line 30, state of case:

"He disappeared before I was born."

And on page 23, line 11, state of the case, she further testified:

"Q. You, yourself, have never heard of him since you were born? A. No, sir."

Complainants then offered the cousin of Jacob Peer as a witness, who testified, page 24, line 19, state of case, and this is the only testimony in the entire case that tendered in any wise to establish the death of Jacob Peer:

"Q. When was the last time you heard of Jacob Peer? A.. I think it was 1889.

"Q. And from whom did you hear of Jacob Peer? A. Why, there was a friend of mine from Boonton went out to the coast.

"Q. What was his name? A. Frank Crockett."

(Continuing further he testified at p. 24, line 32, state of case:)

"Q. And what did he say to you? A. He told me he had met my cousin, Jake, out there.

"Q. Did he say where? A. No, he did not say where. He says he and another man were working a gold claim there and living in a cabin and he could not go further and came back in a couple of weeks and said Jake was dead."

Complainants then offered exhibit C-4, page 56, state of case, purporting to be a deed to the grantors of complainant in which one Laura Peer joined as

grantor reciting "Laura Peer, the only child descendant and heir at law of one Jacob Peer, deceased."

Complainants contend that by the aforesaid recital and the testimony heretofore set forth, sufficient proof of the death of Jacob Peer had been adduced and the conveyance by Laura Peer of the interest of Jacob Peer was sufficient to cut off any interest that Jacob Peer might have in the premises. They then rested their case.

It is respectfully submitted that the testimony of the first witness, the wife of Jacob Peer, in no wise tendered to establish the death of Jacob Peer. She testified that her husband walked out and she never heard from him. The testimony of the sister of Jacob Peer did not sustain the complainants contention that Jacob Peer was dead, because she testified that Jacob Peer had disappeared before she was born and the only testimony which complainants can rely upon is that of the cousin of Jacob Peer, who testified as to a matter which is clearly hearsay. He knows nothing of his own knowledge concerning the death of Jacob Peer, but rests his statement upon information received by him from a stranger who, in turn, got his information from another stranger, as to the whereabouts and death of Jacob Peer. As the learned Vice Chancellor very properly points out in his opinion (state of case p. 27A):

> "I do not think that this testimony is direct enough to justify me in assuming that Jacob Peer is dead. Witness says that somebody told him that somebody told him that somebody else told him that the man was dead. As specific performance will not be decreed as a matter of right, but is in the discretion of the court, it seems to me that starting with the stipulation that Jacob Peer, if alive, is entitled to a one-fifteenth interest, there is

> not enough testimony to conclusively show his death. Therefore this question would so cloud the title as to make it unmarketable. See *Porter v. Ogden,* 68 Equity, page 409."

The Vice Chancellor finds support for his conclusions in the case of *Porter vs. Ogden,* 68 N. J. E., 409, urged by the respondents at the hearing. In that case the facts were identical with the facts in the case at bar, the complainants there obtained title to the land in question under a deed made by one Sarah L. Brown, who is described in that deed as a widow. The defendant alleged that when this deed was made the grantor in fact was a married woman, and that therefore the complainants title was not marketable because it rests upon a deed executed by a married woman in which her husband did not join. Mrs. Brown had been living in a continuous state of separation for about fifteen years at the time the contract was made. The complainant, in support of his title, insisted that under our statute establishing a presumption of death in the case of absence for seven years, the proofs in this case establish the presumption that when Mrs. Brown undertook to make a conveyance of the land in question to the complainant, she was what she described herself in her deed, a widow. (In the case at bar, Laura Peer represents herself as being the only heir at law of Jacob Peer and undertakes to convey his interest). Vice Chancellor Stevenson denied specific performance to the complainant, saying at page 412:

> "I think that any decision of mine in this cause is controlled by my decision in the case of *Berger vs. Gery,* 64 N. J. Eq. (19 Dick. 263). The rule which I found supported by the authorities in that case is 'that a title dependent on a fact must be regarded as marketable when (1) the fact is conclusively proved in the suit for specific performance

that a verdict against the existence of the fact would not be allowed to stand in a court of law; and (2) there is no reasonable ground for apprehending that the same cannot be in like manner proved, if necessary, at any time thereafter for the protection of the purchaser.' It can hardly be seriously argued in this case that if this title based on this presumption of death should be forced on the defendant, he would be in no danger of being unable to prove that Mr. Brown was dead when Mrs. Brown made this deed in any future litigation in which such proof might be necessary. Mr. Brown, if living, apparently is about seventy-five years of age. One of the daughters of Mrs. Brown by a former husband testified to a report that Brown was living in Tombstone. Arizona, some time after the year 1876. The children of Mrs. Brown, who are her heirs-at-law, might, after Mrs. Brown's death, bring an action of ejectment against the defendant and overcome the presumption of Brown's death, which the defendant might establish in his defense by positive proof that Brown in fact was alive when the deed in question was executed. Certainly Mr. Brown himself might return from the west, if he is alive, and utterly defeat any title which the defendant could now obtain from the complainant."

The case of *Porter vs. Ogden* (supra) has been cited and approved and very recently in the case of *Security Bond and Mortgage Co. vs. Weiss,* et ux, 135 Atl. 329, Vice Chancellor Church quoted at length therefrom, also there citing *Tillson vs. Gesner,* 33 Equity, 313, quoting as follows:—

> "The purchaser should have a title which shall enable him not only to hold his land, but to hold it in peace, and if he wishes to sell it, to be reasonably sure that no flaw or

> doubt will come up to disturb its marketable value."

What assurance has the defendant in the present case that Jacob Peer will not appear at any time and oust the defendant from the premises? What assurance has the defendant further that other heirs of Jacob Peer will not present themselves, such a possibility being in no wise far fetched in view of the fact that Jacob Peer was divorced in 1884 while still a young man? None. He never conveyed his interest in the premises and he may be alive today, the proof of his death has been so meagre and remote as to have no weight at all.

POINT II

RESPONDENT WOULD NOT HAVE A TITLE WHICH IS REASONABLY SAFE AGAINST LOSS OR ATTACK, IF SPECIFIC PERFORMANCE WERE DECREED.

The decision of the Vice Chancellor can well rest upon the case of *Porter vs. Ogden* (supra); counsel for appellant admits that the Porter case is on all fours with the case at bar (appellants brief page 14) except for a slight variance discussed hereafter. In that case the court, at page 413, says:

> "But proof of the fact that Brown was dead, duly made in this cause, does not entitle the complainant, the vendor, whose title rests upon that fact, to a decree of specific performance within the rule above quoted. The proofs on behalf of the complainant must go further and show that not only the fact has been proved in the suit for specific performance, but that 'there is no reasonable ground for apprehending' that the same fact cannot

be subsequently proved for the protection of the purchaser. Where the necessary fact in the suit for specific performance is proved by the estsablishment of a presumption, which can be overcome by evidence, but which is not so overcome in that suit, it does not follow, necessarily, that the title dependent on that fact can be forced upon the purchaser, unless the following two propositions are established —first, that there is no reasonable ground for apprehending that the evidence to establish presumptively the existence of the fact will not be available for the protection of the purchaser in the future; and second, that there is no reasonable ground for apprehending that evidence to overcome the presumption, and thus defeat the purchaser's title, can be adduced. The slightest consideration of the testimony in this cause, I think, makes it clear that if the presumption of Brown's death is technically established in this suit under the statute, it is by no means clear that the evidence to establish the same presumption will be available to the defendant after a short time."

Counsel for appellant in their brief, page 14, seek to distinguish the *Porter* case (supra) from the case at bar and contend that that case called for a perfect title. The court in the *Porter* case did not rest its decision on that point at all. The court doubts the existence of a "perfect title" when it says at page 410:

> "A perfect title, if such a thing exists, should probably be defined, if a definition were necessary, in such a manner as to make it appear less open to criticism and attack than many titles which courts of equity deem merely marketable."

The court did not rest its decision on a "thing," (a perfect title), the existence of which it doubts. It is therefore respectfully submitted that any decision of this court is controlled by and must come squarely within the law as laid down in the *Porter vs. Ogden* case (supra).

Counsel for the appellants quote facts and law throughout their brief from the case of *Day vs. Kingsland* (57 Equity 134) in support of their contention that the record title in the case at bar shows no defects.

In that case the court held that at pages 137-138

> "The adjudication by final decree in the partition proceedings is sufficient to make the record title perfect, so far as the partition proceedings go, and this adjudication so made puts upon the defendant the burden of proving in the present case facts which would render it so probable that these heirs or some of them were then alive, that a prudent man would hesitate to accept the title. Such proof has not been offered, and I therefore hold that the objection cannot be sustained on this ground"

and based its decision on the adjudication in the prior partition proceedings plus the fact that there were, at page 138,

> "proofs made in the present case showing adverse possession for over forty years by the complainant and those under whom she claims."

In the *Day* case (supra) the adjudication in the partition proceedings plus the adverse possession by complainants and her predecessors perfected the title; in the case at bar neither of the above facts appear; all that the complainants have in this case is the mere recital in the deed (exhibit

C-4). Surely a recital in a deed is not equivalent to a title perfected through partition proceedings and adverse possession. There is no analogy between the two cases.

Counsel for the appellant cite and quote from *Potter vs. Lumsden,* 93 Equity, 476; *Standard Realty Co. vs. Gates,* 132 Atl. 487; *Salter vs. Beatty,* 137 Atl. 844; *Banger vs. Gery,* 64 Equity, 263. Respondent does not quarrel with the law as laid down in those cases, which cases hold substantially that "the purchaser has a right to a title which is reasonably safe—reasonably safe against loss and reasonably safe against attack." It is with the application of the law, as laid down in those cases to the facts in the case at bar, that counsel differ. In the case of *Porter vs. Ogden* (supra) the court applied the law to a case with facts identical with the case at bar and denied specific performance to the vendors.

The case of *Meyer vs. Madreperla,* 68 N. J. L. 258, cited by appellant, is the only case cited with facts similar to the case at bar, but that case can have no application here, because it was a suit for breach of contract and not specific performance, the court there expressly refusing to decide the specific performance question when it said at page 268:

> "Whether specific performance would have been decreed upon the facts disclosed in the bill of exceptions need not be decided. In actions at law the implied agreement for title in such a contract will be satisfied by a title good at law, upon the proofs under the rules of evidence. To recover at law for a breach of such a contract it must be shown that the title tendered was not a title good at law. The discretionary power of a court of equity with respect to a title which is doubtful though good, is not within the province of a court of law, or a jury therein."

The case of *Porter vs. Ogden,* quoted by Vice Chancellor Church in his opinion (page 27B state of case) did decide the specific performance question and denied specific performance to the complainant in that case thereby deciding the law and the facts in a case identical with the case at bar.

POINT III

THERE WAS NO NEED FOR ANY TESTIMONY BY THE DEFENDANT.

Complainants in their brief, page 16, contend that the "case is conspicuous for the absence of any testimony by defendant." Of course, there is no testimony by defendant. The learned Vice Chancellor denied relief to the complainant at the close of their case. *Kocher & Trier* on Chancery Practice at page 266, Volume 1, Sec. 462, state the law in this state:

> "A defendant is privileged to rest his case upon the evidence offered by the complainant, or to introduce evidence in his own behalf, at his election," citing Sawyer v. Platt, 77 Atl. 1043.

Section 463:

> "A bill seeking equitable relief must be dismissed when its allegations are denied, by the answer and unsupported by the proofs." Citing *C. R. R. Co. vs. Hetfield,* 18 N. J. Equity 323."

It is respectfully submitted that the defendant was within its rights in refraining from introducing any evidence in its own behalf under the rules above set forth. When the complainants failed in their case to establish the marketability of the title under the rules as laid down in cases cited above,

there was no necessity for proof on the part of the defendant. All of the facts proven by the complainants supported the contentions made by the defendant.

POINT IV

The decree appealed from should be affirmed with costs.

Respectfully submitted,

MEANEY & LIFLAND,

Solicitors for and of counsel with defendant.

THOMAS F. MEANEY

of Counsel.